



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4112525/2021

5

Held on 14, 15, 16 and 17 March 2022

Employment Judge B Campbell

10 **Mr A Keir**

**Claimant
Represented by:
Mr N Cunningham -
Representative**

15 **Santander UK plc**

**Respondent
Represented by:
Mr G Cunningham -
Counsel**

20

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the tribunal is that the claimant was fairly dismissed from his employment with the respondent by reason of his conduct and his claim is therefore dismissed.

REASONS

25 **Introduction**

1. This claim arises out of the claimant's employment by the respondent. The claimant worked as a Customer Advisor with the respondent, which is a nationwide bank. He was dismissed by the respondent on 12 August 2021. The claimant argues that he was unfairly dismissed. The respondent maintains he was rightly dismissed for committing an act of gross misconduct.

30

2. The claimant was represented by Mr Nico Cunningham. He was not legally qualified but ably presented the claimant's case nevertheless. The respondent was represented by Mr Greg Cunningham, advocate. I was conscious to explain the relevant legal concepts and the conventions of employment

tribunals when necessary, especially in recognition of the claimant not having legal representation.

3. The tribunal heard evidence from Mr Graeme Smith, Ms Karen Uzzell, Mr Iain Anderson and Mr Niall McCurdy for the respondent. The claimant also gave
5 evidence.
4. Generally each witness was found to be credible and reliable in the evidence they gave. Inevitably there were some more minor conflicts over certain facts or events, and the parties did not agree over the proper way of evaluating those matters in the context of the role the claimant fulfilled with the
10 respondent, and the standards which applied to it. Any relevant issues are dealt with in more detail below.
5. The parties jointly prepared a bundle of productions. References in square brackets below are references to the page numbers of the main bundle.
6. The parties' representatives each helpfully provided written notes of closing
15 submissions which were carefully considered along with their oral submissions in reaching the outcome in the claim.
7. At the outset it was agreed that the hearing would only deal with questions in relation to liability. If it was necessary to decide on a remedy for the claimant, this would be by way of a separate hearing. This was agreed to be the more
20 appropriate way to proceed as the claimant was relying on medical issues in relation to mitigation of loss, and it was accepted that the respondent may need further medical evidence before being able to reply to it. Secondly, the respondent wished to lead two additional witnesses to respond to the claimant's request for reinstatement or re-engagement if his claim were to
25 succeed. There was therefore a possibility that they would not need to be called.

Legal issues

8. The following legal issues had to be decided, as agreed by the parties:

(1) Was the claimant's dismissal on 12 August 2021 for a potentially fair reason within the scope of section 98(1) and (2) of the Employment Rights Act 1996 ('ERA')?

(2) If so, did the respondent satisfy the requirements of section 98(4) ERA by acting reasonably when treating its reason as sufficient to dismiss the claimant, taking into account its size and administrative resources, equity and the substantial merits of the case?

Applicable law

9. By virtue of Part X of ERA, an employee is entitled not to be unfairly dismissed from their employment. The right is subject to certain qualifications based on matters such as length of continuous service and the reason alleged for the dismissal. Unless the reason is one which will render termination automatically unfair, the employer has an onus to show that it fell within at least one permitted category contained in section 98(1) and (2) ERA. Should it be able to do so, a tribunal must consider whether the employer acted reasonably in relying on that reason to dismiss the individual. That must be judged by the requirements set out in section 98(4), taking in the particular circumstances which existed, such as the employer's size and administrative resources, as well as equity and the substantial merits of the case. The onus of proof is neutral in that analysis.

10. Where the reason for dismissal is the employee's conduct, principles established by case law have a bearing on how an employment tribunal should assess the employer's approach. Relevant authorities are considered below under the heading 'Discussion and Conclusions'.

Findings in fact

11. The following findings of fact are made as they are relevant to the issues.

Background

12. The claimant was employed by the respondent as a Customer Advisor within its Core Retail division. His role involved him assisting the respondent's

customers primarily by dealing with their requests by telephone. His role was normally office-based, but during the time of the events considered below he was working from home. He began his period of employment with the respondent on 24 September 2018 and was issued with a written set of terms and conditions of employment [312E-L].

