



EMPLOYMENT TRIBUNALS

Claimant: Mr J Calvert
Respondent: Sequence (UK) Limited
On: 11 September 2024
Before: Employment Judge McAvoy News
Heard at: Leeds Employment Tribunal (via CVP)

Appearances:

For the Claimant: In person
For the Respondent: Ms L Redmen, Counsel

RESERVED JUDGMENT

The Claimant was not unfairly dismissed. His claim is not well founded and is dismissed.

WRITTEN REASONS

Issues

1. On 6 September 2024, Judge Lancaster wrote to the parties and, within that letter, summarised the legal issues in this claim. These are expanded upon in greater detail below. Both parties agreed that these were the issues and, from the Claimant's perspective, when discussing this at the outset of the hearing, a focal point was on the reasonableness of the investigation.

Unfair dismissal

2. The parties accept that the Claimant was dismissed. What was the reason or principal reason for dismissal? The Respondent says the reason was conduct.

The Tribunal will need to decide whether the Respondent genuinely believed the Claimant had committed misconduct.

3. Was it a potentially fair reason?
4. If the reason was misconduct, did the Respondent act reasonably or unreasonably in all the circumstances, including the Respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the Claimant? The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case. It will usually decide, in particular, whether:
 - a. there were reasonable grounds for that belief;
 - b. at the time the belief was formed the Respondent had carried out a reasonable investigation. The Claimant confirmed at the outset of the hearing that this was central to his complaint and that he did not believe that the Respondent had undertaken a reasonable investigation because he did not believe the correct questions were asked of the lender or the insurance provider;
 - c. the Respondent otherwise acted in a procedurally fair manner; and
 - d. dismissal was within the range of reasonable responses. Although this was not highlighted by the Claimant as an important part of his claim at the outset of the hearing, it became clear during the course of the evidence that this was another central part of the claim, with the Claimant believing that, in the circumstances, dismissal was too harsh a sanction. The Respondent had already anticipated that this would form a central part of the Claimant's claim and had defended the same accordingly.
5. The Claimant confirmed at the outset of the hearing that he was not pursuing a claim for wrongful dismissal/breach of contract in respect to his notice pay.

Evidence

6. The Claimant served a witness statement and was cross examined on that statement. The Respondent served witness statements for Katrina Manning, Paul Hitchins and Sundeep Tailor who were also cross examined.
7. I also had sight of a bundle of documents totalling 496 pages (the bundle comprised of 495 pages and the final page was provided separately).
8. Having considered the evidence, both oral and documentary, I make the following findings of fact on the balance of probabilities.

Findings of fact

Background

9. The Claimant commenced employment with the Respondent in early January 2021. His employment terminated on 23 November 2023. At the time of his dismissal, he was a senior mortgage adviser, having been promoted into this role in May 2022.
10. The Respondent provides property services, namely estate agents and lettings. It also provides mortgage services. It is part of a wider group of companies, authorised and regulated by the FCA.
11. The Claimant's role involved helping people apply for mortgages and income protection insurance policies. The Claimant accepted that he had been a mortgage adviser for a long time, having started in 1997. Since that time he had worked for a number of different financial institutions as well as running his own mortgage broker business.
12. The Claimant was required to comply with the Respondent's 'Mortgage Advice Standards Manual (MASM)' and 'Protection Advice Standards' Procedure (PASM)', to ensure compliance with the FCA's requirements. He accepted that MASM required details of client's vulnerability to be recorded [467]. He also accepted that MASM required each application to be fully completed to reflect the customers' needs, views and circumstances and the information provided by him on the forms completed needed to be true. He also accepted that where there was a change to the information provided, this needed to be amended and the amendment needed to be accurate. He accepted he was trained on these rules.
13. The Respondent's representative directed the Claimant to the insurer's rules which began at page 449. The Claimant accepted he was aware of these, that he had been trained on these and that he was checked on these frequently by the Respondent. These stated: "It is imperative all [insurer] underwriting questions are answered accurately and honestly, reflecting the customer's true circumstances. Failure to do so will increase the chances of a claim not being paid when the customer needs it the most" [463]. He accepted in cross examination that a customer needed to be employed for the last 12 months and that they needed to be registered with a UK doctor/GP for the last two years (meaning that they needed to be resident in the UK for the last two years) in order for them to be eligible for the particular insurance product relevant to this case. He accepted it was a disciplinary offence to purposefully manipulate the information given to the insurer. He accepted that, even if the customer wanted the cover, his role was to be truthful and, if he was not truthful, he could put the customer at risk.
14. The Respondent's representative put to the Claimant that if a person was unable to demonstrate permanent employment for the past 12 months, they were unlikely to be able to get a mortgage with this particular lender. The Claimant disagreed. He said six months' worth of employment status was sufficient. He accepted however that with an agency worker, 12 months employment was needed but he had a different interpretation of an agency worker to the Respondent. He considered an agency worker who had been employed in the

same business, albeit paid by an agency, or various different agencies, would be a permanent employee. This is considered further below.

