EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111486/2019

Held in Edinburgh on 9 and 10 March and 3 and 4 September 2020

Employment Judge M Sutherland

Mr Miles Ritchie	**Claimant** **Represented by:** **Ms A Forsyth,** **Solicitor**
HBOS PLC	**Respondent** **Represented by:** **Mr K McGuire,** **Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is the Claimant was not unfairly dismissed and is not entitled to notice pay.

REASONS

Introduction

1. The Claimant presented a complaint of unfair dismissal and for notice pay.

2. The Claimant was represented by Ms A Forsyth, Solicitor. The Respondent was represented by Mr K McGuire, Counsel.

3. Parties agreed that the employer was HBOS plc (and not Lloyds Banking Group plc) and the name of the Respondent was amended accordingly.

4. The final hearing was part heard in March 2020 and was adjourned until September 2020 on account of the COVID-19 lockdown. It was heard in person in March and remotely by video in September 2020.

5. At the final hearing the Respondent led evidence from Ruth Welsh (Hearing Manager), Claire Harper (Investigating Manager) and Michael Mulhearn (Appeal Manager). The Claimant then gave evidence on his own behalf.

6. The Claimant sought compensation only as a remedy (rather than re-instatement or re-engagement). The Claimant had asserted in his claim that he was suffering from depression at the time of the alleged misconduct and the Respondent failed to take this into account in reaching the decision to dismiss but this assertion was not insisted upon at the final hearing. The Claimant brought a claim for notice pay which was understood to be a claim for statutory notice pay (no evidence was led regarding any enhanced contractual entitlement).

7. The parties lodged an agreed set of documents.

8. The Respondent made written and oral closing submissions. The Claimant made oral closing submissions.

9. The following initials are used as abbreviations in the findings of fact–

Initials	Name	Title
MM	Michael Mulhern	('Appeal Manager')
CH	Claire Harper	('Investigation Manager')
RW	Ruth Welsh	('Disciplinary Manager')

Findings in fact

10. The Tribunal makes the following findings in fact:

11. The Claimant was employed by the Respondent in a regulated role as a Mortgage Advisor from July 2013 until 20 June 2019. The Respondent is a large employer with a dedicated HR function.

12. The Claimant was involved in a call handling role for about the last 18 months of his employment. There was a turret (a specialised telephone unit) and a computer on his desk. He originally had a wired headset but on 29 October 2018 he and others were provided with a wireless headset. He would normally receive around 2 external inbound calls a day with each call lasting anywhere between 20 minutes to 1½ hours. Unless they are blocked by ACW (see below), calls were put through to the Claimant automatically. The customer on an inbound was normally introduced by a Tier 1 colleague but sometimes the customer was put through directly without being introduced. The Claimant would also make around 2 or 3 external outbound calls a day. Once he had finished a call he was automatically put into ACW (after call working) which blocked calls enabling him to undertake any work arising from that call. After call work would take between 10 minutes to 1½ hours. He would remain on ACW (with calls blocked) until he deactivated it. The small display screen on the phone shows whether or not ACW is activated.

13. The Respondent's Code of Responsibility states three core values namely: putting customer's first; keeping it simple; making a difference together. The Respondent's Colleague Conduct Policy states that "colleagues must behave in a manner that at all times places the customer first" and "should act with skill care, and diligence in providing services to customers". The Respondent's disciplinary policy includes flagrant and wilful disregard for the Group's policies, procedures or standards and personal or professional conduct that shows a reckless disregard for the best interest of the Group, its customers and its colleagues.

14. On 25 August 2018 the Claimant's then line manager held a meeting with the Claimant to discuss a call where the customer could not hear the Claimant; that his phone appeared to be on mute; and that he needed to check whether his phone was on mute.

