EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		Respondent
MR D HIDE	**AND**	**FARGRO LTD**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: BRISTOL ON: 11TH / 12TH JULY 2022

EMPLOYMENT JUDGE MR P CADNEY (SITTING ALONE) **MEMBERS:**

APPEARANCES:-

FOR THE CLAIMANT:- **MR J DAVIES**

FOR THE RESPONDENT:- **MR N HENRY**

JUDGMENT

The judgment of the tribunal is that:-

1. The claimant's claim that he was unfairly dismissed is well founded and is upheld.
2. Directions as to remedy are set out below.

Reasons

1. By this claim the claimant brings a claim of unfair dismissal. The respondent contends that he was fairly dismissed for gross misconduct.

2. The tribunal has heard evidence from the claimant; and on behalf of the respondent from Ms Amanda Wheeler (HR Manager), Mr Dan Pulling (Sales Director), and Mr Richard Hopkins (Managing Director) .

Facts

3. The claimant was employed by the respondent as an Integrated Pest Management Specialist from 28th January 2013 to 27th January 2020.

4. On 15th November 2019 an incident occurred in relation to a screen saver which his line manager Dr Burnstone considered could cause discomfort if seen by colleagues. He asked the claimant to remove the image, and noticed on 19th November that it was still being displayed. He again asked the claimant to remove it but the claimant refused. On the same day Dr Burnstone emailed Ms Wheeler complaining of the failure to follow a reasonable management instruction, undermining him in front of other staff members and suggested that this was a disciplinary matter.

5. On 22nd November 2019 the claimant and Dr Burnstone held a meeting at which Dr Burnstone set out his expectation that no further incident would occur, that any worries the claimant had be brought up in a calm and considered fashion, and that he adhere to company policy. There was no further disciplinary action at that stage, but the company would continue to monitor his behaviour and he stated that disciplinary action could be taken if further issues arose.

6. Also on 22nd November 2019 a colleague JH made a formal complaint of bullying against the claimant. On 26th November 2019 an investigation meeting was held and he was suspended the same day.

7. The respondent decided to conduct a full investigation and engaged an external "Face2Face" Croner Consultant Mr Carl Tudor to conduct it. The investigation meeting was held on 3rd December 2019 and Mr Tudor reported on 17th December. The allegations were of:

   i) Bullying and Harassment;
   ii) Political Canvassing at Work;
   iii) Inappropriate use of work email; phone and laptop;
   iv) Inappropriate use of work time.

8. In his report, Mr Tudor recommended disciplinary action, with a warning that if upheld that the allegations would be considered gross misconduct, in respect of:

   i) Allegations of bullying JH;

   ii) Failing to follow reasonable management instructions to stop talking about politics in the workplace;

iii) Encouraging political conversation to a level deemed pestering which had the potential to make colleagues feel uncomfortable and intimidated (namely JH);

iv) Inappropriate use of the work email phone and laptop;

v) Inappropriate use of work time;

vi) Not acting in accordance with Fargro's standards of behaviour;

vii) Unacceptable attitude toward management leading to a fundamental breakdown of trust and confidence.

9. For completeness sake I record that on 6th December 2019 the claimant lodged a grievance against Ms Wheeler and Mr Pulling, although nothing in this case turns on it. A meeting was held on 10th December 2019. On 22nd December 2019 the claimant appealed the grievance outcome and the appeal was held on 7th January 2020.

10. I respect of the disciplinary allegations, the respondent accepted the recommendations of Mr Tudor's report, and the claimant was invited to a formal disciplinary meeting to be held on 24th December 2019, with the disciplinary allegations being those recommended by Mr Tudor in the Investigation Report. It was to be held by another "Face2Face"Croner consultant Mr Dean Yeomans. The meeting was held on 13th January 2020 and Mr Yeomans reported on 21st January 2020.

11. Mr Yeomans findings were that in relation to the first allegation:

i) That the claimant "overstepped the professional and moral lines" in relation to the "Tony Blair remark; that JH could reasonably have interpreted his conduct as overlooking her, but that on balance these "isolated incidents" were not "tantamount to bullying"; and that the allegation was not upheld.

12. In relation to the second allegation:

i) That despite the absence of documentary evidence, that the claimant had accepted that he had been told not talk about politics but that he had continued to do so; and this allegation was upheld.

13. In relation to the third allegation:

i) *That the claimant encouraged political conversation both within and outside the respondent; and the allegation was upheld*.

14. In relation to the fourth allegation:

i) That the claimant had inappropriately used a number of devices for non-work related matters in breach of the terms set out in the company handbook. The claimant did not essentially dispute this but contended that a previous manager (Mr Paul Sopp) had given him permission for reasonable personal use of his devices. Mr Yeomans

concluded that this allegation was upheld as it was not reasonable to ignore the clear terms of the company handbook on the basis of a conversation held some five years previously with a former manager.

15. In relation to the fifth allegation:
    i) *This allegation was upheld for the same reasons as the fourth*.

16. In relation to the sixth allegation:

    i) Mr Yeomans upheld this allegation, finding a number of breaches of the Code of Conduct (see report para 55)

17. In respect of the seventh allegation;

    i) This allegation was upheld specifically in relation to the failure to remove the screen saver image.

