Case No. 2403091/2022

EMPLOYMENT TRIBUNALS

Claimant: Mr B Johnson

Respondent: Santander UK PLC

HELD AT: Liverpool **ON:** 11th & 12th April 2023 (In Person) & 9th June 2023 (via CVP)

BEFORE: Employment Judge Anderson

REPRESENTATION:

Claimant: In Person

Respondent: Mr Redpath (Counsel)

JUDGMENT

1. The Claimant was unfairly dismissed.

2. No compensatory award is payable as it is reduced by 100% on Polkey principles. A fair dismissal would have occurred in any event notwithstanding the procedural defects.

3. The Claimant engaged in culpable and blameworthy conduct that contributed to his dismissal. It is just and equitable to reduce any basic award by 100%. Any compensatory award would also be reduced by 100%.

Employment Judge Anderson
12th June 2023

JUDGMENT SENT TO THE PARTIES ON
16 June 2023

FOR THE TRIBUNAL OFFICE

Reasons

Introduction

1. The Claimant, Mr B Johnson claims unfair dismissal against his former employer Santander UK PLC.

2. The issues were as follows:
    a. Is the Respondent able to prove that the reason or principal reason for the dismissal was conduct?
    b. Did the Respondent undertake such investigation was reasonable in all the circumstances of the case?
    c. Did the Respondent form a belief that the Claimant committed these acts based on reasonable grounds?
    d. Was the decision to dismiss within the range of reasonable responses?
    e. Did the Respondent follow a fair procedure?

3. In terms of remedy, it was agreed that I would deal with issues of Polkey and contribution as part of my Judgment.

4. In respect of Polkey, the burden of proof is on the Respondent to prove that a fair dismissal would have occurred in any event, notwithstanding any procedural defect.

5. In respect of contribution, the Respondent must prove that the Claimant has engaged in culpable and blameworthy conduct. In respect of the basic award s.122(2), I have a discretion to consider whether it is just and equitable to reduce any award. In respect of the compensatory award, s.123(6) ERA 1996 mandates the reduction of the award with the amount of the reduction being based on just and equitable principles.

6. There were previous complaints of disability discrimination and claims against named individual Respondents, but these had been previously dismissed on withdrawal.

Procedural Matters

7. This case was heard over two days, with a further half day subsequently listed to deliver Judgment.

8. There was an agreed bundle, but it was necessary to add documents relating to the Respondents internal procedures and investigation during the hearing that should otherwise have been included in the bundle.

9. At the start of the hearing and before the evidence was heard, I called the parties in to discuss the case. At the forefront of my mind was the lack of information regarding the Police investigation and whether there should be a stay. There was an initial discussion and this gave Mr Redpath the opportunity to take further instructions. On the parties return, the Claimant indicated that he would like a stay. The Respondent did not wish for there to be a stay.

10. Mr Redpath took me to a paragraph in the previous case management order which noted that this issue had been considered, that there were no active charges and that the case would be proceeding at that stage.

11. Furthermore, Mr Redpath drew to my attention inter parties correspondence from around January in which the Respondent raises the possibility of a stay with the Claimant. He was able to point to correspondence in respect of which the Claimant personally strongly opposed any suggestion there would be a stay. This was then followed up by correspondence from a solicitor (Feb 2023) writing on behalf of the Claimant, again opposing the mere suggestion of a stay in strong terms.

12. I had regard to Farrell v Stenning [1987] 7 CLR 313 in the Court of Appeal and Gloucestershire Constabulary v Peters (2010) UKEAT 0322_10_1407.

13. There is no absolute right to a stay, but where there are criminal proceedings, a stay would be the normal course of action. The present situation was that the Claimant was released under investigation. He was told that he would be informed of the outcome by July last year, but had heard nothing further. He wasn't able to assist the Tribunal with why he was now asking for a stay on day 1 of a convened case, beyond the fact that he wanted one

14. In the present case, there is no suggestion that the Police have asked for a stay. Neither party has up to date or accurate information regarding the Police investigation.

15. I determined that I was not going to grant the application for a stay. I gave oral reasons at the time, which I record here.

16. I had regard to relevant principles and carried out a balancing exercise. Taking into account 1. This being raised with the Claimant in correspondence and the Claimant being vociferously against it. The facts since then having no changed. 2. The lack of up to date information from the Police. 3. The lack of charge. 4. The Claimant will be given a warning. Further, his evidence is admissible in criminal proceedings, irrespective of whether there are active criminal proceedings or investigations. 5. The principles contained within the overriding objective and the need to progress cases.

