



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss K Clarke

**Respondent:** JCB Services

**Heard at:** Midlands West

**On:** 1 and 2 February  
2021

**Before:** Employment Judge Woffenden

## Representation

Claimant: In Person

Respondent: Mr E Beever of Counsel

# JUDGMENT

1 The claimant's claim of unfair dismissal fails and is dismissed.

# REASONS

## Introduction

1 The claimant ( a marketing product specialist) was employed by the respondent from 12 December 2016 to 12 February 2019 when she was dismissed. She presented a claim to the employment tribunal on 4 June 2016 in which she claimed her dismissal was unfair. I heard that case and announced my decision and gave reasons orally. The claimant asked for written reasons at the hearing which I set out below.

2 The case had been listed for a 2 day hearing on 8 and 9 April 2020. On 8 April 2020 at a preliminary hearing (telephone) conducted by Employment Judge Harding the final hearing was postponed because of the Covid pandemic and relisted for 1 and 2 February 2021. Employment Judge Harding identified the following issues for the tribunal to determine:

2.1 It is the respondent's case they dismissed the claimant for gross misconduct (excessive personal use of a work mobile phone).The claimant does not accept that the respondent had a genuine belief that she had misconducted herself .It is the claimant's case that she was dismissed because she had made a complaint of bullying.

2.2 It is the claimant's case that the respondent in any event did not have reasonable grounds to believe that she had used her work phone excessively for personal use .The evidence showed, the claimant asserts, that the claimant had

made a mistake and left her mobile hotspot running.

2.3 It is the claimant's case that the respondent did not carry out an investigation that was within the reasonable range. In particular the claimant was not provided with details of her UK usage; she was only given details of overseas usage and when she asked to be given information about other members of staff whose data usage was also high who had not been dismissed the respondent refused to provide this to her.

2.4 It is the claimant's case that dismissal was too harsh a penalty. She was not given any prior warning that her data usage was too high, the respondent had not issued any guidelines on what was an acceptable level of data usage, and in particular what the maximum should be, numerous other members of staff had the same amount of data usage as the claimant and were not dismissed (a factor which the claimant also asserts goes to the reason for dismissal), the respondent's policy did not make it clear that using a work mobile for personal use was a serious offence and the respondent's policy provided for an employee to be given the option of paying back any excess costs incurred, which the claimant offered to do and the respondent refused to allow.

2.5 It is also the claimant's case that her dismissal was predetermined.

### Evidence

3 I heard evidence from the claimant and accepted into evidence the witness statement of Mr S Harrison (the claimant's trade union representative). Although Mr Harrison attended the hearing Mr Beever had no questions for him and did not object to me reading his statement which I received into evidence. On behalf of the respondent I heard from Mr Stephen Warden (one of the respondent's global sales managers and investigation officer) and Mr Alan Curtis (general manager of JCB Attachments, a division of the respondent and dismissing officer). In addition the respondent had served a witness statement of Alastair Gorton (former managing director of JCB Heavy Products Ltd who heard the claimant's appeal. He had left the respondent's employment and did not attend as a witness. In the event of non-attendance a statement's contents are of limited weight but in this case the claimant raised no complaints about the appeal Mr Gorton conducted. I therefore read his witness statement and accepted it into evidence.

4 There was an agreed bundle of documents (232 pages). I read only those documents to which I was referred in witness statements or cross-examination.

### Fact Finding

5 The claimant was employed by the respondent (a multi-national construction equipment manufacturer) as a Marketing Product Specialist at its Uttoxeter site. She moved from Norfolk to Uttoxeter to take up her role. Her employment began on 12 December 2016. She liked her job and worked hard. There were no issues with her performance. At the time of these events her line manager was Claudia Hill whose line manager was Darryl Cottingham. The claimant was provided with a work mobile phone.