15. In December 2018 the business area undertook a review of all calls to and from the Claimant's turret (a specialised telephone unit) in the period between 23 November and 18 December 2018 ('the relevant period'). A list of all calls was prepared describing 90 calls to (79 incoming/inbound and 11 outbound calls)

during the relevant period (15 working days). For 69 of the incoming/ inbound calls it described the call as follows: “inbound calls person on line says ‘Hello’ [once/twice/ three times] no response from [the Claimant]. Caller hangs up.” There are 2 other inbound calls which appear to be described as call cutting. For about 5 of the incoming/inbound calls it describes the Claimant having spoken either a colleague (2 calls) or a customer (3 calls). The List of Calls did not provide a summary of the number of each type of call. The List of Calls did not specify whether the caller was a customer who had already been put through or was a tier 1 colleague putting a customer through.

16. The business area believed that the Claimant may have been engaged in call cutting and call avoidance. On 24 December 2018 CH held an investigatory meeting with the Claimant. The Claimant was not given prior warning as to the nature of the meeting and was not given the option of being accompanied. At the meeting the Claimant was advised that a review of his calls in the relevant period indicated that he may be engaged in call cutting and call avoidance. In response the Claimant advised that: he was competent in call handling and turret use procedures; his calls are normally put through by a Tier 1 colleague; he received around 1 – 2 calls a day but it had been less recently; the calls last between 20minute to 1 hour; he was not aware of any problems with his turret; calls do not ring but show up on the small turret screen; having been shown the List of Calls the Claimant advised that he was not aware that this was happening to his calls and he has been unable to hear the customers when they are put through; that his phone was not on mute during these calls; that there must be an issue with the new headsets (which were introduced on 29 October 2018); that he had previously raised being quiet with his manager; when a customer hangs up this puts him into ACW automatically and he hasn’t noticed; and that he may have needed to use ACW to undertake work. The Claimant explained that he had raised being quiet with his manager at the start of November and his manager had checked that his priorities were correct.

17. After the investigatory meeting the Claimant returned to his desk and handed over his wireless headset to be tested. A test was undertaken of the wireless headset at a colleague’s desk in the same department on about 24 December

2018. She would have logged in to the software under her own name (because she would not have had the Claimant's log in code). She would have had different skills and priorities to the Claimant. The Respondent found that the wireless headset to be working in these circumstances. The wireless headset was returned to the Claimant the same day. The Claimant continued working in his role until he went off sick on about 7 January 2019. During that time he elected to utilise his old wired headset and did not experience any difficulties with incoming or outgoing calls. He remained in possession of his wireless headset which he put in his locker. The Claimant did not undertake a test of the wireless headset at his desk.

18. On 24 December 2018 CH produced a Disciplinary Investigation report which found that: "8 calls appear to have been handled over the period which demonstrates that his headset and turret were working correctly at these times"; "evidence of 75 calls cut through not speaking; some calls were taken throughout period and outbound calls made which demonstrates that the turret and headset were working; previous informal conversation confirms that [the Claimant] had used mute. This was presumed as an error at the time. There is no background noise on the 75 calls received which implies that mute has been misused by [the Claimant] to cut calls. [The Claimant] confirms that he raised no concerns over his turret or headset. Confirmation from the business that the wireless headset has been tested and is working. [The Claimant] cannot give a reasonable explanation as to why he has used ACW when the data shows he was not actually handling customer calls received during the period".

19. The investigation report concluded that there was a case to answer in a formal disciplinary hearing in respect of the following allegations: on 75 of 90 calls the Claimant had not spoken forcing the caller to end the call ("call cutting") amounting to "gross misconduct"; and that he had been in ACW for 77.5% in November and 92.6% in December compared with a target of 20% ("call avoidance") amounting to "misconduct".

20. On 15 January 2019 the Claimant was suspended with immediate effect "pending a disciplinary hearing in connection with allegations that: during the period 23 November to 18 December 2018 you have purposefully failed to

engage with callers on 75 out of 90 occasions, either by failing to speak on the line or misusing the mute button; you have been in ACW for 77.5% of your time in November 2018 and 92.6% in December 2018, against an expectation of 20%".

21. On 16 January 2019 the Claimant attended occupational health who advised that: "Your colleague perceives that on hindsight he has had symptoms of depressions for a number of years with it becoming particularly difficult to manage in the past year as a result of mostly personal issues"; he had not discussed the issues with his GP or anyone else until recently; and was temporarily unfit to attend work and that any disciplinary/ investigatory meetings are temporarily postponed. On 23 April 2019 OH advised he was fit to attend such meetings.

