



EMPLOYMENT TRIBUNALS

Claimant: Mr Dan-Musa

Respondent: Sky Retail Stores Limited

Heard at: London South Employment Tribunal by video hearing

On: 11 November 2022

Before: Employment Judge Robinson

Representation

Claimant: Mr Ogilvy (Representative)

Respondent: Ms Ferguson (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that the claim for unfair dismissal fails and is dismissed.

REASONS

Introduction

1. The claimant, Mr Dan-Musa, was employed by the Respondent, Sky Retail Stores Limited, as a Sales Advisor between 1 June 2011 until his dismissal on the grounds of conduct on or around 19 January 2021.
2. ACAS early conciliation started on 10 February and ended on 24 March 2021. The claim form was presented on 27 March 2022. The response form was received on 17 May 2022.

Claims and issues

3. The parties agreed that issues that the Tribunal had to determine were:
 - a. What was the date of dismissal?
 - b. Was the Claimant unfairly dismissed contrary to section 98 of the Employment Rights Act 1996 ("ERA")?

- c. Was the Claimant dismissed for a potentially fair reason within the meaning of section 98(2) of the ERA?
- d. Was the dismissal fair in all the circumstances of the case within the meaning of section 98(4) of the ERA?
- e. Did the Respondent genuinely believe that the Claimant was guilty of misconduct
- f. Did the Respondent have reasonable grounds upon which to sustain that belief?
- g. At the stage that the Respondent formed this belief had it carried out as much investigation into the matter as was reasonable in the circumstances?
- h. Was the investigation carried out by the Respondent within the range of reasonable responses open to a reasonable employer?
- i. Was the decision to dismiss within the range of reasonable responses open to a reasonable employer?

Procedure, documents and evidence heard

- 4. There was an agreed bundle of 297 pages, plus witness statements from the Claimant, and from Mr Parker and Mr Wickson on behalf of the Respondent.
- 5. This claim for unfair dismissal was heard over one day. I heard oral evidence from the Claimant and from Mr Parker and Mr Wickson for the Respondent. However, due to an absence of time, I agreed with the parties' representatives that they should submit written closing submissions. They both did so by the agreed date of 25 November 2022.
- 6. I have carefully considered the documentary evidence provided, together with the parties' oral evidence and their representatives' written closing submissions.

Findings of Facts

- 7. I have made the following findings of fact on the balance of probabilities having heard the evidence and considered the documents. These findings of fact are limited to those that are relevant to the issues listed above, and necessary to explain the decision reached.

The date of dismissal

- 8. There was some disagreement around the precise date of the Claimant's dismissal but it is not disputed that there was a dismissal. I heard a large amount in evidence and closing submissions from the Claimant's

representative about how the Claimant may not have actually been dismissed at the conclusion of the conduct meeting on 19 January, but was only formally dismissed upon receiving the dismissal letter on 21 January 2021. However, given that the Claimant's claim fails for the reasons set out in my conclusion below, it is not necessary for me to make findings of fact on whether it was 19 or 21 January that was the effective date of termination of the Claimant's contract.

9. Both parties accepted that the Claimant was dismissed and that it was for the potentially fair reason of the Claimant's conduct, as required by s.98(2)(b).

