EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr C Watts	**v**	British Telecommunications Plc

Heard at: Bury St Edmunds **On:** 18 July 2018 and 30 August 2018

Before: Employment Judge Laidler (sitting alone)

Appearances
For the Claimant: In person
For the Respondent: Mr S Hall, Solicitor

RESERVED JUDGMENT

1. **The claimant was dismissed for conduct a potentially fair reason within section 98 of the Employment Rights Act 1996**

2. **The respondent acted fairly in treating that reason as one to justify the dismissal of the claimant**

3. **It follows that the claim of unfair dismissal fails and is dismissed.**

RESERVED REASONS

1. This is the claim of Christopher Watts, received on 11 March 2018. In his claim form the claimant made a complaint of unfair dismissal.

2. In its response, the respondent stated that the claimant had been dismissed for gross misconduct for unprofessional behaviour on 4 July 2017. It submitted that was a potentially fair reason for dismissal and that it had acted reasonably in all of the circumstances of the case.

3. The case had been listed into the Norwich Employment Tribunal for a one day hearing but there had not been a judge available and the hearing was

therefore transferred to the Bury St Edmunds Employment Tribunal. The respondent had two witnesses and the claimant was acting in person. There was a bundle of 538 pages, but the claimant also had a supplemental bundle of 27 documents that he considered should have been included in the bundle. At the outset there was discussion of the issues in the case. The respondent had prepared a draft list of issues which it had not been possible to agree. These were then discussed, and it was clear that the claims that were brought were: -

3.1 Unfair dismissal;

3.2 Wrongful dismissal, namely that the claimant had been dismissed without notice in circumstances which he alleges were not justified.

4. The Judge explained that in a conduct dismissal, it would be necessary for the tribunal to apply the test in British Homestores Ltd v Burchell [1978] IRLR 379, and that the tribunal would look at the adequacy of the investigation and then whether the respondent had acted fairly in all of the circumstances of the case. (Further reference will be made to this case below).

5. The Judge then read the witness statements, and in the afternoon of the first day the claimant had the opportunity to cross examine the respondent's witnesses who were:-

5.1 John Fenn, Senior Operations Manager ('SOM'), for service delivery in the Colchester and Ipswich area;

5.2 Kieran Ingram, General Manager for service delivery in the east Anglia area.

6. There was then insufficient time left in the one day allocation to then hear the claimant's evidence. The matter was adjourned, part heard, to the 30 August 2018. That was scheduled to then be the hearing of the claimant's evidence, submissions, time for delivery of the decision and remedy if the claimant was successful. The claimant, however, commenced the hearing by advising that he had not had his list of issues considered. He had forwarded these to the respondent, but they had not agreed them. He had not felt able to raise these on the last occasion. A copy of the issues was obtained for the Judge and these were considered. Each one was then discussed with the claimant. The claimant had to be reminded, as he had on the first day of this hearing that various matters that he wished to raise were not within the remit of this tribunal, either because it did not have jurisdiction over them or they were not relevant to the issues, (as set out above), that it had to deal with.

7. The claimant Statement of Issues: -

7.1 Were the respondent's demands on the claimant to accept the personalised delivery, on the 4 July, beyond or outside the terms of a reasonable employment contract?

As had already been set out, the tribunal has to consider the three-fold test in Burchell and insofar as it would be necessary to do so, would consider the delivery to the claimant's home, but would not be considering whether this was, *"outside the terms of a reasonable employment contract".*

7.2 Was the claimant's refusal to work on the live telephone network in the rain without standard equipment, along with raising a grievance against the management's intrusive forced delivery practice on 4 July, convincing reasons for the management's excessive 12 month final written warning for the first disciplinary?

As had been discussed with the claimant on the last occasion, it was confirmed that the tribunal would take the fact of the final written warning as just that, and it was not a matter that was otherwise before it.

7.3 Was the claimant's grievance raised, 27 July 2017, concerning the management's harassment and disproportionate invasion of privacy, on 4 July 2017, a protected Act for the purpose of s.43 of the Employment Rights Act 1996?