22. On 29 May 2019 the Claimant was invited to a disciplinary hearing on 4 June 2019 regarding allegations that:

    a. "you have breached the call handling and turret use procedures, and…the requirement for colleagues to put customers first, in that during the period 23 November to 18 December 2018 you have purposefully failed to engage with callers, forcing them to disconnect their calls. Additionally it is alleged that you have purposefully avoided taking calls by excessive and inappropriate use of After Call Work (ACW) on your turret. Specifically during the period 23 November to 18 December 2018 you have purposefully failed to engage with callers on 75 out of 90 occasions, either by failing to speak on the line or misusing the mute button; you have been in ACW for 77.5% of your time in November 2018 and 92.6% in December 2018, against an expectation of 20%".

23. He was advised that the alleged conduct failed to put customers first either potentially losing customers or compelling them to have to call in again or potential unfairness to colleagues placed under pressure to answer additional calls. He was advised that the alleged conduct potentially amounted to gross

misconduct and could result in his dismissal without notice. The Claimant was provided with a copy of the List of Calls and the investigation report.

24. On 4 June 2019 the Claimant attended a disciplinary hearing with RW, Disciplinary Manager. The Claimant was accompanied by his union representative. RW was accompanied by a note taker. RW advised that there was no 20% target for ACW (it's an expectation which varies with the type of work). RW believed his use had been inflated. The Claimant accepted that his use of ACW was high but that this was a product of receiving calls. The Claimant confirmed that all roles involved telephony; that he gets a beep in the ear on an incoming call; that the turret was not in line of sight on his desk; that he had raised with his manager about being quiet and this should be confirmed with him; that he's allowed 30 minutes of ACW time after a call; that he had not deliberately avoided calls; there had been no prior issues of competency and this coincided with the headset change; and that he is now off work with anxiety and depression. RW, Disciplinary Manager advised that she was going to listen to some of the calls and offered to make arrangements for the Claimant to do so. The Claimant was willing to do so if that would assist the investigation. No arrangements were made for the Claimant to listen to some of the calls.

25. On 20 June 2019 RW, Disciplinary Manager issued her rationale for decision and sanction. She believed the headset was functioning as expected (he had taken 15 incoming calls and the head set had been tested by a colleague as working); he had not checked the Turret to ensure he was in an appropriate available state ready for a call; that "on the balance of probability I believe you have been deliberately failing to acknowledge the customer on the call causing them to hang up"; he worked in a customer facing environment; that their core value was to put the customer first; that deliberate call cutting and customer avoidance "had a significant impact to the 83% of customers [75 out of 90] connected to him over the 4 week period"; that he had nearly six years of experience all in a telephony environment; that she recognised that this was out of character but he understood the impact of his behaviour; and that the sanction of dismissal was appropriate. His employment was terminated with immediate effect on 20 June 2019.

26. The Claimant performed a regulatory role and the matter was referred to a conduct panel to determine whether a regularly conduct breach had occurred.

27. On 26 June 2019 the Claimant intimated his appeal on the grounds that: the headset testing was flawed having been undertaken by a colleague with a different skills set on a different desk and ought to have been tested at his desk; he had offered to listen and comment on the calls but had not been asked to do so; he was not suspended immediately; there was been little consideration of his mental health; he has not been provided with the transcript of the investigation meeting with his manager; he has only been on the phone servicing customers for 1 ½ years and during that time there were many changes; he was previously a top performer; that he performs a regulated role and this has derailed his career.

28. In early July 2019 MM was appointed appeal manager. He was provided with copies of the documents previously relied upon. On 11 July 2019 MM invited the Claimant to an appeal hearing and advised him of his right to be accompanied. The appeal hearing was held remotely by video on 18 July 2019. (There were some issues with the connection but this did not prevent the Claimant getting all of his points across.) It was attended by MM, Appeal Manager, a note taker, the Claimant and his trade union representative. The Claimant presented his appeal including that he had spoken to his manager about how quiet he was but was told everything was ok; manager should have investigated why he wasn't getting calls; there was no test of his turret or scenario. MM, Appeal Manager asked Claimant some questions and in response the Claimant advised that he could not hear the calls and could not hear anything from customers at all. MM, Appeal Manager believed that 15 of the calls had been serviced correctly.

