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EMPLOYMENT TRIBUNALS

Claimant: **Mrs S Brazil**

Respondent: **The Royal Bank of Scotland plc**

Heard at: **East London Hearing Centre** **On: 17-18 May 2017**

Before: **Employment Judge Burns (sitting alone)**

Representation

Claimant: Mr D Barnett (Counsel)

Respondent: Mrs K Cooper (Solicitor)

JUDGMENT

The judgment of the Employment Tribunal is that:-

(1) The Claimant was unfairly dismissed.

(2) The Respondent must pay the Claimant £19,669.58 compensation for unfair dismissal calculated as follows:

Basic Award	**£6,194.02**
Compensatory Award (including loss of statutory rights but before uplift)	**£12,250.51**
Uplift of compensatory award for breach of ACAS guidelines	**£1,225.05**
TOTAL	**£19,669.58**

(3) In addition the Respondent must pay the Claimant the Tribunal fees paid by her in the sum of £1,200.00.

REASONS

Introduction

1 The Claimant claims unfair dismissal, wrongful dismissal and notice pay.

2 The Claimant worked for the Respondent bank from 14 February 2003 until 8 September 2016 when she was summarily dismissed. The Respondent claims that the Claimant was guilty of gross misconduct, namely that she had avoided incoming telephone calls from customers complaining that they had lost their debit cards. She had transferred those calls to the debit card team instead of dealing with them herself, as she had been trained to do.

3 The Claimant did not deny passing on these calls but said she had been told by her trainer Adam Smith, and she had received informal indications from her line manager Janice Gibbs, that it was permissible to do so.

4 I heard evidence from the appeal officer Shaun Elliott and the dismissing officer Amanda Allix and then from the Claimant. The documents are in a bundle of 375 pages, there was a list of issues agreed before the hearing started labelled C1 and there was a short written chronology and a Respondent's bundle of authorities, which I have considered.

Findings of fact

5 The Claimant worked as a telephony agent at the Respondent's credit card contact centre at Southend. She worked receiving incoming calls from customers. She worked mainly outside normal office hours i.e. at night. Before December 2015 her normal work had been dealing with lost credit cards and other requests from customers, but not dealing with lost or stolen debit cards.

6 In late 2015 she agreed to undertake training in how to deal with these debit cards also. The Respondent has a dedicated lost debit card team but the Respondent wished to enhance its customer service by providing some night workers with the ability to deal with both lost credit cards and debit cards in a single telephone conversation with the customer.

7 The Claimant and three others, including Mandy Lewis and Liz Bridgewater (and a fourth person who subsequently went on long-term sickness absence) were persuaded to apply for training leading to accreditation so that they could work on debit cards also. They all attended training courses. Mandy, Liz and the Claimant attended the same training course with a trainer called Adam Smith in December 2015.

8 Having completed her training the Claimant was allowed to start dealing with both types of cards during an extended training period which ended on 29 March 2016, when she was "accredited" (which simply means that she was given internal approval to start working on debit cards).

9 During work at the call centre the Claimant and her line manager Janice Gibbs and others within the team would periodically get into "huddles" – that is informal discussion amongst the team. During these huddles the question of how to deal with debit cards was discussed.

10 In April 2016 Barry Huxley (a Deputy Team Leader whose job includes listening to recordings of telephone conversations for training and quality purposes), listened to some recordings of the Claimant's calls and found various occasions when the Claimant had passed on lost debit card calls to the debit card team instead of dealing with them herself. There were six separate nights when she had done this in the period January to March 2016 before she had been accredited and there were five nights when she had done this in April 2016 after she had been accredited.

11 The Respondent bank takes what it calls "call avoidance" in call centres very seriously. I have not been taken to any formal definition of what "call avoidance" is or is not but it is to do with a call centre worker who is paid to deal with incoming calls not doing so and either hanging up on the customer or possibly passing the responsibility on to somebody else. This can cause extra work for others as well as often annoying the customer and causing a loss of confidence and goodwill on the part of the customers in the Respondent bank.