It was discussed that had not been raised as such in the claimant's ET1, witness statement or on the last occasion that he believed he had raised a protected disclosure. The claimant referred to paragraph 3 of his witness statement. That deals with the complaint he made to management in the spring of 2017, but it does not say in terms that he believed he was raising a protected disclosure. The tribunal can only deal with the matters before it and as it was now part way through this hearing, could not start adding further legal issues to the claim that the respondent had not had the opportunity to answer.

7.4 The respondent's investigations and findings of the grievance outcome.

These would be considered insofar as it was necessary to do so in considering the **Burchell** test and the issues as identified above.

7.5 Was the respondent's pursuit of formal disciplinary investigation against the claimant fair, unbiased and without suspicion of collusion?

Again, in dealing with the issue of fairness, the tribunal would need to consider this.

7.6 The respondent would not allow the grievance process to overlap with, or to be included as evidence, within the disciplinary / dismissal process.

Again, there would be consideration of this insofar as it was necessary when dealing with the issue of fairness.

7.7 Was is it fair that the dismissal appeal and grievance appeal were to be held consecutively on 9 November 2017?

The claimant argues that the respondent split the 'cause and effect' of his conduct. Again, insofar as it is necessary to deal with this on the issue of fairness, the tribunal will consider it.

7.8 Was the respondent's refusal to leave the claimant's property on 4 July trespass harassment under the Protection from Harassment Act 1997, or a breach of the claimant's Article 8 rights?

The first two were not within the tribunal's jurisdiction, and with regard to the claimant's human right the tribunal would be looking at the fairness of the action taken by the Respondent.

7.9 Was it fair to dismiss the claimant when relocation was a viable option?

This was something that would be considered in deciding whether dismissal was an appropriate sanction.

8. The discussion of these issues occupied the tribunal's time for some while on the first day of the relisted hearing. The claimant was then cross examined and submissions were heard. As the claimant was given further time to prepare his submissions, there was not then sufficient time left for the tribunal deliberations and the delivery of the decision. Hence these reserved reasons.

9. From the evidence heard, the tribunal finds the following facts.

The facts

Relevant policies

10. **The Way We Work**
BT's Business Practices

'Everyone who works with BT should act with integrity, work ethically and live the BT values. Our business standards and people policies are grounded in these principles.

Getting work done in the right way

We respect each other. We want a work environment which helps each of us to achieve more. We enjoy working in a diverse organisation and benefit from looking at things in a different way. We treat everyone equally and do not tolerate any kind of harassment or prejudice.

…

General behaviour

We will only be truly successful if people respect their colleagues…Obstructive behaviour…and abusive language are unacceptable…

11. **Standards of Behaviour Policy**

BT has a set of values which we expect you to demonstrate in carrying out your job.

The following policy should be read alongside 'The Way We Work', our overall policy on ethical behaviour and how we expect you to behave at work…

Global statement

We'll behave in line with our Values and act honestly and with integrity in everything we do and in all our relationships.

12. **Setting the Standard**
Our Standards of Behaviour Procedure

4. What's gross misconduct?

It's a serious offence which leads to a breakdown of the trust which we've place in you as an employee. It's a breach of your contract of employment. It also includes serious misconduct which is likely to have a negative impact on our business, brand or reputation. Acts of gross misconduct may lead to summary dismissal (being dismissed without notice or payment in lieu of notice)

The list below doesn't include everything, but gives you some examples of what may be seen as gross misconduct:

…
Any behaviour, either at work or externally that could have a negative impact on our business, brand or reputation… or that has significant negative impact on your role.
…
Unacceptable behaviour towards customers or colleagues

This isn't an exhaustive list.

13. By letter of 4 July 2017, the claimant was invited to a disciplinary hearing on the 13 July to consider the following matters which the respondent considered constituted misconduct: -

13.1 Failure to carry out work in accordance with company quality standards.

13.2 Failure to carry out work in accordance with company safety policy and working practices.

on 8 and 10 June respectively

14. It was this letter that Ben Graham was asked to deliver to the claimant at home on 4 July 2017, which was the claimant's day off.

15. In relation to this disciplinary matter, there had been a fact finding interview, conducted by Ian Coombes, on the 23 June 2017 and he recommended the matter be passed to a manager for consideration under the respondent's misconduct procedure.