29. After the appeal hearing MM, Appeal Manager checked the headset and the Claimant's turret with IT who advised that no issues had been raised, that they were still in use, and that they had been tested in the same department/ area. The Appeal Manager believed that the wireless headset was working. The Appeal Manager listened to a few of the calls and believed he could tell from

the background noises that it was a customer (rather than a colleague) saying "hello".

30. The Appeal Manager believed that the Claimant had engaged in deliberate call cutting, that he had 5 years service, that the trust and confidence had been broken, that there were no suitable alternative roles in the circumstances, and accordingly the decision to dismiss should be upheld.

31. At the time of his dismissal on 20 June 2019 the Claimant had a gross salary with the Respondent of £32,634 amounting to a net monthly salary of £2,035.28. He benefitted from a 4% employer pension contribution and a preferential mortgage rate (saving £157.96 per month) which ceased 1 September 2019. Following his dismissal the Claimant did not apply for state benefits but signed up to a number of employment agencies. The Claimant elected to make telephone enquiries regarding suitable employment opportunities, rather than submit written applications, in order to explain the circumstances of his dismissal. The Claimant experienced difficulty securing employment at the same rate of pay because he had been dismissed for gross misconduct from a regulated role.

32. The Claimant secured employment with Corgi Home Plan which was due to start on 24 September 2019 but he chose to defer his start date until 4 November 2019 (to enable travel to see family aboard). His gross salary with Corgi was £18,000 (£1,303 net a month). He benefitted from a 4% employer pension contribution from 1 February 2020. At end March 2020 the Claimant was place on furlough by Corgi and his earnings reduced to 80%. The Claimant left his job with Corgi on 6 July 2020 to set up his own business (and he is not seeking compensation beyond that date).

Observations on the evidence

33. The witnesses gave their evidence in a measured and consistent manner; they answered the questions in full, without material hesitation and in a manner consistent with the other evidence, with the undernoted exceptions; and there was no reasonable basis upon which to doubt the credibility and reliability of their testimony.

34. For the purposes of the claim for notice pay it is necessary to consider whether or not the Claimant did in fact engage in regular call cutting over a significant period (and not simply whether the Respondent had a reasonable basis for their belief that he did). The standard of proof is on balance of probabilities, which means that if the Tribunal considers that, on the evidence, the occurrence of an event was more likely than not, then the Tribunal is satisfied that the event did occur.

35. The Disciplinary and Appeal Manager had both understood that in the relevant period (23 November to 18 December) the Claimant had purposively failed to engage with callers on 75 out of 90 occasions either by failing to speak on the line or misusing the mute button. Their understanding was genuine and was based upon the disciplinary investigation report which notes that “75 out of 90 calls were cut through colleague not speaking, forcing the caller to hang up”. The List of Calls did not provide a summary of the number of each type of call. However if totted up the List of Calls noted that he failed to engage with callers on about 71 of the calls. It is considered more likely that not that the Claimant failed to engage with callers on about 71 of the calls.

36. The Disciplinary and Appeal Manager had both understood that in the relevant period (23 November to 18 December 2018) the Claimant had successfully answered (i.e. spoken) on 15 inbound calls. Their understanding was genuine and was based upon an assumption that if the Claimant had not spoken on 75 out of 90 calls he must have spoken on 15 calls and it was assumed that these were inbound calls. The investigation report noted that these calls were a mixture of inbound, outbound and webex calls and that 8 calls had been handled by the Claimant over the period. The Claimant insisted in evidence that he did not receive any inbound calls during the relevant period. If totted up the List of Calls noted that he spoke to either a colleague or a customer on about 5 inbound calls during the relevant period. The Claimant would ordinarily receive inbound calls on a daily basis. The Claimant did not challenge the List of Calls as inaccurate either in the disciplinary hearing or on appeal. The Claimant accepted the list as accurate at the tribunal hearing.

It is considered more likely than not that the Claimant did receive and speak on about 5 inbound calls during the relevant period.