17. Following the above discussion the Claimant was reminded that he was not obliged to answer any question that he considered may incriminate himself. There was a lengthy discussion as to what that meant. It was agreed that if the Claimant wished to exercise this right, he should use words to the effect of 'I decline to answer'. The Claimant was further reminded of this immediately before he gave evidence.

18. Having set the above out, it is right to record that at no time during the case did the Claimant decline to answer a question on this basis.

Facts

19. I made the following findings of fact on the balance of probabilities.

20. The Respondent called the following witnesses

    a. Ms Danielle Roper – SIU

b. Ms Raine Wellman - HR

c. Mr O'Gorman - Disciplinary

d. Ms Angela Hutcheson – Disciplinary Appeal Chair

21. The Claimant gave evidence on his own behalf.

22. In terms of credibility, I took the view that none of the Respondents witnesses were seeking to mislead me. Indeed, Ms Roper was plainly an honest witness, who answered questions truthfully, even if they did not assist the Respondent. There were a number of questions relating to procedure that Ms Roper was not able to answer.

23. I was particularly impressed with the evidence of Mr O'Gorman. In addition to answering the question, he was also able to engage with the substance of the point. I was able to view and understand his thought processes, which were clear and credible.

24. The Claimant's evidence was mixed. It is right and fair to acknowledge that on occasion he did answer the question asked. It is also necessary to make some allowance for the fact that at this stage of the case, he was representing himself and was also caught up in the emotion of the case. For example, I do not wish to be overly harsh in respect of the Claimants witness statement, which concentrated on tangential matters. However, on the whole, the Claimant's evidence did not assist his case or serve to clarify the position that he was adopting. In his written evidence, the Claimant barely touched on the substance of the allegations against him and in oral evidence, he did not go further. The

Claimant has called little, if any evidence to counter the case against him, either within the confines of the Burchell test or on the broader evidential basis of Polkey or contribution. In stating, this I accept that the Claimant bears no burden of proof for s.98(4) and the burden is on the Respondent in respect of contribution and Polkey.

25. The Claimant was employed by the Respondent between 5th December 2011 and 21st February 2022. At the time of his dismissal he was employed as an Operations and Control Manager. Whilst there were a number of aspects to his job role, it is right to state that 'risk' or the management of risk featured heavily as part of his role. He was explicitly required to support the Head of Risk Oversight and Assurance and to work on Managing and embedding risk mitigation strategies across the Bank.

26. On 11th December 2020, the Special Investigations Unit "SIU" of the Respondent were informed by HR that the Claimant had an outside business interest in that he was the director of a business named Prime Solutions (2020) Ltd. HR asserted that the Claimant had not been given permission to hold a directorship.

27. Ms Roper from SIU was allocated the case and used opensource material to search the internet for information on Prime Solutions. She also used Santander's systems to access the personal and business accounts of the Claimant and Prime Solutions. The more she found, the greater her concern grew. The business had only ben incorporated in February 2020 and there were large sums going in and out of the accounts, with no obvious reason as to why, with activity all centring on the same individuals.

28. On the 22nd January 2021, the Claimant was sent an invite by Daniel Roper to a meeting. Ms Roper's witness statement is explicit that the purpose of the timing of this invite was to give the Claimant minimum notice of the meeting. Indeed, in her statement she goes as far to say "It is standard practice to give very little notice to employees of investigation meetings. In some cases, we give an hour, in others we give 24 hours, but this depends entirely on the circumstances."

29. Ms Roper was not able to say in evidence where this standard practice is contained in any policy document or statement of the Respondent.

30. The Respondent has accepted throughout these proceedings that the Claimant was not given a transcript following this meeting, notwithstanding the fact that it was recorded. (para 11 amended Grounds of Resistance).

31. During the meeting Ms Roper asked the Claimant about a number of matters:

    a. Prison visits undertaken by the Claimant, the evidence for which was in his bank accounts. Ms Roper was concerned regarding the potential issue of coercion.
    b. The fact that over a seven month period, the Claimant had made 376 payments to gambling companies totalling just over £100,000.
    c. A bounce back loan of £48.000 taken out by the Company of which the Claimant was a director – Prime Solutions (2020) Ltd.

32. Following this meeting and on the same day, the Claimant was suspended. This was followed up by a formal letter dated 25th January 2021.

33. During his suspension, the Claimant became unfit for work. The Claimant was supposed to have regular contact from his manager Mr Newell during his absence. This did not take place as it should have done and Ms Wellman from HR had to prompt Mr Newell in this regard. Whilst there appears to have been some poor practice in this respect, I do not consider that it had any bearing on the fairness or otherwise of the Claimant's dismissal or the application of the Burchell test and I therefore do not make any further wider or more detailed findings on this point. I make the same point in relation to the various elements of correspondence between the parties throughout the internal process, other than to note that in part explains the delay between various key events in the chronology of this case.