Key performance indicator review

15. On 16 October 2023, a key performance indicator review was carried out by the Claimant's line manager, Katrina Manning (Mortgage Services Area Director). Ms Manning had been the Claimant's line manager since May 2023. These reviews took place between Ms Manning and her direct reports individually, once per quarter. Their purpose was to look at the products that had been sold to customers, including any good customer outcomes received.
16. As part of this review, the Claimant received a low risk rating [107]. Relevant to this, it was accepted between the parties that the Claimant was generally a good performer.
17. Following this review, Ms Manning asked the Claimant about three cases for a particular client, Client X. She asked the Claimant to obtain further information from Client X that day, namely an up to date payslip and a copy of his contract of employment to show current income. The Claimant was informed that he may need to revisit the case once this information had been provided and may have to re-do the policy [115]. The Claimant accepted in cross examination that Ms Manning had said this to him.
18. Ms Manning reviewed Client X's file in full on 25 October 2023. This included applications for mortgage and insurance products which the Claimant completed on behalf of Client X. Ms Manning was concerned that, following this review, it could be deemed that the Respondent had not been honest with the lender or insurer. As such, Ms Manning commenced an investigation.

Investigation

19. An investigation meeting with Ms Manning and the Claimant took place on 26 October 2023. Daniel Irvine, Mortgage Services Sales Manager, attended as a note taker. Although the Claimant complained about Mr Irvine's involvement during the internal process, he accepted during this hearing that Mr Irvine's role was limited to taking notes and Mr Irvine did not ask any questions during the investigation meeting. The typed notes began at page 122 of the bundle. The Claimant accepted in cross examination that he was asked the questions and provided the answers written in these notes. The notes of this meeting, which the Claimant did not specifically challenge with Ms Manning in cross examination, record the fact that the Claimant:
 - a. Confirmed that when he met Client X in March 2023, he had only been in the UK for 5/6 months;
 - b. Explained Client X's case was difficult due to his English. However, when asked whether he recorded/documented Client X as a vulnerable customer, he said he did not;

- c. Explained that he was keen to protect Client X;
 - d. Accepted that he ought to have updated Client X's employer's details on the Respondent's systems when he started working for Arden University, rather than Staffline. He also accepted that he hadn't updated the employer details when the Claimant moved to different agencies (e.g. Adecco, Randstad). He said this was because he was providing services to Schneider, via these agencies, and he considered his employment to be permanent albeit through these agencies because it was the same "end user" that was ultimately receiving the services;
 - e. Accepted that he did not inform the lender that Client X was on a 12 month probation;
 - f. Accepted that he did not check the information received from Client X in full; and
 - g. Accepted that he had ticked yes to the questions about whether Client X had been working for the last 12 months and whether Client X was registered with a UK doctor for the last two years. When asked why he said that he must not have read them in detail. In this regard, the Claimant accepted that he had sold Client X an insurance policy that he was not eligible for.
20. Towards the end of this meeting, the notes record Ms Manning stating: "What that tells me is that you're more worried about people, getting the customer what they want and not doing your job properly – you're passionate about your customers, you've given your customer a policy that he can't claim on, and put a mortgage to a lender that they're not eligible for and taken their word for it" [131].
21. A further investigation meeting with the Claimant took place on 3 November 2023. During this meeting, the Claimant was suspended. This was then confirmed in writing that day [166].
22. With regards to the mortgage product, the Claimant had recorded Client X as a permanent employee which did not appear to be the case. This was addressed in detail in evidence during this hearing. The Claimant's position was that the Claimant worked for an agency but the end user he was providing services to for longer than 12 months was the same organisation. He therefore considered the Claimant to be permanently employed.
23. The Claimant had also informed the lender that Client X had a permanent right to reside in the UK, which he did not have. Emails from Client X highlighted this and queried whether this would create a problem with his mortgage application.
24. Ms Manning's evidence was that she contacted the lenders helpline and spoke to someone called 'Steve' who was previously an underwriter. Steve told Ms Manning that as part of the mortgage application, the client would need one year of payslips and a P60. Steve told Ms Manning that the underwriter would

not have checked the payslips in Client X's case and would instead expect the mortgage adviser to have carried out the correct due diligence before confirming answers on the application form. It was confirmed that Client X's property purchase completed on 20 July 2023.