The conduct and disciplinary process

10. The Claimant worked as a Sale Advisor responsible for selling various Sky products to customers. Sales made were to put through on an ipad and signed for by customers using an electronic signature on a DocuSign system.
11. On 6 November 2020, an Insight Report from the Respondent's Compliance Team flagged possible breaches of Guidelines and that there were 7 potential customer accounts that appeared suspicious and that had not been processed in line with proper procedures. The breaches involved these customers all providing their first names only on the DocuSign and then also only signing with their first name. It was also considered suspicious that these were a cluster of successful sales all on the same day which is a rate of sales that is out of the ordinary.
12. The team leader (Mr Ashraf) carried out an initial investigation. As part of this, the customers who were supposed to have signed were called. Although the customers' recollections of what exactly they had done when they met the Claimant on the day in question, 2 of them confirmed that they had not signed anything and all 7 of the sales that were highlighted as being suspicious ultimately fell through.
13. Mr Ashraf met with the Claimant on 23 November 2020. This was an informal investigative stage so the Claimant was not given prior warning of what the discussion would be about. Mr Ashraf produced a report of his fact findings dated 23 November 2020 and wrote to the Claimant on 24 November 2020 to tell him that he was suspended on full pay so that a full investigation could be carried out.
14. On 13 January 2021, the Claimant was invited to conduct hearing with Mr Parker (Team Leader in the area), which took place on 19 January 2021. The invitation letter set out the allegations that would be put to the Claimant. The Claimant was also informed of his right to be accompanied by a Trade Union representative or a workplace colleague as per the Respondent's policy. The Claimant did not provide details of his companion until the night before the meeting when he proposed Mr Adeyimi (a friend of the Claimant). Given that

Mr Adeyimi was not a Trade Union official nor an employee of the Respondent, Mr Parker refused to allow him to accompany the Claimant at the meeting because it would have gone against company policy.

15. The Claimant confirmed in evidence that he was content at the time to proceed without a representative or a companion at the meeting on 19 January.
16. At the meeting, the allegations that were in the 13 January letter to the Claimant, were put to him:
 - a. Not following DocuSign process on 6 accounts – signing on behalf of customers
 - b. Not following ID process
 - c. Not capturing correct customer details
 - d. Not following SIM sale process on 2 accounts resulting in cancelled sales
 - e. Mis-selling products to customers that they didn't need and encouraging customers to cancel SIM after Sky installed
17. The Claimant was advised by Mr Parker that that (a) and (b) would be gross misconduct and could lead to dismissal. Mr Parker explained to the Claimant his belief that the abnormal number of sales, the manner in which they were signed for, and the fact they were not followed through on by the customers, suggested to him that the Claimant had signed for the customers. Mr Parker suspected the Claimant had done their either because he was trying to gain commission for the sales, or at least to boost his sales figures.
18. In relation to (a) (the allegation that ultimately ended up being the principal reason for the dismissal), the Claimant accepted that it was rather odd that 7 customers on one day had all chosen to sign with just their first name. His explanation was that many people are in a rush and he does not tell them how they must sign; they can sign how they want.

The dismissal and appeal

19. Following that meeting, Mr Parker decided that allegations (a) and (c)-(e) were upheld and decided to dismiss the Claimant which was formalised in a dismissal letter dated 20 January 2021. That letter advised the Claimant of his right of appeal which he chose to exercise. The Claimant wrote by letter dated 25 January 2021 setting out his grounds of appeal.
20. On 25 February 2021 an appeal hearing was chaired by Mr Wickson who went through what he considered to be the 11 grounds of appeal that the Claimant had set out in his appeal letter. Mr Wickson was the Regional Manager from the South West region and did not know the Claimant. The Claimant was accompanied by a Trade Union representative.
21. Mr Wickson gave evidence that he had re-reviewed the calls to the customers and satisfied himself that there was a sufficient level of suspicion in relation to

those 7 customer accounts given (i) how they were signed for with just a first name, (ii) 2 of the customers had confirmed they didn't sign anything, (iii) all 7 of the accounts had fallen through, and (iv) the abnormal volume of sales that day.

22. In addition to the denying the allegation of signing on behalf of customers, the Claimant also alleged that there was a pre-determined decision, and almost a conspiracy, to decide to dismiss him, partly perhaps due to him being part of a group that raised a collective grievance against the Respondent in 2018 (some 3 years before he was dismissed).
23. Ultimately, Mr Wickson chose to uphold the decision to dismiss. He wrote a letter dated 29 March 2021 to the Claimant, which explained his decision and reasons.

