



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case no: 8000808/2024

Held at Edinburgh on 7, 8 and 11 October 2024

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Employment Judge W A Meiklejohn

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Dr Xiaoyang Wu

**Claimant
In person**

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United Kingdom Research and Innovation

**Respondent
Represented by:
Mr N MacDougall -
Advocate**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Employment Tribunal is that the claim of unfair dismissal brought by the claimant does not succeed and is dismissed.

REASONS

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1. This case came before me for a final hearing to deal with both liability and remedy. The claimant appeared in person and the respondent was represented by Mr MacDougall.

Nature of claim

- 5 2. The claimant alleged that he had been unfairly dismissed by the respondent. The respondent admitted dismissal but denied unfairness, contending that the claimant had been fairly dismissed for gross misconduct.

Evidence

- 10 3. For the respondent I heard evidence from -
- Mr D McCarthy, Chief Geologist and Head of Geological Disposal of Radioactive Waste
 - Mr E Hough, Research Lead for Underground Energy Storage
 - 15 • Ms M Bentham, Chief Scientist for Decarbonisation and Resource Management

I also heard evidence from the claimant.

- 20 4. I was provided with three bundles of documents -
- A bundle referred to as the disclosure bundle prepared by the respondent
 - 25 • A bundle referred to as the supplementary bundle also prepared by the respondent
 - A bundle prepared by the claimant

30 I refer below to documents in the disclosure bundle and the supplementary bundle by page number, prefixed by "S" in the case of the supplementary bundle. I refer to documents in the claimant's bundle by describing the relevant document.

Findings in fact

5. The respondent is a non-departmental public body sponsored by the Department for Science, Innovation and Technology. The Natural Environment Research Council (NERC) is one of seven Research Councils which, along with Research England and Innovate UK, come under the umbrella of the respondent. The British Geological Survey (BGS) also comes under the umbrella of the respondent and is funded partly by NERC and partly by grants and consultancy work for the UK and other governments.
6. At the time of the events described below, the claimant worked for BGS in the Geological Disposal of Radioactive Waste team headed by Mr McCarthy, based in Edinburgh. The key stakeholder was Nuclear Waste Services, part of the Nuclear Decommissioning Authority. Mr McCarthy's team comprised Senior Geologists, Geologists and laboratory staff. The team was divided across sites in Edinburgh and Keyworth, near Nottingham.
7. The claimant joined the respondent in January 2012. He became a Research Geophysicist in Mr McCarthy's team in 2021. For the first six months he reported directly to Mr McCarthy, and thereafter Mr T Dodds became the claimant's line manager. Mr Dodds reported to Mr McCarthy. Prior to this the claimant worked within the Edinburgh Anisotropy Project. This team was disbanded, and the claimant transferred to the team headed by Mr McCarthy in preference to redundancy.

Mental health issues

8. The claimant had experienced two episodes where his mental health had been impacted. The first occurred in 2015 when the claimant suffered psychosis and spent some time in hospital. This was documented in the respondent's HR records for the claimant.

9. The second occurred in 2021 during the Covid-19 pandemic and was described by the claimant as persecutory paranoia. The claimant and his wife went to Stornoway for two weeks. Their family were concerned at the loss of contact and the Police became involved in tracing them.

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10. Ms Bentham was the claimant's line manager at the time of the second incident and so was aware that he had been reported missing. She spoke to the claimant when he returned to work. The claimant told her that he had been on holiday. Ms Bentham confirmed that this incident would also be documented in the respondent's HR records for the claimant.

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Emails

11. On 24 February 2024 the claimant sent emails to a number of people both within and outwith the respondent. The emails bore the heading "Loving You" followed by the claimant's name. The text began "Thank you" followed by a series of names including sports and entertainment personalities, some of the claimant's colleagues and various football clubs.

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12. One of the recipients was Ms V Starcher who was a work colleague of the claimant's (and who was also named in the emails). On 28 February 2024 Ms Starcher found a parcel on her desk with a note from the claimant. Ms Starcher was uncomfortable about the parcel and the email and spoke to the claimant about them.