18. In consequence Mr Yeomans concluded that dismissal without notice was his recommendation.

19. Having considered the report Mr Hopkins decided to accept its recommendations and summarily dismissed the claimant by a letter dated 27th January 2020.

20. The claimant appealed. The appeal letter is lengthy and detailed but in essence he contended:

    i) That the allegations should have been dismissed at the investigatory stage and should not have proceeded to the formal disciplinary stage;

    ii) Four of the disciplinary allegations had been created by Mr Tudor from the investigation and were not ones that he had understood to be disciplinary allegations at the investigatory stage;

    iii) That it was not explained which evidence was alleged to support which charge;

    iv) That his suspension was for an excessive period ;

    v) That his apparent acknowledgement that he had been advised not to talk about politics had been misconstrued and misunderstood;

    vi) That the disciplinary sanction was inconsistent and/or was unnecessarily harsh.

21. The appeal was heard by another external consultant Mr Joe Thomas. He summarised the appeal as raising eleven points. Mr Thomas recommended dismissing the appeal. The claimant asserts that the appeal was necessarily flawed as Mr Thomas identified eleven points of appeal but only specifically addressed five of them in his conclusions.

22. The report was considered again by Mr Hopkins who accepted its conclusions and dismissed the appeal.

Conclusions

23. The claimant makes a number of assertions as to the unfairness of the dismissal; each of which is considered below. I have separated them into procedural and substantive defects.

Procedural Defects

24. The first submission is that the respondent had no contractual right to allocate externally any of its responsibilities in investigating and determining the disciplinary allegations, and to instruct Face2Face consultants to carry out the investigation, disciplinary hearing and appeal. Alternatively that in the absence of an express contractual right that it could not be done without the consent of the claimant, which was never sought or given.

25. The respondent submits that whilst it is correct that the contract is silent on this point, that it is relatively common for employers to engage outside contractors to conduct disciplinary proceedings, one of the reasons being that it adds an extra level of fairness as the investigators come with an open mind and have no preconceptions of the individuals involved. Moreover it did at least potentially act to the claimant's benefit in this case as Mr Yeomans, whose view was accepted and adopted by Mr Hopkins, took the view that the most serious allegation, which the claimant accepts would have justified dismissal in and of itself was not upheld. Given Mr Yeoman's own findings that the claimant had "overstepped professional and moral lines" this was a notably generous conclusion (see para 11 above).

26. The claimant alternatively submits that the decision was procedurally unfair as the respondents' decision maker, Mr Hopkins, carried out no independent analysis or investigation but simply accepted, both at the disciplinary and appeal stage, the recommendations.

27. In my judgement the respondent is correct as to this point. Firstly there is nothing in the material provided to me which demonstrates that the contract has any bearing on this issue; and it is open to the respondent to appoint external consultants as the respondent did. In the end the however, the decision must be that of the respondent, not the external consultant. I accept Mr Hopkin's evidence that he was the ultimate decision maker. In the circumstances I accept the process being carried out in this way did not prejudice the claimant or cause any unfairness.

28. Alternatively the claimant submits that if Mr Hopkins was genuinely the decision maker in both cases and had formed independent views at each stage that there was necessarily no genuine appeal independent of the disciplinary hearing. The respondent contends that in the circumstances of this case that there was an independent analysis by Mr Thomas and the fact that Mr Hopkins took the decision in both cases does not alter the fact that there was an independent appeal process and decision.

29. In my judgement there is more substance in this point. Whilst the involvement of Mr Thomas did provide a degree of independent oversight, if I accept that Mr Hopkins was the decision maker at both stages it follows automatically that he was determining an appeal against his own decision. This is clearly a factor in the claimant's favour which has to be considered as part of the overall assessment of the fairness of the dismissal considered below.

30. Further the claimant contends that the "trawl" of his devices in the search for evidence was a breach of his article 8 rights and cannot be justified as proportionate. He relies on *Barbelescu v Romania [2017] IRLR 1032* and contends that if surveillance leading to the discovery of personal use of business devices is in breach of article 8 then dismissal must also be in breach of article 8 and necessarily unfair.

31. The respondent contends that there is nothing in this point as all of the communications were, or should have been work related and the property of the respondent and that the claimant had no reasonable expectation of privacy in relation to them. It relies on the conclusions of Mr Yeomans (see para 14 above) that it was not reasonable of the claimant to rely on assurances given many years before by a previous manager, when the more recent employee handbook was clear as to the point.

32. In my judgement the respondent is correct as to this. This is not a case of the claimant being subject to covert surveillance but of the subsequent examination of his work devices to discover whether he had been adhering to company policy. I am not convinced that this engages the principle in Barbescu or that it results in any unfairness.

33. The next is that the screensaver issue had been decided by Mr Burnstone without any disciplinary action being taken, and it was not open to the respondent to reconsider it or base the decision to dismiss on it in whole or in part. The respondent submits that there was no unfairness in including it as one of the disciplinary allegations; particularly given that the other disciplinary matters, those relating to JH, arose on the same day.

