EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4100693/17

Held in Glasgow on 2, 3 & 4 October 2017

Employment Judge: Robert Gall

Mr Ross Suttie	**Claimant** **In Person**
Sky Subscribers Services Limited	**Respondents** **Represented by:** **Ms J Darling - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claim of unfair dismissal is unsuccessful.

As stated at the Hearing, in terms of Rule 62 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, written reasons will not be provided unless they are asked for by any party at the Hearing itself or by written request presented by any party within 14 days of the sending of the written record of the decision. No request for written reasons was made at the Hearing. The following sets out what was said, after adjournment, at the conclusion of the Hearing. It is provided for the convenience of parties.

REASONS

1. This was a case brought of unfair dismissal. The claimant sought compensation if his claim was successful.

2. The claimant represented himself. The respondents were represented by Ms Darling. A joint bundle was lodged. The claimant also lodged an additional bundle.

3. I heard evidence from Mr Rankine, the Dismissing Officer, Ms Fryer, who heard the appeal, the claimant and a work colleague who attended the appeal with him, Mr Jamieson.

4. The area of the respondents` business in which the claimant was employed was a contact centre. Mr Suttie worked in the "*save team*". His role was to receive calls from customers who intended to cancel their contracts. He and the other advisers in the team were to talk to customers as to possible options which might lead to a decision on their part to remain a customer, that being a "*save*". In the alternative, if the customer confirmed that his or her wish remained that the contract should be cancelled, then the role of the claimant and others in his team was to act upon the cancellation and to ensure that it happened.

5. It was very important that, if a customer wished to cancel notwithstanding the efforts of the adviser, cancellation was the course implemented. There had been an Ofcom investigation into the respondents which had been triggered by only a small number of complaints about a failure to cancel.

6. In his evidence, Mr Suttie asked:-

> "*What more could damage the interests of the business than not cancelling a customer`s account which could lead to an Ofcom investigation?".*

7. The importance of this element was reflected by the respondents` position and evidence that customer service was paramount and that the goal of

being the best was the foundation of its rules and of the behaviour expected from its people.

8. There was no dispute therefore as to the fundamental importance of implementing a cancellation request.

9. To highlight the importance there was a document in place called "*Best Briefing*". The claimant and other advisers had the contents of this document explained to them and signed confirming that they were aware of its terms.

10. There is therefore a clear policy statement regarding cancellation. If an adviser does not cancel or does not keep promises then on the first occasion the formal conduct process is invoked. The sanction is anything up to a final written warning. On the second occasion of any such occurrence there is the potential for dismissal. There is what is referred to as a "*No tolerance*" approach. This is set out in terms. It does not matter if the failure to cancel is as a result of an accident or whether it is a deliberate failure.

11. Mr Suttie had a final written warning live for one year from 3 March 2016. That related to non-cancellation. There was an earlier warning issued to him. That had expired. It was not taken into account in this process by the respondents.

12. On 6 November 2016 there was a system failure. Advisers were told that if a customer called them seeking to cancel it should be explained to them that this was not possible at that point. The customer was then to be asked to call back the following day so that cancellation could be implemented.

13. The claimant received a call that day in which the customer asked that his contract be cancelled. Mr Suttie did not, however, ask the customer to call

back. Seeking to be helpful, he said to the customer that he could not process the cancellation but that he would do so the following day.

14. The respondents have a system known as MHR. That system allows advisers to note the contents of any customer discussion and to set up a reminder if the adviser is to do anything. Mr Suttie noted this call on MHR. No reminder was, however, put in place in relation to the statement made to the customer that Mr Suttie would call him the following day.

15. Mr Suttie omitted to cancel the contract. The customer noticed that the contract was still in place despite his call and the undertaking given by Mr Suttie. He emailed a complaint to the respondents. This led to an investigation.

16. Ultimately Mr Suttie was dismissed after the disciplinary hearing.

17. The reason for dismissal was said to be conduct.

18. I accepted that conduct was the reason for dismissal. There was no alternative theory proposed save for a general statement by Mr Suttie that "*someone was out to get*" him. There was some evidence of there having been an issue between Mr Suttie and Mr Downie who conducted the investigation. That was something considered and investigated by Ms Fryer at time of the appeal.

19. Mr Downie did not make the decision to dismiss. There had been a further investigation carried out by him after his initial view had apparently been reached that there would be an informal disciplinary discussion with Mr Suttie. Mr Suttie had not had that view of Mr Downie communicated to him. Before Mr Downie came to a decision which was intimated to Mr Suttie, Mr McQueen became involved. Mr McQueen was Mr Downie`s manager. It did not appear that Mr Downie was behind the decision to investigate the matter once more with the respondents` IT experts. That appeared to be as a

result of the involvement of Mr McQueen, a close friend of Mr Suttie. There was no suggestion of anyone specifically, whether Mr Rankine or Ms Fryer, being "*out to get*" the claimant.

