



Case Number: 3322583/2016

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
Mrs Y Wang McIntosh

and

Respondent
Royal Bank of Scotland plc

Hearing held at Reading on 19 and 20 April 2017

Representation Claimant: Mr J Davies, counsel
Respondent: Mr W Rollinson, solicitor

Employment Judge Mr SG Vowles (sitting alone)

RESERVED JUDGMENT

Name of Respondent

1. The correct name of the Respondent is Royal Bank of Scotland plc and the title to the proceedings is amended accordingly.

Evidence

2. The Tribunal heard evidence on oath and read documents in a bundle provided by the parties. From the evidence heard and read the Tribunal determined as follows.

Unfair Dismissal – section 98 Employment Rights Act 1996

3. The Claimant was dismissed on 25 November 2015 and that was the effective date of termination. The dismissal was unfair. This complaint succeeds.

Wrongful Dismissal - article 3 Employment Tribunals Extension of Jurisdiction (E&W) Order 1994

4. The Claimant was not guilty of gross misconduct such as to justify summary dismissal. The dismissal was wrongful. This complaint succeeds.

Remedy Hearing

5. The case will now be listed for a remedy hearing.

Reasons

6. This judgment was reserved and written reasons are attached.

REASONS

Submissions

Claimant

1. On 28 February 2016 the Claimant presented complaints of unfair dismissal and wrongful dismissal to the Tribunal.

Respondent

2. On 13 March 2016 the Respondent presented a response and resisted both claims. It asserted that the Claimant had been fairly and lawfully dismissed by reason of gross misconduct.

Evidence

3. The Tribunal heard evidence on oath on behalf of the Claimant from Mrs Yi Wang McIntosh (Personal Mortgage Advisor).
4. The Tribunal also heard evidence on oath on behalf of the Respondent from Mr Gavin Owens (Area Manager and dismissing officer) and Mr Nicholas Warwick (LCEO and appeal officer).
5. The Tribunal also read documents in a bundle provided by the parties.
6. From the evidence heard and read, the Tribunal made the following findings of fact.

Findings of Fact

Background

7. The provision of mortgage advice is regulated by the Financial Conduct Authority and an individual dispensing mortgage advice to customers must be authorised to do so. In order to become authorised an individual must undergo a training course and acquire the qualification of competent advisor status. The Claimant was granted this status on 3 June 2015. She thereupon was authorised to provide personal mortgage advice to the Respondent's customers without supervision.

Investigation

8. In July 2015 a concern was raised regarding one of the Claimant's files and a review was undertaken. The concern related to the planned retirement age of customers Mr & Mrs G. The Claimant was interviewed about this matter by Mr

Will Mould and Mr Ben Guth on 3 July 2015. This interview led to further concerns and further investigations were conducted into other files completed by the Claimant. In total 6 files were investigated and a further investigation meeting was conducted by Mr Mould and Mr Guth with the Claimant on 10 August 2015.

9. During interviews with mortgage applicants the Claimant would complete a "Customer Fact Find Form" which included, amongst other things, their planned retirement age. This was important because mortgage terms could not run beyond the age of 70. If an applicant planned to retire before this age, but the mortgage term ran to the age of 70, enquiry had to be made regarding the applicant's ability to continue to pay the mortgage after they had retired from work. It was assumed that for most people their income would reduce after retirement and it was unacceptable for the mortgage term to exceed the planned retirement age unless the applicant could show that they had the means to continue to pay the mortgage. For example out of savings, investments, lump sum on retirement, or a pension.
10. The Respondent had a process called "Income Into Retirement" (IIR) whereby the mortgage adviser would make enquiries with the applicant regarding their ability to pay the mortgage after retirement and may require them to provide documentary evidence of that ability.
11. The Respondent's "Mortgage Suitable Advice Guide v2.4" included the following guidance:

