EMPLOYMENT TRIBUNALS (SCOTLAND)

5 Case No: 4102001/2017

Held in Glasgow on 13 and 14 March 2018

Employment Judge: Ms M Robison

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Mr Graham Rocks — Claimant in person

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20 British Telecommunications plc — Respondent Represented by Ms L Gould Counsel

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

30 The judgment of the Employment Tribunal is that the claim is dismissed.

REASONS

Introduction

1. The claimant lodged a claim with the Employment Tribunal on 21 June 2017 claiming that he had been unfairly dismissed from his position as a customer 35 services engineer with the respondent. The respondent entered a response to the claim stating that the claimant had been dismissed for a fair reason, namely conduct, following a fair procedure.

2. At the hearing, which took place over two days on 13 and 14 March 2018, the claimant represented himself. The respondent was represented by Ms Gould, 4t) counsel.

3. At the outset, the claimant confirmed that he was no longer seeking reinstatement. He said that he would lodge a schedule of loss, which would include pension loss. It transpired however that the information which would be necessary to calculate pension was not provided by either the claimant or the respondent, not least because the claimant has a new pensionable job. In those circumstances, it was decided that the question of pension loss should be deferred pending this decision on liability (although consideration was given to all other aspects of compensation claimed).

4. The Tribunal heard evidence from the claimant and for the respondent from Mr John Gillooly, senior operations manager who conducted the disciplinary hearing and Mr Paul McGinlay, general manager, who conducted the appeal. The Tribunal was referred by the parties to a joint file of productions (referred to in this judgment by page number).

Findings in Fact

5. On the basis of the evidence heard and the productions lodged, the Tribunal finds the following relevant facts admitted or proved:

Background

6. The claimant commenced employment with the respondent as a customer services engineer on 2 August 1999 and continued in that role until he was dismissed for gross misconduct effective 29 March 2017.

7. Latterly the claimant was employed by the respondent's Openreach division, which has principal responsibility for repairing and maintaining the telecommunications network on which the respondent and other service providers, such as Skye and Talktalk, offer their services. The claimant continued in the same role undertaking repairs and maintenance to the network. He worked in the West End of Glasgow division.

Relevant company policies

8. The respondent has produced a Standards of Behaviour Policy (page 143-150) which requires to be read alongside "The Way We Work", which is the overall policy on ethical behaviour and how employees are expected to behave at work. That policy sets out guiding principles, and lists examples of misconduct and gross misconduct. These include breaching the Anti-Corruption and Bribery Policy (which incorporates the conflicts of interest policy) and the Outside Occupations and Shareholding Policy, as well as inappropriate use of communications media including social media sites.

9. The respondent's Anti-Corruption and Bribery Policy (page 159-160), under conflict of interests, states that: "A conflict of interest is any situation where your loyalties might appear to be at odds with your duties to BT; you are expected to act at all times in BT's interests and to exercise sound judgement unclouded by private interests or divided loyalties. You should avoid situations where you or BT could be open to suspicion of dishonesty or favouritism or lack of transparency or which conflicts or appears to conflict with your duty to BT'.

10. The respondent's Outside Occupations and Shareholdings Policy (Pages 151 - 154) states under guiding principles that: "We won't interfere in private work (paid or unpaid) or shareholdings unless they could create a conflict of interest or harm our commercial interests, our reputation or they're against our policy. But there are a few necessary restrictions. You must: declare any work (paid or unpaid) you do outside BT to your line manager and HR; all senior or significant external appointments or shareholdings must be recorded; not use our premises, services, equipment or vehicles for a private business or when you're working for someone else; tell you line manager and HR about any shares you hold which might harm our commercial interests or reputation; tell your line manager and HR if at any time your work outside BT or shareholdings affect your ability to do your job professionally or objectively; a line manager confirmation letter should be sent to an individual giving approval for an outside appointment; follow the external appointment/di rectorship process and where appropriate register your external occupation or shareholdings on the conflicts of interest register".

11. The policy continues, "You mustn't: use the fact you work for us to gain advantage for your own business or any other organisations you work for, or have shares in; do any work outside BT while you're on duty and working for BT; wear any type of BT corporate or protective clothing or use our equipment whilst working for someone else; do any work outside BT that could: cause your work for us to suffer; conflict with your position working with us; break any BT rules around confidentiality and data protection: compete with us or conflict with our interests; give business to one of our competitors; be connected with goods or services that we provide, unless we let you...".

12. Employees are required to undertake regular training in relation to the "The Way We Work" Policy. This contains a module on conflicts of interest. The claimant completed this training on 19 January 2015 (page 142).

Grievance

13. During 2015 and 2016, the claimant suffered from chronic back pain which meant that he had three periods of absence from work, including an absence of six weeks from around 10 March to 20 April 2016. Following his return to work in April 2016, he received an e-mail from the Scotland Director for Openreach, Peter Stewart, in which he stated that "if you're not seeing your manager on a regular basis or having rounded balanced conversations to help you improve, I need to

know about it…" (page 424). By that point, the claimant was of the view that his relationship with his managers had broken down. The claimant replied saying that he was feeling "very frozen out" by his managers. Mr Stewart replied straight away and said he would investigate (page 422). At that time, the claimant had particular concerns about keeping his job because of the back pain that he was suffering.

14. On 3 August 2016 the claimant spoke to his line manager, Richard Murray, about his backpain and during the conversation he was told that he was to be moved out of his group to the city centre group and that his new manager was to be Scott Wallace.

15. The claimant went off sick again on 4 August 2016, and remained on sick leave until he was dismissed. He had attended his GP and she had said that the back pain was related to anxiety and that he was suffering work-related stress.

16. The claimant subsequently received a home visit from his new manager, Scott Wallace, on 23 August. During the course of that visit the claimant made his manager aware of his mental health issues. The way the meeting was conducted however gave him cause for concern, but he agreed to attend an occupational health assessment.