37. It is considered more likely than not that the Claimant did in fact deliberately engage in regular call cutting over a period of 15 working days having regard to the following: the high number of inbound calls to the Claimant's phone over the period where the caller is connected but the Claimant provides no response causing the caller to hang up (around 71 calls); in around 5 inbound calls over that period the caller is connected and the Claimant provides a response and engages with call (indicating that his wireless headset was working at his desk); the number of inbound calls the Claimant would ordinarily have taken over that period (around 30 calls based upon his average of around 2 a day); although in early November the Claimant did raise being quiet with his manager, he did not raise with his manager that he was not, as he asserted, receiving any inbound calls throughout the relevant period; the significant period of time the Claimant spent in ACW (by failing to take steps to check whether his turret was unblocked and ready to receive calls); the test and use of the wireless headset which was found to work at another desk; and following the disciplinary investigation the Claimant received inbound calls through a wired headset at his desk (indicating that his software was working).

Relevant Law

Unfair dismissal

38. Section 94 of Employment Rights Act 1996 ('ERA 1996') provides the Claimant with the right not be unfairly dismissed by the Respondent.

39. It is for the Respondent to prove the reason for the Claimant's dismissal and that the reason is a potentially fair reason in terms of Section 98 ERA 1996. At this first stage of enquiry the Respondent does not have to prove that the reason did justify the dismissal merely that it was capable of doing so.

40. If the reason for his dismissal is potentially fair, the Tribunal must determine in accordance with equity and the substantial merits of the case whether the dismissal is fair or unfair under Section 98(4) ERA 1996. This depends whether in the circumstances (including the size and administrative resources of the Respondent's undertaking) the Respondent acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the Claimant. At this second stage of enquiry the onus of proof is neutral.

41. If the reason for the Claimant's dismissal relates to his conduct, the Tribunal must determine that at the time of dismissal the Respondent had a genuine belief in the misconduct and that the belief was based upon reasonable grounds having carried out a reasonable investigation in the circumstances (*British Home Stores Ltd v Burchell [1978] IRLR 379, [1980] ICR 303*).

42. In determining whether the Respondent acted reasonably or unreasonably the Tribunal must not substitute its own view as to what it would have done in the circumstances. (*Foley v Post Office; Midland Bank plc v Madden [2000] IRLR 827*) Instead the Tribunal must determine the range of reasonable responses open to an employer acting reasonably in those circumstances and determine whether the Respondent's response fell within that range. The Respondent's response can only be considered unreasonable if the decision to dismiss fell out with that range. The range of reasonable responses test applies both to the procedure adopted by the Respondent and the fairness of their decision to dismiss (*Iceland Frozen Foods Ltd v Jones [1983] ICR 17 (EAT)*).

43. In determining whether the Respondent adopted a reasonable procedure the Tribunal should consider whether there was any unreasonable failure to comply with their own disciplinary procedure and the ACAS Code of Practice on Disciplinary and Grievance Procedures. The Tribunal then should consider whether any procedural irregularities identified affected the overall fairness of the whole process in the circumstances having regard to the reason for dismissal.

44. Any provision of a relevant ACAS Code of Practice which appears to the Tribunal may be relevant to any question arising in the proceedings shall be taken into account in determining that question (Section 207, Trade Union and Labour Relations (Consolidation) Act 1992). The ACAS Code of Practice on Disciplinary and Grievance Procedures provides in summary that –

    a. Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions.

    b. Employers and employees should act consistently.

    c. Employers should carry out any necessary investigations, to establish the facts of the case.

    d. Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.

    e. Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.

    f. Employers should allow an employee to appeal against any formal decision made

45. Compensation is made up of a basic award and a compensatory award. A basic award, based on age, length of service and gross weekly wage, can be reduced in certain circumstances.

46. Section 123 (1) of ERA provides that the compensatory award is such amount as the Tribunal considers just and equitable having regard to the loss sustained by the Claimant in consequence of dismissal in so far as that loss is attributable to action taken by the employer.