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13. Ms Starcher then sent an email on the same date to Ms D Langley and Ms D V Suskil of HR, copied to Mr Dodd and Mr McCarthy (153) saying this -

"I want to report a couple of concerning incidents relating to Xiaoyang Wu:

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1. Xiaoyang sent an email to myself, Brian Baptie and an external person at Edinburgh university with an attachment titled "Loving You". I did not open the attachment but assume that it is a version of the document that

I am currently reviewing for Xiaoyang. The issue is that the title is obviously inappropriate for work.

5 2. *I returned from leave today to find a parcel on my desk which was posted in Edinburgh. Underneath was a note from Xiaoyang telling me that he had sent it and that it contained three camera lenses. In the note he asked that I look after it.*

10 *I did not open the parcel but left it on his desk - I sit next to Xiaoyang. When he arrived I had a brief conversation with him stating that both the parcel and attachment were not appropriate. He listened and apologised. The parcel has now been removed from his desk.*

I have spoken to Tom Dodd this morning but wanted to raise the issue formally”

15 14. The “Loving You” email sent by the claimant was forwarded to Mr McCarthy. Mr McCarthy was at this time aware that there was a separate issue of the claimant allegedly not following the respondent’s internal publications procedure. He discussed the matter with Ms Langley and it was agreed that Mr Dodd, as the claimant’s line manager, should speak to the claimant
20 along with Ms F Jackson, Estates and Health and Safety Officer.

15 15. This meeting took place on 8 March 2024. A note was prepared (119-120). This recorded the claimant agreeing that (a) he would not have personal mail/parcels sent to his place of work again and (b) in relation to the email
25 “*he would not do this again*”. It was pointed out to the claimant that there was a GDPR issue, that there was a risk of reputational damage for BGS and that he needed to be careful about emailing third party organisations.

30 16. The note also included the following -

“Final point - Xiaoyang was asked if he had any additional concerns, and in-particular regarding personal issues and welfare aspects that he would like to raise. Xiaoyang said there were no issues. The EHSO reminded him

that they were part of the mental health and wellbeing support system and that the Employee Assistance Programme and Local and UKRI Welfare Team were available for support if he needed it.”

5 *Further emails*

17. On or around 12 March 2024 Mr McCarthy became aware that another similar email had been sent. A recipient was Ms E Bedda, a geologist in his team. She subsequently forwarded the email to her line manager, Mr T Randles, who reported to Mr McCarthy. The sender's email address was xiaoyangedin@icloud.com.

18. The attachment to the email sent to Ms Bedda (167-170) was again headed “*Loving You*” followed by the claimant's name. The text again began “*Thank you*” followed by a lengthy series of names mainly of actors, entertainers and some cartoon characters. Mr McCarthy thought this odd. The email address appeared to be the claimant's personal rather than business address. It was decided that Mr Dodd should hold an investigatory meeting with the claimant.

20 *Investigation meeting on 22 March 2024*

19. Mr Dodd met with the claimant on 22 March 2024. A note of their discussion was prepared (121-123). This recorded the claimant explaining the outcome of the earlier meeting on 8 March 2024. He accepted that he had said that he would not send personal parcels to his workplace nor emails of the type he had sent on 24 February 2024.

20. Mr Dodd then referred to the email sent to Ms Bedda. The note recorded that the claimant, when responding to Mr Dodd's meeting invitation, had said *7 did not send any email to Emma Bedda using my personal email. Probably someone impersonates me.* When shown a screenshot of the email to Ms Bedda, the claimant denied that xiaoyangedin@icloud.com was

his email address. He said that he was not concerned that someone was impersonating him.

21. The note recorded that Mr Dodd told the claimant that support could be provided and reminded him that links to this had previously been provided. The claimant signed the note confirming its accuracy.

Subsequent events

22. Shortly after this Mr McCarthy spoke with the claimant about his belief that someone was impersonating him. They exchanged emails on 26 March 2024 (171). Mr McCarthy asked the claimant to confirm to which BGS staff he had sent the "Loving You" emails and expressed concern about the impersonation issue. The claimant said in reply -

".../ only sent emails to Edward Hough, Brian Baptie et al. mentioned in the following email. I've realised the severity of this problem now. Please convey my apology to Emma Bedda if any concerns have been caused to her by the impersonating email and document."