The Law

24. Section 94 of the Employment Rights Act 1996 ("ERA") confers on employees the right not to be unfairly dismissed. They can enforce that right by complaining to the Tribunal under section 111. The employee must show that he was dismissed by the Respondent under section 95. However in this case, the Respondent admits that they dismissed the Respondent (within section 95(1)(a) of the ERA).
25. Section 98 of the ERA provides that on a complaint of unfair dismissal it shall be for the employer to show what the reason for dismissal was and that it was one of the reasons set out in s.98(2).
26. The reason relating to the employee's conduct is one of those reasons. Section 98(4) provides that where the employer has shown what was the reason for the dismissal then:

"...the determination of the question whether the dismissal was fair or unfair, (having regard to the reason shown by the employer)-

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and

(b) shall be determined in accordance with equity and the substantial merits of the case."

27. In the case of a reason relating to the employee's conduct, it is necessary that the employer should have genuinely believed that the employee misconducted themselves and have arrived at that belief on reasonable grounds after a fair investigation. The duty of the Tribunal where an employee has been dismissed because the employer suspects or believes that he has committed an act of misconduct is expressed by Arnold J., in the case of British Home Stores Ltd

v Burchell [1978] IRLR 379, 380, as follows:

"What the Tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question ... entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time ...

First of all, there must be established by the employer the fact of that belief; that the employer did believe it.

Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief and ...

thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate on the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further."

28. The burden of proof is neutral. The Tribunal must not substitute its own views.

29. It was held in the case of Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 that:

"it is the function of the [employment tribunal] to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside the band it is unfair."

30. The case of J Sainsbury plc v Hitt [2003] IRLR 23 held that when considering whether an employee has been unfairly dismissed for alleged misconduct, the 'band of reasonable responses' test applies as much to the question of whether the employer's investigation into the suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss the employee for a conduct reason.

31. The ACAS Code of Practice on Disciplinary and Grievance Procedures 2004 provides guidance which the Tribunal must take into account when considering whether a dismissal is fair or unfair (Lock v Cardiff Railway Co Ltd [1998] IRLR 358).

Conclusions

32. Having found the facts as set out above, read the closing submissions of the parties, and considered the law as set out above, I have come to the following conclusions.

33. The purported reason for the dismissal is not in dispute. The Respondent

asserted throughout the disciplinary process, dismissal and at the Tribunal hearing that the reason was that the Respondent believed it had reasonable grounds for concluding that the Claimant had committed gross misconduct by fraudulently signing for products on behalf of customers in order to fabricate sales.

34. The question for me to decide is whether that decision was a fair one by reference to whether the employer acted reasonably in treating that conduct as a sufficient reason to dismiss. And whether that decision was within the band of reasonable responses available to an employer (Iceland Frozen Foods Ltd v Jones). I must also consider whether the Respondent reached that decision after carrying out a reasonable investigation.

The reasonableness of the investigation

35. Taking the investigation first. The conduct was originally flagged by the Compliance Team that believed there were grounds for raising suspicions in its Insight Report. That was then investigated by the Claimant's line manager, followed by a conduct meeting with the Team Leader, and then an appeal hearing with a Regional Manager.
36. The Respondent is required to put the allegation to the Claimant that this was conduct which they believed would amount to gross misconduct in breach of its company policies. I am satisfied, based on the documentary evidence, as well as the oral evidence I heard at the hearing, that this allegation was put to the Claimant orally and in writing at each stage of the investigation, disciplinary, and appeal process.
37. The Claimant's representative believed that the allegation of "fraud" as a criminal offence was never put to the Claimant. The Claimant also stated that he believed his guilt had not been proven beyond reasonable doubt. However, I accept the Respondent's evidence on this point that "fraud" was simply an everyday shorthand for the conduct which the Respondent believed the Claimant had committed. I do not consider that the name given to the conduct makes any material difference in this case. The Claimant was made well aware that he was being accused of signing on behalf of customers. Whether a crime had in fact been committed, and whether it was beyond reasonable doubt, is not for me to determine. What matters is that the Claimant understood what the alleged conduct was (in this case, signing on behalf of customers to fabricate a sale) and that the Respondent would consider such action to be gross misconduct worthy of dismissal if they had a reasonable belief the Claimant had carried out that conduct.
38. The only part of the process that may be slightly questionable was whether the conduct hearing ought to have been postponed so that the Claimant could bring a representative that complied with the Respondent's policy i.e. someone that was a colleague or a Trade Union representative. However, the

Claimant's own evidence was that he was aware of his right to bring a rep at the time, but he opted to go ahead with the hearing.