6 The respondent had a company mobile phone policy which made it clear that costs would be paid by the respondent including for any reasonable personal usage ('the Mobile Device Policy'). Personal usage was to be kept to a minimum, as devices were intended for business use. Violation of the Mobile Device Policy and proven misuse of the mobile device might result in disciplinary action.

up to and including the termination of employment .Action might include recharge to the employee. If usage was deemed excessive the employee might be required to provide justification for any overspend which could lead to a request for repayment of costs. I accept Mr Curtis's evidence that what is reasonable personal use depends on what work an individual was doing so if someone travelled every week what reasonable for them would be different from someone who was office based.

7 The respondent also had a disciplinary policy which included under a non-exhaustive list of examples of gross misconduct (which might lead to immediate dismissal) 'using Company IT communication systems or other facilities for any unauthorised use.'

8 On 29 August 2018 the claimant received an email from Clint Friskney ( a Global Group Buyer for the respondent ) headed 'Confidential :August Mobile Phone Usage -Katie Clarke' telling her that as part of a report on phone usage on data and spend a list of the top 25 of each was submitted to senior management and her company mobile phone number was in that list. Her usage against the Company group total as a whole was shown to be 8.3%.Advice on how to keep it to a minimum when travelling abroad was attached. She received an email in similar terms on 21 September 2018 ( the percentage usage shown as 7.9% ) and on 7 November 2018 (the percentage usage shown as 8.7%).She took no action whatsoever in response to those emails.

9 Darryl Cottingham conducted the claimant's appraisal on 12 December 2018. He raised with her that she had featured three times in the top 25 usage and spend list. He told her she had used a significant amount of data and when she checked her mobile phone settings it showed 237 GB under the heading 'System Services' of which 236 GB was under the heading 'Personal Hotspot'. A screenshot was taken of this and the data counter on the mobile phone was reset.

10 There was a conflict between Mr Cottingham's witness statement made on 3 January 2019 as part of the ensuing investigation and the witness statement of the claimant made in these proceedings about what he told her would follow. His witness statement said that he explained in the appraisal the claimant's use of data would require further investigation outside the appraisal .The claimant said he did not and in fact told her nothing would come of it. Although Mr Cottingham was not a witness in this hearing there is no evidence that the claimant expressed any surprise or concern at being called to attend the subsequent investigation meeting nor did she refer to this at the investigation meeting itself or query the accuracy of the witness statement ( which was included as an appendix to the invite to that hearing) at the disciplinary hearing she subsequently attended. The witness statement (signed by Mr Cottingham on 3 January 2019) which was made nearer the time of the events in question is more likely to be an accurate account of what was said at the appraisal and I find Mr Cottingham told the claimant that the claimant's use of data would require further investigation outside the appraisal.

11 The claimant turned off the personal hotspot at the appraisal and the data usage reduced thereafter.

12 In early January 2019 Mr Cottingham asked Mr Warden to conduct an

investigation into the claimant's use of data. On 8 January 2019 he was given some information which had already been gathered by the respondent's HR department (Mr Cottingham's witness statement dated 3 January 2019, Mr Friskney's 3 emails to the claimant (see paragraph 8 above) unbilled calls information for November 2018 provided by Vodafone (the respondent's supplier) Vodafone report showing data volume used each day in October 2018 snap shot of a Vodafone bill showing usage of 27.87 GB, and the screenshot of her mobile phone taken on 12 December 2018). He gave an undated letter to the claimant to invite her to attend an investigation meeting with him on 9 January 2019 to discuss 'a recent incident at work.'

13 Mr Warden had found that there had been high data usage at weekends (for example November 2018 28GB) outside normal work hours and that 10GB was the equivalent of sending 341,333 emails or streaming 2560 tracks on Spotify or 512 hours on Facebook. On Friday 2 November 2018 the claimant had used 21.6 GB.