23. Mr McCarthy spoke to Ms Langley. He wanted to check from what address the emails were coming and the nature of the documents being sent. On 2 April 2024 Ms Langley forwarded to Mr McCarthy an email from Mr Hough (179) in which Mr Hough confirmed that he had received five emails from the icioud address but nothing similar from a BGS email address. She advised Mr McCarthy to hold a further investigative meeting with the claimant.

Investigatory meeting on 3 April 2024

24. Mr McCarthy met with the claimant on 3 April 2024. A note of this meeting was prepared by Mr McCarthy (205). This was signed by the claimant, confirming that it was an accurate record.

25. Mr McCarthy's note included the following -

5 *"Xiaoyang acknowledged he had been informally told by Vanessa Starcher on the 28th of Feb that these types of emails were inappropriate, and acknowledged he had been formally instructed to cease sending them by Tom Dodd, his line manager, and Fiona Jackson on the 8th of March. Xiaoyang confirmed that he understood those instructions.*

10 *We discussed the time line of emails sent, and the email sent to Emma Bedda at which point Xiaoyang admitted he had sent an email with an attachment entitled "Loving You.Pdf" to Emma Bedda on 11th March using his personal email address [xiaoyanqedin\(g\)Jcloud.com](mailto:xiaoyanqedin(g)Jcloud.com).*

15 *Xiaoyang confirms that he no longer believes someone is impersonating him, and that he sent all of the emails from [xiaoyanqedin\(g\)icloud.com](mailto:xiaoyanqedin(g)icloud.com), including the emails he had previously denied on the 22nd March and 26th March.*

20 *Xiaoyang acknowledged that there were other BGS staff he emailed that he had not admitted to before including Kathryn Goodenough."*

Investigation report

25 26. Mr McCarthy prepared an investigation report (174-177). This was dated 2 April 2024, but included references to the meeting on 3 April 2024, indicating that the report was actually prepared on the latter date. The report covered the sequence of events described above and recommended formal disciplinary action.

Publications

30 27. The respondent had a process which employees were expected to follow prior to publishing any material. The process was set out in a document

headed BGS Publication Worksheet 1 (S121-125). This included a headnote in these terms -

5 *“The approval of the Director or delegated manager must be obtained prior to publication of any article, paper, book, report or web page based wholly or partially on official work. If you have included any external material in your work, please ensure you have obtained prior written permission from the copyright holder. The lead author is responsible for obtaining the approval of contributors and of collaborating organisations.*

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Please see notes and guidance on the back page of this form.”

28. The form contained a number of sections through which an employee was expected to work prior to publication. These included peer review and sign off by a Chief Scientist.

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Background - evidence of Mr McCarthy

29. In mid December 2023 the claimant sent a draft report, unsolicited, to some task leads. According to Mr McCarthy, the claimant was told that this was a good start, and that it could become a good piece of work. The claimant sent the draft report round again in January 2024 for peer review.

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30. Thereafter, without obtaining peer sign off, the claimant sent his report to an external publication. During February 2024 Mr McCarthy asked library staff to remove the report from the respondent’s archive, and asked the claimant to contact the journal to have them remove the report from their review process.

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31. Mr McCarthy explained that BGS had access to sensitive material, so that publishing without approval was *“a quite serious issue”*. Mr McCarthy raised the matter with HR.

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Investigation

32. Mr Hough was asked to undertake an investigation. This related to two reports and a journal manuscript, described as follows -

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1. *Report 1: OR/23/059: Lithology Classification using machine learning*

2. *Report 2: OR/24/001: Review on Machine Learning*

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3. *Journal Manuscript taken from the first report, submitted to Lithosphere*

Investigation meeting on 18 March 2024

33. Mr Hough held an investigation meeting with the claimant on 18 March 2024. He was accompanied by Ms Suskil. A note of the meeting was prepared (S106-109).

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34. The note recorded that Mr Hough asked the claimant about each of the matters where it was alleged that the claimant had not followed the respondent's publication procedure. The claimant accepted that he was aware of the procedure.