16. The disciplinary hearing proceeded on 13 July, and by letter of the 21 July the claimant was advised that he was to be issued with a 12 month final written warning in the following terms: -

"You are now advised that the warning will be filed in your personal papers for a period of three years and may be taken into account when such matters as promotion, pay progression, proposed duty changes etc. are being considered.

Any misconduct committed within the following 12 months is likely to lead to dismissal. Any further misconduct committed beyond the following 12 months, but within the three year period, is likely to lead to additional sanctions being applied. These may include a written warning, final written warning and one or more of the disciplinary sanctions for dismissal, depending upon the severity of the case."

17. The claimant appealed this final written warning. The appeal was held on 17 August and Stuart Stevens, Head of Performance East Anglia, wrote to the claimant on that day stating that he had concluded that the decision was a fair and reasonable one and the claimant's appeal was rejected.

<u>4 July 2017 incident</u>

18. What the claimant says occurred on 4 July is set out in the grievance he raised on 13 July. In his timeline of events he stated: -

"The 4/7/17 was my day off and at mid-day a local manager, called Ben Graham, came knocking on my new hand made, oak / glass door holding a letter and insisting that he hand deliver it to me. This letter was notice of disciplinary proceedings. Without opening the door, I told him it was my day off work and that he should take the letter back to the office and that it could wait until I was back at work. Frustrated by this, and the lack of any letterbox, he then tried to push it through the door seal of my new door, insisting Ben Aires told him that he must give it to me! Having told him twice already to go back to his office, his attempt to force the letter through

my door seal caused me to lose my temper, he was then told to, "Get the fuck off my property and take the fucking letter with you!"

Then he had the audacity to tell me, "Calm down and stop being abusive" – as if my home was an extension of the Openreach workplace and he had authority on my property. Ben was still insisting that he had instructions from Ben Aires (local SOM), a letter had to be delivered to me by hand. At this point I opened the door and again forcibly reminded him it was my day off, my property, my right to say what I wanted within my home and again that he should get off my property taking the letter with him."

19. The claimant alleged he had been harassed, intimidated and bullied on his own doorstep by the respondent's management and complained against Ben Aires for, *"insisting the letter is hand delivered to me at my house knowing it was my day off",* and against Ben Graham, *"for the manner in which he tried to force his letter on me through a closed door and his refusal to get off my property having been told to do so some five times".*

20. Whatever the dispute between the claimant and Ben Graham, as to the exact words used, the claimant accepts as set out above that he did swear twice when asking Mr Graham to leave and those are the words he also uses in his witness statement for this hearing.

21. That grievance was investigated by Rachael Mcleish, Investigating Manager. She met with the claimant on 27 July 2017, Ben Aires on 2 August and Ben Graham on 23 August. Her outcome letter to the claimant was dated 11 September 2017. Although in the bundle this has her rationale attached to it, it was made clear that the employee only receives the actual letter which runs to four pages and not at that point the rationale.

22. In her letter to the claimant, Rachael Mcleish made it clear that she felt Ben Graham could have left sooner after seeing how Chris had responded to his presence, but, *"This would have been a judgment call by Ben at the time"*. She recognised Ben Graham's presence had caused the claimant to feel his privacy had been violated but she found no evidence to suggest that the claimant had been singled out by Ben Aires or Ben Graham and treated any differently to other members of the Broadlands team.

23. Whilst recognising that the hand delivery of an HR letter had caused upset and Chris to feel an invasion of his privacy in his home, she found no evidence to suggest the incident alone could be considered harassment. The claimant had not been singled out and Ben Aires had followed a recognised process to issue an HR letter. She did believe the way that Chris had spoken to Ben Graham was inappropriate and could well be in breach of the BT Code of Conduct.

24. What is clear from her rationale is that she had recommended that a local fact finding interview be conducted to identify if the claimant had breached

the respondent's code of conduct by the language used towards Ben Graham at his property on 4 June 2017.

25. The claimant appealed the grievance outcome by email of 15 September and Kieran Ingram was asked to hear that appeal. The claimant was invited to an appeal hearing on 9 November 2017.

Investigation

26. The charge that Ian Coombes was to investigate was whether the claimant had breached the BT Code of Conduct by the use of obscene language and threatening behaviour to a work colleague.

