EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103018/2020

Held in Glasgow on 11 and 12 January 2021

Employment Judge L Wiseman

Mr Stuart McKie	**Claimant** **In Person**
Anderson Strachan Ltd	**Respondent** **Represented by:** **Mr J Franklin - Barrister** **[Instructed by Ms L Cossar – Solicitor]**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The tribunal decided to dismiss the claim.

REASONS

1. The claimant presented a claim to the Employment Tribunal on the 1 June 2020 asserting his dismissal had been unfair. The claimant argued he had been given permission to send an email with company information to his personal email address and in the circumstances the decision to dismiss had been unreasonable.

2. The respondent entered a response admitting the claimant had been dismissed for reasons of gross misconduct but denying the dismissal was unfair. The respondent believed they had carried out a thorough investigation and based on this believed the claimant had acted contrary to the company rules.

3. I heard evidence from Mrs Helen Wood, Business Development Director, who commenced the investigation into the alleged misconduct; Mrs Veronica Hope, Managing Director, who took the decision to dismiss; Mr Ronald Hope, Company Secretary, who heard the appeal and the claimant.

4. I was also referred to a number of jointly produced documents. I, on the basis of the evidence before me, made the following material findings of fact.

Findings of fact

5. The respondent is a small family business specialising in debt recovery and credit control for a variety of clients. Mr and Mrs Hope are the Directors of the company, which currently employs six employees.

6. The claimant commenced employment with the respondent on the 1 June 2015, until the termination of his employment on the 22 February 2020. The claimant was employed as Head of UK and International Sales Consultant. The claimant earned £2541 gross per month, giving a net monthly take home pay of £2007.

7. The claimant's Statement of Employment Particulars was produced at page 21. The Statement included a clause regarding Confidentiality (page 29) which provided *"You agree that during the course of your employment you will have access to Confidential Information belonging to the company. You shall not at any time during (except in the proper course of carrying out your duties) or after your employment, whether directly or indirectly, disclose to a third party or make use of any confidential information."* Confidential information was defined as information, regardless of the format or manner in which it is recorded or stored, which is not within the public domain and which relates to the business, products, finances, affairs, trade secrets, intellectual property, technical data and know-how of the company, its clients, customers or any business contacts whatsoever.

8. The Statement also included a clause entitled "non dealing" (page 30) which *provided "You will not for a period of 12 months after the termination of your employment either personally or by an agent, whether on your own account*

or for or in association with any other person, firm, company or organisation, for or in relation to any business or activity which is in competition with the company deal, negotiate or contract with any client or prospective client with whom you personally dealt during the six months immediately preceding the termination of your employment."

9. The Statement included a clause which advised the claimant that he could obtain further information regarding the employee code of practice from the Company handbook containing all Data Protection and CSA codes of practice and due to the nature of his role, confirming he was required to abide by these.

10. The respondent also had in place a Computers and Electronic Communications policy (page 32). The policy set out the company's guidelines on access to and the use of the Company's computers and on electronic communications. It made clear that employees were only permitted to use the Company's computer system in accordance with the Company's Data Protection, Bring Your Own Device to Work and Monitoring Policies and the following guidelines. The Policy confirmed employees may have access to the personal data of other individuals, customers and clients and that where this happened, the Company relied on employees to help meet its data protection obligations.

11. The Policy went on to set out the requirements for any employee who had access to personal data, and concluded by stating that any failure to observe the requirements may amount to a disciplinary offence.

12. The Policy also confirmed that where the Company's computer system contained an email facility, it should be used for business purposes only.

13. The respondent also had in place a Conduct and Standards Policy (page 35) which detailed the standards of behaviour required, which included that an employee must comply with all reasonable management instructions and comply with the company's operating policies and procedures.

14. The Disciplinary Policy (page 39) gave examples of gross misconduct which included refusal to carry out a reasonable management instruction; breach of

confidentiality, including unauthorised disclosure of company information to the media or any other party and unauthorised accessing or use of company data.