5

13. Within that document is a section headed 'Compliance'. There the respondent stated that it may have to report the claimant's conduct to an external regulatory authority if appropriate. The respondent also confirmed that if an investigation should conclude that the claimant has committed an act of fraud or another crime, relevant details would be shared with relevant fraud protection databases. One such database is operated by CIFAS and the claimant was directed to the respondent's Employee Handbook for further information. The respondent is regulated by the Prudential Regulation Authority and the Financial Conduct Authority.

10

14. The respondent operates an Employee Handbook which applied to the claimant. Extracts were produced. At page [102] the respondent explains that it is a member of CIFAS, *'the UK's fraud prevention service, which operates an employee fraud database designed to prevent the re-employment of people who have acted dishonestly in other financial organisations'*. The respondent goes on to say *'We will list the names of any of our employees who we know have acted dishonestly while they worked for us.'*

20

15. The respondent also maintains a disciplinary policy [94-101]. Within it, the respondent stipulates five conduct rules which its employees must abide by, namely:

25

Rule 1 – You must act with integrity;

Rule 2 – You must act with due skill, care and diligence;

Rule 3 – You must be open and co-operative with the FCA, the PRA and other regulators;

30

Rule 4 – You must pay due regard to the interests of customers and treat them fairly;

Rule 5 – You must observe proper standards of market conduct.

16. The policy gives examples of what the respondent will normally consider to be gross misconduct. Those include:

5 *'Acts of actual or attempted fraud/dishonesty/deception (regardless of any actual or intended financial gain), including false/exaggerated expenses claims or dishonesty during recruitment or as part of other required employment related checks by withholding or providing false information. This includes providing false answers or withholding information as part of any investigation.'*

- 10 17. Referrals to CIFAS are made by the respondent when deemed appropriate. They would normally be made by someone within the respondent's human resources department.

18. The claimant was part of a team and his manager was Mr Graeme Smith. There were other teams of Customer Advisors with their own managers.

- 15 19. When working, the claimant would log onto the respondent's system at the beginning of a shift. He would be permitted a short amount of 'admin' time, which was intended for him to review any staff briefings which had been issued since the last shift, before making himself available to take calls.

- 20 20. The main method used by the respondent to send employees updates is an internal web-based system named 'I-Exchange'. It contains guidance on many of the respondent's processes for matters such as opening a new account or creating a standing order. New updates are posted on its front page, where they will be seen by employees logging on. Employees including the claimant were expected to check it and read any new updates during their admin time.
- 25 Managers would also communicate with their team members using email and Microsoft Teams.

System outage on Saturday 15 May 2021

21. On Saturday 15 May 2021 the respondent experienced one of its most extensive system failures in recent years. For most of the day its systems for

telephone, internet and app-based banking were offline and account holders found that certain cards would not operate when they tried to make purchases or withdraw money from ATM machines.

22. The claimant was working that day from home. He logged on at around
5 8.30am. Initially he was able to work as normal but in the middle of a customer call the system stopped responding. He apologised to the customer and ended the call. He then found that we was unable to click on the icon he normally used to state that he was ready to receive calls.

23. Through an oversight he was not added to the Glasgow Teams group which
10 had been set up to communicate with Customer Advisors about the outage. He therefore did not initially receive updates from managers.

24. Mr Smith had arrived for work around 10am that day and was briefed about
15 the problems by another manager. He set about updating his own team which he did via Teams, as other electronic systems were not working. The claimant found out more about what had happened that way. Both individuals exchanged some remarks about the situation.

25. Nobody initially knew how long the outage would last. As the claimant could
20 not take any customer calls he checked for updates from time to time. By the end of his shift at 4pm the problems still had not been fixed. Later that afternoon most systems were restored, although issues with a certain type of Mastercard continued into the evening.

26. The claimant visited a local branch of Tesco at some time after the end of his
shift that day. He went with his partner. The circumstances of the visit became the subject of a disciplinary process, discussed below.

25 **Sunday 16 to Wednesday 19 May 2021**

27. The claimant was not working on Sunday 16 May 2021. By then the system
30 outage had been fixed and customer calls were once more coming through as normal. At some point on that day the respondent placed a message to Customer Advisors on I-Exchange which said that should customers call in and complain about loss or inconvenience caused by the system outage, they

could be offered up to £50 in compensation. If they wished to claim a loss of a greater amount, or were otherwise still dissatisfied, they could be referred to a specialist complaints handler. It was unusual to give Customer Advisors authority to provide monetary compensation, but the extent of disruption caused by the outage and number of anticipated calls led the respondent to take that step.