17. Thereafter the claimant lodged a grievance which the claimant believes he submitted on 7 September (pages 428-430). This grievance related to concerns which the claimant had regarding an idea for an app which he had submitted through the respondent's "Big Ideas" programme, whereby employees could receive payments for their ideas. Although his idea was considered at director level, he was advised that it would not be taken forward because it could only be used at local level and was based on an outdated network (page 419). However, the claimant's view is that his idea was used to create an app which is now being used by 34,000 engineers. He also made claims of bullying and harassment against managers.

18. The occupational health assessment took place on 19 October and a report was subsequently produced (page 439-221). In that report it stated that the claimant was "referred due to stress and long-term back problems, as well as volatile behaviour/concerns with him working within customer premises". The claimant was alarmed to read that. It set back his recovery.

19. In or around November 2016, the claimant was advised that his pay would be reduced to half pay in accordance with the respondent's sickness absence policies (pages 434-438). By that time, the claimant was liasing with HR and with his new line manager, Tracy Scally, regarding a return to work in a different part of the business from those who were involved in the grievance.

20. The claimant's grievance was investigated and the claimant was advised of the outcome on 12 December 2016 (pages 443-452), which was that it was not upheld. The claimant appealed on 15 December 2016 (pages 453-454), and an appeal of the grievance decision was heard on 1 February 2017 (pages 166 - 214). The claimant was informed of the outcome (that his appeal was not upheld) after he was dismissed.

Misconduct allegations

21. Towards the end of 2016, a document was put under the door of the claimant's former line manager, Richard Murray. It was a print out from Companies House relating to a company called Rockscom Limited. Printed in stencil on the page with an arrow from the word Rockscom were the words "GOOGLE THIS". The paper stated that the company had three current officers, one of whom was the claimant.

22. As a result of this coming to light, an investigtion was undertaken by a division called BT Security and a report prepared by Andy Moody, head of investigators (pages 138-141). This confirmed that a search showed that two companies, Rockscom Limited and Home Broadband Solutions, were registered to the claimant's home address. The report stated that his Linked In profile gave his occupation as Director of Rockscom, a telecommunications company in Glasgow and that he left Openreach in April 2016.

23. His profile summary was very critical of Openreach, including: "they are not a happy bunch I can tell you, poor service from overseas call centres and the mind blowing inability of communication companies to communicate with their end users is the source of much frustration. Nobody is listening as Openreach continue with not delivering real fibre optic broadband and the nation's end users are losing out".

24. This report included a screen shot of the Rockscom home page (page 139) and stated that the website was registered to the claimant at his home address (page 141). Rockscom's website indicated that they provide "new installations, fault finding and repairs as well as knowledge calls to help you get set up". It showed that the claimant was linked to three other company names, Home Broadband Solutions Limited, Business Broadband Solicitions and Fibre and Ducting Solutions, with website addresses which all redirected to the Rockscom website. Comments included: "if left to OPENREACH the nation will never get a fibre to the premises network; can we afford to keep throwing money at BT OPENREACH, so that they do not provide the FTTH that we need; our old copper telephone system was an asset to the nation and BT was a public service but it ain't no more; it's a liability a money pit and if the latest fibre take up figures are anything to go on its holding our nation back. If we continue to allow OPENREACH to overlay their network using the £1.7 billion set aside for next generation access then we could be committing industrial suicide by hamstringing business in a way we will struggle to overcome". A screenshot with contact information including

these website addresses and the claimant's home address and a telephone number was included in the report (page 140).

25. Graham Foster was instructed to conduct an investigation interview and he sent a letter dated 9 December 2016 to the claimant which commenced, "I'm sorry about the continuing problems you're experiencing with your health. Normally, business matters would await your return to work. However, I am in the process of investigating a potential report of conflict of interest and denegration of BT/Openreach and do need to look at this as soon as possible". The claimant was invited to attend a fact finding meeting and to contact him to agree a date to meet (page 161-162).

26. When he received no reply, Mr Foster wrote a second letter dated 16 December 2016 (page 163 - 164) in which he said that if he did not respond he would need to complete the investigation on the basis of the information which he had available to him. He said that if he felt unable to attend a face to face meeting that he could submit a written explanation by 23 December 2016.

27. As the claimant did not reply, Mr Foster completed a Misconduct Investigation Report dated 30 December 2016 on the basis of the information which he had (pages 126-134). He recommended that the case was passed to his manager for consideration under BT's gross misconduct procedure.

28. The claimant received this letter but did not reply to it. He considered that it was "fake" and "a wind up". This was because the letter was not on headed paper and was not signed. He did not know Graham Foster and he did not explain who he was in the letter. He knew nothing of the subject matter and no one had contacted him about it. This was despite the fact that he was on sick leave and in contact in that regard, and in regard to the grievance, with HR.

29. Because of the ongoing grievance, HR sought to select a manager who was not in his division and who did not know of the circumstances of the grievance. John Gillooly, Senior Operations Manager was therefore appointed. He wrote to the claimant on 15 February 2017 (pages 215-218) enclosing the documents relied on during the investigation and the investigation report.

30. The letter set out the allegations of gross misconduct namely: "1. Breach of Bribery and Corruption Policy by operating a business in direct competition with Openreach, 2. Deliberately misleading employer, 3. Breach of outside occupations policy, 4. Failure to act in the best interests of Openreach, in that you are registered as a director of Rockscom Ltd which is verified by companies house registrations and is registered at your home ddress. You have failed to declare this potential conflict of interest; you are registered as a director of Home Broadband Solutions which is verified by companies house registrations and is registered at your home address; you have failed to declare this potential conflict of interest;

there is further evidence on the Rockscom website to suggest that you are affiliated to several other companies; Home Broadband Solutions Limited; Business Broadband Solutions and Fibre & Ducting Solutions. Once again you have failed to declare this potential conflict of interest".