47. Where, in terms of Section 123(6) of ERA, the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the Claimant, then the Tribunal shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

48. An employer may be found to have acted unreasonably under Section 98(4) of ERA on account of an unfair procedure alone. If the dismissal is found to be unfair on procedural grounds, any award of compensation may be reduced by an appropriate percentage if the Tribunal considers there was a chance that had a fair procedure been followed that a fair dismissal would still have occurred (*Polkey v AE Dayton Services Ltd [1987] IRLR 503 (HL)*). In this event, the Tribunal requires to assess the percentage chance or risk of the Claimant being dismissed in any event, and this approach can involve the Tribunal in a degree of speculation.

49. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA") provides that if, in the case of proceedings to which the section applies, it appears to the Tribunal that the claim concerns a matter to which a relevant Code of Practice applies, and the employer or the employee has unreasonably failed to comply with the Code in relation to that matter, then the Tribunal may, if it considers it just and equitable in all the circumstances, increase or decrease the compensatory award it makes to the employee by no more than 25%. The ACAS Code of Practice on Disciplinary & Grievance Procedures is a relevant Code of Practice.

Notice pay

50. Under Section 86 of the ERA 1996 an employee is entitled to one week's notice of termination of employment for each year of continuous employment up to a maximum of 12 weeks' notice.

51. A contract of employment may be terminated without notice where the employee is in repudiatory breach.

Respondent's submissions

52. The Respondent's submissions in summary were as follows-

- the Claimant would normally have around two inbound customer calls a day. i.e. around 35 calls during the relevant period. The Claimant asserts that he received absolutely no inbound customer calls during the relevant period. If

he had not been engaged in deliberate call cutting he would have raised the complete absence of such calls with his manager but he did not do so.

- Claimant's wireless headset was adequately tested and did not require to be tested at his desk – the headset was tested at a colleague's desk and found to be working; the Claimant had engaged with some inbound calls using the wireless headset; the other 'technology' at the Claimant's workstation was working because the Claimant continued to work there for two weeks with his wired headset; the wireless headset was subsequently used by others and no faults were reported.
- An arithmetical error regarding the number of successful inbound calls did not undermine the fairness of the inference that because he had received some inbound calls his headset appeared to be working
- Any basic or compensatory award should be reduced by a significant percentage because the Claimant caused or materially contributed to his dismissal.
- The Respondent should not be liable for C's additional wage loss due to being placed on furlough by his (then) new employer.
- The Claimant was in repudiatory breach of the duty of trust and confidence such that the Respondent was entitled to terminate his contract without notice

Claimant's Submissions

53. The Claimant's written submissions were in summary as follows: -

- The reason for the Claimant's dismissal was a belief he had deliberately engaged in call cutting
- That belief was not held on reasonable grounds following a reasonable investigation
- Deliberate call cutting is a serious issue which would merit dismissal. Given the risk of dismissal the investigation should have been more thorough.
- All the witnesses including the Claimant were credible and reliable
- The Disciplinary and Appeal manager proceeded on and repeated flawed assumptions regarding the number of inbound customer calls which were successful

- The issues with his calls arose around the time the new wireless headset was introduced
- The wireless headset was not adequately tested because it was not tested at the Claimant's desk utilising his equipment and software
- The Claimant had taken adequate steps to mitigate his losses

Decision

54. The Claimant was dismissed by the Respondent for misconduct on the ground that he had engaged in deliberate call cutting on 75 of 90 calls during period 23 November to 18 December 2018 by deliberately failing to speak on the line or misusing the mute button. There was no evidence that the Disciplinary Manager had another unrelated reason in mind when she made the decision to dismiss or that the Appeal Manager had another unrelated reason in mind when he refused the appeal. The Tribunal therefore concludes that the reason for dismissal was the stated ground. This reason related his conduct which is a potentially fair reason within the meaning of Section 98(1) of the ERA 1996.