15. The claimant reported to Mrs Helen Wood, Business Development Manager, whose role was to organise and co-ordinate administration duties and office procedures, monitor staff performance and generate new business leads. Mrs Wood had had overview of the claimant's probationary period and his promotion to Head of UK and International Business Manager. The claimant had been given the responsibility of expanding the business and supervising two other members of staff; and he had been given a personal monthly sales target with the opportunity to earn commission.

16. Mrs Wood noticed that from approximately April 2018 onwards, the claimant's performance and target achievement began to decline, and absences started to increase. At the start of the new financial year in 2019, new clients were down 20% on the previous year, and account management down 52% on the previous year.

17. Mrs Wood, having taken advice, decided to introduce a Performance Improvement Plan. She met with the claimant on the 21 October 2019 to discuss and explain her decision.

18. Mrs Wood met with the claimant again on the 3 and 13 December 2019 and 31 January 2020 to discuss his progress. The Performance Improvement Plan was produced at page 51 and noted the performance shortfall, the target, whether training was required and what progress had been made at each review.

19. Mrs Wood wrote to the claimant in advance of the meeting planned for the 3 February 2020 (page 65). The letter (dated 21 January) was entitled "Letter of Concern" and referred to the claimant's sales performance figures highlighting revenue generated from his new business sales. The figures fell short of the minimum requirement in terms of commission per month. The letter also described the claimant's leadership skills in terms of the staff he managed as "vague". Mrs Wood expressed concern the claimant was not

going to meet the revised targets and she enquired whether there was any reason for this or whether any training was needed to assist him in improving his performance, because a failure to improve would result in disciplinary action being taken.

20. On Wednesday 29 January Ms Kelly MacKinnon, Office Administrator, announced, in the open-plan office, that her emails on the desktop computer had disappeared. Mrs Wood heard this and checked the generic email box on her desktop computer. The claimant intervened to ask what had happened and returned to working on his computer. Ms MacKinnon, approximately 5 minutes later, announced all of the emails had reappeared.

21. Mrs Wood was concerned that emails had disappeared and reappeared, because this had not happened before and the generic email box was the mainstream email account for the business. She also found the claimant's intervention curious because he did not usually show any interest in such matters. Mrs Wood decided to check the claimant's computer when he left the office to see what email activity had taken place around the time of the emails disappearing. Mrs Wood noted that just after 3pm the claimant had forwarded an exchange of emails between her and the claimant regarding his contract of employment, to a mailbox outside the company. Mrs Wood discovered, upon checking the sent items box, that the email had been deleted.

22. Mrs Wood informed Mrs Hope about what she had discovered and suggested they contact their IT company to conduct an investigation into the vanishing emails. Mr Iain Dunbar of ID Computer Software Ltd was instructed to establish what had caused the emails to disappear and re-appear.

23. Mr Dunbar reported the following day that he could not confirm why the emails had disappeared and re-appeared, but he had found files which had been "forcibly deleted" on the 24 January. The term "forcibly deleted" refers to the situation where an item is deleted from the deleted items box. Mr Dunbar explained the claimant had sent an email from his office account to his personal email account, the email had three attachments containing business

information, and that the sent email had been deleted from the system. Mrs Hope instructed Mr Dunbar to conduct a more in-depth investigation.

24. Mrs Wood sought some HR advice and then met with the claimant to conduct an investigation meeting (page 74a). Mrs Wood informed the claimant that Mr Dunbar had identified that an email had been sent from the company email to his personal email, which had contained excel spreadsheets from the claimant and the two members of staff he managed, which contained financial data/client information and debtor information. The claimant denied having sent the email and told Mrs Wood he would have to look into it. The claimant suggested the email could have been sent by someone accessing his system. Mrs Wood suspended the claimant and confirmed this in writing (page 75).

25. Mrs Wood decided she required to interview all members of staff present on the 24 January to ascertain whether any of them had accessed the claimant's computer. Mrs Wood conducted those interviews (pages 80 – 89) and was satisfied no other member of staff had accessed the claimant's computer that day.