5 31. A fifth charge was a breach of Standards of Behaviour Policy, "in that you made derogatory comments about Openreach on your Linkedin social medial account; there are derogatory comments about Openreach on the website Rockscom Ltd, to which you are registered as a director".

32. The claimant was invited to attend a disciplinary hearing on 27 February 10 2017. He was advised that it was his responsibility to contact his union representative and to contact HR to confirm his attendance. The letter stated that "if you are unable to attend and fail to make contact, I may need to make a decision based upon the information I hold which is less than ideal". He was advised that the outcome could be summary dismissal.

15 33. Mr Gillooly wrote again to the claimant on 27 February 2017 since he had not replied. He advised that he would have to make a decision based on the information which he had, but he offered him one more opportunity to submit a written response (pages 219-220).

34. The outcome of the disciplinary investigation was communicated to the 20 claimant by letter dated 16 March 2017, when he was advised that he was summarily dismissed. A rationale for the decision was enclosed (pages 222-223H). He was advised of his right to appeal.

35. Mr Gillooly then mentioned to the claimant's union representative, Mr David McClune, that the claimant should be aware that he would be receiving important 25 correspondence. Mr McClune convinced the claimant that he should appeal the decision.

36. Mr Paul McGinlay was identified by HR as an appropriate third line manager who could hear the appeal, who was employed in a different division from the claimant. He conducted the appeal as a complete re-hearing of the case. The 30 claimant attended an appeal hearing on 9 May 2017. The meeting was recorded and transcribed ((pages 226-256). Mr McGinlay was assisted by Ms Kelly Lawton from HR who attended by way of telephone conference link. The claimant was represented by Mr McClune, full time official with the CWU.

37. The outcome of the appeal was communicated to the claimant in an 35 undated letter (page 257) which included a rationale for rejecting the appeal (pages 258- 267).

38. Mr McGinlay did not accept the suggestion from the CWU that the misconduct process should not have been pursued because the claimant was absent from work with stress, had personal issues and an ongoing grievance around bullying and harassment. Having investigated that, he concluded that the allegations were considered serious enough that it was reasonable to investigate them despite the claimant's absence from work; in any event the allegations formed no part of the grievance and there was no overlap and independent investigating and decision managers were utilised, who were not part of the claimant’s direct line management and had no previous involvement with him. That explained why none of the managers dealing with the grievance had mentioned the misconduct allegations.

39. With regard to charges 1-4, he endorsed the conclusions of Mr Giflooly that the evidence clearly showed that the claimant was or had operated operated a number of businesses in direct competition of Openreach, and in breach of the Outside Occupations Policy.

40. At the appeal hearing, the claimant confirmed that he was the registered director of Rockscom Ltd but said that he wasn’t actively involved in the business and that his wife set up the business name to make him feel better with the on going personal issues and mental health problems. Mr McGinlay followed up this claim that the business has never had a customer and was never intended to be an active business, by googling the business name. As a result of that search, he found that there was a number registered against the company name and that the claimant’s address was on yell.com (the report included a screen shot of the yell.com web page).

41. He concluded in the rationale report that, “having considered the evidence provided by BT Security, the investigating manager and the decision maker manager I cannot accept that the business name was set up by Graham’s family as a morale boost. The fact that the number was (and still is) registered on yelt.com shows an intention to gain custom”, and "Whilst I accept the fact that Graham has had mental health issues to deal with I cannot ignore the fact that this is a clear breach of policy and conflict of interest”.

42. He said that he agreed with Mr Gillooly conclusion, which he thought was both fair and reasonable, that he could not accept that the claimant did not consider that the work he was doing privately with his registered business was not in direct competition with Openreach and would not cause a conflict of interest, relying on the fact that the policies were clear in stating that being the director of another company or organisation is an example of a conflict of interest and therefore should be declared.

43. Mr McGinlay also followed up the claimant’s assertion at the appeal hearing that although he had not formally told Openreach that he was registered as a

director, his manager was aware. He contacted Mr Murray who confirmed that he had not been aware of that.

44. Further he noted that the claimant had regularly completed The Way We Work compliance training, which included a module on conflicts of interest, and cleared stated that any possible conflict of interests should be declared to his line manager or to the ethics team. He did not accept the claimant's assertion that anti-corruption and bribery is not covered in the compliance training. He said that as the director of a company which advertises telecommuncations repair and installation services, it is reasonable to conclude that the claimant would realise that this is in direct competition with Openreach and therefore should be declared.

45. Nor did Mr McGinlay accept that the claimant had no knowledge of the derogatory comments on the Rockscom website and a Linkedin page. Although the claimant said that he did not write the derogatory comments, as the registered director of Rockscom he was accountable for the content published on the website. In any event it was reasonable to assume that he was aware of what was written there and how that would impact on his role with the respondent. He also said that the language, abbreviations and acronyms used clearly indicated that the author was aware of Openreach terms.

46. The appeal was therefore rejected and the decision to dismiss upheld.

Relevant law

47. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996. Section 98(1) of this Act provides that, in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason for dismissal and, if more than one, the principal one, and that it is a reason falling within Section 98(2) of the 1996 Act or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. Conduct is one of these potentially fair reasons for dismissal.

48. Section 98(4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair, having regard to the reason shown by the employer, 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 dismissal and this is to be determined in accordance with equity and the substantial merits of the case.

49. In a dismissal for misconduct, in **British Homes Stores Ltd v Burchell [1980]** ICR 303 the EAT held that the employer must show that:

- He believed the employee was guilty of miscondcut

- He had in his mind reasonable grounds upon which to sustain that belief, and

- At the stage at which he formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.