12 The Claimant was called by her line manager Janice Gibbs to an investigatory meeting on 29 April 2016. The Claimant was questioned about how she handled lost and stolen cards during her shifts. At an early stage of the interview Ms Gibbs asked the following question "*Tell me any reason you would not be able to deal with the cancellation of a Lost & Stolen Debit Card. And what would do in those circumstances?"* The Claimant gave the following answer which is to be found at page 116 of the bundle, namely: *"If it was a compromised Pin we couldn't process. In a huddle and at training with Adam (I) was advised if busy to hand the calls off*".

13 In this answer the Claimant set out her defence which has two aspects. Although she accepted that she had handed on the calls which the Respondent had identified that she had handed on, her defence was that she had believed that she was authorised to do this during busy times as a result of what she had been told during training by Adam Smith and secondly during huddles, by indications such as shrugging of the shoulders and other signs of tolerance and condonation which had been given by Janice Gibbs the line manager when she was made aware by the Claimant and others that they were handing on some calls when busy.

14 It is convenient here to set out the course of subsequent events in the form of an abbreviated chronology before I return to particular features of the process: Following the investigatory meeting the matter was handed over to Amanda Allix who carried out various interviews in June and held the first disciplinary meeting with the Claimant on 4 July. There was then a lengthy adjournment of the disciplinary meeting while Ms Allix carried out further enquiries until 8 September 2016 when the disciplinary hearing was resumed and Amanda Allix summarily dismissed the Claimant with no notice on the grounds of gross misconduct. There was a delay before the dismissal letter was sent out on 5 October although the Claimant had been told verbally on 8 September that she had been dismissed. The Claimant lodged an appeal letter on 18 October. Shaun Elliott was made responsible for dealing with the appeal. He interviewed about eight other people and carried out various detailed investigations and finally held an appeal hearing (which had been postponed by approximately a week at the request of the Claimant's trade union representative) on 5 December. He finally notified the appeal outcome (which was to dismiss the appeal against dismissal)

on 31 January 2017. Thus nearly nine months had elapsed between the investigatory meeting on 29 April 2016 and the appeal outcome on 31 January 2017.

15 As stated, one of the two main aspects of the Claimant's defence was the training she had received from Adam Smith in 2015. This was corroborated by Mandy Lewis and Liz Bridgewater who had also been suddenly confronted on 29 April 2016 with accusations that they had passed on debit card enquiries to the debit card centre instead of dealing with it themselves. As can seen from pages 276 and 324 of the bundle, they gave similar explanations independently of the Claimant by reference to the training they had received from Adam Smith in the same training sessions which they had attended with the Claimant in December 2015. (Although they supported the Claimants version, the statements of Mandy and Liz were never given to the Claimant throughout the dismissal or appeal process.)

16 Adam Smith was therefore a person who should have been interviewed by Ms Allix before she decided whether or not to dismiss the Claimant. Ms Allix had been given the responsibility for the disciplinary proceedings in about mid-May and Adam Smith left the employ of the Respondent on 19 June 2016 so there was a window of opportunity during which she could have contacted Mr Smith before he departed, but she did not. Even after he had departed he was clearly contactable because his details were with HR but nevertheless no contact was made with Adam Smith until Mr Elliott contacted him on 25 November 2016.

17 Mr Elliott then asked Adam Smith (page 214) as follows: *"I have been told that during this course there were in-depth conversations where the attendees asked you how they were supposed to deal with the Debit Card Lost and Stolen calls when they also had to deal with other priorities like Black Cards and correspondence. Do you recall this conversation?"* The answer from Mr Smith was *"I don't know to be honest. I had similar conversations…*" There is then a lengthy and rather inconclusive elaboration recorded at the bottom of page 214 which does not contain any clear indication that he did not say things to the Claimant and to Mandy and Liz which are consistent with their version.