26. The claimant, following his suspension, hand-delivered a letter of grievance to Mrs Hope on the 5 February (page 76). The grievance raised allegations of bullying and harassment against Mrs Wood (primarily) in respect of the Performance Improvement Plan. The claimant also raised concern regarding the targets he had been set, which he considered unachievable in circumstances where the collections department had been under-staffed. The claimant, in relation to his suspension, noted he had previously been told by Mrs Wood that there would be no issue if he had to work from home, and he had taken this as authorisation that he could send information home.

27. Mrs Hope received the grievance from the claimant and decided it was no longer appropriate for Mrs Wood to be conducting the investigation.

28. Mrs Hope received a report from Mr Dunbar on the 6 February, which made clear that the claimant had, on the 24 January, sent an email from his business email account to his personal email account, which included confidential client information about the respondent's client base; contact list; financial

information and sales data for himself and the two members of staff he managed. This was approximately 140 pages in total. Mrs Hope sought advice and decided to invite the claimant to attend a dual disciplinary and grievance hearing.

29. Mrs Hope left a telephone message for the claimant on the 10 February, as well as an email (page 97) and a letter (page 98) inviting the claimant to attend a meeting on the 14 February. The letter set out the allegations of gross misconduct: sending confidential company information to your personal email account, taking commercially sensitive information to make himself more attractive to any future employer and deliberately taking steps to hide his actions.

30. The letter enclosed the report from Mr Dunbar (page 90), statements from other members of staff who had been interviewed, a snapshot of the email cover sent on the 24 January and the five policies relevant to the situation.

31. The claimant confirmed he would attend the meeting accompanied by a trade union representative. On the morning of the hearing, the claimant telephoned Mrs Hope to advise he was unable to attend due to feeling unwell. The hearing was re-arranged for the 21 February.

32. Mrs Hope met with the claimant on the 21 February, and a note of the meeting was produced at page 111. Mrs Hope dealt with the grievance issues first, before moving on to the disciplinary issues. The claimant agreed that he understood how sensitive the information was, and admitted he had sent emails to his personal email address, but his position was that he had been authorisation from Mrs Wood to log onto and access the respondent's systems. The claimant believed he was trusted with company information and asserted he had sent the information to his personal email because he wanted to do some work to see where he could improve his performance. The claimant felt Mrs Wood had orchestrated the whole situation.

33. Mrs Hope interviewed Mrs Wood to investigate whether she had given the claimant authorisation to send emails from his company email box to home, and/or to access work emails from home. Mrs Wood confirmed she had not

given the claimant, or any employee, this authorisation and was unaware the claimant had accessed any information at home from his personal computer.

34. Mrs Hope reviewed the information that had been gathered during the investigation and disciplinary hearing. She concluded (i) when initially questioned by Mrs Wood, the claimant had lied about sending the email; (ii) the claimant did not have authorisation from Mrs Wood to send emails from his company email to his personal email; (iii) he had, without authorisation, exported company confidential information, for his own use and deleted the emails to hide his actions and (iv) the explanation that he required this information to improve his performance was false and made up to justify his actions. Mrs Hope concluded there had been a clear breach of the respondent's Computer and Electronics Communications Policy and the disciplinary rules of conduct. Mrs Hope decided to dismiss the claimant for gross misconduct and confirmed this in a letter dated 27 February (page 123), which also dismissed the grievance.

35. The claimant was given the right to appeal Mrs Hope's decision, and did so by letter of the 5 March (page 128). The claimant was invited to attend an appeal hearing on the 18 March at 3pm.

36. Mr Hope received an email from the claimant at 10.06 on the 18 March (page 137) requesting the hearing be re-arranged because he had an interview to attend. Mr Hope agreed to re-arrange the appeal hearing to the 25 March, and confirmed this in a letter (page 138).

37. Mr Hope wrote to the claimant on the 24 March (page 139) advising that due to the lockdown, the appeal hearing had to be postponed. He confirmed the position would be reviewed in three weeks' time when either it would be re-arranged, could take place remotely or the appeal could be considered on the papers.

38. Mr Hope wrote to the claimant on the 2 April (page 141) inviting him to attend a remote appeal hearing. The claimant responded on the 26 April (page 142) advising that he did not intend to attend a remote hearing because he did not

consider the Zoom platform to be sufficiently secure. The claimant expressed a preference to meet Mr Hope in person for the appeal hearing.

