# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr G Oliver**

**Respondent:** **Secretary of State for Work and Pensions**

**HELD by** **CVP in Leeds** **ON: 7 and 8 March 2023**

**BEFORE:** **Employment Judge Lancaster**
**Members:** **Ms C Hunter**
**Mr M Taj**

**REPRESENTATION:**

**Claimant:** **In person**
**Respondent:** **Mr R Ryan, Counsel**

**JUDGMENT** having been sent to the parties on 9 March 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided, taken from the oral judgment delivered immediately upon the conclusion of the hearing:

# REASONS

1. We are dealing with complaints of disability discrimination either direct discrimination or unfavourable treatment because of something arising in consequence of disability: sections 13 and 15 of the Equality Act 2010.
2. The claimant Mr Gareth Oliver, it is admitted, is disabled because he has a diagnosis of anxiety and emotionally unstable personality disorder, alternatively known as borderline personality disorder.
3. He worked as a work coach for the respondent the Department of Work and Pensions (DWP) for just over a year from January 2021 until his dismissal on

28 February 2022. The reason for that dismissal was misconduct. The respondent has a policy whereby members of staff are not permitted without proper justification to access any personal records, including their own personal records in respect of their dealings with the department. The claimant was found on three occasions in December of 2021 to have done that, to have accessed his own account he at that point being himself in receipt of or claiming Universal Credit.

4. Within the policies any breach of that procedure is clearly identified as being a serious matter which could amount to gross misconduct. So it would ordinarily result in dismissal for that reason, or the alternative sanction of a final written warning if there is appropriate mitigation. The claimant knew full well of the consequences of any such breach, because in May of 2021, relatively shortly after commencing employment, he had been disciplined under this policy. That was because of a computer audit analysing the records of staff usage to see which client accounts they had accessed to seek information, had identified on several occasions on the same day that he had accessed his own account. He was dismissed for that offence but was reinstated on appeal, a procedural defect having been identified. There was no determination at that appeal as to whether or not he had in fact breached the policy and had accessed his own information on that earlier occasion. We do observe that on this occasion he was working in the office and he raised a defence to say that he was not able to have carried out the acts alleged because he was seeing a client at the time, but that was never formally investigated so far as we could see from the papers. The appeal decision was purely on a technical point that he had not been afforded the right to present that defence at a hearing.

5. Following that reinstatement however the claimant was unwell due to a combination of factors, but principally relating to an apparent regression in his mental health. He returned to work on 1 November. That was on a “phased return”, that is a gradual increase in hours and he also at that stage worked from home.

6. For the purposes of this case it is not disputed that in those circumstances his working from home was potentially something that arose in consequence of his disability. That is even though the occupational health report does not expressly state that this would be a reasonable adjustment either on a temporary nor a permanent basis. But that is not in issue before this Tribunal.

7. Having returned to work on that phased return and working at home the three further instances of alleged unauthorised access to his own Universal Credit account from the works computer were identified on 1 December, 15 December and 31 December. The claimant has always denied that he accessed his account on any of those occasions as indeed he maintained his denials in respect of the earlier instance in May of that year.

8. This was a matter that came to the respondent’s attention because of a computer audit. The claimant has always asserted that there was a computer error and whilst its right that there may of course be errors in the system, there is nothing in this case to suggest that that happened here. In order for that to be relevant either there would have to have been no access to Mr Oliver’s own personal account from a works computer by anybody and yet on those total four occasions it had been incorrectly identified that there had been such access, alternatively somebody did access that information but the computer systems

on each of those four occasions incorrectly identified the member of staff involved. Given that there is no suggestion of any known defects within the system and given that this is a relatively straightforward computerised function of identifying dates, times and the identity of those who access the system, it is in our view highly implausible that this was indeed the case.

9. Faced with that evidence which the respondents in our view correctly categorise as robust, the claimant was called to a disciplinary investigation followed by a disciplinary hearing and an appeal. He did not in fact attend at any of those three meetings because he raised issues as to his mental health and an adjustment was then made to allow him to submit representations in writing in response to questions that were posed to him.

