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# EMPLOYMENT TRIBUNALS

***Claimant***

***Respondent(s)***

Mr I Hussain

**AND**

Santander UK Plc

**Heard at:** London Central

**On:** 23-24 May 2017

**Before:** Employment Judge Oliver Segal QC

**Representation**

**For the Claimant:** In person

**For the Respondent:** Mr P Linstead, of Counsel

Reasons provided following request pursuant to Rule 62(3) of the Employment Tribunal Rules of Procedure 2013.

## REASONS

**Claim**

1. The Claimant brings a claim of unfair dismissal.

**Evidence**

2. The Claimant gave evidence on his own behalf.
3. For the Respondent, I heard evidence from Ms Maxine McMenamin, HR People Consultant, Mr Mark Watson, Branch Director, Mr Darren Cheshire, Divisional Manager, Mr Peter Sutton, Head of Transformation etc.. and Ms Louise Moore, HR Consultant.
4. I had an agreed bundle of documents.

**Facts**

5. The Claimant worked for the Respondent as a Personal Banker at its High Street Kensington Branch (“the Branch”). The Respondent is a well-known high street bank.

6. On 12 November 2015, the Claimant was suspended on the basis that he was suspected of falsifying customer signatures. The following day the Claimant raised a grievance which he had been planning to raise in any event, he states, against colleagues in the Branch, as a result of which the disciplinary process was adjourned. The grievance was not upheld (the outcome was provided in February 2016) and the Claimant did not appeal.

7. There were various investigators appointed to deal with the disciplinary investigation, who were then replaced at the request of the Claimant (who was represented throughout the disciplinary process by a union rep), on the basis that they were, or could be seen as potentially biased by reason of their friendship with one or more of those people at the Branch against whom the Claimant had brought the grievance, or had been tainted by considering a report made by such a person, or had worked within the same region as the Claimant.

8. During that period, some contact had been made, or attempted, by Branch officers and/or one of those appointed to investigate (Ms Emma Fuller) with the customers whose signatures it was thought the Claimant had falsified (“the Customers”). When the eventual investigator, acceptable to all parties, was appointed in May 2016, Mark Watson, it was agreed with the Claimant through his union rep, that the Customers should not be contacted again.

9. On Mr Watson’s recommendation, the matter proceeded to a disciplinary hearing in front of Mr Cheshire, on 3 and 19 August. Mr Cheshire dismissed one of the three charges, but upheld the other two; namely, that the Claimant

9.1. had been required to complete a new document in the name of TS after that customer had left the Branch and had done so, falsifying her signature, rather than going to the trouble of getting the customer to return to the Branch to sign herself; the Claimant did not and does not dispute that the relevant signature is not that of TS, but asserts that the falsification was not made by him (though he completed the rest of the form) but was rather the replacement of a genuine signature of the customer TS by a colleague at the Branch with an animus towards the Claimant, perhaps using an ink eraser pen;

9.2. had again been required to complete a form for MH when that customer was not in the Branch, and had done so by falsifying the customer’s signature rather than require him to attend the Branch again; that signature did not match the verified signature held on record by the Respondent, although the Claimant’s case (supported implicitly by a letter purportedly from MH which the Claimant handed to Mr Cheshire on 3 August 2016) was and is that MH had more than one way of signing his name and that the supposed falsified signature was in fact a true one.

10. There is no dispute that the Respondent's published procedures categorise the falsification of customer signatures as gross misconduct, regardless of the motive. It is not alleged that the Claimant had any motive of financial or other personal gain; only that he falsified the documentation in order to save time, effort and embarrassment.

11. Accordingly, Mr Cheshire made the decision that the Claimant should be dismissed for gross misconduct, which was communicated orally to the Claimant on 19 August 2016 and in writing on 30 August 2016.

12. The Claimant appealed that decision. Mr Sutton heard and dismissed that appeal in January 2017.

### **Law**

13. Section 98 ERA 1996 provides that where, as here, the employer has shown a potentially fair reason for dismissal, *"the determination of the question whether the dismissal is fair or unfair ... (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."*

14. Since this is a misconduct dismissal, I bear in mind the guidance given by the EAT (approved repeatedly since) in Burchell v BHS [1980] ICR 203. The Claimant did not challenge the genuineness of the conclusions reached by Mr Cheshire or Mr Sutton; rather he asserted that those conclusions were not reasonable in the circumstances given the flaws in the investigation of the facts.

15. Iceland Frozen Foods Ltd v Jones [1983] ICR 17, subsequently approved by the Court of Appeal in other cases, is authority for the well-known proposition that a tribunal must not substitute its own decision on the reasonableness of a dismissal for that of the employer; rather the tribunal must decide, objectively, whether the decision to dismiss was within the range of reasonable responses of a reasonable employer.

16. I was referred to only two authorities, by the Respondent, to one of which I make brief reference: Monji v Boots Management Services Ltd EAT/0292/13, in which at para 59 it is pointed out that substantive (as opposed to strictly procedural) criticisms of an employer's disciplinary investigation are material only if they *"establish an evidential basis to suggest that another line of inquiry would have led to the unravelling of the case against the [employee]"*.

### **Conclusions**

17. In the end, this is a straightforward case. Despite the Claimant's detailed forensic analysis of the primary factual material and the steps taken and not taken by the Respondent in investigating the allegations, it is not the tribunal's function to re-hear the charges against the Claimant; although (not unnaturally, particularly in light of the Respondent's alternative case that if the dismissal was unfair, compensation should be refused or reduced on Polkey grounds and/or

because the Claimant had contributed to his own dismissal by his actions in falsifying documents), much evidence was concerned with the primary facts rather than simply the decisions of Mr Cheshire and Mr Sutton. I am able quite easily to find that the Respondent was entitled to and did reasonably conclude that, on the balance of probabilities, the Claimant falsified the two signatures he was in the end found to have falsified.