39. Mr Hope considered this was an attempt by the claimant to simply delay the appeal hearing, and so he decided to proceed to determine the appeal based on the information available. Mr Hope considered all of the information available to him and also conducted a search of the claimant's browsing history which demonstrated that the claimant's stated position of always deleting his emails was not correct. Mr Hope decided to dismiss the appeal and wrote to the claimant on the 30 April (page 144) to confirm this and give full reasons for his decision.

40. Mrs Hope was very concerned that the claimant had, in his possession, confidential information. Mrs Hope had made it clear at the disciplinary hearing that she wished the claimant to delete the information, but she was not satisfied that he had done so. Mrs Hope instructed the company solicitor to write to the claimant to make him aware of his post-termination obligations (page 133) and to return a letter of undertaking, duly signed. The claimant responded to this to say that as he had already confirmed he had deleted the information, he did not intend to sign the letter of undertaking.

41. Mrs Hope reported the matter to the Police as a breach of the Data Protection laws.

42. The claimant had, prior to the termination of his employment, been making applications for other employment (claimant's document 3, page 6, 7, 8 and 10).

43. The claimant was in receipt of Jobseekers Allowance from the time of his dismissal until May 2020, when he set up his own company, engaged in the same type of work as the respondent. The claimant was unable to say how much had been earned, but confirmed he had furloughed himself.

44. The claimant also obtained employment as a Delivery Driver in mid-September. He works 10/14 hours per week and earns £300/400 gross per month.

Credibility and notes on the evidence

45. I found the respondent's witnesses to be credible and reliable: they gave their evidence in a straightforward and honest manner and were able to answer the questions put to them and explain the basis for the decisions they had made.

46. There were two key points in Mrs Wood's evidence. The first point related to the question of why Mrs Wood checked only the claimant's computer following the disappearing emails. Mrs Wood acknowledged the claimant's computer was the only one she had checked, and explained that his behaviour had aroused her suspicions. The claimant and Mrs Wood had had some discussion regarding the claimant's request to take home his Employment Contract and Handbook. The situation with the emails occurred immediately after this. Mrs Wood "felt something was untoward" and that the claimant had a vested interest in the emails disappearing. She acknowledged she had acted on her "gut instinct" and felt she had been proved right. Mrs Wood rejected the claimant's suggestion that he had been targeted and that this was a ruse to get him out of the company.

47. The second point related to the issue of whether authorisation had been given. The claimant's position was that he had been given authority to work at home and had been provided with the password for remote access to the respondent's system to access emails. The claimant, in support of his position, referred to an email dated 30 January 2019, with a spreadsheet of contact names attached. The claimant accepted, in cross examination, that the spreadsheet attached to the email contained commercially sensitive information for which the respondent had paid. The claimant rejected the suggestion that if the respondent had known of this it would have been a disciplinary matter. He, instead, adopted the position that he had been given authority by Mrs Wood, to forward it to his personal email.

48. Mrs Wood's position was that no employees were allowed to work from home and that she had not given the claimant authority to do so, nor had she given him access to the generic email box in order that he could work from home.

49. The tribunal preferred the evidence of Mrs Wood on both material points because the claimant was not a reliable witness.

50. The tribunal did not find the claimant to be a reliable witness because there were a number of occasions when he either changed his position, or undermined himself or simply gave an answer which lacked credibility. For example:-

- the claimant was questioned by Mrs Wood on the 30 January regarding the emails sent to his personal email. The claimant's initial position was that he was not aware of having sent anything and that he would need to check. The tribunal acknowledged the claimant may have been taken by surprise by the question, but considered it odd he did not recall sending an email to his personal email only 11 days earlier, particularly when this was not a common occurrence;

- the claimant also suggested someone else may have accessed his computer and sent the email;

- the claimant deleted the "sent" email and forcibly deleted it from the deleted items box. The claimant told the tribunal it was his practice to delete all sent emails, but when faced with Mr Dunbar's report which showed the only forced delete found on the system was the one by the claimant, the claimant changed his story to explain he did not usually send emails of that size. This effectively left the claimant with no explanation for his action in forcibly deleting the sent item;