14 At the investigation meeting on 9 January 2019 Mr Warden asked the claimant (who was accompanied by a work colleague) about the amount and timing of the data usage which she attributed to work activities outside normal working hours, having created a personal hot spot to give her work laptop internet access. She had not realised it was never turned off and her laptop was always switched on. She confirmed she had been made aware of the Mobile Device Policy at her appraisal but knew her company mobile phone was to be used for work, not streaming for which she used her personal mobile phone.

15 Mr Warden did not consider that the claimant had explained the high level of data usage. He could not understand what the claimant had been downloading or doing for work which would equate to the amount of data she had used. He investigated her assertion that the data used was work related both internally getting information from the respondent's Management Information Systems ('MIS') team (which included details from the SAP (a service that integrates all the different software modules within the relevant business activity) and with Vodafone and met with the claimant again on 29 January 2019 to update her. She was told he was waiting for the phone bill from Vodafone for December's usage. He asked her if she would like MIS to look at her mobile phone and check the settings but she said she did not feel this needed to be done.

15 Mr Warden received information from Vodafone which showed the claimant had used 42.3 GB in November 2018 but did not tell him what the exact usage was for because of data protection issues. Possible reasons were given for that use of data and said to be downloading a large file like movies, web series; streaming on line videos sharing data with others through a hot spot. He prepared a brief undated investigation report in which he recommended that a 'disciplinary' was required. He set out his main findings which were that in the main the data was being used as a personal hot spot on a weekend or evening, the claimant was aware of the Mobile Phone Policy, she had received the emails telling her of her high usage but had taken no action, she had said she was using the personal hotspot from her mobile phone to connect to her laptop to do out of hours work but had not complained about excessive workload nor was there any evidence to support any work being completed out of hours for which she had said mobile data was used.

16 Mr Curtis was the general manager of JCB Attachments ( a division of the respondent) and had been in that post for a matter of weeks .The claimant was one of thirty eight office staff for whom he was responsible. Mr Cottingham told him in December 2018 that he had raised the issue of high mobile data use at her appraisal and shortly after wards Mr Warden told him he had been asked to carry out an investigation into the reason for this. Mr Warden later asked him to approve IT releasing details to him to assist Mr Warden with his further enquiries which Mr Curtis authorised .When Mr Warden concluded his investigation he told Mr Curtis this and that he had recommended there was a case to answer.

17 One of the respondent's HR team then asked Mr Curtis to conduct the claimant's disciplinary hearing . He told her that there would be a disciplinary hearing at a meeting with her on 5 February 2019. That same day he wrote to her inviting her to attend such a hearing on 7 February 2019 and enclosing with the letter 19 appendices which included the information provided by Vodafone and the MIS Team . The allegation was 'Using company IT ,communication systems or other facilities ,for any unauthorised personal use Specifically, excessive and unauthorised use of Company Mobile Data for non-business related activities, with your Company Mobile number 07384 435723 ) appearing in the top 5 out of approximately 2,400 users every month since July 2018 for phone usage data and spend in the UK.' The allegation was described as 'potential gross misconduct' and the claimant was advised that 'a possible outcome of the hearing could be summary dismissal on the grounds of gross misconduct.' He told her of her right to be accompanied at the hearing.

18 The disciplinary hearing took place on 7 February 2019 before Mr Curtis. An HR team member was in attendance .The claimant was accompanied by a colleague Mr Smith. Typed notes were made of the hearing.