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35. The claimant made reference to having rewritten some areas of Report 1 following input from Mr J White, a Project Manager. He had resubmitted to Mr White but had received no response. The claimant was concerned about the timescale of the approval process because he was apprehensive about the risk of plagiarism of his work.

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36. In relation to Report 2, the claimant referred to delay in obtaining a response (in this case from Mr G Carter). He was again concerned about the risk of plagiarism.

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37. In relation to the manuscript submitted to Lithosphere, the claimant said that he did not believe this needed to be reviewed as it contained the same text

as Report 1. He had however sent it to Ms Bentham and had not had a response when he sent it to Lithosphere.

5 38. The note of the investigation meeting recorded the claimant as accepting that he had deliberately gone against the instruction not to publish. He was concerned about plagiarism, and he believed that it was reasonable to publish because there were not sensitive or confidential elements to the reports. He was frustrated at how long the review process took.

10 39. The claimant accepted that the instruction had come from Mr Dodd in a face-to-face meeting and had been clear. He described Mr Dodd as a "good communicator". Mr Hough's view was that the claimant's concerns about plagiarism did not justify subverting the respondent's process.

15 40. The note then covered Ms Suskil asking the claimant about his welfare, in these terms -

20 *"DVS asked if XW had anything else going on currently that may be affecting him (stress, wellbeing, workload...)? Not currently, he feels he's managing his workload effectively and doesn't have and [any?] additional stressors at this point in time."*

Investigation report

25 41. Mr Hough produced an investigation report dated 26 March 2024 (S83-88). The allegations under investigation were that (a) the claimant had failed to follow reasonable management instruction in regard to the process of internal peer review before publishing a report externally and (b) by allegedly subverting the internal processes in regard to publishing, the
30 claimant had potentially placed BGS at risk of reputational damage.

42. The report summarised the investigation carried out and attached the written evidence considered by Mr Hough. The report concluded that the claimant knew the procedures in place when publishing and the importance

of them and chose to publish against managers' advice. Mr Hough recommended disciplinary action.

Disciplinary process

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43. The respondent had a Code of Conduct (286-298) and a Managing Performance and Conduct Policy (299-323). These policies formed part of the claimant's terms and conditions of employment (their antecedents being referenced in the respondent's offer of employment to the claimant dated 30 September 2011, contained in the claimant's bundle of documents).

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44. The Managing Performance and Conduct Policy contained examples of gross misconduct. These included -

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- *Refusal to carry out any lawful and reasonable instructions*
- *Actions that cause a severe breakdown of trust in confidence between the employee and UKRI, that are irreparable*

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45. Ms A Dubickas, HR Business Partner, wrote to the claimant on 16 April 2024 (206-207) inviting him to a disciplinary hearing on 26 April 2024. In her letter Ms Dubickas referred to various sections of the respondent's Code of Conduct. The allegations against the claimant were expressed as follows -

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1. *That, on 11th March, you sent an e-mail entitled "Loving You" to your colleague, Emma Bedda. Similar e-mails were also sent to Ed Hough on 9th and 10th March. It is alleged that, in doing this:*

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- *You directly ignored a reasonable management instruction given to you verbally by your line manager, Tom Dodd, in which he explicitly told you not to send such e-mails.*
- *You created a reputational risk to BGS by including external stakeholders in these e-mails.*

- *By sending unwanted e-mails, which are known to have made some recipients uncomfortable, your behaviour may be considered to be a form of bullying and/or harassment.*

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2. *It is additionally alleged that, in relation to the above incident, you misinformed Tom Dodd by saying that the e-mail to Emma Bedda had not been sent by yourself and, as a result, misled the investigation into this incident.*

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3. *It is alleged that you failed to follow reasonable management instruction in regard to the process of internal peer review before publishing a report externally. By allegedly subverting these processes you have potentially placed BGS at risk of reputational damage.*

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46. Ms Dubickas' letter advised the claimant that these allegations, if proven, constituted gross misconduct and could result in dismissal. Her letter also reminded the claimant of the support available to him under the NERC Welfare Service and the Employee Assistance Programme.