5

28. On Monday 17 May 2021 the claimant was working, again from home. He logged on as normal and read the I-Exchange update about compensating customers who complained. He dealt with some such customers himself on that day, and the following day when he was again working.

10

29. The claimant was not scheduled to work on Wednesday 19 May 2021. On the afternoon of that day he contacted the respondent's customer help service online and took part in an online chat with a Customer Advisor which was logged and produced to the tribunal [65-69].

15

30. The text of the chat was accepted by all parties as accurate and is not reproduced in full. In summary:

a. The claimant said he had an issue with the purchase of a product the Saturday before (15 May 2021) which had since gone up in price by £110;

20

b. He was given a link to an online reimbursement form;

c. He continued the discussion, saying that he wished to raise a complaint, and was transferred to a complaint handler;

25

d. He explained that his aunt (in his evidence to the tribunal it emerged that it was his partner's aunt, who he feels sufficiently close to that he refers to her as his own aunt) tried to purchase some furniture from DFS which was reduced from £499 to £389 but was unable to, and he had to pay the full price the next day;

- e. He gave the name of the furniture set, which the complaint handler checked, to find that it had been reduced in price that day from £549 to £499, and was not previously advertised at £399;
- f. He then said that he had been told the set had not been on sale at DFS, but had come from a small furniture shop instead, although it was the same set;
- g. He went on to say he was embarrassed at being unable to purchase items such as food and toiletries as a result of his card not working;
- h. The complaint handler apologised for his embarrassment and offered £25 as a goodwill gesture;
- i. The claimant asked if the amount could be increased to at least £50, which was agreed. The chat ended. The claimant's account was credited with £50.

31. On 28 May 2021 an HR Manager named Lee Greenwood contacted Mr Smith by email to say that the person who dealt with the claimant's complaint chat on 19 May 2021 had raised concerns about the exchange [64]. It said that the advisor felt the claimant may have falsely claimed he suffered a detriment in order to gain compensation. The advisor felt the claimant's story *'isn't consistent'* and wanted to raise their concerns.

32. The above concern was raised through an internal whistleblowing procedure and the individual raising it was not named at the time, or in the tribunal hearing itself. The advisor did not participate in any internal process which followed.

33. A copy of the chat transcript was sent with the email [65-69].

25 **Suspension and disciplinary investigation**

34. Mr Smith decided to interview the claimant about his complaint on 4 June 2021. The claimant was working from home and therefore the discussion took place via Teams. The claimant was using a work PC which did not have a webcam, and so connected using sound only. Mr Smith was assisted by a

more senior manager named Liam Wallis. This was mainly because Mr Smith had not conducted a fact find with a colleague where the potential issue was so serious. He was accustomed to dealing with issues at levels 1 or 2 which related to lesser types of misconduct. The concerns raised about the claimant were being treated as potentially a level 3 matter.

5

35. Mr Smith was given the option to hand over the investigation to a more senior manager such as Mr Wallis. He wished to be the investigator so he could extend his experience. It is the respondent's normal practice to have an employee's line manager conduct fact find discussions – a point clarified with HR - and so there would be no departure from normal practice. It was agreed he could conduct the investigation.

10

36. It is the respondent's policy not to give an employee advance notice of a fact finding interview when potential fraud is suspected. This is to minimise the scope for the employee obscuring evidence or tipping off others.

15

37. Mr Smith asked the claimant some questions about the subject matter of his complaint of 19 May 2021. Mr Wallis took notes and those were typed [71-79]. At a later point the claimant was provided with a copy and added some comments on the original notes [104-112]. That version is accepted as being a sufficiently complete and accurate summary of the discussion.

20

38. Mr Smith brought the meeting to an end, saying that he would discuss the information gathered so far with HR and then let the claimant know what was to happen next. The claimant went back to his normal duties.