19 The notes record the claimant was asked about her data usage and reiterated that she had used the data only for work and attributed it to having left the hot spot running which was a mistake for which she apologised. Mr Curtis focused on 2 dates (2 and 11 November 2018 ) when the usage of data outside work hours was particularly high. She was asked what could have caused her to use data outside of work hours on those days but could not recall . It was put to her that on Friday 2 November 2018 there were 9 emails sent but no SAP activity and she had logged on to the respondent's Virtual Private Network ('VPN' a service which allows remote access to the respondent's systems) only once but had used 16 GB of data .She said she could not justify it and denied having watched any films on her laptop. It was also put to her that on Sunday 11 November 2018 she had used 10.35 GB when no emails had been sent and there were no SAP activity or logging on to VPN and no webpages on the work computer. She could provide no explanation for data use, saying she used her phone for work and that was it .She queried the meaning of 'reasonable personal usage ' but Mr Curtis said that 20% of the total group usage could not be deemed reasonable. She explained the downloads were because she had left the hotspot running but Mr Curtis explained to her that each represented a new transaction so 'something' had requested a new data download from the hotspot connection on those occasions. She confirmed she had paid no attention to the emails she had received about her data usage. She said that she felt she was being victimised by her two managers .She knew it was high data but it was true that it had not been not used for personal use .She could only say she was sorry and it had not

been done deliberately. Mr Curtis said that the hearing would be adjourned and asked her to give some serious consideration as to what the particularly high numbers could be and if there were other things to consider to please bring them forward.

20 After a short break because the claimant became upset she said she wanted to discuss victimisation . The HR team member told her that there was a grievance procedure in place to be followed but she said she did not want to raise a grievance. She complained of a lack of support from Claudia Hill and Mr Cottingham and that she felt she was being singled out and what she did was not good enough. Mr Curtis said that there was a grievance procedure to follow should she wish to do so and it was up to her. She sent an email to HR copied to Mr Curtis on 8 February 2019 in which she complained of a problem she was experiencing at work in that she was being hassled outside working hours and asking that her reporting line change from Claudia Hill and Darryl Cottingham but he was not involved in dealing with the follow up to it. .

21 The adjourned disciplinary hearing resumed on 12 February 2019. Again typed notes were made. The claimant was represented by a colleague Mr Heath .Mr Curtis asked her if she had had the chance to give any more consideration to the high usage and anything she wished to add. She repeated that she had just left her hot spot running and it was a genuine mistake for which she apologised. She showed him how much data she was using on her mobile phone for which she was paying. Mr Curtis told her that leaving a hotspot running did not result in data usage unless it was used to download something. It must be some active data transfer and could not happen naturally if left connected by accident. He was struggling to see how it was only company usage. Before adjourning he said that the data could not be correlated to work usage and again asked her if she had anything else to add. She said she was sorry it had happened , she had a clean record and the respondent's best interests at heart.

22 Mr Curtis then adjourned the disciplinary hearing for 29 minutes .On his return he said the claimant had had multiple occurrences of significantly high data usage on the respondent's phone and that all possible avenues had been explored to justify it for business but the volume could not be substantiated. She had been notified about it on three occasions but took no personal responsibility in investigating or reducing it and had been offered the opportunity to hand in her phone but had declined. She said she had said if it was needed she could take it. He said there was nothing plausible to suggest it (the usage ) was accidental and therefore he had decided she should be dismissed immediately for gross misconduct, She was told of her right of appeal.

23 On 14 February 2019 Mr Curtis wrote to the claimant to confirm the outcome of the disciplinary hearing.

24 Mr Curtis recorded in that letter the claimant's denial that she had used the phone for personal use and her explanation that she had only used her phone for work, the data usage had reached the levels it did because she left her personal hotspot running and she had used her phone outside of work hours because she was proactive in her role and reiterated she had not abused or had any unauthorised personal use in the period since July 2018.He referred to the two specific dates raised at the disciplinary hearing and summarised what had been said at the disciplinary hearings. He stated there were multiple occurrences of