25. Ms Manning explained in evidence during this hearing that Steve was unable to look at the specifics of Client X's case because exchange had already taken place on the house purchase meaning that the information was no longer visible. She had asked Steve to do so because she was unclear why the application had gone through when, based on the criteria, it should not have. She accepts that she has no notes of this call.
26. She also said that, considering the loan to value of this particular product that Client X was purchasing, it would be classed as a POD-A which means automatic underwriting applies. The underwriters would only check the amounts on the payslips, rather than the detail of them (e.g. who the employer was etc) because they trusted the mortgage advisers to undertake the correct due diligence. The checks would be automatic rather than manual. I asked Ms Manning some questions about this and she explained that POD-A applies where the client has a 30% or more deposit, which Client X had.
27. The Claimant was insistent that the mortgage would have been underwritten manually and stressed to Ms Manning that her failure to ask this specific question meant that they could not be certain about this. However, he did not point to any evidence in support of this.
28. I asked Ms Manning whether the outcome would have been different if the mortgage was manually underwritten. She said it wouldn't have been manually underwritten as it did not meet the criteria. If it was manually underwritten due to the error of the underwriter at the lender, Ms Manning said this wouldn't have made a difference because the Claimant had still not followed the process when undertaking the due diligence and providing information to the lender.
29. Ms Manning considered emails between the Claimant and Client X and reached the conclusion that the Claimant was trying to manipulate the situation with the client in order to get the mortgage approved with this particular lender. Emails showed the Claimant asking Client X to arrange for funds in his wife's name to be transferred to Client X.
30. With regards to the insurance product, Ms Manning found that the Claimant had given incorrect advice to Client X. In particular, the Claimant had answered yes to a question concerning whether Client X had been working for the past 12 months and this was not the case. He had also answered yes to a question about whether Client X had been resident in the UK for two years when he had not. The insurance product was sold to Client X however, if the answers had been processed accurately, he would not have been eligible.
31. Ms Manning's evidence was that she contacted "Matt" at the insurer who confirmed that Mr X would not be eligible for the policy because he had not been working for the past 12 months and because he had not been registered with a

UK doctor for the preceding two years. She says Matt told her that if the Claimant had ticked “no” to these questions, he wouldn’t have been able to apply for the policies as he wouldn’t have been able to progress the completion of the form any further. She accepts that she had no notes of this call.

32. The Claimant accepted in evidence that he made a mistake when completing the insurance application but this was a genuine human error whilst providing support to a vulnerable member of his community. In cross examination he said that the Claimant was the only income earner and was borrowing the maximum amount. In his desire to try and protect him (e.g. to ensure he had insurance in place if something happened to him that meant he was unable to pay his mortgage), he got it wrong by answering those questions incorrectly. He accepted that Client X may not be covered under the policy and this was not a good customer outcome. He also accepted that, whilst he had recognised Client X was vulnerable, he had not recorded him as being vulnerable on the Respondent’s systems. He said that “what’s more important is how I treated the customer, rather than how it was documented”.
33. The Claimant relied heavily on the fact that he understood that the insurer had undertaken a medical on Client X and therefore it should be assumed from that that the insurer was happy to insure Client X. Ms Manning’s position was that the process would not have reached the medical examination stage if the Claimant had answered the questions correctly. The medical examination stage was a separate stage in the process and just because it reached this stage does not mean that someone else had checked the answers that the Claimant had provided and made sure they were accurate.
34. He also asked when this policy was cancelled. He said that if the policy had been incorrectly put into place, the first thing the Respondent ought to have done is cancel it. Ms Manning did not know the answer to this.
35. As part of this investigation, Ms Manning also reviewed some of the Claimant’s other cases. Some cases showed clients applying for insurance when they had not been working for over 12 months [222]. The Claimant accepted this was the case when asked in cross examination. Another case involved a mortgage application being made with both clients living together at the same address however the clients had not lived together for 18 months. In cross examination, the Claimant accepted that the concern regarding this latter case was raised by someone else, when his cases were being covered during his suspension. He also said that this couple needed an agreement in principle and they did not have time to change their ID documents to complete such an agreement.
36. Given the seriousness of her concerns, Ms Manning also contacted the Respondent’s Financial Crime Team and asked them to undertake their own checks.
37. Ms Manning also reviewed a competency review for the Claimant that had been completed by his former manager just over a year before [202]. This identified a training need had been identified for the Claimant, namely that he was required to ensure that the sales process was followed as per MASM and

PASM. It transpired that, on this earlier occasion, the Claimant had not followed the Respondent's processes in full in order to make life easier for the Claimant. This was discussed with the Claimant and training was arranged for him. Ms Manning noted that training was also booked and the Claimant confirmed, in cross examination, that he attended such training.