50. Subsequent decisions of the EAT, following the amendment to the burden of proof in the Employment Act 1980, make it clear that the burden of proof is on the employer in respect of the first limb only and that the burden is neutral in respect of the remaining two limbs, these going to “reasonableness” under section 98(4) **(Boys and Girls -v- McDonald [1996] IRLR 129, Crabtree -v- Sheffield Health and Social Care NHS Trust EAT 0331/09).**

51. The employer does not need to have conclusive direct proof of the employee’s misconduct - an honest belief held on reasonable grounds will be enough, even if it is wrong. The Burchell test was approved by the Court of Appeal most recently in **Panama** v **London Borough of Hackney 2003 IRLR 278.** The principles laid down by the EAT in the Burchell case have become the established test for determining the sufficiency of the reason for dismissal where the employer has no direct proof of the employee’s misconduct, only a strong suspicion.

52. In considering the reasonableness or unreasonableness of the dismissal the Tribunal must consider whether the procedure followed as well as the penalty of dismissal were within the band of reasonable responses **(Iceland Frozen Foods Ltd** -v- **Jones [1982] IRLR 439).** The Court of Appeal has held that the range of reasonable responses test applies in a conduct case both to the decision to dismiss and to the procedure by which that decision was reached **(Sainsbury v Hitt 2003 IRLR 23).** The relevant question is whether the investigation falls within the range of reasonable responses that a reasonable employer might have adopted.

53. The Tribunal must therefore be careful not to assume that merely because it would have acted in a different way to the employer that the employer therefore has acted unreasonably. One reasonable employer may react in one way whilst another reasonable employer may have a different response. The Tribunal’s task is to determine whether the respondent’s decision to dismiss, including any procedure adopted leading up to dismissal, falls within that band of reasonable responses. If so, the dismissal is fair. If not, the dismissal is unfair.

Respondent’s submissions

54. Ms Gould submitted that the claimant had been dismissed for a fair reason, namely conduct, that the decision-makers had a reasonable belief that it was gross misconduct following a reasonable investigation. Summary dismissal was within

the range of reasonable responses and the respondent acted reasonably in the cicumstances.

55. With regard to the reason, Mr Rocks' strength of feeling that there was a conspiracy does not make that true. Mr Gilooly and Mr McGinlay were purposefully chosen as people who were well outside the claimant's line of business, with no link between them and the managers that he was complaining about, and they had no knowledge of the grievance or of the big ideas proposals.

56. With regard to the claimant's concerns about Richard Murray, the claimant did not raise, until this Tribunal, his belief that Mr Murray had created the document with the stencil. While this may be implied during the appeal hearing, the important point is that Mr McGinlay did not take that to have been implied by the claimant or his union rep.

57. The closest the claimant came to implicating Mr Murray was to state that he believed he knew about it because he had it up on a laptop in his presence. He suggests therefore that it was not as serious as suggested because it was condoned by his manager. However, it was not clear that Mr Murray knew and in any event Mr McGinlay asked him and he accepted his explanation.

58. The fact is that the document was investigated by BT Security and the website found on the internet. He did not say that Mr Murray had fabricated the Linkedin account or doctored the evidence. There was no suggestion that Mr Murray was aware of the derogatory comments. In any event, however the matter arose, the company was entitled to take the view that it did because of that evidence.

59. A detailed investigation was carried out by BT Security into the online elements of the claim, and also an investigatory report was created by Mr Foster. The claimant was given an opportunity to respond, but since he did not, there was no more that they could do at that point.

60. With regard to the claimant's mental health, on the one hand he says he wants to go back to work from November 2016 and on the other he says that he was suffering from paranoia at this time. In any event, neither manager took a negative view of the failure; he was not charged with delaying or failing to get involved; and he was given the opportunity to respond in the appeal hearing, when he was supported by his full time union rep.

61. With regard to the disciplinary procedure, the claimant has criticised the letters for not being on headed paper, but it is only with the benefit of hindsight now knowing how he perceived them that this is a learning point. In any event, once Mr Gillooly was involved, his letters are detailed and he offers the claimant another opportunity to submit written representations. Mr Gillooly did not telephone him

because he did not want to get involved in a conversation about the disciplinary hearing. In any event, the claimant was otherwise corresponding with HR and his union rep in relation to his sickness absence and the grievance. So there was no evidence that the claimant was not mentally fit, or that he might ignore correspondence because of his mental health.

62. The respondent made a very deliberate decision to keep the grievance and the misconduct allegations separate because of the claimant's claims about a conspiracy. Perhaps the line between them was in fact too distinct, and for instance his line manager should have been informed. However, the fact that she contacted him about his return to work shows that there was no conspiracy. In any event what happened after dismissal is not relevant to the fairness of the dismissal.

63. The grievance had no bearing on the decision which was made, which was a very serious allegation undermining trust, which is the essence of gross misconduct. The witnesses said that he would have been suspended and his pass withdrawn if he had been at work, but this is complicated by the interplay with the grievance and his attempts to get back to work.

64. While the claimant said that he did not know of the policy, it was clear from his evidence that he knew he should not be working in competition or taking work away from the respondent. Further, if as the claimant says, he could not do work because he had no network, then there would be no concerns about doing homers and it would not be possible to get paid for doing jobs. Whether it was doing homers or being the director of a business, he knew that he should not do it. Further, the claimant accepted that the comments which he made were negative, and that is sufficient.

65. With regard to the concerns raised by the claimant about the procedure, the delay in concluding the appeal can be explained by the time taken to find a senior manager who was unconnected with the grievance, and in any event, the delay is not fatal to fairness. Mr McGinlay said that he would not deal with it on the day and his union rep did not expect him to.

66. With regard to the reference to yell.com, Ms Gould accepted that the claimant was not given the opportunity to comment on that. However, Mr McGinlay said that it confirmed what he already knew and the decision would have been the same in any event.

67. With regard to the failure to review documents put forward in the appeal, the case manager from HR, who knew about the grievance, was concerned to keep matters separate. The only two points that were relevant was the link with Richard Murray and the claimant's mental health, both of which were discussed in the hearing, when HR said that they were fully aware of that as an issue. It was correct for them not to view the documents, and it was clear from cross examination that

the claimant did want the issue to be reinvestigated and wanted Mr McGinlay to form his own view about the actions of Richard Murray. However, the most he could have done was act on the finding that had already been been in the grievance, which was not supportive of his view of Mr Murray. This was done in order to keep the investigation untainted with the charges of conspiracy, and for that reason an HR colleague, who knew about the grievance, attended to guide the manager.