39. Otherwise, the process appeared to be what I would expect a large employer like the Respondent to do. The Claimant was given reasonable notice where appropriate, the allegations were put to him in writing and at the hearings and meetings, he was given the opportunity to explain himself and ask questions, and each stage of the process was carried out by a different person. Indeed, the appeal was heard by someone from a different region. The Claimant was given every opportunity to defend himself against the allegations and did so at length.
40. I do note that the Respondent is a very large employer with a dedicated HR team. The size and administrative resources of the employer are a factor I must take into consideration under s.98(4)(a) in deciding whether its investigation was adequate.
41. As for the Claimant's suggestion that there was a pre-determined decision to get rid of him, perhaps as part of a conspiracy that arose from him being part of a collective 2018 grievance, I find no evidence of that. The initial Insight Report that flagged the suspicious transactions was prepared by a Compliance Team that did not work directly with the Claimant. I find it unlikely that they, combined with the Claimant's line manager, Team Leader and the Regional Manager from another area, conspired to frame the Claimant as revenge for something he had been part of 3 years previously. I am satisfied with the witness evidence of Mr Parker and Mr Wickson that they approached their roles with an open mind and carried out adequate investigation before reaching their decisions.
42. Taking all of the above into account, I find that the Respondent has carried out a reasonable investigation and an adequate disciplinary and dismissal process.

The reasonableness of the decision to dismiss

43. Turning now to the decision to dismiss, I am aware that I must not substitute my own view for that of the Respondent in this case. That is not the role of the Tribunal. The question is not what I believe a reasonable response to the Claimant's conduct would have been. Instead, the question is whether the decision to dismiss was within the band of reasonable responses available to an employer in this situation. I find that it was.
44. In unfair dismissal cases such as this, it is not for me to decide whether the Claimant was actually guilty of the misconduct of signing on behalf of customers. I have to decide whether the Respondent acted within the range of reasonable responses available to an employer acting reasonably in these circumstances by treating the conduct as a reason to dismiss.

45. I have already concluded that the investigation into this matter was thorough. The Claimant was given ample opportunity to explain himself. However, it was reasonable for the Respondent to conclude that such explanation was weak. The combination of the following factors:

- a. the unusual number of sales in a short space of time,
- b. the way in which they were all signed for with a first name only which was abnormal,
- c. some of the customers denying they ever using DocuSign, and
- d. all 7 sales falling through,

means that I conclude the Respondent had a reasonable belief that the Claimant had actually committed the fraudulent act of signing on behalf of customers.

46. Once the Respondent had formed that belief, I consider it was also reasonable for the Respondent to conclude that this was gross misconduct justifying dismissal. I note the Claimant had a relatively long service period with the Claimant of around 9 years. However, given this is clearly fraudulent behaviour that could seriously impact the Respondent's customers and damage its reputation, it was within the range of reasonable responses for the Respondent to dismiss the Claimant.

47. I am aware of the significance for the Claimant in being dismissed for gross misconduct where it relates to alleged fraudulent activity, and then not having that decision over-turned by a Tribunal. However, the law relating to unfair dismissal does not allow me to substitute my own view for that of the employer unless they have acted in a way that no reasonable employer would.

48. On the facts of this case, I conclude that the Respondent had a reasonable belief that there had been gross misconduct on the part of the Claimant. They had reasonable grounds for reaching that decision and did so after a reasonable investigation. Deciding to dismiss was also within the range of reasonable responses.

49. The Claimant's claim for unfair dismissal fails and is therefore dismissed.

Employment Judge Robinson
Date: **16 December 2022**

Case No: 2301163/2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

Date: **22 December 2022**

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FOR THE TRIBUNAL OFFICE