25

39. Later in the afternoon of 4 June 2021 Mr Smith convened a further fact find meeting with the claimant. Again, Mr Wallis was present to provide support to Mr Smith and take notes. Mr Smith asked the claimant some further questions about the circumstances supporting his claim for compensation. At the end of the meeting Mr Smith suspended the claimant on full pay pending further investigation. A more senior manager was brought in to do that as Mr Smith did not have the experience that the respondent required. A prepared script was followed in notifying the claimant of the decision and its effect on him

30

[119-121]. A letter was sent to the claimant confirming the details on 7 June 2021 [122-127].

40. In the days that followed the claimant's suspension he came to the view that there were aspects of the investigation he wished to either clarify or say more about. He got in touch with Mr Smith to request a further fact find meeting and one was arranged for 8 June 2021. Again this was via Teams and Mr Wallis was present as a note-taker and advisor. By this time the claimant was using his own laptop but did not connect using video, only sound. In his evidence he said that his laptop had a camera but he could not get it to work. This is found to be unlikely, and that it was more likely that the claimant chose not to connect using video. This may have been so that he could be assisted by his partner in the meeting, although equally he may simply have felt uncomfortable interacting on screen. No formal finding is made as to why he did not activate his camera, as the respondent did not make any negative inference about his contribution to this or any subsequent virtual meeting because he only took part using audio.
41. The claimant was given a copy of Mr Wallis' notes of the discussion and again added his comments [131-139]. Those notes are accepted to be sufficiently complete and accurate.

20 **Grievance**

42. On 9 June 2021 the claimant submitted a grievance about the way in which he had been dealt with by Mr Smith and Mr Wallis [128-130]. He received an acknowledgment letter [140] and then an invitation to a grievance meeting on 29 June 2021 [141]. Ms Karen Uzzell, Operations Manager, was identified to hear the grievance. She was from a different part of the respondent's business and had no previous involvement with the claimant.
43. On 24 June 2021, and so before the claimant's grievance hearing, Ms Uzzell interviewed Mr Smith. She prepared a record of the questions she asked him and the responses he gave [142-144].

44. The claimant's grievance meeting proceeded on Teams. Ms Uzzell was accompanied by a note-taker and typed notes were prepared after the meeting [145-150].
- 5 45. The matters raised by the claimant led Ms Uzzell to check a number of points with Mr Greenwood from HR, which she did by email. He added his comments next to each of her five questions and emailed those back to her [151].
46. Ms Uzzell also obtained a report showing the details of the claimant reporting his system issues on 15 May 2021, and how those had been responded to [163- 169].
- 10 47. Ms Uzzell met with Mr Wallis on 6 July 2021 and asked him to clarify some aspects of how the fact find meetings had been conducted. This was also noted [157-159]. Mr Wallis added his own comments in different coloured ink.
48. Ms Uzzell felt able to decide on a response to the claimant's grievance and prepared a template form titled 'Grievance Appeal Outcome Form' [154-156].
15 This was dated 5 July 2021 although finalised the next day.
49. Ms Uzzell sent her outcome form to HR who converted it into an outcome letter. This is the respondent's normal process. She checked the letter and signed it electronically before sending it to the claimant [173-175]. It was
20 emailed by Mr Greenwood, who said the claimant would receive an update on the disciplinary investigation in the coming days.
50. Ms Uzzell's decision was not to uphold the grievance. In summary:
- a. She reviewed the complaint chat transcript and did not believe there was any element of entrapment as the claimant had complained, finding instead that the advisor had dealt with the complaint normally and in a supportive way at the time and only had concerns at a later
25 point;
 - b. She concluded based on the materials she had, including the IT report she had requested, that there was no suggestion of the claimant

having his system access removed or restricted before being suspended;

c. There was not inordinate or unfair delay in the claimant being provided with notes of the fact find meetings;

5 d. It was appropriate for Mr Smith as his manager to conduct the fact find meetings;

e. The claimant did not complain about being given short notice of the first fact find, and the timing of that was justified; and

10 f. It was justified not to extend the right to be accompanied in those meetings to allow the claimant's partner (who was not an employee of the respondent) to attend.

51. She explained that the claimant had 14 days to appeal against that decision. He did not do so. As she had found no fault with Mr Smith's handling of the investigation, no steps were taken to prevent him from completing that process.

15

52. Mr Smith concluded his investigation by preparing a report of what he had done [49-56]. The report had a number of appendices, comprising documents relevant to the process [57-90].