*"The earlier questions will establish if the loan runs into retirement and a yes or no answer should be recorded at this point.
If the answer is yes – then the questions below should be asked.
The loan still must be settled before the age of 70.
You should only recommend a term that exceeds the customer's retirement age once all the other options have been considered as most customers will experience a significant reduction in their income once they retire.
You can only recommend a mortgage run into retirement if the customer has the ability to service the loan post-retirement, for example through a private pension. Pensions are acceptable, as is investment income.
If a customer confirms that they will be able to service the loan post-retirement documentary evidence of how they will do this may be required.
Therefore it is worth establishing at this stage if the customer has suitable evidence such as pension contribution statements.
This information is used to assess the affordability of the mortgage into retirement."*
12. Although it was not entirely clear from Mr Owens' dismissal letter which of the 6 files were taken into account in the decision to dismiss the Claimant, during

his evidence at the Tribunal he confirmed that it was only 3 files - Mr McF, Mr & Mrs S and Mr & Mrs B. The file of Mr & Mrs G was not, apparently, included in the basis for the dismissal.

13. In respect of each of the 3 files, the Claimant had noted on the Customer Fact Find Form that the planned retirement age was 70. In each of these cases Mr Mould and Mr Guth had therefore telephoned the applicants to ask about their planned retirement age. They did not give evidence at the Tribunal but Mr Owens said in his witness statement:

"I also asked Ben [Mr Guth] what questions he asked customers regarding their planned retirement ages. I did this to establish if he was asking the right questions. He confirmed that the question asked was "what age are you planning to retire?" and if relevant "For your mortgage purposes we have age 70, are you planning on retiring at this age?". I did not think this was a particularly complicated question and I do not think it could have confused customers.

I also called one customer myself (I think it was customer McF...but I cannot be certain as it was some time ago). Ben had already spoken to this customer during the investigation process. When I called them, I recall that they confirmed a different retirement age to me than had been recorded by the Claimant on the Fact Find Form. They had said 67 to me and I understand this was the same age given to Ben during the investigation process. The Claimant had recorded the age of 70 on the Fact Find Forms and the discrepancy itself was not disputed by the Claimant. When I asked the customer "would you work until 70?" the customer said "not a chance".

14. In respect of Mr McF, Mr Guth had recorded in handwriting on an investigation form the response from Mr McF during his telephone call as follows:

"Wanted 25 years however couldn't due to age. Will be retiring at 67. However at state retirement age. Not 70."

15. In respect of Mrs S, Mr Guth had reported the following response, again in handwriting:

"We had chosen a term but we did look at a 20 year term also (retire at 65)."

16. In respect of Mr B, there was no written account of the telephone call in the bundle but in the dismissal letter it is stated: *"For example, Mr Bury stated that he planned to retire at age 66."*

Disciplinary Action

17. Due to the discrepancies between the planned retirement ages which the Claimant had entered on the Customer Fact Find Forms and the ages stated during these later telephone calls to the applicants, the Respondent concluded that there was evidence of misconduct and that the Claimant should be the subject of disciplinary action. Having been interviewed by Mr Mould and Mr Guth on 3 July 2015 and 10 August 2015, the Claimant was suspended on 13 August 2015. The suspension letter included the following:

“Following an investigatory meeting, you have been suspended from duties. During this time, you should not come into work and must not enter your place of work unless agreed with your line manager.

This is a precautionary measure whilst we carry out an investigation into an allegation that you have raised the retirement age for a number mortgage [sic] applications above that which was advised by the customers. The investigation will be done as quickly as possible and you will be kept up to date.

You will be paid as normal for the period of suspension.”

18. On 11 September 2015, the Claimant was invited to a disciplinary meeting to answer the following allegations of gross misconduct.
- Falsifying or suppressing a RBS document or record
 - Serious and/or persistent neglect of RBS instructions
19. Attached to the letter were the following:
- Minutes of investigation meetings with William Mould dated 3 July, 10 August and 13 August 2015
 - Minutes of meeting dated 29 January 2015
 - Letter detailing outcome of disciplinary meeting dated 29 January 2015
 - Copy of disciplinary policy and support pack.
20. Documentation regarding the cases of Mr and Mrs G, Mr & Mrs S and Mr McF was referred to but not enclosed for reasons of confidentiality, although it was said that these documents would be available for the Claimant to read at the disciplinary meeting and would be taken into account.
21. A disciplinary meeting was held on 17 September 2015 chaired by Mr Owens. The Claimant attended but chose to be unaccompanied. She was taken through the allegations against her and Mr Owens said that it appeared to him

that she had changed retirement ages on the Customer Fact Find Forms. He said:

38. *The Claimant also claimed that people were being asked questions about retirement during the CCEs which they did not understand or that these questions had been asked in the wrong way. She stated that customers often wanted to pay until they were 70 but wanted to retire at 55. I wanted to know if she thought she needed to explain the impact of that on the customer in terms of their mortgage and their requirement to be working until their retirement age for mortgage purposes. It is her responsibility to inform the customer of this impact. She suggested that it would depend on the customer and was different for everybody.*
 39. *I felt that the Claimant continued to blame other people. She insisted that no documentation was falsified and she didn't trust the way that Ben or anyone else conducting CCEs had been asking the questions around planned retirement ages. I therefore wanted to investigate the matter further before making any decision. ...*
 42. *Following our meeting and the points raised by the Claimant, I wanted to undertake some further investigation to establish whether she didn't have the capability to follow the correct process, either due to lack of training or some other reason, or whether it was just that she didn't want to follow the Bank's processes correctly.*
22. Accordingly, the disciplinary meeting was adjourned for Mr Owens to conduct further investigations and did not reconvene until 25 November 2015. It was during these further enquiries that the case of Mr and Mrs B was discovered. Regarding this second meeting, Mr Owens said:
57. *To me it seemed that a lot of the Claimant's customers wanted to take their mortgages to the Bank's maximum age of 70 but the Claimant had not discussed the impact this would have on the customer should they retire before then. I saw no documentation that such conversation ever took place.*
 58. *In order to assess when a customer plans to retire, I felt that the question that should have been asked was "When are you retiring?" it should not be "when would you be willing to work until to make your mortgage affordable?". This is because the latter question opens up the possibility that the customer would apply for a longer mortgage term than originally planned in order to make it more affordable but still plan to retire at an earlier age without being taken through the correct FCA Handbook MCOB affordability tests detailed in the SAG including*

the IIR process.

59. *None of these affordability tests or conversations appeared to have been done in the cases looked at. As mentioned earlier customer [Mr B] confirmed that he would be retiring at age 66 but an age of 70 was recorded and there was nothing documenting a discussion around this and therefore the Claimant's file was not compliant. I therefore thought that this was a risk to the Bank and this particular customer.*
61. *After an adjournment, I informed the Claimant that my decision was to dismiss her for gross misconduct and that written reasons would be provided after the meeting.*

Dismissal

23. The decision to dismiss was confirmed in a letter dated 7 December 2015 which included the following:

Why you have been dismissed

I took all the information into consideration when reaching my decision. I concluded that you have failed to meet the acceptable standards in relation to the act of falsifying RBS documents or records. I have taken this decision because I believe you have misrepresented customer needs by falsifying records whilst undertaking mortgage interviews and completing applications. I also believe that you have failed to follow the correct process where the customer may have benefited from the Income Into Retirement process. I believe your actions could potentially cause a significant risk both financially and reputationally to the Bank's customers and the Bank.

As advised your dismissal took place with immediate effect and your last day of employment was 25 November 2015. You will be paid 37 hours outstanding holiday entitlement which is due to you on a pro rata basis as at the date of dismissal.

Appeal

24. The Claimant presented an appeal against the dismissal on 18 December 2015 but, due to ill health, requested that the appeal be dealt with in writing and the Respondent agreed to do so. The appeal was conducted by Mr Warwick who conducted some further investigations and produced his outcome letter on 18 May 2016. He dealt with all the Claimant's appeal points and the summary read as follows:

Summary - I have addressed each of your appeal points in turn. I have reviewed the documentation made available to me from the informal

investigations meetings and the disciplinary process. I have conducted interviews of my own with those who were involved throughout those processes and I have decided to uphold the decision to dismiss you. I believe that you have failed to follow the bank's processes correctly and you have deliberately falsified bank records and documents. This is considered gross misconduct under the bank's disciplinary policy and is grounds for summary dismissal. I believe this has been done so that you could have the benefit of having mortgages written that otherwise may not have been and to save yourself time by not having to complete the income into retirement process detailed in the Suitable Advice Guide. When questioned by the ADQM customers Greenway, [Mr Mcf, Mrs S and Mr B] all reported lower retirement ages than the age recorded by you on the mortgage application. In doing so you have misrepresented the customers' needs and this could potentially cause a financial and reputational risk to the bank and our customers.