27. Mr Coombes met with the claimant on 21 September 2017, page 344. On page 345 the claimant confirms that he swore.

28. There is a dispute about the way the document appears on page 345 of the bundle. In the claimant's supplemental bundle was a corrected version of that page in which Ian Coombes had accepted on 28 September 2017, that he had, in his words, *'committed an administrative error by inserting in the middle of the page the swear words'*.

29. The claimant takes issue with this and asserts that what Mr Coombes had done was cut and paste Ben Graham's words into these notes. He accuses Mr Coombes of doing that after the claimant had signed the fact finding interview. The suggestion is that these words had been cut and pasted from the statement that Ben Graham gave as part of the investigation.

30 The tribunal heard from John Fenn, who was approached by Mr Coombes on 28 September and asked to look at that paragraph in the fact finding papers. Mr Fenn gave him advice to correct it. It was the corrected version that the tribunal saw in the claimant's bundle and the correction is signed and dated by Ian Coombes on 28 September, acknowledging that the words, *"fuck off"* and *"get off my fucking property",* in a very aggressive manner, were not said by the claimant during the fact finding interview. Mr Fenn accepted the claimant raised this at the disciplinary hearing, but he did not believe anything turned on it. As far as Mr Fenn was concerned, from his conversation with Ian Coombes, it was a complete error and he had not noticed it was in the wrong order when he did the paperwork. Mr Fenn had, in any event, seen Mr Graham's witness statement in the investigation report in which he attributes those words to the claimant. The fact is, that they are not very different to the words that the claimant himself acknowledges that he said. The tribunal is also satisfied nothing turns on this.

Disciplinary hearing

31. By letter of 25 September, the claimant was invited to a disciplinary hearing on 6 October. He was advised that the charge was considered gross misconduct, and that this was:-

"Unprofessional behaviour in that on 4 July 2017, you were aggressive towards and repeatedly swore at a colleague as he tried to deliver a letter to you".

32. The claimant was advised he could be accompanied by a friend who may be a qualified union representative or fellow worker. He was sent: -

33.1 The misconduct investigation report.

33.2 Ben Graham's statement.

33.3 Team member job description and standards.

33.4 The Way We Work document.

33.5 The respondent's Standards of Behaviour policy.

33.6 Pictures of the claimant's door and driveway.

33.7 The claimant's absence and disciplinary history.

34. The claimant attended the disciplinary hearing conducted by John Fenn and was accompanied by a trade union representative, Lee Davie. The claimant was asked if he was happy for the meeting to be recorded and he confirmed that he was. It is noted that the meeting lasted from 9:26 am to 10:49 am. The claimant got every opportunity to put his position.

35. By letter of 19 October 2017, the claimant was advised that he was to be dismissed for gross misconduct.

36. Mr Fenn dealt with the notes of the investigation meeting with Ian Coombs on the third page of his letter, where he stated:-

"Ian Coombes who completed the initial investigation had accidentally duplicated a sentence from page 6 into page 5 of the investigation report. I was made aware of this by Chris before the discipline meeting and Ian Coombes reissued an amended document to Chris before he attended the meeting with me. As such this makes no material difference to this case and was an administrative error."

37. The Claimant stated in paragraph 11 of his witness statement that he raised this with HR when he received the invite to the disciplinary meeting. He then went to see Ian Coombes that day. He stated that he met him when he came out a meeting with Mr Fenn and that Mr Fenn was incorrect when he said in paragraph 6 of his witness statement that prior to the disciplinary hearing he had not met the Claimant. Mr Fenn in cross

examination could not recall meeting him. The tribunal accepts his evidence as his focus on that day was in advising Mr Coombes to deal with the error in the notes and it is therefore likely he may not recall seeing the Claimant. A manager who has met an employee before though is not precluded from hearing a disciplinary hearing against that employee.

38. Mr Fenn concluded:-

"I am not satisfied I could trust Chris to work in line with the business' standards of behaviour and I have therefore given due consideration as to whether a sanction less than dismissal is appropriate in all the circumstances. However, my view, is that given the seriousness of the gross misconduct charge a lesser sanction would not be warranted. I therefore find that I can no longer employ Chris with any confidence and on that basis my decision is to summarily dismiss Chris."