Disciplinary hearing

20 53. On conclusion of the claimant's grievance the disciplinary case was resumed. HR contacted a manager at random from a pool of suitably experienced managers to take the process forward. He was named Iain Anderson and based in Glasgow. Mr Anderson had had no previous involvement with the claimant.

25 54. Mr Anderson received a pack of documents comprising the investigation report and its appendices. He also received copies of the fact find meeting notes which the claimant had amended. He did not receive any of the documents created as part of the claimant's grievance, but was aware that the claimant had raised a grievance and that it was now treated as concluded.

55. The claimant was sent a disciplinary hearing invitation letter by Mr Greenwood on 30 July 2021 [186-191]. The hearing was proposed for 12 August 2021 by Teams.

56. The disciplinary allegations that the claimant had to answer were stated as follows:

1. *'It is alleged that you have attempted to deceive the Company's customer service department by falsely claiming financial detriment on 15th May 2021, when the bank's systems went down, with the intent of fraudulently obtaining compensation.'*

2. *'It is alleged that you have utilised your knowledge of the bank's internal complaints process to obtain a higher level of compensation.'*

3. *'As a result of the above, you have fundamentally breached the trust and confidence that must exist between employer and employee.'*

57. The disciplinary hearing took place on 12 August 2021 as planned. Mr Anderson chaired it and another manager, Mr Eadie, took notes. The claimant attended using sound but not video. Mr Smith also attended the meeting to answer questions about his investigation. The meeting lasted from 10am until 2.25pm, with an adjournment of almost two hours.

58. Mr Eadie's typed notes were produced and are accepted as sufficiently accurate [192-206].

59. During the adjournment Mr Anderson spoke to HR. He reached his decision, which he explained to the claimant after reconvening.

60. Mr Anderson considered the claimant's account of the attempted purchase of furniture. He concluded that there were too many anomalies and changes in position for it to be credible. He believed that the claimant had falsely described a situation involving financial loss in order to obtain compensation. His conclusion was that there was sufficient evidence to find that the claimant was guilty of misconduct, and that he should be dismissed.

61. Mr Anderson confirmed that his decision would be set out in full in a letter to follow, along with details of how the claimant could appeal the decision.
62. Next Mr Anderson completed a 'Disciplinary Hearing Outcome Summary' document [207-212]. This was dated 16 August 2021. In it he stated the allegations to be answered, the conduct rules which were potentially breached, a summary of the evidence established in the investigation, the claimant's position in response, and the rationale for his decision.
63. The document was sent to HR who used it as the basis for a draft outcome letter which was sent back to Mr Anderson for review. He approved it and it was sent to the claimant on 19 August 2021 [214-222]. It is therefore taken to be the equivalent of Mr Anderson's own words.
64. In the outcome letter Mr Anderson:
- a. Summarised the discussion;
 - b. Explained his key findings;
 - c. Confirmed that he believed the claimant's conduct was fraudulent and amounted to gross misconduct, with reference to the respondent's existing standards;
 - d. Confirmed that the claimant's employment was being ended immediately;
 - e. Explained the claimant's right of appeal; and
 - f. Stated that a reference to CIFAS would be made.

Appeal

65. The claimant emailed a letter appealing against his dismissal to HR on 23 August 2021.
66. The letter was acknowledged by an Individual within the respondent's HR Hub named Lorinda Udejiofo. She replaced Mr Greenwood as the provider of HR

support in the process. An appeal hearer was identified and briefed. His name was Niall McCurdy, who was a Certified Business Manager based in Belfast.

67. As a result of the claimant appealing his dismissal, the proposed reference to CIFAS was put on hold.

5 68. The claimant was invited to an appeal hearing on 21 October 2021, again via Teams. He once more joined using audio but not video. The invitation letter explained the process which would generally be followed, and indicated that this would not involve a complete re-hearing of the original disciplinary case. Mr Anderson would be asked to attend in order to answer any questions about
10 his stage of the process.

69. The meeting took place on 21 October 2021. Notes were taken by a Mr Dickson and are treated as a reliable summary of the discussion [262-267].