- the claimant told the tribunal that it was part of his role to look at competitors to find out information which could be used to the advantage of the respondent. The claimant then accepted he had only looked at one competitor, based near where he lived;

- the claimant, in cross examination, denied he had been looking to change jobs, and invited the tribunal to find he had only started his search for another job once he had been dismissed, but the claimant later had to accept he had made job applications prior to his dismissal;

- the claimant stated the information he had sent home was for the purposes of analysis to identify where he could improve his performance but he did not ever produce this analysis and his suggestion that he required his colleagues' information for the same purpose lacked credibility and

- the claimant, if he believed he had authority to send information to his personal email, did not say that immediately when challenged.

Respondent's submissions

51. Mr Franklin submitted the claimant had been dismissed for reasons of conduct in terms of section 98(2) Employment Rights Act. The conduct related to the unauthorised sending of sensitive information to a personal email address in circumstances where the claimant was not authorised to use the information in this way. Mr Franklin referred the tribunal to the examples of gross misconduct at page 43 and the Communications policy at page 33, and submitted it had been clear the information was confidential.

52. Confidentiality is important to the respondent because it depends on sensitive information regarding debtors. The respondent buys information regarding companies and debtors, which has a financial value. The respondent had systems in place to protect the information, and it was clear the claimant did not have the same systems in place to protect the information on his personal computer at home.

53. Mr Franklin submitted the issue of the performance improvement plan was a red herring. This was not a case where the respondent was trying to remove the claimant for poor performance. The respondent wanted the claimant to improve and offered training and support. This was not consistent with an oppressive employer trying to get rid of an employee.

54. The claimant sought to argue that the collections department were at fault and responsible for his poor performance. Mr Franklin invited the tribunal to prefer the evidence of Mrs Wood to the effect that collections depend on the quality

and quantity of referrals, and the claimant's argument was undermined by the fact the two colleagues managed by the claimant were performing very well.

55. Mr Franklin also invited the tribunal to prefer the evidence of Mrs Wood and find there was no set up regarding the disappearing emails. Mrs Wood had honestly said she acted on her gut instinct in checking the claimant's computer. The claimant, when questioned about sending the email, told Mrs Wood he could not recall sending it. This was not credible in circumstances where he was being questioned only 11 days after the event, and where he subsequently agreed he had sent it and that it related to the performance plan. Mr Franklin invited the tribunal to consider that if the claimant had authority for what he did, why had he not immediately said this when asked about it.

56. Mr Franklin invited the tribunal to have regard to the expert report of Mr Dunbar (pages 90 – 96) where it was clearly explained that the claimant had tried to conceal what he had done by deleting the sent email and then forcibly deleting it from the deleted items.

57. The reality was that the claimant sent highly sensitive information to his personal email when he had no authority to do so. It could not have been merely coincidence that Mrs Wood was out of the office at the time the claimant had sent the email. Mrs Wood and Mrs Hope had been clear, consistent and credible in their evidence, in contrast to the claimant who had been none of these things. He had, furthermore, set up at rival company in May 2020. He said he had investigated competitors, but in fact he had only investigated one competitor who happened to be located close to where he lived. He said he had been given remote access to the respondent's systems: if this was true, why had he needed to send the information to his home email.

58. Mr Franklin submitted it had been entirely reasonable for the respondent to take the view that they no longer trusted the claimant. The claimant's refusal to follow a reasonable management instruction to delete the information he had sent to his personal email, could have amounted to gross misconduct. This, it was submitted, supported the reasonableness of the respondent's decision that they could not trust the claimant any more.

59. The claimant's appeal had been heard by Mr Hope, who had dealt with it as impartially as possible. It was a small, family company and he had been the only person who could hear the appeal. Mr Hope's decision to proceed with the appeal in the claimant's absence had to be seen in the context of the appeal having been postponed and reconvened by way of Zoom which the claimant refused to participate with.