38. Although I was provided with several versions of the investigation report, the final version begins at page 212. The Claimant said in cross examination that he had still not read this document in full as he considered it to be a personal statement against him. He also said that in evidence that this investigation report did not comprise the full picture; for example, in respect of some of the entries, there was a drop down menu allowing free text to be inserted. This would have been visible on the information provided to the lender/insurer but was not visible in the report. However, this was not a point that the Claimant raised at the time, in his claim and nor did he put this to the Respondent's witnesses when he was cross examining them.
39. The Claimant raised several times during his evidence that he had processed applications in this way consistently and if this was not correct, the checks he had carried out ought to have been red however they were consistently green. However, this was not a point that he put to Ms Manning, in cross examination, in respect to the checks that she had undertaken on his files.
40. The Claimant volunteered in evidence that he considered Ms Manning to be the hardest working person he has worked with, who doesn't do short cuts.

Disciplinary proceedings

41. On 13 November 2023, the Claimant was invited to a disciplinary hearing arranged for 15 November 2023. Enclosed with this letter was the investigation report and the Respondent's disciplinary policy.
42. This letter confirmed that the allegations being considered against the Claimant were:
 - a. Bringing or potentially bringing the Respondent into disrepute due to concerns over misleading a leader and potentially committing mortgage and insurance fraud;
 - b. Behaviour which was prejudicial to the Respondent's interests or which undermined the confidence and trust in the Respondent;
 - c. Failing to comply with the Respondent's reasonable requirements; and
 - d. Breaches of FCA rules 1 (acting with integrity), 2 (acting with due skill, care and diligence) and 6 (acting to deliver good outcomes for retail customers).
43. In submissions, I asked the Respondent's representative whether all four of these reasons were being relied upon. She told me that they were, but they

were intertwined and at their heart was the provision of inaccurate information which put the Respondent in disrepute and prejudiced its interests.

44. The letter also informed the Claimant that he could attend the hearing with a companion and warned him that the allegations potentially constituted gross misconduct, meaning that outcome could be the termination of his employment. Investigation materials were enclosed.
45. The hearing took place on 15 November 2023 and was chaired by Paul Hitchins, Mortgage Services Regional Director. The Claimant chose to attend without a companion. In cross examination the Claimant accepted that he was given the opportunity to present his case and respond to the questions that he was asked.
46. At the outset, the Claimant requested that the hearing be postponed as the Claimant was too upset to read the investigation notes. Mr Hitchins refused this request and the hearing proceeded.
47. During the disciplinary hearing, the Claimant made a number of concessions regarding his conduct. This included the point about Client X living in the UK for more than 12 months when he had not. He accepted in cross examination during this hearing that he said, several times during this disciplinary hearing, that he had made errors.
48. Following the hearing, Mr Hitchins undertook his own review. This required him to be given access to the Respondent's electronic system, to enable him to access the customer cases relevant to the allegations that were being made against the Claimant.
49. After being given such access, Mr Hitchin's unchallenged evidence was that he could see firsthand what the Claimant had inputted whilst he tracked Client X's mortgage application journey. He saw nothing different to what was in the investigation report.
50. He also said in evidence that he spoke to both the lender and the insurance provider, although he accepts that he did so generically and he has no notes of these discussions. Both referred Mr Hitchins back to the written criteria mentioned earlier. It is worth nothing at this juncture that the contemporaneous documents do not suggest that Mr Hitchins made these enquiries at the time therefore I can understand why the Claimant may have been confused about this. However, the fact that Mr Hitchins was saying during this hearing that he spoke with these third parties when it was not apparent from the documents that he had done so was not a matter that the Claimant raised in cross examination. Therefore I do not know what Mr Hitchins would have said in respect to any questions regarding this.
51. The Claimant put to Mr Hitchins that he had asked him to speak with the lender and the insurance provider about the specific case. Mr Hitchins disputed this. Mr Hitchins said that he spoke with the lender generically but asked about a client in the same situation as Client X. He echoed what Ms Manning had said, namely that because the client had moved into pre-completion, the information

was not available. He discussed the criteria with the lender who said that the mortgage would not have been approved. He said he also asked the insurance provider whether they would pay out if a claim was submitted by a client who had not been with a UK doctor for 2 years and they said they would not. He said he didn't refer to the customer specifically but applied the same criteria.