70. The claimant provided a further piece of evidence in the form of a screenshot of an exchange via WhatsApp he had had with someone at Tesco. This was
15 in relation to the second part of the disciplinary case, namely that he had fabricated an account of trying to purchase some items on 15 May 2021, only for his card to be declined because of the outage. The claimant had asked whether a record would have been kept of declined transactions. The response was that Tesco did not, but it was believed that his bank – i.e. the respondent – should have a record.
20

71. Mr McCurdy was unable to reach a decision on the day and so brought the meeting to a close, saying that he would consider all of the issues and try to reach a decision shortly after.

72. Mr McCurdy wished to investigate further the claimant's account of having a purchase declined at his local Tesco store on the afternoon or evening of 15
25 May 2021. Via HR a request was sent to the respondent's Special Investigations Unit for any information that may have been gathered about a declined transaction on that occasion. On 9 November 2021 a member of the unit emailed HR to say that the system outage only affected Mastercard Debit cards, and as all of the claimant's cards were of a different type on a different
30

system, they should not have been affected. The individual expressed concern that the suggestion of a different type of card being affected by being declined appeared to suggest fraud.

5 73. Upon receipt of this information Mr McCurdy completed a hearing outcome template [277-286]. In it he set out the reasons why he had decided to uphold the original decision of Mr Anderson to dismiss the claimant for gross misconduct.

10 74. Mr McCurdy confirmed his decision to the claimant in a letter dated 18 November 2021 [287-291]. The issuing of Mr McCurdy's letter marked the end of the respondent's internal disciplinary process.

75. A referral was made to CIFAS to the effect that the claimant had been dismissed for an act of dishonesty.

The parties' submissions

15 76. Both parties provided written notes of their closing submissions which they addressed orally in the hearing. Those are not reproduced or summarised in detail, but the parties' arguments are referred to below in dealing with the identified issues in the claim.

Discussion and conclusions

The reason for the claimant's dismissal

20 77. The respondent argues that the claimant was dismissed by reason of conduct, under section 98(2)(b) ERA. This was said to be the sole reason for his dismissal. The claimant does not contest this point. He did not argue in the disciplinary process or in the tribunal hearing itself that the respondent had a different motive. On the basis of all of the evidence, and particular the oral
25 evidence of the respondent's witnesses, it has been established that the claimant was dismissed by reason of his conduct. The documented disciplinary process which was followed supports this finding. Deliberate dishonesty, which is what Mr Anderson believed had occurred, falls within the scope of conduct.

General reasonableness of the respondent's process

78. In assessing the overall reasonableness of an employer's actions in such cases ***British Home Stores Ltd v Burchell [1978] IRLR 379*** will apply. That decision requires three things to be established before a conduct related dismissal can be fair. First, the employer must genuinely believe the employee is guilty of misconduct. Secondly, there must be reasonable grounds for holding that belief. Third, the employer must have carried out as much investigation as was reasonable in the circumstances before reaching that belief.

10 ***Burchell part 1***

79. In relation to the first part of the Burchell test, Mr Anderson gave clear evidence to the effect that it was the claimant's conduct which caused him to make the decision to dismiss. That evidence is accepted. Again, it was not challenged by the claimant in the process, or at the hearing before the tribunal.

Burchell part 2

80. It is next necessary to consider whether the respondent had reasonable grounds for holding the belief that the claimant was guilty of misconduct.

81. Looking first at what Mr Anderson as dismissing officer had by way of evidence, there was a transcript of the claimant's interactions with the Customer Advisor who assisted him on 19 May 2021. This was a timeous and complete record of the exchanges between the two. He also had reliable notes of the claimant's more detailed account of his circumstances and motives from the fact find meetings. He had a sufficiently clear and complete picture of the facts on which to base his decision.

82. Mr Anderson had enough evidence to draw the conclusion, as he did, that the claimant's account involved too many unlikely details and changes in position. Essentially Mr Anderson had to form a judgment about the claimant's credibility based on the evidence. There was nothing to suggest he did so other than by doing his best to evaluate the evidence in as neutral a way as

possible. There is no reason for the tribunal to interfere with that assessment, as per *Morgan v Electrolux Limited 1990 ICR 269* which was referred to in the respondent's closing submissions. In that case, the Court of Appeal issued a reminder that a tribunal would be making an error of law by substituting the employer's view about the credibility of one of its employees with its own – again, without there being any factors suggesting the employer went about that assessment in the wrong way. Such factors might have been a lack of relevant evidence, a mistaken belief about the evidence, the interference of others or personal bias. No such elements were present in this case.