significantly high data use which in December amounted to 20.2 % of the total group usage .Although she had challenged what was 'reasonable' use of her company mobile phone for personal use, he did not consider it reasonable for an individual to use 20% of the total data for the whole group. She had denied the allegations throughout the investigation and disciplinary hearings but he believed all reasonable routes to establish whether the usage was for legitimate business purposes had been explored , including reviewing her activity on email SAP websites and VPN. He had tried to understand if there was any plausible explanation for accidental high usage but had not seen any evidence to suggest there could be. He believed she had used the mobile phone data for unauthorised non-business related activities, abusing the trust placed in her when she was issued with her mobile .He stated that he had confirmed to her that her actions were a breach of the respondent's disciplinary policy and an act of gross misconduct and decided to dismiss her without notice. He stated that he had considered alternatives to dismissal and took into account her length of service and work history but said 'given that this is a serious offence and that the relationship of trust and confidence is destroyed ,I do not believe that action short of dismissal is justified.' Mr Curtis's evidence to the tribunal (which I accept) was he had asked HR if there was any precedent or previous case that might assist him in his decision making but was told there were none, the claimant's inability to offer any kind of credible explanation throughout despite being given numerous opportunities had made him doubt her honesty and her offer to repay the cost of data usage was inappropriate because the issue was not the cost implications but the breach of trust that occurred through the claimant persistently using incredibly high amounts of data without credible explanation.

25 The claimant appealed in a letter dated 20 February 2019. She did not provide any new evidence or explanation in that letter nor did she mention alleged victimisation or bullying .She has made no allegations about the conduct of the appeal against dismissal which was heard by Mr Gorton ( at that time the managing director of JCB Heavy Products Limited ) on 5 March 2019.He had no personal or professional connection with the claimant. The claimant was accompanied by Mr S Harrison a full time GMB officer .Her appeal was unsuccessful and the outcome was confirmed in a letter to her dated 8 March 2019.

## Law

26 Section 98(1) and (2) of ERA provide that:

“(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reason) for the dismissal; and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it –

(b) relates to the conduct of the employee.”

27 Section 98(4) of ERA provides that:

“(4) 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) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and

(b) shall be determined in accordance with equity and the substantial merits of the case.”

28 It was held in the case of **Sainsbury’s Supermarkets Ltd v Hitt [2003] IRLR 23 CA** that the range of reasonable responses test applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason.

29 In conduct cases the tribunal derives considerable assistance from the test set out in the case of **British Home Stores Ltd -v- Burchell [1978] IRLR 379 EAT**, namely: (i) did the employer believe that the employee was guilty of misconduct; (ii) did the employer have reasonable grounds for that belief; (iii) had the employer carried out as much investigation into the matter as was reasonable in all the circumstances. The first question goes to the reason for the dismissal. The burden of showing a potentially fair reason is on the employer. The second and third questions go to the question of reasonableness under Section 98(4) ERA and the burden of proof is neutral.

30 I remind myself that it is not for the tribunal to substitute its view of what was the right course for the employer to adopt. The function of the tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; if the dismissal falls outside the band, it is unfair (**Iceland Frozen Foods Ltd v Jones 1982 IRLR 439 EAT**). In the case of **Taylor v OCS Group Ltd [2006] EWCA Civ 702** tribunals were reminded they should consider the fairness of the whole of the process. They will determine whether, due to the fairness or unfairness of the procedures adopted the thoroughness or lack of it of the process and the open-mindedness or not of the decision –maker the overall process was fair, notwithstanding any deficiencies at an early stage. Tribunals should consider the procedural issues together with the reason for dismissal. The two impact on each other and the tribunal’s task is to decide whether in all the circumstances of the case the employer acted reasonably in treating the reason they have found as a sufficient reason to dismiss.

Submissions

31 I thank both parties for their oral submissions which I have carefully considered .



## Conclusions

32 The first issue is has the respondent shown the reason for dismissal and is it a potentially fair reason within section (1) ( b) or (2) Employment Rights Act 1996. ? I find that the reason for dismissal was misconduct in that Mr Curtis believed that since July 2018 to December 2018 the claimant had made excessive and unauthorised use of company mobile data for non-business related activities. 'Conduct ' is a potentially fair reason within section 98 (2) (b) Employment Rights Act 1996.The claimant has contended that she was dismissed because she had made a complaint of bullying but she did not put this to Mr Curtis in her questions of him and there was no evidence before me on which I could conclude that Mr Curtis had anything else in his mind other than the above misconduct when he took the decision to dismiss her .

