EMPLOYMENT TRIBUNALS

Claimant: Ms N El Kassimi

Respondent: Traveljigsaw Limited
(t/a Rentalcars.com)

HELD AT: Manchester **ON:** 17 & 18 November 2016

BEFORE: Employment Judge T Ryan

Appearances:
For the Claimant: Mr M Ainscough, Chartered Legal Executive
For the Respondent Mr S Lewinski, Counsel

REASONS

1. These are reasons for the judgment that was sent to the parties on 18 November 2016. Reasons were given orally at the hearing and the claimant made an application for the written reasons for the judgment to be provided on 23 November 2016. At that stage I discovered that the oral reasons had not been recorded due to my oversight.

2. Both advocates have provided copies of their notes of the judgment taken by them. I record my thanks for the time and effort that they have put into that task. In preparing the reasons that I set out below I have relied to a significant extent upon their notes. The reasons that are expressed below are not a word for word duplication of the reasons which I gave orally at the hearing. I confirm that the central findings of fact and the reasoning for the conclusions are materially the same as those expressed at the hearing although differently expressed.

3. By a claim presented to the tribunal on 23 May 2016 the claimant brought a complaint in respect of a dismissal orally communicated to her on 13 January 2016. It is common ground that the reason for the claimant's dismissal related to conduct. The issue before the tribunal that I had to determine was whether the decision was fair or unfair.

4. I heard oral evidence from Mr Wayne Parkins who dismissed the claimant and from Mr Robin Claesson who heard the claimant's appeal against dismissal. I

heard oral evidence from the claimant herself. I read the statements of each of those witnesses. There was an agreed bundle of documents. I refer to the documents by page number. I made the following findings of fact.

5. The claimant began her employment with the respondent as a customer service adviser or "agent" on 4 September 2012. She was engaged in the respondent's global business of arranging the hiring of cars. The business operates from a multilingual contact centre based in Manchester.

6. Staff are assigned to different departments so that when an application for a quotation for car hire is received, there is communication with the customer in the relevant language. The claimant, who is a French speaker, worked in the French team with others.

7. The claimant and other agents were rewarded by salary and commission. It is common ground that the commission could be a significant element of an agent's remuneration.

8. The claimant's duties during her working day were to attend the respondent's premises, to make calls and send emails to customers and try to convert enquiries i.e. requests for quotations into confirmed orders.

9. There was no dispute about the process that was adopted. In the course either of the previous day or on the morning of a particular day, potential leads were allocated amongst agents by managers. The agents are responsible for prioritising new quotes and existing ones which they already have on their screens and the respondent had clear procedures as to how that was to be done.

10. The first step is for the agent to make a telephone call to a potential customer. If that call is not answered, the agent registers it as, "CNA1" i.e. "first call not answered". After a lapse of 3 hours the agent is permitted to call that potential customer again. If that call is not answered it is registered as "CNA2". The next day, the agent may make a further call to the same potential customer and if that call is not answered it is registered as "CNA3". Agents may only then send an email to the potential customer. That causes the case to be treated as "CNA3-email" on the respondent's computer system.

11. If in the course of this process a call is connected to the potential customer then the agent "owns" the client for the purposes of obtaining commission. If however there is no connected telephone call the agent only owns the client after the case is categorised as CNA3. The agent owns the client, and receives commission on the sale to that client, for the period of 28 days after the call is connected or the cases categorised in that way. If in that 28 day period a further quotation is sent to the client the 28 day period for commission is renewed.

12. The stages of the process are recorded on the respondent's computer system by a series of drop-down menus. In addition agents can record memoranda on the system. There is also a recording made of any connected call whether the connection is made to a person or to an answering machine.

13. If the telephone number that is provided to the agent is not correct, it may be identified as a wrong number call and the agent can click through the drop-down menu process of categorisation by identifying it as a wrong number. In that event, the stages of the process between CNA1, CNA2 and CNA3 are abridged. The agent then obtains the benefit of owning the lead for the purposes of commission within a shorter timescale. In this way there is incentive to an agent in categorising a call early as CNA3 since, potentially, it may allow an agent to earn more commission.

14. There are strict rules against adopting this procedure, i.e. of accelerating the stage process, without proper justification and a breach of those rules is treated as commission fraud under the respondent's disciplinary procedure. The claimant accepted she had a clear understanding of the process and the consequences of an agent abusing it. Her case throughout was that she did not abuse the process.

15. Agents employed by the respondent are paid according to the extent to which they achieve targets. It is therefore in their interest to have a high level of active leads i.e. those where a call has been connected or leads categorised as CNA3. Bonuses range from 5% to 11% depending upon the targets achieved. Additional bonuses are available, known as "kickers" of up to 15% for achieving certain targets and up to 25% for high target achievement.

16. Mr Parkin gave evidence that in his view the claimant was a middle-of-the-road performer as a sales agent who would normally expect receive a bonus of 6.5-8%. In December 2015 the claimant was due to receive bonus of £2,913.75 which equated to 11% with a 25% kicker. The claimant's gross monthly pay according to her claim form was £3,481.58. This shows that bonuses can be at a very high level compared to basic salary.

17. The respondent's system is subject to checks. Upon checking Mr Parkins noted that in 2015 the claimant's percentage of leads categorised as CNA3 was significantly higher than other members of her team, even though, at this time, the membership of the team was fluctuating and reducing. As a result he asked the claimant's line manager Mr David Maxwell to investigate this.