- 5
- 10 83. Whether Mr Anderson was entitled to reach the view that the claimant was guilty of misconduct at the level of gross misconduct is a separate matter. The seriousness of his conclusion was something he had to make a decision about. Given the standards set by the respondent, and the particular emphasis placed on honesty and integrity in roles such as the claimant's, he was entitled to categorise the claimant's misconduct – again as he saw it – as the most serious type.
- 15

Burchell part 3

- 20 84. The third limb of *Burchell* requires consideration of whether the employer carried out as much investigation as was reasonable in the circumstances in order to reach its genuine belief in the employee's misconduct. That does not require an employer to uncover every stone, but no obviously relevant line of enquiry should be omitted.
- 25 85. Considering again the disciplinary allegations raised, the evidence gathered and the claimant's response to them, it is found that the respondent's investigation met the required legal standard. The legal test, as emphasised in *Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23* is whether the investigation fell within a band of reasonable approaches, regardless of whether or not the tribunal might have dealt with any particular aspect differently. This means that the respondent should do everything reasonable to gather the relevant facts, but not necessarily absolutely everything possible without regard to time, cost or the likelihood of meaningful results.
- 30

86. There was no material area of enquiry which the respondent failed to follow up, document it declined to consider or witness which it omitted to speak to. So, for example, it became clear that no further evidence would reasonably be available from the two parties the claimant had alleged were involved in the transactions which could not be completed - i.e. Tesco and his partner's aunt. He himself said that he had deleted all WhatsApp messages from his aunt, and she had done likewise with the conversation.

The band of reasonable responses

87. In addition to the *Burchell* test, a tribunal must be satisfied that dismissal fell within the band of reasonable responses to the conduct in question which is open to an employer in that situation. The concept has been developed through a line of authorities including *British Leyland UK Ltd v Swift [1981] IRLR 91* and *Iceland Frozen Foods Ltd v Jones [1982] IRLR 439*.
88. The principle recognises that in a given disciplinary scenario there may not be a single fair approach, and that provided the employer chooses one of a potentially larger number of fair outcomes that will be lawful even if another employer in similar circumstances would have chosen another fair option which may have had different consequences for the employee. In some cases, a reasonable employer could decide to dismiss while another equally reasonable employer would only issue a final warning, or vice versa. Both decisions could be justifiable.
89. It is also important that it is the assessment of the employer which must be evaluated. Whether an employment tribunal would have decided on a different outcome is irrelevant to the question of fairness if the employer's own decision falls within the reasonableness range and the requirements of section 98(4) ERA generally. A tribunal must not substitute its own view for the employer's, but rather judge the employer against the above standard. How the employee faced with disciplinary allegations responds to them may also be relevant.

90. Mindful of the above approach which a tribunal must take in dealing with the question of reasonableness, it is found that dismissal of the claimant was within the band of reasonable responses open to the respondent in these circumstances.
- 5 91. In particular, it was reasonable on the evidence before him for Mr Anderson to consider that the claimant was guilty of gross misconduct, and that it was appropriate to dismiss him. He, or another manager, may have decided differently on the same facts but that does not change the fairness of the decision which was taken.
- 10 92. In reaching this assessment, it was recognised that the effect of Mr Anderson's decision was to effectively end, or at least temporarily curtail, the claimant's career in the banking sector. He had studied at university in order to obtain a degree in support of that career. Despite the significant effect of the decision, there was adequate evidence that the respondent placed the
15 highest emphasis on honesty and integrity among its employees. In the particular context of this claim, the decision to dismiss fell within the set of reasonable outcomes available to Mr Anderson.
93. Further, it was consistent with the above that a reference was made to CIFAS.