60. Mr Franklin invited the tribunal to find the dismissal was fair in the circumstances. If the tribunal found the dismissal was unfair, there should be a significant (if not 100%) reduction for contributory conduct.

Claimant's submissions

61. The claimant invited the tribunal to find the dismissal was unfair for the following reasons:

- the targets he had been given in the performance improvement plan had been unachievable, and this demonstrated the respondent's desire for him to fail;
- the meetings had not been minuted;
- Mrs Wood had told him he was fighting for his life, and this had put intolerable strain and pressure on him. It also demonstrated the outcome of this process had been predetermined;
- Mrs Wood acted on her "gut feeling" and this demonstrated she had been looking for something incriminating to hold against him;
- it was clear the respondent had not following the proper processes. The information was not sensitive and had been attached to the performance improvement plan;
- he had authority to work from home (see the email of the 30 September 2019);
- no personal/sensitive information was breached;

- it would have been appropriate for the Communications policy to be restated for staff to ensure consistency and remove doubt;
- no consideration had been given to his explanation;
- no warning had been considered;
- the appeal had been unfair because it had been heard by Mr Hope and
- the impact of the dismissal had been financial and professional.

62. Mr McKie invited the tribunal to find the dismissal unfair because no employer would have acted as the respondent did.

Discussion and Decision

63. I had regard to the terms of section 98 Employment Rights Act which sets out how a tribunal should approach the question of whether a dismissal is fair. There are normally two stages: firstly, the employer must show the reason for the dismissal and that it is one of the potentially fair reasons set out in section 98(1) and (2). If the employer is successful at the first stage, the tribunal must then determine whether the dismissal was fair or unfair under section 98(4). This requires the tribunal to consider whether the employer acted reasonably in dismissing the employee for the reason given.

64. The first issue for this tribunal is to determine whether the respondent has shown the reason for the dismissal of the claimant. The respondent admitted dismissing the claimant and asserted the reason for the dismissal was conduct. The claimant disputed this insofar as he invited the tribunal to find the respondent had set him up to fail in the performance improvement plan and had targeted him in order to get rid of him. The tribunal did not accept the claimant's position (for reasons set out below). The tribunal accepted the respondent had, on the basis of the investigation they carried out, a reasonable belief that the claimant had done what was alleged, and that was the reason for the dismissal. The tribunal accepted the respondent had shown the reason for the dismissal was conduct, which is a potentially fair reason

falling within section 98(2)(b) Employment Rights Act. The tribunal must now continue to determine whether dismissal for that reason was fair.

65. The EAT, in the case of ***British Home Stores Ltd v Burchell 1980 ICR 303*** stated the employer must show –

- it believed the employee guilty of the misconduct;
- it had in mind reasonable grounds upon which to sustain that belief and
- at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

66. The tribunal had regard to the investigation carried out by the employer. The investigation was started by Mrs Wood, who held the first interview with the claimant to ask him for an explanation for sending the email to his personal email. Mrs Wood also interviewed the other employees to investigate the claimant's suggestion that the email may have been sent by someone else accessing his computer. Mrs Wood, having spoken to the other employees, concluded no-one had accessed the claimant's computer. The tribunal was satisfied Mrs Wood had reasonable grounds to sustain that belief, based on the investigation she had carried out.

67. The claimant did not provide Mrs Wood with any information regarding the email sent to his personal address, other than to say he would have to look into it. Mrs Wood was removed from the investigation before this matter went any further.

68. The investigation was continued by Mr Iain Dunbar of ID Computer Software Ltd, who had initially been asked by Mrs Hope to investigate the disappearing/re-appearing emails. Mr Dunbar noted in his report (page 90) that as part of the investigation he had checked users who had forcibly deleted information from their email accounts "Deleted Items". The report continued:

"During the review of deleted items, I noticed that in the mailbox belonging to Stuart McKie [company email address noted] there were items which had

been removed from the deleted items folder (that is, forcibly deleted). As a precaution, and having spoken to Mrs Hope, this mailbox was recovered using Office 365 tools and was saved to a file to allow the management team to review the mailbox to ensure there was nothing suspicious going on."