68. There was no suggestion from the union rep that there should be another appeal or that medical evidence should be obtained.

69. The claimant admitted that he was registered as a director and admitted much of what was on the Rockscom website, and that he did not inform his manager. Although he denied the Linkedin comments, these were viewed during the investigation, and they were similar to the comments on the Rockscom website. It was clear that the matter was serious and it does not matter that he made no money because it was clear that he was offering services to people. This was not a private facebook account criticising an employer, but here is a BT engineer touting for business. That is relevant to trust, because he was given access to customers to attract to his own business or to make derogatory comments about the business. He denied that he had said that at all, and did not say that it was because of his mental health. Irrespective of the grievance and his genuine belief about how he was treated by managers, that does not excuse this behaviour and therefore it was reasonable to conclude that dismissal was within the range of reasonable responses.

70. Mr McGinlay took account of his long service, and knew that he had a clean disciplinary record, and it was never suggested that he was anything other than a good worker. He also took account of his ill-health. In the circumstances it was reasonalbe for a manager to conclude from that information that the claimant was guilty of misconduct.

71. With regard to contributory fault, Ms Gould invited the tribunal to conclude that he had committed the condcut, that he was the author of his own misfortune and so compensation should be reduced to nil.

72. If the Tribunal finds that process was in any way unfair, for example that Mr McGinaly should have looked at the grievance documents or Tracy Scally should have been informed, these were not matters which would have altered the outcome and therefore compensation should be reduced to nil under Polkey.

73. With regard to the reference in the ACAS guidance about contacting claimants with mental health issues, given the number of letters sent and received while he was in contact with HR and his union, there was no breach because he had every opportunity to engage in the process. She submitted that the ACAS

code had been complied with by the respondent who does not seek a reduction in respect of the claimant's failure to get invovled at an earlier stage.

Claimants submissions

74. The claimant submitted that the offence in this case was not sufficiently serious to justify dismissal. It was clear from the evidence that he had not approached customers, not touted for business and not done any work, or profited in any way. He asked the witnesses why it was considered so serious, but he did not get an answer. Yet if it had been serious, then they would have come round to take away his passcard, his keys and his phone.

75. With regard to the webpage, that was solely for private use; and was not available through search engines, rather you had to type in the full address to reach the web-site. Although Mr McGinlay said that when he did a search the first thing that came up was yell.com, that was not mentioned by BT Security who would have done a thorough search. The only screenshot of the website is on page 139, but the website had around 7,000 words, and the sentences had been taken from it at random and were out of context. Rather consideration should have been given webshots of the other pages. He denied ever having made reference to Openreach on the website.

76. With regard to the telephone number, he does not believe that appeared on the website, and certainly he did not put it on, and indeed he would not have since that is not his home number, and this number was not registered to him. He asked if they had tried to phone it but they had not. He was not aware that the phone number was an issue until he noted that Mr McGinlay brought it up in response to the appeal but he was not asked about it during the appeal hearing.

77. He said that the respondent could have undertaken an investigation into the number of hits on the website, which is something that BT Security could have done, but there was no evidence and that anyone had ever accessed the web-site. There was no evidence that he had done work or taken customers. Mr McGinlay said in answer to one of his questions that in theory Skye and Talktalk could come and ask him to do work for them; but that would not be possible, because you cannot work on the Openreach Network without a licence, which is a criminal offence.

78. He never claimed that Mr Murray fabricated the letter because he has no evidence about that, but that is what he suspects.

79. This case boils down to the fact that he had registered a business name and it was believed that he had created a webpage with derogatory comments about the company; but he had never denied registering the business name or creating the webpage.

80. With regard to Linkedin, he always denied any knowledge of that. It could easily have been hacked and he had his suspicions about who that might have done it but he could not say. There was no screen shot of the Linkedin page; he assumed the way it was set out in the report was not how it appeared. He had asked his doctor who is on linked in and she said that the only Graham Rocks on it is in Australia.

81. He was not aware that it was a conflict of interest; and this was not something that he had heard in training. With regard to the Bribery Policy, it says that you must agree and register an interest if there is a conflict of interest, and at no point did they say that there was a conflict of interest so here they were always dealing with a potential conflict of interest; and it does not say anywhere that you will be disciplined for it. If there really was an actual conflict, he accepted that the Standards of Behaviour Policy would be relevant, but here there was only potentially a conflict; there was no evidence of loss, or taking customers, of using premises or equipment etc. He could understand if he had been running a business and making money that it would be taken seriously, but that did not happen here. He said that he was well aware of the outside occupational policy and he had never done "homers".

82. If they felt that the webpage was so derogatory, why was there no attempt to have it removed; which was easy to do and indeed it was removed by the time of the appeal. If the charges were so serious, why did they not inform the inland revenue; if there was evidence of bribery and corruption, why did they not contact the police; if he was such a bad egg then why did they leave him with access to all of the BT systems; which he was able to go in and check a week after his dismissal which is when he found a number of e-mails to him.

83. With regard to the ACAS guidance, it states that where an employee is repeatedly unable or unwilling to attend a meeting, that might be due to genuine illness or refusal to face up to the issue. In such circumstances the employer should consider the seriousness of the disciplinary issue, the employee's disciplinary record, work record position and length of service, obtain a medical opinion on whether the employee is fit to attend the meeting, and how similar cases in the past have been dealt with. It also states that if there is a known mental health condition, then employers should make reasonable adjustments. ACAS code says manager can proceed if a person can't supply a good reason for not turning up, but here the claimant was never asked why he had not attended. It would have been different if they knew, but to make the decisoin without knowing was unreasonable.