34. On 3rd August 2021, Ms Wellman called the Claimant to inform him that SIU had completed its investigations and the matter was to proceed to a disciplinary hearing. This prompted the Claimant to put in a grievance.

35. Ms Wellman read the SIU report and then via a desktop exercise created a fresh document. It was this fresh document that was sent to the Claimant. As to why this was necessary remains unexplained.

36. On 25th November 2021, the Claimant was arrested, questioned and released under investigation. He made no comment at interview. I have been provided with no further information, beyond the Claimant stating that he was told that he would have an outcome by July 2022 but has heard nothing further as of April 2023.

37. The formal invite to a disciplinary meeting was sent on the 14th January 2022.

38. The three allegations were:

a. Operating a business outside of the Respondent without appropriate permission, giving rise to a potential conflict of interest.
b. Financial irregularities across the Claimant's bank accounts to the value in the region of £2.7 million that did not fit the profile of an employee of the Respondent or the projected turnover of Prime Solutions (2020) Ltd of £400,000.
c. The Claimant had abused the Bounce Back Loan Scheme to claim £48,000.

39. The Claimant requested that the hearing was postponed as he was unfit for work. He also referred to the fact that there was an ongoing Police investigation.

40. The Respondent considered that it was possible to go ahead, but nonetheless postponed the hearing to the 7th February 2022. Mr O'Gorman chaired the meeting. Mr O'Gorman's job title was 'Senior Operational Risk Manager'. He had only had very limited contact with the Claimant previously. The Claimant did not respond to the invite to the meeting and did not attend the meeting.

41. Someone from SIU did not attend the disciplinary hearing to present the investigation report. I was told by witnesses that this was due to a longstanding agreement with the unions. The Respondent was not able to evidence that agreement. However, one of the policies disclosed (and recently reviewed) refers to SIU attending the disciplinary hearing.

42. Mr O'Gorman took the decision to dismiss the Claimant. He found the allegations against the Claimant proven.

43. Notwithstanding the fact that the Claimant did not attend, I find that Mr Gorman took his role seriously and took time to consider the evidence in detail. Mr O'Gorman's witness statement records his thought processes in detail and this was consistent with his oral evidence.

44. Date A was the 6th March 2022 and Date B was the 5th April 2022. The Claimant submitted his ET 1 on 29th April 2022.

45. The Claimant appealed his dismissal. The appeal hearing took place on the 11th May 2022. Angela Hutcheson, Head of Advisory was appointed to hear the appeal. The Claimant indicated in advance that he would not be attending the appeal hearing and the hearing proceeded in his absence. Ms Hutcheson dismissed the Claimant's appeal. Her reasoning is contained within her witness statement, which was consistent with her oral evidence to the Tribunal.

The Law

46. The Right not to be unfairly dismissed is contained within s.94 Employment Rights Act 1996.

47. In the present case, it is agreed that the Claimant had in excess of two years continuous service and that he had been dismissed by the Respondent.

It is for the Respondent to prove that the reason or principal reason for the dismissal was one of those listed within s.92(b) Employment Rights Act 1996.

In this particular case, the Respondent relies upon conduct as the reason for dismissal.

48. A reason for dismissal is a set of facts or belief held by the employer which

cause them to dismiss the employee: Abernethy v Mott Hay and Anderson [1974] IRLR 213 per Cairns LJ. This has been subsequently affirmed on numerous occasions and has most recently been analysed by the Supreme Court in Jhuti v Royal Mail [2019] UKSC 55.

49. If the Respondent does prove a potentially fair reason for dismissal, then reasonableness under s.98(4) ERA 1996 must be considered. The classic formulation of a conduct case based on BHS v Burchell [1978] IRLR 379 requires the Tribunal to consider a) whether the Respondent formed a belief that the employee had committed the act of misconduct and whether that belief was held on reasonable grounds b) whether the Respondent had undertaken such investigation as was reasonable in the circumstances of the case and c) whether the decision to dismiss was within the range of reasonable responses open to an employer.

50. It is also necessary to look at whether the employer followed a fair procedure in dismissing the Claimant.

51. The range of reasonable responses test applies throughout the Burchell test. The leading authority of Sainsbury's Supermarket v Hitt [2003] IRLR makes it clear that I must apply the range of reasonable responses test to the investigation and not substitute my own view as to what a reasonable investigation would have been.