52. As he had done with Ms Manning, the Claimant put to Mr Hitchins during this hearing that because the medical was completed on the customer, this meant that the insurance had been approved. Mr Hitchins explained that the medical assessment is undertaken by a third party. He said that the information given at the outset to start the process was incorrect; had the Claimant ticked the boxes correctly, the outcome would have been different. Mr Hitchins went further and said in evidence that he believed the Claimant had manipulated the information to get the answer he wanted.
53. The disciplinary hearing reconvened on 23 November 2023. Mr Hitchins asked the Claimant why he ticked yes to the following questions: does a customer have rights to reside in the UK and are they a UK resident? The Claimant's reply was, "when you tick no for those questions, it will just say don't lend to the customer. The depth to the question isn't there".
54. In reaching his decision, Mr Hitchin's evidence was that the Claimant had admitted his actions but he had tried to explain them away, either by stating that he was acting in the client's best interests or that he felt there was a nuanced interpretation of the guidance. Mr Hitchins said that he found it difficult to accept the Claimant's responses and his answers didn't stack up.
55. He concluded that the Claimant had misled a lender, committed potential mortgage fraud and that his behaviour was prejudicial to the Respondent's interests. He also concluded that the Claimant breached the FCA rules and, considering all of this, he had committed gross misconduct.
56. Relevant to his decision to dismiss the Claimant was that Mr Hitchins concluded that the Claimant knew what he was doing and therefore had not made a mistake. He concluded that data had been manipulated by the Claimant to gain an advantage with the lender to either obtain or speed up an offer being made to a client. He was aware of and mindful of the training need that had been identified the year before and the training that the Claimant had been on. He did not feel therefore that further training would assist. The training would always tell the employee to input the truth of the situation yet the Claimant had decided not to do so for reasons which he had elected were in the client's interests, even though they were contrary to the Respondent's policies.
57. In evidence, Mr Hitchins explained that the Claimant had put a customer at risk because he did not meet the criteria for the insurance product yet the product was still purchased. The effect of this was that if the client ever sought to claim on the insurance, his claim would be refused because he was never eligible for the policy in the first place. The Respondent's representative put to the Claimant that inaccurate answers can put the customer and, in turn, the Respondent's business at risk. The Claimant agreed.

58. In re-examination, Mr Hitchins was asked whether his decision would have been different if the mortgage had been manually underwritten. He said it would not. The Claimant had made a pattern of mistakes. These mistakes were particularly important due to the reputational risk that the Respondent could have been exposed to. He said: “customers have negative views of insurance companies not paying out. That’s the situation in this case. Customers are at risk of paying money that they wouldn’t be able to claim for”.
59. On 24 November 2023, the Respondent wrote to the Claimant to confirm that he had been dismissed without notice for gross misconduct. He was offered an appeal. The Respondent’s representative put to the Claimant in cross examination that it was the reasons set out in this letter that caused Mr Hitchins to make this decision and the Claimant agreed.

Appeal proceedings

60. On 30 November 2023, the Claimant requested an appeal against his dismissal [329].
61. As part of his appeal, he requested that the lender be contacted to ascertain whether they had underwritten the case. He believed that the lender did underwrite the case meaning that, he believed, they would have checked the pay slips and visa status and were willing to offer the mortgage. His position therefore was that the mortgage provider had not been fraudulently misled.
62. He also requested that the insurance provider be contacted. In this regard, he accepted that he had answered the initial questions incorrectly but as the client had had a medical completed by an organisation who works with the insurer, he wanted to ascertain whether the policy was in place correctly.
63. He explained that he had made mistakes but they were not deliberate acts. He suggested the outcome of dismissal was therefore too harsh. He offered to undertake additional training.
64. On 4 December 2023, the Claimant was invited to an appeal meeting arranged for 12 December 2023.
65. The appeal meeting took place on 12 December 2023. It was chaired by Sundeep Tailor, Divisional Mortgage Services Director. In cross examination the Claimant accepted that, during this hearing, he was given the opportunity to present his case. He also accepted that he thanked Mr Tailor for giving him the opportunity to put his side of the story across.
66. Following the appeal hearing, Mr Tailor undertook further investigations such as interviewing Mr Hitchins, Ms Manning and Mr Irvine. These investigation meetings were delayed until 10 January 2024. Mr Tailor accepted this delay which he said was attributable to the Christmas period and pre-booked annual leave as well as meetings. The Claimant stated in cross examination that Mr

Tailor's investigation was impressive, noting that all conversations had been fully documented.