25. The appeal was therefore rejected and the decision to dismiss was upheld.

Decision

Unfair Dismissal

26. Under section 94 of the Employment Rights Act 1996 an employee has the right not to be unfairly dismissed by her employer.
27. For cases involving misconduct, the relevant law is set out in section 98 of the Act and in the well-known case law regarding this section, including British Home Stores v Burchell [1978] IRLR 379, Post Office v Foley [2000] IRLR 827, and Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23. From these authorities, the issues for the Tribunal to determine were as follows.
28. Firstly whether there was a potentially fair reason for the dismissal under section 98(2) and did the employer have a genuine belief in the misconduct alleged. The burden of showing a potentially fair reason rests with the employer.
29. Secondly whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating the misconduct as a sufficient reason for dismissing the employee under section 98(4), in particular did the employer have in mind reasonable grounds upon which to sustain a belief in the misconduct and, at the stage at which the employer formed that belief on those grounds, had it carried out as much investigation into the matter as was reasonable in all the circumstances of the case. Did the investigation and the dismissal fall within the range of reasonable responses.

30. Thirdly the Tribunal must not substitute its own view for that of the employer, but must assess the actions of the employer against the range of reasonable responses.
31. The ACAS Code of Practice on Disciplinary Procedures sets out the steps which employers must normally follow in such cases. That is, establish the facts of each case, inform the employee of the problem, hold a meeting with the employee to discuss the problem, allow the employee to be accompanied at the meeting, decide on appropriate action and provide the employee with an opportunity to appeal.
32. In the Claimant's ET1 claim form, the allegations of unfairness were set out as follows:

22. *In the circumstances, no reasonable employer could have concluded the Claimant had deliberately falsified records for personal gain or failed to follow the process detailed in the suitable advice guide. The Respondent could not have had a reasonable belief that the Claimant had done such things on the basis of the evidence it had before it.*

23. *Furthermore, the dismissal was procedurally unfair in that:*

- (a) *the investigation was inadequate;*
- (b) *the Respondent failed to seek exculpatory evidence;;*
- (c) *the Respondent's mind was closed;*
- (d) *the Respondent failed to give the Claimant sufficient notice of investigatory and disciplinary meetings;*
- (e) *the Respondent failed to supply the Claimant prior to the investigatory or disciplinary meetings with documentation on which it was seeking to rely or to seek out documentation the Claimant requested in order to be able to defend himself.*

24. *In the circumstances, the Respondent has dismissed the Claimant in breach of Sections 94 and 98 of the Employment Rights Act 1996.*

25. *Furthermore, the Respondent failed to give notice to the Claimant of its intention to dismiss her.*

33. Additionally, during the course of the Tribunal hearing, the Claimant referred to documents which had been disclosed by the Respondent during the Tribunal process. These were the Customer Fact Find Forms and letters referred to as "Suitability Letters" in the Respondent's Mortgage Suitable Advice Guide as follows:

Chapter 8: Suitability Letter

Background and purpose

The customer should be issued with a Suitability Letter within 2 working days for the seller (excluding Saturdays or bank holidays) after any advice has been given or after there has been a material change to the customer's circumstances within 2 working days (excluding Saturdays or bank holidays) of the advisor being advised of this change.

Advice being given constitutes a verbal recommendation of a suitable mortgage product whether an application has been submitted or not.

This gives the customer documented proof for your recommendation. Failure to do so will result in the file being marked as non-compliant. The construction of the Suitability Letter is through deleting the unnecessary sections of the template and adding personalised customer information to make it unique to this application. For the examples detailed in the guidance above – the blue words are those to be personalised to make the Suitability Letter bespoke to the customer's needs and circumstances.