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47. The disciplinary hearing took place via Zoom. It was chaired by Ms Bentham who was accompanied by Ms Dubickas and a notetaker. The accuracy of the notes of the meeting (209-212) was not challenged. The notes recorded the claimant's answers to the allegations in these terms -

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- *Allegation 1 : XW claimed to have used his personal email after speaking to Tom Dodd (his line manager) and 'BGS shouldn't waste their time doing this investigation'.*

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- *Allegation 2: XW stated this is about "freedom of speech" and he was "just saying thank you, everyone has the right to say that". XW stated he "doesn't know what the problem is". XW does not understand how his emails were considered bullying or harassment. XW gave the Oxford dictionary definition of bullying and felt his*

emails did not fit that definition. XW stated that he believed "this [process] is wrong" and BGS were "finding an excuse to kick me out". In response to his alleged dishonesty, XW said he felt he "didn't have a choice, as he thought he would be fired if he was honest".

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- Allegation 3: XW explained he understands the publication process and made best efforts to follow it but "couldn't find anyone to sign the publication form". XW also stated "the process takes too long". He was worried his work would be plagiarised if he didn't get it published quickly. XW expressed that all data in the papers was not confidential to BGS and did not understand why it could not be published.

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Outcome

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48. During an adjournment Ms Bentham looked at the relevant policies while considering the appropriate outcome. When the disciplinary hearing resumed, she advised the claimant that the allegations against him were upheld and that this constituted gross misconduct. She told the claimant that he was being dismissed.

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49. Ms Bentham wrote to the claimant on 29 April 2024 (214-216) confirming the outcome of the disciplinary hearing and explaining the reasons for her decision in respect of each of the allegations. Her letter advised the claimant that he had the right to appeal against her decision, and that any appeal should be submitted within seven working days of the claimant's receipt of the letter (which was sent to him by email on 29 April 2024 - 213).

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50. The claimant did not intimate an appeal within the seven working day period. He did send an email to Ms Dubickas on 29 May 2024 (223) in which he appeared to suggest that the conduct for which he had been dismissed was related to his mental health issues from 2015 being triggered by the unfriendly environment in which he had been working. Ms Dubickas

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responded to the claimant on 30 May 2024 (222) to the effect that it was too late for him to appeal.

Mental health evidence

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51. The claimant was seen by Dr E Hargreaves, Consultant Psychiatrist, on 5 June 2024. Dr Hargreaves provided a report to the claimant's GP (231-233) on that date. This included the following passages (in which I have corrected the mis-spelling of the claimant's name) -

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"From around November/December 2023, Xiaoyang's mood started to deteriorate. He describes feeling low in mood, tearful, irritable and angry towards his colleagues. He stopped sleeping well and generally wakes after a few hours sleep and cannot get back to sleep. He has not experienced any suicidal thoughts of (sic) thoughts of DSH but since his dismissal, his level of anxiety and mood has worsened understandably. Xiaoyang said that he felt he had been unfairly dismissed and spoke with his union. The advice given was that as he hadn't contacted them within a week of being dismissed, there was not further action they could take unless there was evidence that his mental state had begun to deteriorate before the decision to dismiss occurred. This does seem to be the case.

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Xiaoyang experienced a brief episode of psychosis in 2015. In retrospect Xiaoyang feels that this episode was also associated with depression and feelings of isolation and loneliness at the time. The symptoms he experienced in 2015 are not present currently, ie this episode is not a recurrence of psychosis."

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52. This indicated that the claimant's mental health was impaired at the time of the incidents which led to his dismissal and during the disciplinary process. The claimant may not have been aware of this at the time, and he did not raise it with the respondent until his email to Ms Dubickas on 29 May 2024.

Submissions

53.1 was provided with a comprehensive written submission from Mr MacDougall and a brief written submission from the claimant. Mr MacDougall invited me to make findings in fact which were broadly in line with the findings I have made above. He also addressed me on the relevant law, in line with what I say below.

54. The claimant focussed on his mental health, suggesting that he had been "*mentally unwell with intermittent psychiatric delusions since December 2023 due to the stress from change in working environment*".