67. Ms Manning confirmed that she did contact the lender as well as checking their criteria which said they would not lend to agency workers. She said that this particular lender do not check the data on the payslips, they just check that the payslips are attached to the case. This is because they trust the due diligence undertaken by employees such as the Claimant. She explained that if the Claimant had inputted the data correctly into the form, it would not have passed through the computer checks and would have been picked up by an underwriter. Ms Manning also confirmed that she had contacted the insurance provider. She said that they would not accept a claim from the client and wouldn't pay out if the client made a claim in the future. She explained at the end that her trust in the Claimant had gone because of this conduct.
68. The Claimant had complained about how Ms Manning's notes had been written which Mr Tailor investigated. Mr Hitchins explained that he did consider the notes of the investigation meeting with Ms Manning to be worded or written in a way that suggested the Claimant was guilty without a balanced approach being undertaken. However, he said this didn't change the investigation or the outcome, it was just the wrong choice of words being used in the notes. He explained that a lot of work was undertaken by him after the disciplinary meeting looking at the notes and investigating the points that the Claimant had made. In terms of whether he had spoken with the lender, Mr Hitchins said the information he needed was on the lender's guides. He said he considered the mistakes that the Claimant admitted to were not minor and there were trends in terms of the same mistakes being repeated. He was concerned about the insurance policy and the fact that the insurer would not pay out. He considered this to be a short cut, a misrepresentation to the customer which placed the customer at risk.
69. Mr Tailor's evidence was that, following his review of the documents and his interviews with the above mentioned individuals, he formed the same view as Mr Hitchins. He concluded that there were a number of failings on the Claimant's part that led to poor customer outcomes and in doing so the Claimant had breached the FCA rules. He considered the Claimant's length of service and performance record but concluded that these did not mitigate the seriousness of his conduct. He considered an alternative sanction, such as a final written warning, but did not consider this to be appropriate. He was concerned in particular about the fact that the Claimant had misrepresented a client's position to an insurer and lender.
70. Mr Tailor accepted that he did not speak with the lender or the insurance provider. This was because they had already been questioned by Ms Manning and Mr Hitchins and therefore Mr Tailor considered it to be more appropriate to interview these individuals.
71. On 15 January 2024, Mr Tailor confirmed his decision regarding the Claimant's appeal in writing. He set out his findings and concluded that there were a number of failings on the Claimant's part which led to poor customer outcomes.

The Law

72. The relevant parts of s.98 Employment Rights Act 1996 (**ERA**) state:

- (1) *In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*
 - a. *the reason (or, if more than one, the principal reason) for the dismissal...*
 - b. *that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
- (2) *(b) relates to the conduct of the employee;*
- (3) ...
- (4) *Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*
 - a. *depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
 - b. *shall be determined in accordance with equity and the substantial merits of the case.*

73. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions in ***Burchell 1978 IRLR 379*** and ***Post Office v Foley 2000 IRLR 827***. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (***Iceland Frozen Foods Limited v Jones 1982 IRLR 439, Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23, and London Ambulance Service NHS Trust v Small 2009 IRLR 563***).

Submissions

74. Both parties provided oral submissions. They are not set out in detail in these reasons but both parties can be assured that I have considered all the points made, even where no specific reference is made to them.

Conclusions

What was the reason or principal reason for the Claimant's dismissal?

75. The Claimant was dismissed because the Respondent formed the conclusion that the Claimant had provided inaccurate information to at least one lender and insurance provider which the Respondent believed placed customers (including Client X), these organisations and the Respondent at risk. The Claimant accepted in cross examination that these were the reasons for his dismissal and did not seek to advance a case that the Respondent had an ulterior motive for his dismissal.

Was that a potentially fair reason for dismissal?

76. Yes, this gives rise to a conduct issue which is a potentially fair reason for dismissal.

Did the Respondent act reasonably or unreasonably in all the circumstances, including the Respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the Claimant? In particular:

A. Did the Respondent have a reasonable and genuine belief that the Claimant had committed this act of misconduct?

77. Yes, Mr Hitchin's gave clear and unchallenged evidence regarding this belief. Indeed, the Claimant admitted that he had provided inaccurate information, although he said that one of his reasons for doing so was error. He also accepted that this placed the Respondent at risk and acknowledged that, in respect of the insurance product, the insurer would not pay out if a claim was made by Client X. This was also clear from the contents of the investigation report.

B. At the time the belief was formed, had the Respondent carried out a reasonable investigation?

78. Yes.

79. In considering this, I have had to decide whether the investigation was within the range of reasonable responses and I must not substitute my view for that of the Respondent. I cannot, for example, consider what I would have done if I was responsible for this particular investigation.