39. The claimant submitted an appeal on 19 October which was acknowledged by letter on 31 October, advising the claimant that it would be heard by Kieran Ingram on 9 November 2017. The claimant was again advised of his right to be accompanied.

40. The claimant attended that meeting and was again accompanied by Lee Davie. He again had every opportunity to state his position. Mr Ingram took time in the hearing to understand the claimant's grounds of appeal. The commenced the meeting stating that the hand delivery had been an intrusion on his day off. There was discussion about the whereabouts of his letter box and a video he had taken of it was watched. Mr Ingram made it clear they were there to discuss the claimant's behaviour. The claimant responded, as he has at this hearing that 'you can't have effect without a cause'. The claimant stated that Ben Graham had refused to leave his property putting him in a position as if he was at work when he was not.

41. Mr Ingram was clear that the meeting was considering the claimant's actions and asked him if he had any regrets. The claimant's response was that he regretted not having filmed the incident.

42. By letter of 23 November 2017, Mr Ingram sent a detailed letter to the claimant following the appeal hearing. He rejected the appeal upholding the decision to dismiss. Having heard the claimant's mitigation, he did not feel it justified the claimant's actions. He found that the charge of unprofessional behaviour was established and that the original decision was fair, reasonable and appropriate. He had spoken to GM Liam Smith in response to a point raised by the claimant and could find no evidence of a local agreement that documents would not be hand delivered in this way to the claimant. It had been for convenience only and did not justify or mitigate the claimant's response on the day in question.

43. Mr Ingram explained in evidence, and it can be seen in the minutes, that he was aware of the Grievance the claimant had raised and was due to

hear the appeal against the Grievance outcome. His consideration was whether the claimant's concerns about Ben Graham and Ben Aires justified the claimant's conduct and he was satisfied they did not.

44. The Grievance Appeal hearing did not go ahead on the 9 November 2017 and Mr Ingram wrote to the claimant on the 4 December 2017 asking if he wished to pursue it. The claimant replied that he was awaiting some information from HR. On 12 January 2018 Mr Ingram wrote to the claimant stating he believed that had been supplied but he heard nothing further.

Relevant Law

45. The claimant claims unfair dismissal. It is for the respondent to establish a potentially fair reason falling within s98 Employment Rights Act 1996 (ERA). One such reason is 'conduct'. The tribunal must therefore consider the threefold test laid down in British Home Stores Ltd v Burchell [1978] IRLR 379:

> 'In a case where an employee is dismissed because the employer suspects or believes that he or she has committed an act of misconduct, in determining whether that dismissal is unfair an Industrial Tribunal has to decide whether the employer who discharged the employee on the ground of the misconduct in question entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time.
>
> This involves three elements. First, there must be established by the employer the fact of that belief; that the employer did believe it. Second, it must be shown that the employer had in his mind reasonable grounds upon which to sustain that belief. And, third, the employer at the stage at which he formed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case. An employer who discharges the onus of demonstrating these three matters must not be examined further. It is not necessary that the Industrial Tribunal itself would have shared the same view in those circumstances. Nor should the Tribunal examine the quality of material which the employer had before him, for instance to see whether it was the sort of material which, objectively considered, would lead to a certain conclusion on a balance of probabilities, or whether it was the sort of material which would lead to the same conclusion beyond reasonable doubt.'

46. If the respondent so satisfies the tribunal it must then determine, applying section 98(4) ERA whether in all the circumstances the employer acted fairly in treating that reason as one to justify the dismissal of the claimant having regard to all the circumstances of the case.

47. It is now well established that in reaching its decision the tribunal must not substitute its view for that of the employer. Further, the tribunal is to determine whether in the particular circumstances of each case the decision to dismiss fell within the 'band of reasonable responses' which a reasonable employer might have adopted.

Submissions

For the Respondent

48. The claimant worked for Openreach the service delivery part of the business. This required him to work alone and often go into customers' homes and in a position of trust. In particular it is a very customer facing role and the type of work involves dealing with difficult situations every day.

49. At the time of dismissal, the claimant was on a final written warning for another disciplinary offence. It was unrelated in terms of its nature but part of the same disciplinary framework. It was very clear in the wording of the warning that any further misconduct within 12 months was likely to lead to dismissal. This tribunal is not however here to deal with that final written warning.