20. I was satisfied that the reason for dismissal was conduct. I was also satisfied that Mr Rankine and Ms Fryer had a genuine belief in misconduct having occurred. Non-cancellation of the account by Mr Suttie notwithstanding the customer request to cancel was that misconduct.

21. I was also of the view that there were reasonable grounds for this belief. Termination at this point ties in with the consideration of the investigation process. The investigation process involved the actings of Mr Downie and also the actings of Ms Fryer at appeal.

22. As mentioned, the initial investigation was carried out by Mr Downie. The claimant criticised this investigation. In the main he criticised:-

- The time taken to carry out the investigation with there being a suggestion that it had been prolonged in order to obtain evidence to support dismissal.

- The involvement of Mr McQueen.

- The decision taken that there be a disciplinary hearing.

- Inaccuracies and mistakes in documentation produced for the disciplinary hearing as a result of the investigation.

- The reference to the claimant`s personal situation and information sought upon that.

23. The respondents accepted that the timeframe for the investigation process was not ideal. It was longer than would have been hoped for. They

accepted that mistakes were made in the documentation produced for the disciplinary hearing.

24. There was an explanation for the timescale involved. This related to the Christmas holiday period as well as to consideration given to the issues. There was a need to check out some points. System issues required to be explored. The investigation could and should have been carried out more swiftly than proved to be the case. That, however, on its own or taken with other elements did not mean, in my view, that the investigation lay outwith the band of a reasonable investigation which would be carried out by a reasonable employer. I was also satisfied that the mistakes were not such that there was any prejudice to Mr Suttie. He knew at all times what the complaint or accusation was which he was facing.

25. My main concern with the investigation carried out by Mr Downie was as to the involvement of Mr McQueen. Mr Downie had had an initial conversation with Mr Galloway, an IT expert within the respondents` organisation. He had concluded from that conversation that there was no conclusive evidence enabling a view to be taken as to whether the MHR reminder had not been set due to error on the part of Mr Suttie or due to the system fault.

26. Mr McQueen, who as mentioned had a close relationship with the claimant, had then become involved. The IT expert had been approached once more. This time by email of 5 January 2017 Mr Galloway said that his opinion was that the MHR system was, in essence, doing its job as far as he could see on 6 November 2016. Mr Suttie had initially said that he had not set the MHR reminder correctly. He had subsequently said that he thought that the system had not saved the MHR reminder due to a system fault.

27. This was an odd situation. It was impossible on the evidence led at the Tribunal Hearing to understand why this extra round of consultation with the IT expert had taken place and to ascertain precisely why Mr McQueen had become involved. It was also impossible to ascertain if there had been any

pressure put upon Mr Galloway. I was unaware of what information might have been given to him before his telephone call with Mr Downie expressing his initial view. I was also unaware of what might have been said to Mr Galloway prior to production of the email of 5 January 2017. It was certainly odd in my view that Mr McQueen had become involved. There was no evidence or firm basis for a suggestion, however, of some ulterior motive in that occurring. This was underlined given that Mr McQueen and Mr Suttie were close. It was therefore hard to imply some sinister purpose to those events.

28. I also noted the concern of Mr Suttie as to the personal information sought from him. The circumstances involved were extremely sad and unfortunate. I understood that this was a very difficult area for Mr Suttie.

29. I bore in mind that the first mention of this area was by Mr Suttie who said that he had "*a lot on the go* "around the time of the incident on 6 November 2016. This was then followed up by an opportunity being given to Mr Suttie to speak about it. When that occurred Mr Suttie had, freely it seemed to me from the notes, spoken about this horrible time which no doubt has had a lasting impact.

30. I viewed it as reasonable that this area had been explored given Mr Suttie`s initial reference to it. It represented potential mitigation. Mr Suttie, however, expressly excluded this factor as being an explanation of or excuse for the absence of cancellation.

31. I was satisfied that the investigation process met the test which requires to be applied. I was satisfied that at the end of the investigation there was sufficient material to entitle Mr Downie to reach the view that it was appropriate that disciplinary proceedings take place.

32. Mr Rankine had then become involved. He conducted the disciplinary hearing.

33. On the information I had, I was satisfied that Mr Suttie had the opportunity to state his position at the disciplinary hearing. Relevant matters were explored. There was reference to the original expired warning. That arose, however, from a comment which Mr Suttie initially made.

34. The possibility of there being a financial motive in not cancelling the contract came up. That was not, however, an element in the decision making by Mr Rankine and indeed was discounted as being a motive.

35. I therefore concluded that the relevant points had been covered by Mr Rankine.

36. Mr Suttie raised the fact that he had not been suspended. It is true that he could have been suspended. The fact that he was not, however, was not in my inconsistent with dismissal ultimately occurring.