80. In my conclusion, a reasonable investigation, or the investigation that a reasonable employer would have done in this situation, is likely to have involved consideration of:

- a. Did the Claimant provide inaccurate information to third parties such as lenders and insurers?;
- b. Why did he do so?;
- c. What impact did this have?; and
- d. Are there any mitigating circumstances?

81. All of these points were investigated and considered by the various managers involved in this case.
82. The Claimant accepted that he had provided inaccurate information, not just in respect of Client X, but in respect of other customers as well. As well as the Claimant conceding this, the Respondent investigated into these individual matters which is apparent from the detailed investigation report.
83. The Respondent attempted to understand why he had done so and whether he was clear about the rules that he was supposed to follow. His reasons were mixed. He said that he had done so through error, because he had not read the forms fully, because he had a different interpretation of the relevant rules and because he thought he was acting in the customer's best interests. The Respondent observed that the Claimant had worked as a mortgage adviser for some time and was aware of the relevant rules. They noted that he had recently received training on the same. Mr Hitchins considered all of these points when reaching his decision.
84. Although the Claimant accepted his conduct could have placed the customer and the Respondent at risk, he disputed the assertions that mortgage fraud had been committed. He was adamant that the lender would have underwritten the mortgage and that the insurance policy was validly in place. However, in making these representations, the Claimant demonstrated to the Respondent that he believed the lenders and insurance providers followed different rules and processes to those which the Respondent had trained and instructed him to follow.
85. The Claimant insisted that a reasonable investigation would have involved the Respondent speaking with the insurer and the lender about these specific cases. The Respondent did not do so and I have had to decide whether this decision takes the conduct of the investigation outside of the range of reasonable responses. Relevant to this decision is:
- a. The Claimant did not challenge whether Ms Manning or Mr Hitchins spoke with the insurer and the lender. He accepted that these conversations did take place albeit he complained about their lack of formality e.g. no notes of the conversations were provided and, as is clear from these Reasons, he complained strongly about the questions which were not asked (considered below);
 - b. The Respondent's firm evidence was that they could not speak with the lender about this particular case because completion had taken place and the information was no longer visible. Although the Claimant disagreed, he could not challenge with this any evidence;
 - c. Two managers from the Respondent had spoken with the lender and the insurer about a hypothetical case involving the same facts. Both the lender and the insurer said that the client would not have been eligible for the product for the same reasons described earlier in these Reasons

and, in respect of the insurance product, if a claim was brought by the client, they would not pay out;

- d. These two managers reviewed the written guidance from the lender and insurer, which the Claimant also had access to, and reached the same conclusion based on such guidance; and
- e. In respect to the mortgage, the Respondent's position was that this particular lender approached cases differently. Those with higher deposits, and therefore created less risk for the lender, went through an automatic underwriting processes that relied upon the mortgage adviser providing honest information. It is stressed in the Respondent's policies quoted earlier that the provision of honest information is paramount. Although the Claimant insisted that the mortgage would have gone through a manual underwriting process, he was not able to point to any evidence of why this would be the case with this particular deposit in mind. In this regard I recognise that the Claimant was unable to obtain any confirmation from the lender themselves to the fact that the Respondent did not ask this specific question.

86. Considering all of the above in particular, the Respondent's conclusion that the mortgage would not have been manually underwritten by the lender was reasonable. As was their conclusion that the insurer would not have insured Client X. The rules are clear from the documentation and two of the Respondent's witnesses gave evidence, under oath, that they had discussed similar but hypothetical scenarios with both organisations who had said that the client has not eligible. The Claimant's interpretation of being employed technically by a service provider yet paid by the agency/ies was, understandably, rejected by the Respondent. It is clearly not permanent, secure, employment when an individual is providing agency work, even if they provided such work to the same organisation for 12 months or more. They don't have a permanent contract of employment with the end user, guaranteeing them a certain amount of work per week on an open ended basis. The Respondent's conclusion that the medical examination is a separate process and that this would not have been arranged if the Claimant had not ticked the boxes he ticked also appears to be a reasonable one. Had the Respondent been able to ask the insurer and the lender about these specific cases, I consider it likely they would have received the same information.

87. It is relevant that the Claimant received a low risk rating, in particular immediately prior to the commencement of the investigation. But this does not negate the fact that the Claimant accepted that, in respect of the matters that the Respondent raised concerns about, he had provided inaccurate information.

88. I have concluded, therefore, that the investigation undertaken was within the range of reasonable responses open to the Respondent.