55. Mr MacDougall referred to ***Scottish and Southern Energy pic v Innes EATS/0043/10*** where the Employment Appeal Tribunal (EAT) upheld an appeal against a Tribunal's finding of procedural unfairness where the employer had not investigated whether the employee's depression explained his admitted misconduct. It would, he submitted, be an error of law in the present case to find that the claimant's dismissal was unfair because of a failure to investigate whether there was a connection between the claimant's misconduct and his mental health.

56. In any event, Mr MacDougall contended, the respondent had made an attempt to establish if there was a link between what the claimant did and his mental health. The claimant had been asked if there were any "*issues*" and had been pointed in the direction of the support which the respondent could provide.

Applicable law

Statute

57. The right not to be unfairly dismissed is found in section 94 of the Employment Rights Act 1996 (ERA)-

(1) An employee has the right not to be unfairly dismissed by his employer.

58. The fairness, or otherwise, of a dismissal is dealt with in section 98 ERA which provides, as far as relevant, as follows -

5 (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*

10 (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 -*

15 (a)

(b) *relates to the conduct of the employee*

20 (3)

(4) *Where the employer had 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) -*

25 (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*

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

Case law

59. In **British Home Stores Ltd v Burchell 1980 ICR 303** the EAT said this -

5 *"What the tribunal have to decide every time is, broadly expressed, whether
the employer who discharged the employee on the ground of the
misconduct in question (usually, though not necessarily, dishonest conduct)
entertained a reasonable suspicion amounting to a belief in the guilt of the
employee of that misconduct at that time. That is really stating shortly and
10 compendiously what is in fact more than one element. First of all, there
must be established by the employer the fact of that belief; that the
employer did believe it. Secondly, that the employer had in his mind
reasonable grounds upon which to sustain that belief. And thirdly, we think,
that the employer, at the stage at which he formed that belief on those
15 grounds, at any rate at the final stage at which he formed that belief on
those grounds, had carried out as much investigation into the matter as was
reasonable in all the circumstances of the case. It is the employer who
manages to discharge the onus of demonstrating those there matters, we
think, who must not be examined further."*

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60. In **British Leyland (UK) Ltd v Swift 1981 IRLR 91** the Court of Appeal said
this-

25 *"The correct test is: Was it reasonable for the employers to dismiss him? If
no reasonable employer would have dismissed him, then the dismissal was
unfair. But if a reasonable employer might reasonably have dismissed him,
then the dismissal was fair. It must be remembered that in all these cases
there is a band of reasonableness, within which one employer might
reasonably take one view; another quite reasonably take a different view."*

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61. In **Iceland Frozen Foods Ltd v Jones 1983 ICR 17** the EAT said this -

5 *"We consider that the authorities establish that in law the correct approach for the tribunal to adopt in answering the question posed by [s.98(4)] is as follows:*

(1) the starting point should always be the words of [s.98(4)] themselves;

10 *(2) in applying the section [a] tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the tribunal) consider the dismissal to be fair;*

15 *(3) in judging the reasonableness of the employer's conduct [a] tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;*

20 *(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;*

25 *(5) the function of the tribunal, as an industrial jury, 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."*

62. In **Sainsbury's Supermarkets Ltd v Hitt 2003 ICR 111** (otherwise referred to as **J Sainsbury pic v Hitt**) the Court of Appeal said this -

30 *"The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question whether the investigation into the suspected*

misconduct was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss for the conduct reason.”

ACAS Code

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63. The ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) *“provides basic guidance to employers, employees and their representatives and sets out principles for handling disciplinary and grievance situations in the workplace”*. The Code describes the steps which an employer should take when following a disciplinary process -

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- *Establish the facts of each case*
- *Inform the employee of the problem*
- *Hold a meeting with the employee to discuss the problem*
- *Allow the employee to be accompanied at the meeting*
- *Decide on appropriate action*
- *Provide employees with an opportunity to appeal*

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64. Section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 provides -

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In any proceedings before an employment tribunal any Code of Practice issued under this Chapter by ACAS shall be admissible in evidence, and any provision of the Code which appears to the tribunal to be relevant to any question arising in the proceedings shall be taken into account in determining that question.