33 Was that belief held on reasonable grounds? The investigations carried out by Warden into the claimant's use of data revealed a high level of data usage which the claimant had not been able to explain was work related. She had not taken any action although she had received notifications about her individual data usage against total group use in three successive months .The evidence which was before Mr Curtis showed that the usage was not work related and that it was excessive. When Mr Curtis was at pains to explore how the usage could have occurred and explain to the claimant it could not have happened in error (as she suggested) by leaving a hot spot running in error because something had to be done actively to trigger a download ,she maintained that there was no unauthorised use but provided no explanation. He could not establish how the data was used but Mr Curtis was entitled on the evidence before him to conclude it was the claimant who had used it in the absence of any credible explanation from her about how it had happened and further that she was not being honest with him .

34 The claimant had alleged that her dismissal was predetermined but I conclude that Mr Curtis did not approach his decision making with his mind already made up ;he was at pains to keep an open mind in seeking credible explanations from the claimant.

35 The claimant had alleged that the investigation carried out was not within the range of reasonable responses( see paragraph 2.3 above ) but I conclude that any such deficiencies would not render the investigation carried out by the respondent outside that range. The respondent's investigation was carried out with Vodaphone about how the data usage could have happened ( see paragraph 15 above) and with the MIS team into the work related activity carried out and when this occurred and into whether data usage could happen accidentally. The claimant was not only given details of overseas and not UK usage during the investigation.

36 As regards procedure generally, I find that the procedure followed was within the range of reasonable responses. Although these were not issues raised by the claimant the letter which was sent by Mr Warden to the claimant (see paragraph 12 ) would not have been of any assistance in enabling a recipient to know what was being investigated and therefore to prepare and the notice given by Mr Curtis of the disciplinary hearing was notably short to enable an employee to identify a companion and prepare for a hearing. However ,I do not consider that these matters in the circumstances of this case would be sufficient to render the

dismissal unfair. The claimant has made no criticism of the appeal carried out by Mr Gorton; she has not said that during the appeal she was not permitted to put her case to him and or that there was material she wanted to rely on at the appeal that she was unable to put forward. There is no evidence that Mr Gorton did not approach the appeal and his decision making with an open mind and overall (notwithstanding any earlier deficiencies there may have been) the procedure adopted by the respondent fell within the range of reasonable responses.

36 Did the respondent act reasonably in treating the claimant's misconduct as sufficient reason to dismiss her ? I conclude that it did. The respondent had identified the importance it attached to the appropriate use of mobile phones in its Mobile Device Policy and disciplinary policy ( see paragraph 7 above).It had taken steps to draw the claimant's usage of data to her attention on three occasions. The claimant agreed under cross examination ( as she had told Mr Warden ) that she knew she should keep personal use of her mobile phone to a minimum. Mr Curtis considered all plausible explanations for the data usage but could not believe her explanations. He concluded that she had committed an act of gross misconduct. He considered whether there were options other than dismissal and took into account the claimant's disciplinary record and length of service but decided to dismiss her .I cannot say that his decision to do so was outside the range of reasonable responses. That another reasonable employer might have accepted an offer to repay does not make the decision to dismiss unreasonable. The claimant also complained in her oral submissions that the lack of prior warnings concerning the use of her mobile phone rendered the dismissal unfair .Another employer might reasonably have issued a warning on this occasion or taken into account that there had been no prior warning .However acts which are regarded as gross misconduct can call for dismissal for a first offence . I cannot say that Mr Curtis's decision to dismiss summarily in the absence of prior warning was outside the range of reasonable responses. The claimant complained about the lack of guidelines about acceptable usage but I accept that would not have been practical since it would vary depending on the individual circumstances of employees.

37 The claimant's dismissal was not unfair and the claim is dismissed.

Employment Judge Woffenden

Date 30/04/2021