34. Again in my judgement the respondent is correct. The decision of Dr Burnstone was taken in the light of the screensaver incident alone, and not as part of a wider pattern of behaviour, which in my judgement the respondent was entitled to consider.

<u>Substantive Defects</u>

35. The essence of the claimant's case substantively is that even without the alleged procedural defects identified above, that the respondent could not reasonably have concluded that he was guilty of gross misconduct.

36. Firstly the most serious allegation, that of bullying and harassment of JH, which would undoubtedly have been gross misconduct was dismissed; and secondly that the remaining charges were simply insufficiently serious to justify dismissal. At worst the disciplinary charges proven relate to a "minor dispute" over a screensaver, and sending personal emails about politics on work devices.

37. The respondent contends that this is to underplay the seriousness of the allegations that were upheld. The essence of the respondent's submissions is that the claimant's approach is too atomistic; and that the tribunal should step back and look at the overall picture. The claimant's behaviour towards colleagues and his line manager was unacceptable s encapsulated in allegations vi) and vii) . He failed to follow company instructions as to the use of electronic devices and refused to accept reasonable instructions from his line manager. The conclusion that the evidence overall demonstrated a pattern of unacceptable behaviour amounting to serious misconduct was, on any analysis, one that was reasonably open to the respondent, and the sanction necessarily fell within the range reasonably open to it. They contend that Mr Tudor, Mr Yeomans and Mr Thomas, and ultimately Mr Hopkins all clearly took the view that the behaviour categorised by the claimant as minor disputes were in fact examples of serious misconduct and that conclusion was on the evidence, one that was reasonably and rationally open to them.

38. The claimant's second submission is that a number of the findings were not supported by the evidence, for example the conclusion that he was guilty of the inappropriate use of work time (allegation (v)). This assumed that the inappropriate use of the devices had occurred during working time but there was no evidence, or at least insufficient evidence to support this. This in my judgement is a valid point, and it follows that at least in part the conclusions that led to his dismissal fell outside the range reasonably open the respondent.

39. However, in my judgement for the reasons set out above the respondent is broadly substantively correct. On the information before the respondent it was open to it to conclude that the claimant had committed serious misconduct; and that the decision to dismiss substantively fell within the range reasonably open to it.

40. However there is one procedural flaw in relation to the appeal and the question is whether that has so fundamentally affected the process so as to render the dismissal unfair. That automatically results in the conclusion that the same person took the decision to dismiss and heard the appeal, which ordinarily would at least raise the question as to whether there had been a genuine appeal and if not whether the process was fair overall. The complicating factor in this case is that there was a separate individual who made an assessment of the appeal albeit that he was not the decision maker. The second difficulty is that in my judgement the claimant is correct in his assertion that the appeal report itself evidently did not address all the grounds of appeal.

41. It follows that in my judgement the appeal stage was flawed which may lead to the conclusion that the dismissal was procedurally unfair. However that conclusion is not inevitable. The respondent submits that in the context of this case given the independent assessment by Mr Thomas, that it was not unfair for Mr Hopkins to decide the appeal. In my judgement the difficulty with that argument is that if the decision was genuinely that of Mr Hopkins, then the same person decided both stages. This appears to be an unavoidable conclusion.

42. Although this is a somewhat unusual case given the involvement at each stage of the external consultant, as a general proposition a fair process, other than in exceptional circumstances, requires an independent appeal which did not occur in this case. It follows that in my judgement the dismissal was procedurally unfair as there was no genuine appeal.

43. Polkey – The respondent submits that even if I identify any procedural flaws, that the decision to dismiss was based on a body of substantive evidence which had been independently examined by three external consultants. Whilst hey did not agree as to every point each took the view that the claimant was guilty of gross misconduct; a view shared by Mr Hopkins. Even if there are procedural errors rendering the dismissal unfair there should be a 100% Polkey deduction on the basis that it is essentially inevitable that anyone other than Mr Hopkins hearing the appeal would have reached the same conclusion.

44. The claimant submits, as set out above that the evidence does not support the conclusion that the claimant had committed any misconduct and certainly not misconduct sufficient to justify dismissal and there is a significant likelihood that a properly conducted appeal would not have resulted the claimant's dismissal.

45. In my view the fact that although I have taken the view that the decision was broadly substantively fair, that there are elements of the decision that were not factually supported, and the appeal did not address all the grounds of the appeal there is a possibility that a different conclusion would be reached it does not appear to me to rise above that level and in my judgement the likelihood of the same substantive conclusion being reached by a different appeal officer is substantial. In the circumstances a 66.66% Polkey reduction is appropriate.

46. Contributory Fault - There has been no direct evidence called before me to allow me to make any specific findings of fact in relation to contributory fault; and in the circumstances I make no finding as to contributory fault and there is no further reduction beyond the **66.66%** Polkey reduction set out above.

Directions

47. The parties are directed to notify the tribunal within 28 days whether they have been able to reach agreement as to remedy. If not the case will be re-listed for a 1 day remedy hearing.

Employment Judge Cadney
Date: 02 December 2022

Amended Judgment sent to the Parties: 04 January 2023

FOR THE TRIBUNAL OFFICE