52. The burden of proof for the purposes of s.98(4) is neutral.

53. Key to understanding the Burchell test is the concept of a range of reasonable responses. It is not for the Tribunal to substitute its own view for that of the Respondent. Rather the Tribunal must answer the questions posed from the perspective of whether or not the actions taken fall within the range of reasonable responses open to an employer, having regard to the size of the undertaking and the administrative resources available to it.

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Conclusions

54. The reason for dismissal was not actively in dispute. I am satisfied that the Respondent has shown that the reason for the dismissal was the conduct of the Claimant. The genesis of the investigation being referred to SIU was the discovery within HR of the Claimant holding a directorship. When taking the decision to dismiss the Claimant, Mr O'Gorman had only the conduct of the Claimant in mind.

55. In terms of the investigation, I restate the principle in Sainsburys Supermarket v Hitt [2003]. I must apply the range of reasonable responses to the investigation. The question is not whether the Tribunal would have done something different, rather whether the investigation was outside the band of what was open to the reasonable employer.

56. There were a number of commendable aspects to the investigation. Ms Roper sought to utilise a range of sources. Other than the criticisms that I make below, the report itself was detailed and set out the issues identified and the basis for

there being a concern. As to Ms Roper's demeanour, I find that she behaved professionally throughout.

57. There were however also problems with the investigation. It is fair to describe these as largely procedural in nature. To summarise, the investigation had the following defects:

    a. In general terms, the Respondents approach lacked procedural rigour. These were serious allegations. The Respondents investigation witnesses were not able to engage with the basic premise of questions relating to the procedure followed and why it was being followed or why safeguards exist. The Respondent is a bank, a regulated entity with access to administrative resources, HR and legal advice.
    b. As to what procedure was being followed was a moveable feast. I concluded that ultimately the Respondent was following what was internal practice, but that this was not practice reflected in any written internal policy. Written internal policies cross-referred but not in any coherent fashion or in a way that added to the readers understanding of the correct process.
    c. The Respondents witnesses had difficulty with engaging with the issue of the basis of the powers that they were utilising e.g. to look in a third parties bank account. There was an attempt to address this in re-examination and It was established that the Respondent was a regulated entity (a somewhat obvious point), but I was looking for greater detail and was left with a resulting impression of this not being something that

the Respondent actively had in mind, which was concerning given the lack of adherence to written policy.

d. Given the seriousness of the allegations, the principles in A v B [2003] IRLR 405 (and as developed by subsequent authorities) were engaged. I formed the view that the Respondent had not appreciated the procedural rigour needed for a balanced investigation.

e. It is to Ms Roper's credit that she openly stated something that others would obfuscate. A deliberate decision was taken to provide the Claimant minimum notice of his investigatory interview. This was not authorised by any written internal policy document and even if it was, I take the view that it is so far removed from good practice that it is outside the range of reasonable responses to have in place such a practice. I note the ACAS guidance in this respect but have not treated it as determinative. This is an unacceptable practice based on first principles and the A v B line of the need for a balanced investigation.

f. As to why the SIU report is not disclosed to the employee remains unexplained. The further fact is that this was not disclosed until the hearing itself at my instigation. This was a disclosure breach.

g. As to why the SIU report is then repackaged by HR is also unclear. It isn't supported in policy. Even if it were a quirk, the mischief arises from the non disclosure of the earlier report. The Claimant did not have time to analyse for discrepancies.

h. The Respondents internal policy provides for SIU to be present at the disciplinary to present the report. This is symptomatic of the Respondents actual practice differing from the written practice.

i. As part of the appeal Ms Hutcheson made further enquiries post the hearing. It follows that the Claimant did not have the opportunity to comment on this. Para 23 describes this as 'new knowledge' on AH's part. Because this is about how the facts were looked into, this forms part of my procedural criticism of the investigation.

58. Notwithstanding the procedural problems and the criticisms I have made of the investigation, the Respondent believed that the three allegations against the Claimant were established and held that belief based on reasonable grounds. Again, Mr O'Gorman's evidence in this respect was compelling.

59. The decision to dismiss was within the range of reasonable responses. This was a serious matter and the Respondent was entitled to treat it as such and in particular as gross misconduct. The Claimant's role involved the assessment of risk. His actions as found by the Respondent were wholly incompatible with that role.