10. From the outset he maintained that he had not accessed the system and could not have done so because he was not actually within working hours at the times or dates alleged. So on 1 December he said that he had finished work at 5 o'clock, and yet the access was some fifty minute later. On 15 December he said that he had taken time out in the middle of the day to attend a medical appointment and was not at work at 11.57am when the computer access was recorded. Indeed it has now come to light that he had apparently flagged this absence up on the system, he was covering the diary of another employee at that point (although no appointments are actually shown within that diary) and had put a note to say he was taking flexi time to cater for his travelling from his home to the appointment from 10.10 onwards, the appointment was scheduled for 11am. And on the third occasion the 31st December, which was of course New Year's Eve, he stated that he had finished work at 4.30pm but again the alleged access to the information was at 5.12pm.

11. In support of his case on the first and third occasions he identified that on the flexi time sheets which he filled in he had recorded the time he had stopped work. But the respondent throughout has correctly maintained that this was not conclusive of any matter because the time on the electronic form was simply filled in manually by the claimant and did not relate to any time when he had actually logged out of the works computer system.

12. In relation to the second incident on 15th December, at the time of the initial dismissal meeting he produced the invitation letter stating his appointment time of 11am but no further evidence at that point. By the time of the appeal he had also obtained a letter from a mental health practitioner who records that he had been given an appointment with one of her team scheduled for 11 but not starting until 11.15. The times were not precise: it was stated it at least lasted for something of an hour.

13. Neither of those pieces of evidence was however accepted by the respondent because they did not consider it was sufficiently robust nor conclusive so as to identify that the claimant had not in fact accessed the systems at the dates and times evidenced by the computer audit.

14. On the entirety of the evidence which we have heard which extends beyond that which was available to the dismissal or the appeal, we find as a fact that on this evidence the claimant did access his own computerised Universal Credit records on the three occasions specified. In particular we have regard to the facts which have emerged as to what other computer activity is recorded against him on the 15th December.

15. The claimant's appointment was scheduled for 11 o'clock, it would have taken him approximately half an hour to travel on public transport from his home in the centre of York to the health centre in Huntington. Therefore he would have to have left home no later than 10:15. If his appointment was an hour he would then not be able to resume work until the afternoon. He states that because he had booked out at those times and because there is some corroboration that he did attend an appointment within that window he cannot have accessed his work computer and been responsible for the infringement that was proved against him. But we note that on that very same day he was engaged in a serious of exchanges of emails with a Mr Gray who was involved from the respondent's HR department in dealing with a complaint that the claimant had raised about incorrect payments during the period of his phased return. That is whether or not he was entitled to full pay even if he was not working full hours. That was an ongoing issue. We note from the disclosed documents that it was clearly a live matter in Mr Gray's in-tray that day. The first communication he had about this issue was an incoming email to him. It was part of an internal inquiry he was carrying out with other members in HR who would be able to assist and that came into his email at 8:26. He sent out emails on the same subject matter internally at 10:41 and at 10:46.

16. The claimant sent a lengthy email which was copied in to Mr Gray and that was timed as being sent at 10:59, which of course will be one minute before he was due to attend the appointment at 11 o'clock. Mr Gray then replied to that promptly acknowledging receipt at 11:05. The claimant then sent a further email to Mr Gray at 12:29, which again on the face of it will be within the timescale that he identifies as when he would be travelling back from his appointment. Mr Gray sent another email to the claimant at 14:49 to which he received a prompt reply at 14:57 and there was then a further and final exchange of correspondence on that day when Mr Gray emailed the claimant at 15:13. The claimant confirmed in evidence that he used only his works computer for work-related email correspondence, and he accepts that he sent the relevant emails most particularly those at 10:59 and 12:29. But he says he did not do so at the times recorded. He alleges therefore that that which is timed at 10:59 must also be a computer error and in fact he will have sent it before he left for his appointment ,so sometime before quarter past 10 in the morning. That is that it is incorrectly recorded as being some hour and three quarters later than it was in fact sent. Conversely the email that is shown to be sent by him at 12:29 he maintains would only have been sent by him after he had resumed work after 2 o'clock, so that instance the timing is some hour and a half at least earlier than the actual time maintained by the claimant.

17. Within that chronology it is entirely implausible that these errors of timing are as the claimant now maintains. There is a full timetable of Mr Gray's involvement with this issue throughout the course of that working day .It is entirely inconceivable that two of those emails are mistimed in completely opposite directions, whereas within the series they fit very neatly into Mr Gray's other involvement not only with the claimant but with internal correspondence with other members of the HR team.