84. Here there were only two letters which is the legal minimum and the way they dealt with it is not reasonable or fair, given his mental health and other issues. The reasonable and fair approach would be to have tried to get in touch with him another way, to explain the letters and show they were not part of a conspiracy; which would at least have involved contacting his union or line management; and

the normal procedure would have been to attempt to contact him by text or phone. If Mr Gillooly had thought that the disciplinary issues would have been raised on the phone, then he could have put the phone down.

85. He submitted that the length of time that the grievance took was not a coincidence but rather they held out concluding the grievance until he was dismissed. He got a letter regarding disciplinary in relation to sickness absence the day before he was dismissed for gross misconduct.

86. With regard to the legal tests, he submitted that the investigation could not be reasonable since they only heard one side of the evidence. While Mr McGinlay had spoken to Mr Murray they should have done much more and should have investigated when the letter came to light and asked Mr Murray more about the background.

87. The investigation could not be reasonable when they refused to take documents which he said were relevant would prove his sickness and history with Mr Murray. It would be different it he had looked at them and decided that they were not relevant. This suggests that they had made up their mind; especialy given this was the first time he had brought these up. Along with the failure to challenge Mr Murray, this meant that the investigation was not reasonable.

88. He submitted that it was not reasonable for them to conclude that misconduct had taken place; the facts here did not fall under the policies. Dismissal was not in the range of reasonable response because there was no actual conflict of interest and BT did not suffer any actual loss of customers or income.

89. Ms Gould pointed out that the claimant had raised a number of matters in submissions which he had not raised in evidence. Her position was that he had an opportunity to raise these two times during the process, and in any event the issue is what is in the mind of the decision maker so they would not be relevant to the decision making process; here he had a trade union rep who could have raised them on his behalf.

Tribunal's deliberations and decision

Observations on the evidence and the witnesses

90. In this case, there is a clear dispute on the facts. Although the claimant has admitted that he did register as a director of the company Rockscom and he did set up the website with the help of his wife and his son, he states that it was not registered with any search engines; that he knows nothing of the Linkedin account; that he knows nothing of the yell.com account.

91. However it is quite clear from the documentary evidence before this Tribunal, supported by the oral evidence of the respondent's witnesses, that the claimant did have a Linkedin account, that he had included information regarding his directorship of Rockscom and that he was registered with yell.com. It is also clear that there was a link between that and the Rockscom website, not least in having the same telephone number.

92. In the face of clearly contradictory facts, I took the view that he was not telling the truth in order to play down the seriousness of the situation, and to support his argument that in the circumstances dismissal was not unfair.

93. In contrast, I considered that the respondent's witnesses gave their evidence in a clear and straightforward way, and thus where there was any conflict on the facts, I preferred the evidence of the respondent's witnesses.

Reason for dismissal

94. Turning to the substantive case, the first issue which the Tribunal considered was whether the respondent had shown that the claimant had been dismissed and that the reason for the dismissal was misconduct.

95. Although the claimant initially said in submissions that he disputed the reason for the dismissal, he then agreed that he accepted that the respondent had dismissed him for misconduct, but he argued that it was not fair and reasonable in the circumstances to have dismissed him for misconduct. In this case, the dismissal related to information which the respondent had obtained regarding a telecommunications company set up by the claimant. Given that background, I accepted that the reason for dismissal was misconduct. I accordingly find that the respondent has shown that the reason for the dismissal of the claimant was conduct, which is a potentially fair reason for dismissal.

Reasonableness of decision to dismiss

96. I turned to consider the key question in this case which was whether the respondent acted reasonably in dismissing the claimant for misconduct. The question is whether it was reasonable in all the circumstances for the respondent to dismiss the claimant for misconduct, and not whether this Tribunal would have dismissed the claimant in these circumstances but whether the dismissal was within the band of reasonable responses available to the respondent in all the circumstances.

Reasonable grounds for belief

97. In considering whether or not dismissal was reasonable in all the circumstances, I considered the second limb of the Burchell test, that is whether or

not the respondent had in mind reasonable grounds upon which to sustain the belief that the claimant was guilty of misconduct.

98. As discussed above, the respondent had received an anonymous “tip off’ regarding a company which the claimant had set up. The claimant admitted having set up that company, having registered as a director, and having created a web site. In the circumstances, I had no hesitation in concluding that there was reasonable grounds for the respondent to believe that there had been misconduct on the part of the claimant.

The investigation

99. I then turned to the third limb of the Burchell test. The question is whether at the stage at which the respondent formed the belief that the claimant was guilty of gross misconduct, he had carried out as much investigation into the matter as was reasonable in the circumstances. The range of reasonable responses test applies to the question of the investigation as well as other procedural aspects leading up to dismissal.

100. In this case, BT Security carried out an investigation in relation to information regarding the company which had been brought to their attention. The claimant in evidence said that this investigation would be thorough given that it was carried out by the head of investigators at BT Global Services. That investigation revealed the website and Linked! n profile and that companies were registered in the claimant’s name.

101. Mr Foster considered the evidence and produced a comprehensive Misconduct Investigation Report. He attempted to contact the claimant, but the claimant did not respond. Given the failure to respond, he had to make his decision based on the information which he had, as he had informed him he would.

102. The respondent made several attempts to contact the claimant, at the fact finding stage, and at the disciplinary decision-making stage. The claimant did not respond or contribute. Before coming to the decision, checks were made which ascertained that, according to Royal Mail system, the letters had been recieved by the claimant.

103. Indeed, the claimant accepts that he did receive the letters. He explains his failure to respond to them was linked to the grievance he had raised, and his concerns that there was a conspiracy against him. He attributes that now to his mental health at the time. It was around the time he had just been put on half pay, it was coming up to Christmas, he had not long before received the OHS report, which had alarmed him and set back his recovery. He noted that the letters were not on headed notepaper; they were not signed; he thought that they were vague and lacking in substance; he had never heard of Graham Foster, he did not explain

who he was; he had never heard about this issue through any other channel such as HR or his union. He concluded that the letters were "a fake" and a "wind up" and "part of the conspiracy". His misgivings about them were confirmed, he said, when he saw that the disciplining officer was John Gillooly, whom he (wrongly) believed to be the step-father of Richard Murray, and when he read the paperwork and saw that the letter had been put through Richard Murray's door, which all added to his paranoia. He also thought that if it was so serious, they would have taken his security pass card from him.