18 Other relevant evidence on the Adam Smith training issue is the email exchange at page 185-186 between a manager Linda Johnson and Jacqueline Cook in May 2015. Ms Cook was not in the same training group as the Claimant, Mandy and Liz but she had also been trained by Adam Smith in December 2015 and had followed very much the same familiarisation process as they had done. It can be seen from these emails that as late as 4 May 2016 she was having to be pulled up for sending on lost debit card calls to the debit card centre.

19 Jacqueline Cook was asked about the training directly on 19 December 2016 (page 237), as follows *"If you had a call from a customer where both their credit and debit cards had been Lost/Stolen would you have handled both yourself? Was it only calls where just the debit card was Lost/Stolen that you would hand-off?*" Her answers included the following ""*If it was both I would have dealt with both cards. If it was just a debit card I would have handed this off when calls waiting."…"I was using my initiative especially if I were the only operator. I was not told by anyone to transfer the calls but then I wasn't told that I wasn't supposed to*." …"*The trainer said 'Don't worry about not taking them all*"". (The trainer is a reference to Adam Smith.)

20 This material relating to Ms Cook provides further corroboration of the fact that Adam Smith did not tell the trainees they should not pass on debit calls and in fact told them not to worry about "*taking them all*" – i.e. in effect telling them it was permissible for them, when they were busy, to allow others such as the debit card team to deal with some lost debit card calls received by them.

21 Carol Francis, another trainee was asked about the same matter (page 236). She provided an extremely short statement in which she denied that the Claimant's version. What she said was "*We were told that if we were L+S Debit Card trained we would deal with these calls whether it was busy or not. We were told that the Debit Card teams were really busy and couldn't handle these calls themselves."*

22 The second aspect of the Claimant's defence was that Janice Gibbs, the line manager, had condoned (the passing on of calls) when informed about this in huddles. Apart from what the Claimant said, there were three sources of evidence about this. The first (page 117) is the record of the investigatory meeting that she held with the Claimant on 29 April 2016 and which I have already referred to above. It is notable that after the Claimant at question 12 had indicated that her defence to the claim was inter alia that she had been advised in huddles that she could pass on debit card calls, Janice Gibbs (the responsible line manager who had been in these huddles) did not take the opportunity to rebut that proposition.

23 The further evidence insofar as she is concerned is her interview on 30 June 2016 (page 148) and her later interview by Mr Elliott on 19 December 2016 (page 237). In both of these interviews she denied having indicated to or authorised her team to pass on debit card calls other than in very limited circumstances which did not apply in the instant case.

24 The Respondent's disciplinary policy is in conventional form and it contains a definition of gross misconduct and examples of gross misconduct one of which is *"serious or persistent neglect of RBS instructions*". It was that particular paragraph that the Respondent focused on when justifying their dismissal of the Claimant.

Relevant law

25 Where the conduct of the employee is established by the employer as a potentially fair reason for dismissal under section 98(1) and (2) of the Employment Rights Act 1996, then section 98(4) must be considered which provides as follows: *Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends upon 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.'*

26 A dismissal for misconduct will not be unfair if it is based on a genuine belief on the part of the employer that the Applicant had perpetrated the misconduct, which belief is based on reasonable grounds following a reasonable investigation BHS v Burchell [1978] IRLR 379.

27 An Employment Tribunal should not substitute itself for an employer or act as if it were conducting a rehearing of or an appeal against the merits of an employer's decision to dismiss. The employer not the Tribunal is the proper person to conduct the investigation into the alleged misconduct. The function of the Tribunal is to decide whether that investigation is reasonable in the circumstances and whether the decision to dismiss, in the light of the result of that investigation, is a reasonable response. HSBC v Madden [2000] ICR 1283.