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Discussion and disposal

5 65. The issues I had to decide in this case were (a) had the respondent established a potentially fair reason for dismissal of the claimant and (b) did the respondent act reasonably or unreasonably in treating that reason as sufficient grounds to dismiss the claimant. The reason advanced by the respondent related to the claimant's conduct.

10 66. I approached matters (a) by working through the three steps in **Burchell** and then (b) considering whether dismissal fell within the band of reasonable responses open to the respondent in this case. I also had regard to whether the respondent had complied with the ACAS Code.

15 *Did the respondent believe the claimant was guilty of misconduct?*

20 67. There were three allegations of misconduct by the claimant. Two of these related to the "Loving You" emails and the third to the publications issue. The allegations relating to the emails were (a) they were inappropriate and the claimant persisted in sending them despite being told by his line manager not to do so and (b) the claimant was untruthful about the use of his personal email address.

25 68. The emails came to the respondent's attention when Ms Starcher reported the matter. She described the email and the parcel and note which she found on her desk as "*concerning incidents*". When she spoke to the claimant on 28 February 2024, she told him that they were "*inappropriate*". This was recorded in her email to Ms Langley and Ms Suskil of HR on the same date.

30 69. The claimant was untruthful when first asked about the subsequent emails sent from his personal email address. He suggested that someone was impersonating him. He subsequently admitted that he had sent the emails and lied about doing so.

70. The publication matter came to Mr McCarty's attention in early 2024. There was an established procedure which employees were required to follow. The requirement that approval "*must be obtained*" was clearly stated in the respondent's Publication Worksheet. The respondent was in no doubt that the claimant had not complied because the claimant accepted that this was the case.

71. Both of the investigating officers (Mr McCarthy and Mr Hough) recommended disciplinary action against the claimant. They did so on the basis that they believed the claimant had done the things he was accused of. Ms Bentham also believed that the claimant was guilty of the allegations he faced at the disciplinary hearing. In these circumstances I was satisfied that the first element in **Burchell** - belief of misconduct - was established.

Did the respondent have reasonable grounds for that belief?

72. The material upon which the respondent's belief was based, that the claimant had done what was alleged, can be summarised as follows -

(a) The complaint by Ms Starcher.

(b) The claimant's acceptance that he had sent the initial "*Loving You*" emails.

(c) The claimant's acceptance that he had sent the subsequent "*Loving You*" emails.

(d) The claimant's acceptance that he had been untruthful about sending the subsequent emails and the use of his personal email address.

(e) The claimant's acceptance that he had not followed the publication procedure.

73.1 found it to be self-evident that this material provided reasonable grounds for the respondent's belief of the claimant's guilt of the alleged conduct.

Did the respondent carry out as much investigation as was reasonable?

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74.1 looked at what the respondent (a) did by way of investigation and (b) did not do but arguably should have done. The two investigative processes undertaken by the respondent are described above. They consisted principally of speaking to the claimant about the allegations. The notes of the investigation meetings were detailed and were agreed by the claimant at the time. I found that both investigations were adequate in terms of what a reasonable employer might be expected to do.

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75.1 then considered whether a reasonable employer would have done more than the respondent did to investigate whether, and if so to what extent, the claimant's alleged misconduct was attributable to his mental health. In **Innes** the EAT said this -

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*"...this was a case where the Claimant had admitted the charges which were found to have been established. Further, he did so in circumstances where the misconduct he admitted was a repeat of the misconduct in respect of which he had received a written warning only three months or so earlier. We are satisfied that not only was "little scope" for further investigation for the purpose of the third strand of **Burchell** but there was no such scope"*

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76. This decision was referred to by the EAT in the more recent case of **Tesco Stores Ltd v S UKEATS/0040/19**. There the **Innes** case is erroneously referred to as **Ness** and I have corrected this in the passages I now quote. The EAT said this -

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"42.there is no reason in principle why the need to carry out a reasonable investigation should not apply equally to issues bearing upon sanction for proven or admitted misconduct. As the Court of Appeal noted

in **Sainsbury's** (at paragraph [34]) the range of reasonable responses applies to all procedural and substantive aspects of the decision to dismiss a person from employment for a conduct reason. The degree of investigation required in relation to potential mitigation is inevitably fact sensitive and will vary from case to case. In considering whether a particular line of enquiry was so important that failure to undertake it would take the investigation outside the **Sainsbury's** band, Tribunals require to consider *inter alia* the degree of relevance of the enquiry to the issue of sanction, whether or not the employee advanced any evidential basis which merited further enquiry, and the extent to which resultant further investigation could have revealed information favourable to the employee.