104. He said that at the time he genuinely believed that they were out to get him, and so he denied it was happening, put it down to the conspiracy, and while he now appreciates these were not rational thoughts, he had become quite paranoid and was suffering severe anxiety and dark thoughts at that time.

105. What is odd of course about this is that he did not telephone HR to check, or even ask his trade union rep to check if the letters were genuine. It is particularly odd when he was, as he readily admits, in constant communication with his trade union and with HR regarding his sickness and his grievance. Further, it was around this time that HR, along with his line manager and Ms Keith, was trying to get him returned to work in a different part of the business following his grievance.

106. He says that further measures should have been made to get in touch with him by alternative means. It may well be there are cases where a respondent in such circumstances should make alternative efforts to contact an employee who was absent on sick leave, especially if they knew that their absence related to their mental health.

107. However, the circumstances here were perhaps different from the norm and I accepted Ms Gould's submission that there were no signs that the claimant's mental health issues might explain his failure to respond. In particular, the claimant's evidence was that he was seeking a return to work from November 2016. Although he said that seeking a return to work was different from being fit to return to work, it is difficult to see how the respondent could have acted on that subtlety. Further, the respondent was aware that the claimant was, as he said himself, in regular contact with HR over his sickness and his grievance, and that he was also in frequent contact with his union rep.

108. I accepted therefore that it was not unreasonable for the respondent not to have used other methods of communication to try to reach the claimant, in the particular circumstances of this case.

109. Given the lack of contact from the claimant, and the attempts to get him to get in touch, and therefore there being no response to the allegations or mitigation in relation to them, I considered that the extent of the investigation conducted in this case was reasonable.

110. I therefore was satisfied that in these particular circumstances, the respondent undertook as much investigation as was reasonable before coming to the decision to dismiss the claimant.

Reasonableness of the sanction of dismissal

5 111. I then turned to consider whether the sanction of dismissal was reasonable in all the circumstances, having regard to equity and the merits of the case.

112. As I understood the claimant's argument, he argued that to dismiss him in these circumstances was not reasonable in particular because his misconduct was not as serious as the respondent was making out.

10 113. He said that it was clear that the allegations were not serious because they left him with his pass, his mobile and his keys and with access to all BT systems. He said that in any event his manager and his colleagues knew about the website, that he was open about it and had not hidden anything from them. He said that he thought that Richard Murray had seen it on his laptop on one occasion. Further, he 15 argued that he was not aware of the policies, and did not know about the conflict of interest policy. He said that the training on "The Way We Work" was different for front line engineers than for managers.

114. I did not accept that the claimant was not aware of the policies, particularly given the reference to The Way We Work in all the policies lodged. However in any 20 event, even if he was, he ought to have known about them. Indeed he did say that he was aware of the outside occupations and shareholdings policy or at least the sentiment and principles behind it. Indeed he was aware in general terms of the importance of not doing "homers", which as Ms Gould submitted, was a clear indication that he knew that he was not meant to operate in competition with the 25 respondent.

115. However, the claimant argued in any event, as I understood his argument, that his actions did not breach the policies. This is particularly because there was in this case no actual conflict of interest, only a potential conflict of interest. Referring to the Anti-Corruption and Bribery Policy, which refers to potential 30 conflicts of interest, which "are situations that require you to agree a way of ensuring the conflict does not materialise (mitigation) and register the interest". He argued that all that is required is a discussion with your manager and no-where does it state that failing to do so will be a disciplinary offence. I did not accept this argument, because this fails to appreciate the interplay between the policies, to 35 which employees are specifically directed.

116. The claimant stressed in evidence and in submissions that there was no evidence in this case that anyone had even seen the website, that the claimant had touted for any customers, that any customers had ever come to him, that any

services had been provided to any customers. The respondent could have produced evidence to support this, for example they could have obtained a report which showed that people had clicked on his website but they did not.

117. I did not accept the claimant's submissions in this regard. I did not accept, given the policies, and indeed from a common sense point of view, that it was only in circumstances where the claimant had actually traded, actually reached potential customers with adverts, actually taken customers, or actually made money, that the respondent could conclude that there was misconduct. So there was no requirement for the respondent to have any evidence to suggest that this had impacted on the respondent in any material way, rather than there simply being the potential to do so.

118. In particular, I did not accept that the claimant had only created a website to boost his morale, or to keep himself busy during his sick leave or because he realised how easy and cheap it was to create a website, or because it would be fun to set up a company called Rockscom. While it was only necessary for me to conclude that the respondent had acted reasonably in coming to the conclusion which they did based on the material which they had, given the investigation carried out, I accepted on the evidence that I heard that the claimant had deliberately set up the company and that it was his intention to trade in competition with the respondent, even if that had not yet happened, or even if he may have changed his mind about it.

119. Nor did I accept that he knew nothing of the Linkedin site. There is no possible other explanation why such a site would be populated with the information that it was. The claimant made some suggestions (for the first time in this hearing, as I understood it) that someone else had created the Linkedin in website, implying that they did it to "frame" him, but that he was not prepared to say who it was. He had also suggested that someone had tampered with the Rocksom site because he did not make any reference to Open reach or make any derogatory comments about the company there. I did not accept that. There was no evidence to support that suggestion. I did not consider that it was reasonable to suggest that the respondent should have got a report that would suggest the website had been tampered with, given the information they had. The evidence points to the claimant having written down these comments, or at least being responsible for them.