50. The key to this case is the 4 July incident. The respondent accepts that the claimant was at home and it was a non working day but it was during business hours. Ben Graham had been given a letter to be delivered. There are different versions of events but the respondent submits some common ground. The claimant accepts he swore twice. The respondent submits it is likely to have been more. It ended with Ben Graham leaving and not delivering the letter.

51. On the 13 July when dealing with the other disciplinary matter Ben Aires commented to the claimant that his behaviour had been unacceptable. The claimant indicated that he was going to bring a grievance and that that day submitted it. The grievance was investigated and those involved spoken to. Rachael Mcleish was not able to conclusively determine what had happened as there was a dispute between the two who were there. What she was able to conclude as both the claimant and Ben Graham agreed was that the claimant lost his temper and swore at Ben Graham. As part of her outcome she recommended a fact finding into the claimant's behaviour and potential gross misconduct.

52. Ian Coombes carried out the investigation and the claimant admitted swearing. Ian Coombes recommended disciplinary action. Applying the **Burchell** test there was a potentially fair reason, the swearing and abusive language and behaviour. The respondent reasonably believed that to be the case. The claimant had admitted he had sworn.

53. When John Fenn heard the disciplinary he was not aware of the grievance but that had already been investigated by Rachael Mcleish and it was her recommendation that had led to the fact finding and subsequently to the disciplinary hearing. In any event it made no difference as the disciplinary was covering the same ground, namely what happened on the 4 July. Insofar as it needed to be considered it was at the appeal stage.

54. The claimant alleges that the respondent has confused 'cause and effect'. That is not correct. Both of the respondent's witnesses were clear that they had taken both sides into account. They understood that the claimant was unhappy with the hand delivery to his home and that he

reacted rashly and without thought. What they could not understand was why he had reacted in the way he did. In their view, which was a reasonable one, if there was any provocation, it was not sufficient to justify his reaction.

55. The respondent's policies are clear that unprofessional behaviour of this kind amounts to gross misconduct. It was clear to the claimant how the respondent would treat it.

56. Both managers looked into the issue of hand delivery and found it a common practice. There was no evidence of any prior agreement with the claimant that he was not to have hand deliveries.

57. Both managers also considered the whereabouts of the claimant's letter box. It was clear to them that it could not be seen when approaching the house. It was not in an obvious place. It was reasonable to conclude that Ben Graham could not find it.

58. They also considered it was the claimant's day off at home. That undoubtedly contributed to the claimant being upset but did not warrant his behaviour to a work colleague just doing his job. He is in a customer service role dealing with difficult situations and must remain calm even when being shouted at by angry customers.

59. The respondent could not understand and the claimant could not explain why he had not taken an alternative course of action. He did not point out where the letter box was, walk away or take any action to diffuse the situation.

60. If the conduct itself was not sufficiently serious (which the respondent does not accept) taken with the final written warning the respondent was entitled to dismiss.

61. In considering the range of reasonable responses test dismissal was clearly within the range in all the circumstances.

For the claimant

62. The claimant stated that on the 4 July he had repeatedly asked Ben Graham to leave but he refused. He swore twice when Ben aggressively jabbed at his front door. He is not proud that he swore but it was a response to being harassed and one he thinks a number of people would be guilty of in that situation.

63. The claimant accepted he had openly admitted to swearing during the grievance process to convey how serious this harassment was at his home. The swearing was a direct response to this unacceptable practice. The claimant would like the practice of forced hand delivery to be taken into account.

64. BT's justification for dismissal is that they could no longer trust him to work in his role and deal professionally with customers. In his time as an engineer he has had to deal with many irate customers and he has never reacted in this way. As a visitor to their home/business he has always respected their wishes and requests unlike Ben Graham on the 4 July.

65. The behaviour of BT was not fair or reasonable and outside the contractual agreement that they had. No reasonable company that values the wellbeing of its staff behaves in this way.

66. The 12 month final written warning was issued on the 21 July, long after the visit from Ben Graham on the 4th. It was retaliation against him for raising health and safety concerns with the chief engineer. BT have back dated events or brought events forward so that the 4 July came within the final written warning which came well after the 4 July. The 4 July incident didn't actually occur within the 12 months of the final written warning.