43. **Innes** was an unusual case. It involved an employee who was dismissed for excessive private internet use during working hours. The Tribunal held that in not investigating the employee's health prior to dismissing, the employer had failed to carry out an investigation which fell within the **Sainsbury's** band. The Employment Appeal Tribunal held that the Tribunal had erred in reaching that conclusion. Importantly, however, and as is clear from the Judgment, there was no evidence whatsoever of any causal connection between the employee's health and his internet use. To the extent that **Innes** held that there was no requirement on an employer to investigate wholly speculative matters advanced as possible mitigation, we agree with that proposition. If, however, the decision in **Innes** was intended to suggest that it could *never* be unreasonable in terms of section 98(4) ERA for an employer to fail to investigate mitigation, we would respectfully disagree. Such an approach would be inconsistent with what was said in **Sainsbury's**."

77.1 did not agree with Mr MacDougall's submission that it would be an error of law to find that the claimant's dismissal was unfair because of a failure to investigate whether there was a connection between the claimant's misconduct and his mental health. However, such a finding would not be appropriate unless the respondent's investigation was not reasonable in all the circumstances (per **Sainsbury's**).

78. In the course of the investigations the claimant was asked about "*personal issues*" and "*anything else going on currently that may be affecting him*". That was unsurprising because the "*Loving You*" emails were bizarre. The claimant's responses indicated nothing untoward. Given the terms of Dr Hargreaves' report, I considered it more likely than not that (a) at the time of the incidents which led to his dismissal and the resulting disciplinary process the claimant's mental health was impaired but (b) the claimant did not realise this.

79. With the wisdom of hindsight, the respondent might have done more to find out why the claimant was behaving as he did. However, I did not believe that it could fairly be said that no reasonable employer would have accepted the claimant's answers when asked about personal issues etc. The question was whether the investigation undertaken by the respondent was reasonable. I found that it was.

80. Another employer might have taken a different view. They might have decided that the claimant's behaviour was so odd that it would be necessary to explore if there was some underlying health-related reason for it, before determining whether disciplinary action was appropriate. I considered that this illustrated what the EAT said in **Jones**. That another employer might have decided to take a different approach did not mean that what the respondent did was unreasonable.

81.1 was satisfied that the respondent did what it needed to do per **Burchell**. It genuinely believed that the claimant was guilty of misconduct in relation to the emails and publications. It had grounds for that belief based on the evidence relating to (a) the emails and the claimant's personal email address and (b) the publications. It formed that belief after carrying out two reasonable investigations and conducting an appropriate disciplinary process.

5 82.1 was also satisfied that the respondent followed a fair procedure. Each step in the investigative and disciplinary processes was explained to the claimant. He was advised of his right to be accompanied. He was provided with the evidence obtained by the respondent. The allegations were put to the claimant at a disciplinary hearing and he was given the opportunity to respond to these. He was advised of his right to appeal.

10 83. The respondent took the steps which are set out in the ACAS Code. While compliance with the Code does not mean that a dismissal is necessarily fair, it counted in the respondent's favour when I was assessing whether it acted reasonably or unreasonably in treating the claimant's misconduct as a reason for dismissal.

15 84.1 found that the respondent had shown the claimant was dismissed for a reason related to his conduct. This was one of the potentially fair reasons for dismissal. In terms of section 98(4) ERA and for the reasons set out above, I found that the respondent had acted reasonably in treating the claimant's conduct as sufficient grounds for dismissing him.

20 85. Accordingly the claimant's dismissal for misconduct was fair and his complaint of unfair dismissal required to be dismissed.

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Employment Judge: W A Meiklejohn
Date of Judgment: 17 October 2024

Date sent to parties..... 01 November 2024