C. Were there reasonable grounds for that belief?

89. Yes, the evidence gathered, including the Claimant's own representations, clearly supported the belief that the Claimant had provided inaccurate information to at least one lender and insurance provider which placed customers (including Client X), these organisations and the Respondent at risk. The risk was particularly evident in respect of the insurance product. Client X thought that he had purchased a policy that would protect him and his family in the future, should they be unable to meet their mortgage repayments. As it happens, they have not. If Client X attempted to claim on such policy, it appears very likely that the insurer will not pay out. As well as financial difficulties for Client X, this no doubt creates reputational risk for the Respondent and the insurer. People purchase insurance to protect them in these situations. This client will have no protection if this happens. I can understand the Claimant's insistence that the policy ought to have been cancelled and we don't know either way whether this was done. But it appears evidence and was certainly reasonable for the Respondent to have concluded that the policy should not have been put in place to begin with and it wouldn't have been put in place if the Claimant had not provided inaccurate information to the insurer.

D. Had the Respondent otherwise acted in a procedurally fair manner?

90. Generally yes, although I have one concern about this. The Claimant had not read the investigation report but Mr Hitchins still decided to proceed with the disciplinary hearing and ask him questions about the same. A reasonable employer would have adjourned the hearing, even if just for 30 minutes or so, to ensure the employee read this in full, before proceeding. I have concluded however that this procedural issue did not render the dismissal unfair. The Claimant still acknowledged that he had provided inaccurate information and the Respondent reasonably concluded that this placed them and other third parties, as explained above, at risk. Additionally, the Claimant said in evidence that he was given the opportunity to present his case and respond to the questions asked. Furthermore, the Claimant also said during this hearing that he had still not managed to read the report in full. Offering the Claimant an adjournment to read it might therefore have not made any difference.

91. The Claimant also sought to rely in evidence on the delay in dealing with the appeal process. The Respondent acknowledged the delay and I can understand why inaction between 12 December 2023 and 10 January 2024 would frustrate the Claimant. However, the Christmas and New Year holidays were in the middle of this period and coupled with other business commitments that Mr Taylor and the people he was interviewing are likely to have had during this time, this delay does not place the conduct of the appeal procedure outside the range of reasonable responses.

E. Was dismissal within the range of reasonable responses?

92. Yes.

93. Again, as part of considering this, I am required to consider whether a reasonable employer would have dismissed the Claimant. I am strictly not

allowed to take into consideration whether I would have dismissed, had I been in Mr Hitchin's shoes.

94. On one hand, dismissing the Claimant for providing inaccurate information without any formal warnings being in place, in circumstances where the Claimant admitted his errors and showed some contrition, appears to be harsh.

95. However, this case is more nuanced than that and for the following particular reasons I have concluded that dismissal was within the range of reasonable responses:

- a. Client X was not the only customer that the Claimant had provided inaccurate information for. He had done so for others and these were not realised by the Respondent until the Claimant's work had started to be passed to his colleagues during his suspension;
- b. The Claimant's failure to follow the Respondent's processes had been raised in the recent past and the Claimant had received training on this; and
- c. The Respondent's conclusions regarding the Claimant's motivations for providing such information were reasonably reached. The evidence does strongly suggest that the Claimant did so because he was keen to ensure that the client managed to secure the product. It is reasonable to conclude that this is not good customer service if the client is not eligible for the product, particularly in respect of the insurance related products.

96. In summary, the Respondent reasonably concluded that the Claimant had provided inaccurate information to third parties in circumstances where he was or ought to have been aware of the importance of not doing so. This created risks as, if the insurer did not pay out when an otherwise valid claim was made, the Respondent and the insurer would likely be criticised. It created risk for the customers because they thought they were paying for something that would assist them in the future, should they be unable to repay their mortgage. However, as it happens, it won't assist them at all. Not only will they have lost the money they paid for their premium but they won't have insurance in place to help them. This could be a significant life changing event for a family who may face the prospect of having to sell their home. Although the Claimant admitted what he considered to be mistakes, he demonstrated to the Respondent that he was prioritising what he considered to be in his clients best interests, above the rules that the Respondent had in place, that he had been trained on. The Respondent therefore reasonably concluded that another sanction, such as a warning or a final written warning, together with further training, would not bring about the desired improvement. As Ms Manning said, her trust in the Claimant had gone and the Respondent would likely have had to actively supervise every matter that the Claimant worked on subsequently, to ensure the same issues did not arise again. The Claimant understood the rules and procedures and had been trained on them fairly recently. The decisions he took arose out of a mindset which was contrary to the Respondent's rules and the Respondent

reasonably took the view that further training would not assist in changing such mindset.

97. Consequently, the Claimant's claim is not well founded and is dismissed.

Employment Judge McAvoy News

Date: 16 October 2024

Sent to the parties on:

Date: 18th October 20224
For the Tribunal:

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