28 The range of reasonable responses test (or to put another way, the need to apply the objective standards of the reasonable employer) applies as much to the question whether the investigation into the suspected misconduct was reasonable in all the circumstances, as it does to the reasonableness of the decision to dismiss for the conduct reason. Sainsbury v Hitt 2002 EWCA CIV 1588

29 The ACAS Code of Practice Disciplinary & Grievance Procedures (2015) provides that that an employer wishing to discipline an employee should carry out an investigation to formally establish the facts; inform the employee in writing of the problem; hold a meeting to discuss the problem; decide fairly on the appropriate action, and provide an opportunity to appeal. Relevant paragraphs of the code require the various steps to be taken without unreasonable delay. If these steps are not taken then, even if the employee has been guilty of misconduct, it is likely that the dismissal will be unfair and, under Section 207A of the Trade Union and Labour Relations Consolidation Act 1992, an Employment Tribunal, in awarding compensation for unfair dismissal can, if it considers it just and equitable in all the circumstances to do so, increase the award it makes to the employee by no more than 25%..

Conclusions

30 It is not in dispute that the decision-makers Ms Allix and Mr Elliott had a genuine belief in the Claimant's misconduct and it is also common cause that the reason for dismissal was purported misconduct.

31 Copies of initial interview transcripts of Charlotte Thorn and two others including Janice Gibbs, were not provided to the Claimant before the first disciplinary hearing. This was not in accordance with the ACAS code paragraph 9 but this omission was speedily rectified because they were handed over shortly after the first disciplinary hearing to the Claimant and I do not regard this as a serious matter.

32 However, the Claimant was not provided with copies of the statements of Mandy Gibbs and Liz Bridgewater. The Claimant and her representative should have been given the opportunity to have this material to make the Claimant's case on the Claimant's behalf during the disciplinary process. This was also in breach of paragraph 9 of the ACAS code and I do regard it as a serious omission and procedurally unfair.

33 Jacqueline Cook and Adam Smith were not interviewed by Ms Allix but this omission was made good by Shaun Elliott who carried out a very thorough and very lengthy process at the appeal stage including interviewing those two individuals, so I do not regard that as being particularly significant.

34 The delay was serious and inadequately explained. As I have already mentioned the process took nearly nine months. A very small part of that nine months, probably amounting to a few weeks at the most was attributable to the Claimant. There has been a serious unwarranted delay to deal with this matter contrary to paragraphs 5, 11, 26 and 29 of the ACAS code.

35 The great weight of the evidence insofar as Adam Smith is concerned was in favour of the Claimant's version being correct. . The suggestion that the Claimant and Mandy and Liz had colluded in advance of their questioning on 29 April to invent a story about what they were told in training, (anticipating a disciplinary process which they had no inkling was about to start) is fanciful and I have no hesitation in dismissing it. They all three independently said the same thing about Adam Smith. Furthermore, this was confirmed to a very large extent by Jacqueline Cook's statement when the Respondent eventually obtained it. Adam Smith himself was unable to deny the Claimants version. The only crumb of evidence going the other way was Carol Francis' very short very late statement which says things which are not corroborated by Adam Smith himself. It was perverse for the Respondent to have concluded that the Claimant was lying about this

36 The only reasonable conclusion open to the Respondent on this issue on the balance of probabilities was that the Claimant and her co-trainees while in training had been told or given indications by Adam Smith which had led them to believe that they could do as they had done.

37 Insofar as Janice Gibbs is concerned, she did deny the Claimant's version when formally interviewed but she had not done so at the first opportunity on 29 April. Her vested interest in the matter was plain to see. She was the line manager. If she had been found to have been condoning or encouraging call avoidance (as the Respondent chose to characterise it in May 2016) she would have become herself the subject of disciplinary action possibly leading to her dismissal. Therefore she had every reason to try to deny what had happened.

38 Ms Gibbs was not experienced in dealing with debit card matters. She had not received the training herself. The passing on of debit card calls had been going on since the beginning of January. As the line manager it is more likely than not that she would have been fully aware of what was going on because she was the line manager discussing and overseeing the work. If she had not condoned it the Claimant and others would have stopped doing it.