Further submissions and issues raised by the parties

- 20 94. Mr Cunningham for the claimant argued a number of points in particular in closing submissions, and so those are specifically referenced in this section of the judgment.
95. It was noted that within the respondent's disciplinary process, an employee's line manager should be excluded from investigating their conduct where there
25 are concerns about bias. On that basis, Mr Smith ought to have been removed as investigator as a consequence of the claimant's grievance and replaced by another manager. To ensure no taint of bias remained, the investigation should have been started afresh.
96. It is correct that the respondent's disciplinary process contained that caveat.
30 Ms Uzzell was told as much by HR. However, Ms Uzzell found that there was

insufficient evidence of Mr Smith being biased against the claimant. She was entitled to reach that view, since she had the relevant evidence before her and spoke to Mr Smith, Mr Wallis and the claimant himself. HR advised that the norm was for a line manager to carry out the initial investigation.

5 97. Further, it is difficult to see in any event how the relevant content of the investigation would have been different had another manager conducted it either in place of Mr Smith from the very start, or by coming in and repeating what he had done. The key pieces of evidence, being the transcript of the customer chat, the claimant's own account of events and some contextual
10 technical evidence, would have most likely been the same.

98. In any event, the disciplinary decision was made by Mr Anderson who had no previous contact with the claimant and gave him an adequate opportunity to be heard.

99. Therefore, whilst replacing Mr Smith with another investigator was an option
15 open to the respondent, it did not render its disciplinary process – or the claimant's dismissal – unfair because that choice was not made.

100. The claimant made two separate but connected points in relation to the way in which the Customer Advisor or complaint handler dealt with him on 19 May 2021 during the recorded chat. He argued that the individual's agreement to
20 provide £50 in compensation contributed to the claimant being found to have breached the rules, when instead that person should have ended the conversation at an earlier stage and referred any misgivings to more senior management at that point. By not doing so, the claimant was essentially the victim of entrapment, or at least had become compromised in a way which
25 was avoidable. He also believed that Mr Smith's investigation should have included consideration of whether the complaint handler followed the correct procedure in granting the claimant the compensation amount, but that was not explored.

101. Mr Cunningham on the claimant's behalf went on to say that because no
30 concerns were immediately raised or acted upon, he was put at a disadvantage when asked to attend the first fact find discussion on 4 June

2021, some two weeks later. This delay increased the risk that the claimant's account was less precise, or any evidence he had to support it, such as WhatsApp messages, was lost.

102. This is another example of a way in which the respondent's procedure could
5 have been better than it was. Were the claimant telling the truth about having exchanged WhatsApp messages with his partner's aunt, he may well have not deleted them had Mr Smith met with him on an earlier date. However, the delay of two weeks was not unreasonably long and it is plausible that the process of the complaint handler forming a view that they had concerns worth
10 escalating via an internal whistleblowing procedure, and then those being referred back to Mr Smith for follow up, could take that long. Implicit in this is that the complaint handler may not have believed while the chat was going on that there was anything untoward, and only formed that suspicion some time after it had ended. Ultimately therefore any delay which was not justified by
15 the process which had to be followed did not take the respondent's actions outside the band of reasonable responses.

103. Finally, Mr Cunningham argued that Mr Anderson had contradicted himself at two different stages of the disciplinary process. In the disciplinary hearing he had said that he was confident that the claimant was aware of the extent of
20 the system issues on 15 May 2021, whereas at the appeal before Mr McCurdy he had said that a case could be made either way on that point, and he was not dealing with absolutes.

104. Mr Anderson was justified in saying that the issue was not an absolute, as there was not complete certainty over what the claimant knew and when.
25 What mattered was that he concluded that the claimant was aware by 19 May 2021 that owing to the extent of the system outage, Customer Advisors were given discretion to offer up to £50 to compensate complaining customers for their inconvenience. As such, he made a finding which was open to him and his two comments are not in any event inconsistent – Mr Anderson could be
30 'confident' that the claimant had sufficient knowledge without being one hundred per cent sure.

Conclusions

105. As a result of the above findings it is not necessary to address further matters such as questions in relation contributory conduct, reduction in compensation under the Polkey principle, mitigation of loss or other aspects or remedy.

- 5 106. The respondent has shown that the claimant was dismissed because of his conduct, and applying the relevant legal tests the tribunal is satisfied that the respondent implemented the decision to dismiss in a reasonable way and using a fair process. The claim of unfair dismissal is therefore unsuccessful and is dismissed.

10

Employment Judge: Brian Campbell
Date of Judgment: 14 April 2022
Entered in register: 19 April 2022
and copied to parties

15