60. Dealing with the point regarding whether the Respondent should have proceeded in light of an ongoing disciplinary investigation, I was concerned by the initial apparent lack of evidence called on this point by the Respondent. It was a point put front and centre of the Claimant's case and the Respondent was on notice of it. However, the evidence of Mr O'Gorman was compelling in this regard. He was able to articulate why the Respondent proceeded and felt capable of proceeding. That decision was within the range of reasonable responses open to the Respondent. It was not obliged to wait indefinitely, the

Police investigation was not defined or finite and the Respondent had established facts.

61. There was the issue of the prejudice to a Claimant that was said to have received legal advice to make no comment. It does need to be put into the mix and considered. However, there was simply no reasonable timescale that the Respondent could have had regard to.

62. A similar point arises in respect of the Respondent proceeding whilst the Claimant was signed off work. This matter needed progressing. It was within the range of reasonable responses for the Respondent to proceed. Indeed, it would be unreasonable and artificial to require the Respondent to have held off progressing matters further or in effect indefinitely.

63. Nonetheless, I find the dismissal to be unfair due to the procedural problems with the investigation. Cumulatively, there are too many problems with the approach taken by the Respondent when I look at matters in the round.

Remedy

64. It was agreed that I would address limited aspects of remedy as part of my initial judgment.

65. The law requires me to consider Polkey first, then contribution.

66. Polkey affects the compensatory award only. The burden of proof is on the Respondent to prove on the balance of probabilities that either a) a fair dismissal would have occurred notwithstanding the defects identified, had they

not been made or b) that a fair dismissal could have occurred at a future date if it would have taken longer to carry out a fair procedure.

67. In the Polkey scenario, the following key facts remain:

    a. The Claimant has set up a limited company,
    b. Significant sums have passed through the Claimant's personal and business accounts, this being incompatible with the Claimant's salary
    c. The suspicious nature of the loan.

68. The Respondent has proven these points through its documentary evidence as explained by its live witnesses. These matters are not compatible with the Claimants continued employment, in a position of responsibility with the Respondent, with access to the Respondents date, systems and processes. These points remain irrespective of the procedural defects.

69. This is not a case in which the Claimant has shown insight into the issue and with guidance/warning would have remained in employment. The Claimant has shown little if any insight into the seriousness of the allegations in so far as they relate to a risk that must be managed by the Respondent. He views his actions as technical breaches of procedure. They are not.

70. This is not a case in which the procedural defects affected the timing of the dismissal. This was a process over a long period. No additional step would have taken any longer and all could have been taken in the same timeframe.

71. Contribution is culpable and blameworthy conduct that contributes to the dismissal. (c.f. Nelson v BBC (No 2) [1980] ICR 110.). The burden of proof is on the Respondent to establish the contributory conduct.

72. These are exceptionally serious matters. The Respondent is a regulated financial institution. It is entitled to take the view that its employees must show insight in respect of risk and why provisions are in place. These are not technical infractions, they involve large sums of money and concern deliberate acts taken by the Claimant.

73. The fact that the Claimant was a Director of a Ltd company was an agreed fact. The Claimant did not inform the Respondent of this fact. This was contrary to the spirit of the Respondents policy, but given the Claimant's role, this was not a point to be decided technically. The Claimant knew that he should have sought the appropriate permissions and did not.

74. The Respondent has also proven that there were extraordinarily large amounts of money passing through the bank accounts which were unexplained. Following the trial, they remain unexplained.

75. In terms of the bounce back loan, the Respondent has established the dates on which the company was established, the fact that the loan was applied for and the fact that a payment was immediately made to an individual about whom there are significant concerns. No coherent explanation has been advanced for the bounce back loan and at best the Claimants' explanation could be described as obfuscation.

76. I find that a reduction of 100% is appropriate to both the basic and compensatory awards. I recognise that I have a just and equitable discretion in respect of the basic award. I exercise that in favour of making a reduction. I see no reason in this case for there to be different figures in respect of basic and compensatory awards. The level of contribution was too serious.

77. I must take a step back and consider whether a 100% Polkey, 100% contribution Judgment is appropriate. Taking that step back, I do consider that this is such a case. The Respondent has proven exceptionally serious facts in relation to the conduct of the Claimant. These facts remain notwithstanding the procedural problems with the investigation.

78. For the sake of completeness, I record that this is not a case in which reinstatement or re-engagement would be appropriate given the level of contribution. The parties would be required to have a relationship of trust and confidence. It would be unrealistic and artificial to suggest that this was remotely possible.

79. Accordingly

    a. The Claimant was unfairly dismissed.
    b. No compensatory award is payable as it is reduced by 100% on Polkey principles.
    c. Further the basic and compensatory awards are reduced by 100% to reflect the Claimant's contribution to his dismissal.

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Employment Judge Anderson

12th June 2023