120. In any event there was the yell.com site. The claimant insisted that he had not taken any steps to register with the yell.com site. He knew nothing about the yell.com site. So that would mean that someone else registered the entry in his name. He said that he had received correspondence very recently from them to re register and as re-registration is annual, it must have been this time last year that the company was registered. It may well be that is right and that is the reason BT Security did not identify this entry was because it was registered after their search. There was no evidence to support his implication that this had been registered by anyone else.

121. The claimant complained that nothing about the yell.com website had been put to him, and therefore he was not given the opportunity to respond to it. The evidence was that in the course of his follow up to the appeal hearing, Mr McGinlay had put "Rockscom" into the google search engine and that the yell.com website had been listed. This belies the claimant's assertions that it was only possible to access the site by putting the specific address into the internet. But in any event, while it was accepted that this was not put to the claimant because Mr McGinlay was not aware of it at the time of the appeal, he said that it simply confirmed what he already knew and it make no difference to his decision.

122. During the hearing (for the first time as I understood it) it was confirmed that the telephone number on the yell.com entry matched that of the telephone number in the Rockscom contact page (again the claimant said he did not know where that page had come from, but I accepted that it could have only come from a search of the website or internet). The claimant stated that this was not his home number and was not registered by him. However, as Ms Gould pointed out, this was not something which he had raised prior to this Tribunal, although he had the opportunity to do so at the appeal hearing, when he was represented by a full-time trade union official.

123. Given all of the above, I accepted that the claimant had deliberately set up a company which was or would be a competitor to the respondent, and that in order to attract business had made derogatory comments about the respondent, all in breach of polices and the implied term of mutual trust and confidence.

124. Mr McGinlay said that he had taken account of the claimant's length of service, and the information he had showed that he had a clean disciplinary record, and indeed there was no argument that he was anything other than a good worker. However, Mr McGin lay's view was that the conduct was particularly serious so that these factors did not outweigh the fact that the respondent had a concern about being able to trust the claimant going forward not to make negative comments to customers or not to undertake work in competition with them.

125. He said that he took account of the claimant's mental health although the claimant did not seek to excuse his actions by reference to his mental health, and indeed he said that he had worked on the project with his wife and son.

126. Given the evidence and the conclusions reached after reasonable investigation, I accepted that a reasonable employer could have concluded that the claimant was guilty of gross misconduct. I accepted therefore that dismissal was within the band of reasonable responses.

Procedural fairness

127. The Tribunal went on to consider whether the dismissal was nevertheless unfair on procedural grounds. The question was whether in all the circumstances a fair procedure was followed, and the band of reasonable responses test applies not only to the decision to dismiss but also to the procedure relating to dismissal.

128. The claimant argued that a fair procedure had not been followed in a number of respects. He referred to failures in relation to the ACAS guidance (rather than the code of practice itself). This related particularly to the adjustments an employer should make when dealing with an employee with mental health difficulties.

129. He complained about the failure of the respondent to communicate with him using alternative methods. He also complained about the letters not being on headed notepaper, being vague and unsigned, such that this would lead him to conclude that they were fake.

130. As discussed above, I did not consider that in this particular case, further adjustments could have been made because of the claimant's mental health, given the background facts here that the claimant was otherwise regularly in touch with the respondent’s HR department, either directly or through his union rep.

131. The claimant also complained about delays in dealing with the hearing. As I understood it, this related particularly to the delay in staging the appeal hearing and in issuing the appeal outcome. However, I did not accept that these relatively minor delays in this case could be said to have contributed to any unfairness. In any event I accepted Ms Gould’s submissions that there was a very good reason for the delay, and that related to the need to find a third line manager who was not involved in any way in the grievance.

132. The claimant also complained about the refusal of Mr McGinlay to take account of materials which he brought along to the appeal hearing relating to the grievance and the sickness absence. He thought that Mr McGinlay should at least have looked at these to determine whether they were relevant or not, and that to fail to do so was unreasonable. However, I accepted Ms Gould’s submission that the purpose of an HR colleague being involved, who did know the full picture, was to assist the manager and to confirm what issues were relevant. Here, as Ms Gould said, the issues that were relevant was the connection with Richard Murray and his sickness absence. As can be seen from the notes of the appeal meeting, a discussion regarding Richard Murray did take place, and further Ms Lawton stated that they were fully aware that the claimant's mental health was one of the issues to be taken into consideration.

133. When I asked the claimant what the connection was between the grievance and the misconduct allegations he said that it was Mr Murray, against whom he had made the grievance and who was seeking "revenge" for that to the extent that he had fabricated the "google this" document about the company himself. This seemed clear to him because Mr Murray works in a secure building, so that it could not have been a member of the public, but of course that does not even suggest that it may have been Mr Murray who created it since the claimant says that his colleagues were aware of the website so one of his colleagues who worked in the building could well have put it through the door. As discussed above this was never stated by the claimant in terms in the appeal hearing. I accepted that the claimant had every opportunity to raise his concerns about Mr Murray in the appeal hearing, and in any event Mr McGinlay followed up the appeal with a phone call to Mr Murray to ask about his involvement. So to the extent that there was any link between the grievance and the misconduct, I consider that was explored in the context of the appeal, short of the grievance itself being reinvestigated by Mr McGinlay which I accepted was not appropriate.

134. Thus I did not consider, either individually or cumulatively, that any of these concerns raised by the claimant could be said to render the procedure followed by the respondent unfair.

135. In all the circumstances, I consider that the procedure followed by the respondent fell within the band of reasonable responses and therefore that the procedure followed could not be said to render the dismissal unfair.

136. Consequently, considering in particular equity and the substantial merits of the case, I decided that dismissal was reasonable in all the circumstances.

Conclusion

137. I therefore concluded, in all the circumstances, that dismissal for gross misconduct was within the range of reasonable responses open to the respondent, and therefore that the dismissal was not unfair. The claim is therefore dismissed.

Employment Judge: Muriel Robison
Date of Judgment: 23 March 2018
Entered in register: 27 March 2018
and copied to parties