67. The tribunal should find John Fenn an unreliable witness which calls into question his decision as despite what he said in his witness statement he had met the claimant before on the 28 September. If he can't remember meeting someone he is not fit to make this judgment call. As he is lying about that meeting he is therefore potentially lying about other aspects of the decision-making process in that he had considered the emotional response of being harassed, whether he was without bias in his decision and his whole trustworthiness in the decision-making process.

68. Just because hand delivery is recognised by local management doesn't make it an admissible form of behaviour and will always upset the home owner in their own home.

69. The respondent has latched onto two four letter words said behind a closed glass door after undue provocation. If the behaviour was so bad why was it not raised on 6 July on return to work. The claimant believed he only became 'untrustworthy' when he raised a grievance about the incident and Rachel Mcleish made her decision to progress to a formal investigation. Ian Coombes had an axe to grind as he had already raised an issue about management withholding equipment. Had he not raised that the claimant believes he would still be working at BT.

From the respondent

70. Dealing with the final written warning it is clear that the relevant time is that of a subsequent disciplinary sanction.

Conclusions

71. The respondent dismissed for conduct a potentially fair reason falling within section 98(2)(c) of the ERA. They satisfied each aspect of the Burchell test.

72. At the time of the decision to dismiss Mr Fenn clearly did believe that there had been misconduct and had reasonable grounds for his belief. The swearing was not denied. There had been a reasonable investigation by Mr Coombes. He had spoken to the relevant people and Mr Fenn had his detailed investigation report.

73. It is not accepted that Mr Fenn was in any way an unreliable witness because he could not recall meeting the claimant on the 28 September. His evidence was that he 'could not recall' meeting the claimant. Nothing turns on whether he met him or not. The person conducting a disciplinary hearing may have previously met the employee. It does not make Mr Fenn's evidence unreliable.

74. As the respondent has satisfied the tribunal that conduct was the reason the tribunal must consider whether it acted fairly in treating that as a reason to dismiss the claimant. It is satisfied that it did. The claimant was given every opportunity to state his case at the fact finding interview, disciplinary hearing and appeal. He was advised of the seriousness of the allegations and that the respondent considered they amounted to gross misconduct.

75. It is not for this tribunal to substitute its reason for that of the employer but to determine whether dismissal came within the band of reasonable responses. It did.

76. The claimant received a final written warning by letter of the 21 July 2017. It made it clear that if any misconduct was committed within the following 12 months it was likely to lead to dismissal. It was not for this tribunal to go behind that written warning which had been issued following a disciplinary process culminating in an appeal on the 17 August 2017 at which Stuart Stevens upheld the sanction. By the time the disciplinary hearing was heard in relation to the 4 July incident that warning was on file and the dismissing officer was entitled to take it into account. To suggest otherwise would mean that the employer was ignoring previous misconduct. The submission by the respondent is accepted that to do otherwise would mean that where conduct was committed some time ago but only came to light later the employer would be precluded from taking into account the final written warning already given.

77. Even without the final written warning it was reasonable for the respondent to conclude in all the circumstances that it could not 'trust Chris to work in line with the business standards of behaviour' (Mr Fenn's outcome letter). Mr Fenn considered other sanctions but given the seriousness and the claimant's customer facing role did not consider a lesser sanction was warranted. That was within the band of reasonable responses open to him.

78. Despite the claimant's attempt on the 30 August 2018 when this hearing resumed part heard to suggest he had raised a protected disclosure on the

27 July 2017 when he raised his grievance that had never been pleaded in his ET1 or referred to before. The respondent's evidence had been heard. It was only in accordance with the overriding objective to proceed to conclude the case as it had been identified on the first day and not to entertain a new claim to which the respondent and its witnesses had not had the opportunity to respond.

79. It follows that the claim for unfair dismissal fails and is dismissed. Although the tribunal did not hear submissions on causation and contribution had the dismissal been found unfair (which it has not) it is highly likely that the tribunal would have found that the 'dismissal was to any extent caused or contributed to by any action of the complainant' within the meaning of section 123 (6) ERA such as to result in a substantial reduction to any compensatory award.

_____
Employment Judge Laidler
18 September 2018
Date: ……..
20 September 2018
Sent to the parties on: .....

.....
For the Tribunal Office