39 To some extent the facts speak for themselves. Three experienced and trusted long-serving and satisfactory employees in the form of the Claimant, Mandy and Liz, who had not previously presented any problems with call handling, and not previously been found to avoid calls, had all been trained at the same time by the same person in December 2015, and then taken forward through the same appraisal process in the early months of 2016. They were then all managed by the same line manager and all, at much the same time, handled debit card calls in the same way, which the Respondent then decided after the event, to characterise as gross misconduct. The most obvious explanation for this pattern of events is not that these three satisfactory employees have suddenly decided to turn bad for reasons of their own, but that there

had been a failure in their training or subsequent line management or both. This was the only reasonable conclusion open to the Respondent on the evidence.

40 Quite apart from the question of whether Mr Smith or Ms Gibbs permitted or condoned the passing on of calls there was a complete absence of a clear instruction not to pass on calls. If the Respondent did not wish the Claimant and the other trainees never to pass on calls they should have made this clear in a written instruction. There was no clear instruction in writing or otherwise to this effect. If there had been, no doubt the instruction would have been obeyed.

41 I accept that it is well known in the call centre that call avoidance is a serious sackable offence. But the term "call avoidance" is a vague one and its boundaries are not well-defined in this context at least. Previously the Claimant and her colleagues had all been passing calls to the debit card team and indeed many of her colleagues continued to do so because they had not been trained on debit cards.

42 If, having acquired training on the subject of debit cards, the Claimant and her colleagues were thenceforward to be regarded as in a quite different position in which they were forbidden to pass on debit cards to the team, no matter what the circumstances, then this should have been clearly communicated to them in advance.

43 The sanction of dismissal as wholly disproportionate. An informal warning would have sufficed. The Respondents managers acting sensibly would have concluded that the Claimant and the others in the same boat simply needed a clear instruction that they should not pass on any more debit cards to the team. Had that been done I have no doubt that the problem would have been immediately rectified. The Claimant is plainly a hardworking diligent honest person who is anxious to comply. Putting the matter at its highest, this was a misunderstanding for which the Respondent was largely if not wholly responsible.

44 Gross misconduct is defined inter alia as a "*serious and persistent neglect of RBS instructions*". I was not shown any such instruction. Furthermore the term "persistence" suggests a doing of something despite instructions to the contrary, which did not happen here.

45 This was a substantively and procedurally unfair dismissal; there was no contributory fault and there is no *Polkey* reduction because if the Respondent had acted reasonably the Claimant and no doubt the other colleagues would still be employed.

46 The ACAS code was breached by the failure to give the Claimant the statements of Mandy and Liz, and by the Respondent delaying the whole process unduly. However this was not a case where the Respondent completely ignored the ACAS code. Mr Elliott in particular did take significant steps to try to do things properly. In those circumstances I do not think it is fair to award a 25% uplift I award 10%.

Remedy

47 The figures were set out in the Claimant's schedule and were not disputed. The only contentious matters were (i) the period for future loss and (ii) whether compensation should be awarded for the fact that although by the date of the Tribunal

hearing the Claimant had largely mitigated her financial losses in terms of earnings (she was earning by the date from 21 February 2017 onwards only £48 per week less than she was earning with the Respondent), she had achieved this only by increasing her working hours from 25 hours per week with the Respondent to 41 hours per week with her new employer.

48 Mr Barnett argued that it would be just and equitable to award compensation on the basis that from 21 February 2017 onwards she was in fact only earning £181.62 per week (which is what she would have been earning at her new rate of pay if she was still only working 25 hours per week rather than 41). I accepted this submission but only on the basis that future loss awarded would end one year after dismissal, namely on 7 September 2017. (If I was wrong to accept this submission I would in any event have extended the period of future loss compensation so as to arrive at the same result on the basis of this would be just and equitable).

49 Accordingly the Respondent must pay the Claimant compensation of £19,669.58 for unfair dismissal as set out in the judgment and in addition the Tribunal fees.

50 The damages for wrongful dismissal are co-extensive so no separate award is made.

Employment Judge Burns

23 May 2017