37. It is the case that there was delay in the disciplinary hearing ultimately taking place. That, however, was not an unreasonable delay in my view. Mr Suttie also said that there was inconsistency. He himself had received a final written warning in March 2016. When the incident of 6 November 2016 came to light, after the initial stages of the investigation there was going to be an IDD issued to Mr Suttie. The circumstances therefore were explored. It was not an automatic move to final written warning or sanction in each instance.

38. Ms Flynn was mentioned. The issue from her point of view appeared to be that calls had not been returned as promised. It was difficult for me to form a view as to the comparative circumstances as there was no real explanation or setting out of facts before me at the Tribunal to enable a full comparison. Similarly in relation to Mr Higgins, that appeared to relate to a failure to make calls as promised. Again there was not enough information as I saw it to enable me to say that the no tolerance policy had or had not been applied

in this instance or that Mr Suttie was dealt with differently to others such that he had been singled out. There was no sign of any specific issue between the respondents and Mr Suttie.

39. Mr Suttie also raised the fact that Mr Rankine had taken just over an hour considering the decision in his case. There is no set time for consideration of that type. There was nothing either at time of the decision when that was set out in the outcome letter or in course of Mr Rankine`s evidence at Tribunal to suggest to me that he did not give this enough thought or consider points which were raised. While Mr Suttie said that some elements had led him to the view that the decision was predetermined, I did not read those elements as persuasive of that. I considered that Mr Rankine was able to provide cogent evidence as to how and why he had reached the decision to dismiss.

40. An appeal was held. The claimant made various points at appeal. He was accompanied at appeal as he had been at the disciplinary hearing.

41. Mr Jamieson, who accompanied the claimant, said in evidence at Tribunal that the appeal meeting had lasted between 5 and 6 hours. He said that he was more than confident that it had been conducted in the correct manner.

42. There were various points raised on behalf of Mr Suttie at appeal. Ms Fryer who held the appeal hearing investigated those points. I am satisfied that she checked out what Mr Suttie said or queried. She checked all points in my view. She considered them and wrote a full decision letter which dealt with all of the points.

43. Again the appeal process took longer than was ideal. It did not, however, take an unreasonable length of time in my opinion. There was a lot of investigation work carried out. Ms Fryer did say in March 2017 that the report would be with Mr Suttie shortly after that telephone conversation. In reality it took some 3 or 4 weeks for that to occur. There was an

explanation, however, given by Ms Fryer. That was that the report required to go through the hands of the legal department and HR department before being issued. She had not anticipated that as being required. It resulted in delay in issue of the decision.

44. There was a complaint or grievance intimated by Mr Suttie against Mr Downie. That was dealt with in course of the appeal. It was investigated and the outcome letter dealt with the conclusions of Ms Fryer.

45. I was satisfied that there were no procedural issues which rendered the dismissal unfair. The Tribunal is not ultimately to separate out issues of procedure and substance. The overall question is one of fairness.

46. I came then to consider whether dismissal lay within the band of reasonable responses of a reasonable employer.

47. I was conscious that the respondents had dismissed Mr Suttie who was by all accounts a good employee with what, on the evidence, was a lengthy period of service in the industry, almost 5 years service.

48. The no tolerance policy seems to me on reading it as an outsider to be somewhat harsh. An employee might be dismissed potentially for a second failure to cancel. That could be due to an oversight, as appears to be the case here. It could be therefore an oversight by a very good employee. Again that appears to be the case here. That, however, does not matter in terms of the policy. Dismissal may follow. There will certainly be a formal disciplinary hearing on the second occasion of any failure to cancel.

49. The respondents were, however, able to explain why this policy, which at first glance results in a severe penalty relative to the transgression, is in place. There had been an Ofcom investigation. They were concerned about customer service and reputation in addition to the potential consequences of an Ofcom investigation.

50. It also seemed to me that there was a possibility of mitigation affecting the decision taken. The personal circumstances of Mr Suttie might have pointed to such a route. Mr Suttie, however, did not put forward those in aid of his position. He expressly wished that these be excluded.

51. I was satisfied that the respondents did not jump to dismissal. It was not a predetermined decision. They considered matters before them and investigated points raised.

52. The decision makers, Mr Rankine and Ms Fryer, had by way of information upon the system operation, the email of 5 January 2017 from Mr Galloway. That expressed an opinion. It was enough in my view, however, to establish the genuine belief of the respondents as to misconduct on reasonable grounds and after a reasonable investigation. Any view I might have as to whether I would have been likely to dismiss the claimant is not relevant to the weighing up of the case. I applied the tests which the Tribunal requires to apply. In doing that, I could not say that dismissal lay outwith the band of reasonable responses. It follows therefore that the claim is unsuccessful.

Employment Judge: Robert Gall
Date of Judgment: 10 October 2017
Entered in register: 11 October 2017
and copied to parties