18. I do have some concerns as to the investigation.

18.1. The Respondent did bend over backwards to accommodate the Claimant in relation to the Claimant's concerns about the impartiality of successive people appointed to investigate the allegations. The Respondent acted fairly and appropriately in responding to those concerns and I do not accept that at any point the Respondent appointed someone who they should have known better than to appoint on the basis of potential partiality. However, the Respondent in one respect did get the worst of two worlds; in that they sacrificed a quick hearing in favour of satisfying the Claimant's concerns as to the independence of the investigator, but did not require the investigator finally appointed, Mr Watson, to begin the investigation afresh; thus laying itself open to the predictable criticism that Mr Watson's investigation and indeed the subsequent disciplinary hearing was tainted by the earlier gathering of information by two people, Mr Clark and Ms Fuller, whom the Respondent had seen fit to remove from the investigatory role. However, I do not believe that had Mr Watson begun the investigation afresh, the outcome would have been different: there is no *"evidential basis to suggest that another line of inquiry would have led to the unravelling of the case against"* the Claimant.

18.2. That is particularly so in light of the agreement that Mr Watson should not be in contact with the relevant customers again so that all the information that the Respondent had from those customers had been gathered by Mr Clark and Ms Fuller.

18.3. The Claimant criticises the Respondent for not promptly copying relevant CCTV footage. I can see the force of this criticism potentially in relation to the allegation that was eventually not upheld in relation to Mr OH (although there is a query over whether by the time the relevant concern was raised the CCTV footage had already been erased). I am less convinced it was a natural course to look for CCTV footage in relation to the other two allegations and I am not convinced that even had it been obtained, it would have thrown much light on the matter. The Claimant says that it might have evidenced his completion of the form in the TS case at a time he said he had done that, but it is rather unlikely that it would have captured sufficient detail in the photographs to be persuasive in that regard.

18.4. The most obvious potential omission in the investigatory process was the failure of the Respondent to be in direct contact with TS herself, though they were in contact with LS, her mother, who accompanied TS to the Branch on the material occasion. There is no evidence that the

Respondent even attempted particularly to be in contact with TS. True it is that later on, and certainly by the time Mr Cheshire dealt with the matter, the Claimant had agreed that the signature that was being queried could not be that of LS and there is circumstantial evidence by reference to other signatures that LS provided on the same date or dates similar to that date that she would not have used a different signature on the form in question. However, without contacting TS, the matter could not be put entirely beyond doubt; it would have been natural to be in touch with her; and that should have been done in my view. I note that in relation to the TS case, somewhere along the line the impression was formed, including by Mr Cheshire, that TS had in fact confirmed she had not signed the relevant form; whereas she had not been asked that question. However, since both the employer and the tribunal are applying a balance of probability test, that failure was not material: Mr Cheshire considered (and I agree) that the overwhelmingly more likely explanation for the false signature of TS was that the Claimant had inserted it when completing the rest of the form; rather than that the form had in fact been signed by TS and a third person had erased that signature without trace and substituted a false one purely with a view to implicating the Claimant in wrongdoing.

18.5. A less significant criticism was the failure to be in touch with Mr H in July following the production of a letter purportedly from him to Mr Cheshire, which on its face might well be thought to have required the Respondent to try to get from Mr H a copy of his passport to compare a potentially different variant of his signature to exclude the possibility that the contentious signature was not in fact similar to that. The Respondent did however have, in my view, a good reason to suspect that the letter (at page 64 of the bundle) was not all that it appeared to be and did undertake a certain amount of further investigation to establish whether those initial suspicions were valid, which further investigation supported those suspicions. Were it necessary to do so, I would have found as a fact on the balance of probabilities that this letter had at least been drafted by the Claimant (whether on MH's instructions or not): I was particularly struck by peculiarities of written expression in the letter which are features of the Claimant's other written documents.

19. In all the circumstances, it seems to me that the Respondent reached a reasonable decision of the Claimant's guilt on the balance of probabilities, based on an investigation that was sufficient in the circumstances for it to be confident that the decision it had reached was a reasonable one.

20. I reiterate that the Respondent was not required to prove the matter beyond reasonable doubt, though it contends that it came close to meeting that threshold; and on the evidence available to it, I concur.

21. It is, as I say, not disputed that dismissal was within the range of reasonable responses of the Respondent.

**Polkey**

22. In circumstances where I have found the dismissal to be fair, I say only that, had I determined the dismissal to have been unfair by reason of an inadequate investigation for one or more of the reasons identified by the Claimant, I would have found that, but for such failure(s), it was extremely likely that the Claimant would have been dismissed in any event.

**Contributory Conduct**

23. Again, this issue does not fall to be determined. However, had I found the dismissal to have been unfair, I would have been bound to determine whether, on the basis of all the evidence before the tribunal, the Claimant had in fact been guilty of the misconduct for which he was dismissed, in order to consider whether that conduct was such that it would be just and equitable to reduce the amount of respectively his basic award under Section 122(2) or his compensatory award under Section 123(6).

24. In that circumstance, I would have found that, on the balance of probabilities, the Claimant did falsify the signatures of TS and MH, which was the primary and direct culpable cause of his dismissal; I would therefore have reduced the basic award by 50% and would have refused to make any compensatory award.

**Final comment**

25. I would like particularly to acknowledge the skill and assistance of the Claimant and of Mr Linstead in presenting their respective cases.

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Employment Judge Segal QC  
15 August 2017