69. Mr Dunbar continued to note in the report that he had attended the meeting with the management team on the 4th February to review the mailbox that had been restored. The report continued:

"At this meeting, it was identified, by management, that an email had been sent to a personal email address [claimant's personal email address noted] on the 24th January at 09.14am. This email contained 3 company documents relating to the sales activities of the business."

70. Mr Dunbar's report noted he had been asked by the respondent to verify if the email had been sent and received successfully and to find out if any further emails had been sent from this work address to the same personal email address. Mr Dunbar carried out this investigation and confirmed exactly when emails had been sent and received, and he further confirmed that other emails had been sent, on the 29 January, from the same work address to the same personal email address. Those emails related to correspondence between the claimant and Mrs Wood regarding the employee handbook and contract of employment, and attached those documents.

71. The onus on the employer is to carry out as much investigation as is reasonable before deciding whether dismissal is a reasonable response in the circumstances. The claimant, having initially been non-committal about whether he had sent the email/s, accepted at the disciplinary hearing that he had sent an email with confidential sensitive client information and sales figures (his own and those of other employees) to his personal email. In those circumstances the focus turned to why the claimant had done that. The claimant's position was that he had authority to send the email: the claimant told Mrs Hope that although he had not been given authority to send that email, he *"thought [he] had authorisation previously from Mrs Wood".*

72. Mrs Hope investigated the issue of authority by interviewing Mrs Wood. Mrs Wood was asked specifically whether she had given the claimant authority to send emails from his company work email to home, or to access work emails from home. Mrs Wood confirmed she had not given the claimant authority to do this, and further confirmed that at no time had any member of staff asked for permission to work from home or transfer data to allow them to work from home.

73. The tribunal, in addition to the above, noted Mrs Wood's evidence that at that time, no member of staff worked from home: it was not something which was allowed by the company.

74. The tribunal also noted the claimant's evidence regarding what he had been given authority to do was not reliable. The claimant told Mrs Hope, at the disciplinary hearing, that although he had not been authorised to send the email on the morning it happened, *he "thought [he] had authorisation previously from Mrs Wood"*. The claimant's position was that he had authority to work at home: Mrs Wood wholeheartedly rejected that suggestion.

75. The claimant told Mrs Hope that he had sent the information home so he could analyse it to help with his performance. Mrs Hope questioned why the claimant had not been able to do this in the office, and had been told by the claimant that he had no time to do so. Mrs Hope could not accept this in circumstances where the claimant's browsing history showed that he had been looking at other jobs with competitors, as well as spending time letting out his flat. The claimant explained it was part of his job to look at competitors, but could not offer any explanation why, if this was correct, he had only looked at one competitor who was based near to his home.

76. The claimant was cross examined about the issue of authority. He stated he believed he had authority to log into the respondent's email box from home. It was suggested to the claimant that if this was correct, why had he needed to send the information home. The claimant suggested the information would not have been in the respondent's email box, but located elsewhere.

77. The claimant relied on an email dated 30 June 2019 which had been sent to his personal email address, with an excel spreadsheet containing a call list. The claimant argued this demonstrated he had authority to send information home. The difficulty with the claimant's position was that there was nothing on the document to indicate authority had been given to send the document home, nor had his email been copied to anyone else to alert them to the fact he had sent this information home. The email appeared to be nothing more than another example of the claimant having sent confidential information from work to his personal email. Mrs Wood and Mrs Hope knew nothing of this information having been sent to the claimant's home, and confirmed it had not been authorised.

78. The issue for Mrs Hope came down to accepting the evidence of Mrs Wood or the claimant. Mrs Wood's position was clear and consistent in terms of no-one in the company being allowed to work from home. The claimant's position was muddled and not reliable: at a very basic level, if the claimant had authority to send the information home, why had he deleted the "sent" email and the "deleted" email forcibly? The claimant's explanation that deleting such items was his practice was proved not to be the case when Mr Dunbar's investigation confirmed the only example of forcibly deleted emails was the one by the claimant on the 29 January.