18. Similarly in relation to 31 December, the claimant, although he says he signed off his timesheet at 4:30 on New Year's Eve, received yet a further email still about the ongoing dispute about his pay at 4:51 to which he replied at 5:06.Then

the alleged infringement of accessing his personal records is at 5:12. So again there is a clear indication, with no suggestion whatsoever that there is an error in the recorded timings, that he had not completely logged out of his work systems at 4:30 but was still engaged in work-related matters and therefore clearly had the opportunity to do what the respondent said he did at 5:12.

19. So having seen that evidence in support of the fact that the claimant was indeed able to access the works computer at the relevant times, we conclude that he did do so. We do not know how he did so, how he accessed the internet or where from, but the reliable evidence of the computer audit corroborated by that indication of other computer related activity on the work system at the material times clearly supports our conclusion.

20. In so far as that then relates to the two complaints of either direct or disability related discrimination, there is firstly no evidence whatsoever from which we could conclude, absent any other explanation, that the reason why the claimant was disciplined and ultimately dismissed, nor why the robust evidence of the computer audit was preferred as against anything he put forward to the contrary, was because he was a disabled person: applying section 136 of the Equality Act 2010 to the section 13 direct discrimination complaint. The reason why this happened was because the respondents acted on entirely credible evidence that he had breached the policy and accessed his own Universal Credit account from the work system, which would have afforded access to internal memos on notes that would not have been available to him simply as a client.

21. And so far as the complaint under section 15 is concerned, the claimant has long attempted to construct an argument along the lines that had he not been working from home he would have been able to have corroboration to show that he had not been able to access the systems at the times he did. That is not a valid argument. The reason why the claimant was unable to establish his innocence of the charge brought against him on this occasion was not because he was working from home but because his defence was in this instance, we are afraid, untrue. On any instance, whether working from home or at the office, if the computer audit identified the breaches the respondent would then look at any evidence to suggest there was any inaccuracy. Their looking at the strength of that evidence does not depend on whether one is working at home or elsewhere, but will depend upon the different circumstances. It is not a valid comparison to assert that similar unfavourable treatment would not have occurred had the claimant been working in the office because his log out time would then have been corroborated, so that the reason for the unfavourable treatment in this instance was therefore that he was working from home. If the claimant had left work and had he then not subsequently accessed his records from his works computer the audit would not, of course, have identified a breach and potential evidence in rebuttal would not ever have been required. In this case, on the contrary, the audit showed that the claimant had in fact accessed his work computer after the times he said he had stopped work where there was no sufficient evidence of computer error and it is not because the claimant was working at home that he did not have corroboration of his defence, it simply did not exist.

22. We do not know why the claimant would access his information nor why he lied about what he had done, nor when he decided to start telling those lies. On

these facts there is certainly a possible inference that he deliberately chose to access his account outside of work hours at times when he believed he would be able to set up a paper trial for a potential alibi. But we cannot say that with certainty and any further comments about these matters would be entirely speculative and not necessary to our decision.

23. But in this case as we say we find on the evidence as a fact, unfortunately, the claimant has not told us the truth about what he did. The respondents had a credible basis, even without having seen all the surrounding circumstantial evidence that we have considered, to conclude that even in the light of his potential attendance at a medical appointment on one of those of three occasions he had nonetheless somehow been able to access his account. That was the reason why they rejected the contrary evidence and why they dismissed him. It had nothing to do with his disability and nothing to do with anything that arose in consequence of his disability.

24. We are also mindful in this context of the decision to which we have been referred by the respondent: Kelso v DWP UKEAT/009/15. This appears to be entirely analogous. The fact that the claimant was working from home, even if ostensibly because of disability, is simply part of the background information and not any link in a chain of causation between his disability and the decision that his evidence was not adequate. The respondent certainly did not merely disregard any evidence produced by the claimant. They considered it but, rightly in our view, concluded that it was not sufficient to rebut the findings of the computer audit that had identified the breaches in the first place.

25. For those reasons all these claims are dismissed.

Employment Judge Lancaster

Date 23rd March 2023