34. In each of the 3 files relied upon by Mr Owens to find the allegations against the Claimant proved, such a letter had been sent to the mortgage applicants. Each letter included a copy of the Customer Fact Find Form which stated that the planned retirement age was 70 years old, and also included the following paragraph: *"If you have any questions about this letter, the mortgage I have recommended or the enclosures, please call me on [telephone number]. If any of the details are incorrect or if your circumstances have changed, please let me know as this may affect my recommendation".*
35. Additionally, in each letter there was a section headed *"Mortgage Term"* in which the Claimant described in detail the mortgage term, the means by which the mortgage would be repaid and, in each of the 3 cases, ended with the following words: *"This means that the mortgage will be paid off before your intended retirement age of 70".*
36. The Tribunal did not find Mr Owens to be a reliable witness. Despite being the dismissal officer, he seemed to be unprepared for the hearing and could not recall many relevant matters, stating that they happened *"a long time ago"*. Although the telephone interviews with applicants were at the very heart of allegations against the Claimant, he said in his witness statement that he had personally called one customer but said *"I think it was customer McF... but I cannot be certain as it was some time ago."*
37. Remarkably, neither Mr Owens nor Mr Warwick were aware of the existence of the Suitability Letters. Although copies of the letters must have been on the Respondent's files, they were not considered during the course of the

- investigation or the disciplinary and appeal procedures.
38. This was a remarkable omission which made the investigation and the disciplinary process seriously flawed. This was particularly so in respect of Mr Owens' evidence in paragraph 57 of his witness statement (quoted above). He said that the Claimant had not discussed the impact of taking a mortgage to the age of 70 and that he "*saw no documentation that such a conversation ever took place*". Neither Mr Owens nor Mr Warwick thought to ask themselves the simple and obvious question - Was anything regarding the planned retirement date confirmed in writing to the mortgage applicant? If they had been aware of, and examined the Suitability Letters in each case, they would have seen that not only had the Claimant discussed such matters with the applicant but she had set them out in writing with a request that if any of the details were incorrect, the applicant should let her know.
 39. The Customer Fact Find Form taken together with the Suitability Letters clearly showed that the Claimant had discussed the impact of the planned retirement date on repayment of the mortgage with each applicant. Mr Owens confirmed that there was no evidence that any of the applicants had complained about details in the letters being incorrect, nor indeed had they complained at all.
 40. The only evidence which contradicted what the Claimant had put in the Customer Fact Find Forms and the Suitability Letters were the brief handwritten notes of telephone calls with the applicants some weeks or months after their interview with the Claimant. The phone calls were made without prior warning. There was no formal record (apart from Mr Owens' conversations with Mr Mould and Mr Guth) of the questions which were asked of the applicants. This, and only this, evidence formed the basis for the Respondent's conclusion that the Claimant was guilty of the charges alleged against her.
 41. There was no evidence of falsifying or suppressing an RBS document or record or of serious and/or persistent neglect of RBS instructions. On the contrary, had a reasonable investigation been conducted and the Suitability Letters considered, the evidence would have shown that the Claimant had recorded what the applicants had told her regarding planned retirement ages and that she had then immediately written to them to confirm that detail as required by the RBS instructions.
 42. There was no breach of the Respondent's instructions regarding the IIR process. If an applicant had a planned retirement date of 70, there was no need to go through the IIR process because the planned retirement date would fall after, or coincide with, the end of the term of the mortgage.

- 43. The dismissal letter lacked the necessary detail of how and why it was said the Claimant was guilty of the charges set out in the invitation letter. There was disagreement between Mr Owens and Mr Warwick as to what mortgage files were taken into account in the decision to dismiss. This was not surprising in view of the lack of detail in the dismissal letter.
- 44. The Tribunal found that the investigation was not reasonable and that there was insufficient evidence upon which to base a finding of misconduct, much less gross misconduct.
- 45. The decision to dismiss was outside the range of reasonable responses.
- 46. The dismissal was unfair.

Wrongful dismissal

- 47. The test for wrongful dismissal is different to the test for unfair dismissal. In wrongful dismissal the reasonableness or otherwise of the employer's actions is irrelevant. The question is whether the Tribunal considered the employee to have been guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract.
- 48. The Tribunal looked objectively at the evidence placed before it and could find no evidence of gross misconduct such as to justify summary dismissal. It is clear from the above that the Tribunal found that there was insufficient evidence to support a finding of misconduct, much less gross misconduct.
- 49. There was no evidence that the Claimant had conducted herself in such a way as to commit a fundamental breach of her contract of employment.
- 50. The dismissal was wrongful.

Employment Judge Vowles

Date:11 May 2017

Reasons sent to the parties on

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For the Tribunal office