79. The tribunal, having had regard to the points set out above, and to the fact the claimant did not challenge the thoroughness of the investigation, concluded the respondent had carried out as much investigation as was reasonable in the circumstances.

80. The tribunal next asked whether the respondent had reasonable grounds upon which to sustain their belief the claimant had acted as alleged. The allegations being investigated were (i) that the claimant had exported confidential company financial and client information, going back four and a half years and relating to himself and his colleagues, without authorisation to your personal email account in breach of company policies and procedures; (ii) that he had taken this commercially sensitive data in an attempt to use it against the company commercially, to make you more attractive to any future

employer and exposes the company to potential financial loss should this information be shared/sold out with the company and (iii) taken deliberate steps to hide your actions in this respect.

81. The tribunal concluded the respondent, based on the investigation carried out by Mr Dunbar and by Mrs Hope following her meeting with the claimant at the disciplinary hearing, had reasonable grounds upon which to sustain their belief the claimant had sent confidential company and client information to his personal email, without authority to do so and that he had taken deliberate steps to hide his actions in this respect by deleting the sent email and forcibly deleting the deleted email. Mrs Hope also had reasonable grounds upon which to sustain her belief that the claimant had taken the commercially sensitive information in an attempt to use it against the company. Mrs Hope considered the fact the claimant had been looking at competitors and making job applications supported that belief.

82. The tribunal next asked whether dismissal in those circumstances was reasonable. We had regard to the case of ***Iceland Frozen Foods Ltd v Jones 1983 ICR 17*** where the EAT summarised the law as follows:

"We consider that the authorities establish that in law the correct approach for the tribunal to adopt in answering the question posed by section 98(4) if as follows:

(1) the starting point should always be the words of section 98(4) themselves;

(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;

(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;

(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;

(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 response 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."

83. The tribunal, in considering the fairness of the dismissal, had regard to the procedure followed by the employer when dismissing the claimant. The only point raised by the claimant concerned the appeal hearing being heard by Mr Hope, the husband of Mrs Hope who made the decision to dismiss. We acknowledged that as a matter of good practice the investigation, the decision to dismiss and the appeal should be heard by different, independent persons. However, the respondent is a small family owned company and there was no evidence to suggest anyone else may have been able to hear the appeal. We noted the ACAS Code of Practice recognises it may not always be possible for small employers to have the different stages of a disciplinary process dealt with by different people. We considered this was the case here, and there was nothing to suggest Mr Hope would not have taken a decision to uphold the appeal if there had been the basis to do so.

84. The appeal hearing did proceed in the absence of the claimant in circumstances where he had refused to participate in a Zoom appeal hearing. We, in considering the fairness of proceeding in the claimant's absence, had regard to the fact the country had just entered a period of Lockdown: things were very uncertain and people were trying to do their best to progress matters. We concluded that in the circumstances the decision to proceed with the appeal hearing using Zoom fell within the band of reasonable responses which a reasonable employer might adopt. The alternative of delaying matters by months was not realistic.

85. We next had regard to the fact the respondent had reasonable grounds upon which to sustain its belief that the claimant had acted as alleged. The claimant had, by his actions, breached company policies and procedures regarding confidential information and Mrs Hope (as set out in the letter of dismissal) did not believe any of the explanations put forward by the claimant to explain his actions. She did not believe he had authority to do what he had done; she did not believe he had sent the information to his personal email in order to carry out some analysis to improve his performance (because she was clear he had adequate time at work to do this); she did not believe he did not have time to do this at work because his browsing history showed otherwise; she did not believe he routinely deleted his sent emails because the evidence from Mr Dunbar did not support this; she did not believe he was looking at competitors to assist the business because he had only looked at one competitor who was located near where he lived and she did not believe he had been taken by surprise by Mrs Wood asking his about the email.

86. The tribunal was satisfied the decision of the respondent to dismiss the claimant, in the circumstances, fell within the band of reasonable responses which a reasonable employer might have adopted. We reached this conclusion because of the reasons set out in the above paragraph. The decision to dismiss was fair.

Employment Judge: Lucy Wiseman
Date of Judgment: 01 March 2021
Entered in register: 18 March 2021
and copied to parties