55. As a result of their investigations the Respondent had established that: the wireless headset was introduced on 29 October 2018; the Claimant was not speaking on over 70 inbound calls in period between 23 November and 18 December 2018 forcing the caller to end the call; the Clamant successfully received some inbound customer calls during that period using the wireless head set; the Claimant was sitting in ACW (with his calls blocked) for significant periods of time during that period; a colleague tested the wireless headset at her desk with her software and found it to be working; the Claimant continued to utilise his software with a wired headset and found it to be working. The Respondent had carried out as much investigation as was reasonable in the circumstances. Specifically the wireless headset was adequately tested in the circumstances. It cannot be said that no employer acting reasonably in the circumstances would have failed to arrange a test of the wireless headset at his desk.

56. The Disciplinary and Appeal Manager had both understood that in the relevant period (23 November to 18 December) the Claimant had purposively failed to engage with callers on 75 out of 90 occasions either by failing to speak on the line or misusing the mute button. The disciplinary investigation report notes that “75 out of 90 calls were cut through colleague not speaking, forcing the caller to hang up”. If toted up the List of Calls noted that he failed to engage with callers on about 71 of the calls. Disciplinary and Appeal Manager had proceeded on an erroneous understanding regarding the exact number of calls. That misunderstanding was reasonable given the terms of the investigation report, was not significant given the small discrepancy, and did not affect the fairness of their conclusion that the Claimant had engaged in call deliberate cutting with a significant number of callers over a protracted period.

57. The Disciplinary and Appeal Manager had both understood that in the relevant period (23 November to 18 December) the Claimant had successfully answered (i.e. spoken) on 15 inbound calls. Their understanding was genuine and was based upon an assumption that if the Claimant had not spoken on 75 out of 90 calls he must have spoken on 15 calls. The investigation report noted that these calls were a mixture of inbound, outbound and webex calls and that 8 calls had been handled by the Claimant over the period. Further the List of Calls if toted up noted that he had spoken to either a colleague or a customer on about 5 inbound calls during the relevant period. The misunderstanding of the Disciplinary and Appeal Manager regarding the number of such inbound calls was not unreasonable in the circumstances and did not affect the fairness of their inference that the wireless headset was functioning during some inbound calls. The key issue was that the Claimant had successfully answered some incoming calls during the relevant period and not the number of such calls.

58. The Claimant offered to listen to a sample of the calls but did not ask to do so. The disciplinary and appeal manager listen to a sample of the calls. The Claimant was not afforded the opportunity to listen. No issue was being raised with what the Claimant said on the call. The issue was that the Claimant had

not spoken at all. It is unclear what would have been usefully derived from the Claimant listening to the calls. It cannot be said that no employer acting reasonably in the circumstances would have failed to arrange for the Claimant to listen to a sample of the calls.

59. Having regard to the above there was a reasonable basis for the Disciplinary Manager's and the Appeal Manager's belief that the Claimant had deliberately engaged in call cutting (by failing to speak or misusing the mute button).

60. Considering the disciplinary process as a whole, and having regard to the reason for dismissal, the procedure adopted fell within the range of reasonable responses open to an employer acting reasonably in the circumstances.

61. Both the Disciplinary Manager and the Appeal Manager held a genuine belief in the Claimant's misconduct based upon reasonable grounds following a reasonable investigation. The effect of cutting calls was in breach of the Respondent's core value of putting the customer first particularly on the occasions where the customer had been put through by the Tier 1 colleague. Another employer of similar size and administrative resources, acting reasonably in the circumstances, might well have taken the decision to dismiss a Mortgage Adviser with 5 years' service who deliberately engaged in regular call cutting over a significant period.

62. The Tribunal therefore determined in accordance with equity and the substantial merits of the case that the Respondent acted within the band of reasonable responses (including the procedure adopted) in treating the reason given as a sufficient reason for dismissing the Claimant in the circumstances.

63. The Claimant was not therefore unfairly dismissed.

64. The Claimant also submitted a claim for notice pay. A contract of employment may be terminated without notice where the employee is in repudiatory breach.

65. On balance of probabilities it was determined that the Claimant deliberately engaged in regular call cutting over a significant period. Parties are under a mutual obligation of trust and confidence. Engaging in such call cutting amounted to a breach of that implied duty and was repudiatory. Accordingly the Respondent was entitled to dismiss without notice.

Employment Judge: Michelle Sutherland
Date of Judgment: 14 September 2020
Entered in register: 24 September 2020
and copied to parties