18. Mr Maxwell investigated and held an investigatory meeting with the claimant on 4 January 2016 (106-108a). He had only checked what he described as a small sample but, of the 16 leads he checked, 8 telephone numbers were correct but 8 were what he described as "false". He told the claimant he was not satisfied with her explanation and that he would need to do further investigations which might lead to "gross misconduct". He suspended the claimant.

19. The claimant was sent notes to the investigatory meeting and a list of 27 calls in which the claimant had recorded that the telephone number was a wrong number and recorded as "invalid".

20. A disciplinary hearing was fixed for 13 January 2016. Mr Parkins conducted the hearing which was attended by the claimant and notes were taken (116-129).

21. Mr Parkins explained that the claimant had been suspended for "putting calls into CNA incorrectly". The process and the calls were discussed in detail. At the conclusion of the hearing he told the claimant that he was dismissing her.

22. Mr Parkin sent the claimant a letter dated 20 January 2016 (135-137) in which he summarised the reasons for reaching that decision. He recorded that the claimant explained that she understood the CNA process and denied that she had purposely breached it in order to make a financial gain through bonus. He said that the claimant had been provided with evidence of the calls. He acknowledged that 3 of the calls should not have been on the list.

23. Mr Parkins noted that the claimant had suggested at the investigation and disciplinary hearings that there were connection errors or the customers were travelling at the time. He said that upon investigation there was no record of the claimant having called the customers. He said that the claimant had recorded in memos that the number was invalid but upon asking another manager to check it had been found that the numbers connected and were not invalid.

24. Mr Parkin said that he considered the explanation unsatisfactory. He said that neither he nor anyone else been made aware by the claimant of connection issues. When there had been such issues in the past the claimant had immediately notified a manager. He said he could not understand why the claimant had not informed the manager in respect of these calls and this did not explain why the number connected when tried by another agent. He said that if a connection issue was the reason the claimant would not put the customer directly into CNA3 as this would be a breach of process itself.

25. He referred to the claimant's explanation that there were possibly human errors. Mr Parkin said that these calls were from a three-day period beginning of December when there were more agents in the office. He noted the claimant said she was working fast and under pressure and could have copied and pasted the wrong number or memo. He found that 24 incorrect numbers during a three-day period was excessive and he rejected that explanation.

26. Mr Parkin said that the claimant has not provided any other justifiable reason for such a high volume of incorrect errors in such a short period of time and that he believed that the claimant had purposely failed to follow the CNA process knowing that this would increase her bonus and that she had committed commission fraud.

27. Mr Parkin said that having considered the evidence the decision was taken to terminate the claimant's employment that day. He informed the claimant of her right to appeal. The claimant notified her intention appeal by an email to Mr Claesson dated 28 January 2016 (138). The claimant requested, amongst other things, copies of any emails that the claimant had sent to the 27 CNA3 customers. Mr Parkins accepted that the respondent had received such emails and they had not been shown to the claimant at the stage of the disciplinary hearing. By letter dated 29 January 2016 (140-147) the claimant set out her grounds of appeal.

28. On 3 February 2016 the respondent responded (148-150) to the request for information included by the claimant in her letter to Mr Claesson. Some additional documents were sent to the claimant. These included appendix 1 which showed that the errors that were alleged occurred on 9 dates in December and one date in November and also the contents of the memos recorded. Appendix 2 was a table of 93 calls since the respondent had said that other errors had been apparently found but had not been brought "to the table" in other words were not to be relied upon at the disciplinary hearing. The letter went on to say that the emails sent to the CNA3 customers would be available for the claimant to view ahead of the appeal hearing.

29. On 5 February 16 the claimant was sent a letter (157-158) by Mr Claesson inviting her to an appeal hearing on 11 February 2016. The claimant was informed she could be accompanied by a colleague or a registered trade union representative. Mr Claesson recognised that the grounds of appeal were: that the respondent failed to follow procedure by not giving the claimant information and the evidence the company relied upon; not giving the claimant a chance properly to defend herself; not providing information to the claimant or not checking some of it and that the claimant had listed 12 reasons why she believed she had been unfairly dismissed including 4 reasons which she alleged were not taken into account by the company.

30. At the appeal hearing on 11 February 2016 the claimant was accompanied by Ross Quinn a trade union representative. Notes of the appeal were taken (165-172). The claimant raised issues at the appeal including that the selection of evidence relied upon by the respondent was not reliable, that Mr Maxwell had harassed her over a period of time in a number of respects. She read at length from a document she had prepared. Mr Claesson pointed out that there was a lot of things for him to look into and it would take time.

31. After the appeal Mr Claesson asked another member of staff to check the telephone numbers and checked some of them by making calls personally as well . He also interviewed Mr Maxwell, Mr Parkins and another member of the French team, Matthieu Harivel to discuss the sharing out of the work.

32. Mr Claesson wrote to the claimant on 10 March 2016 providing the outcome of the appeal (186-195). Mr Claesson's decision addressed each matter specifically that the claimant had raised and gave a response. He summarised his conclusion on the 1st ground of appeal in the third paragraph on page 5 of his letter (190) and concluded that the company had followed a fair procedure and was neither in breach of the law nor the company's formal disciplinary process.

33. In respect of the 2nd ground of appeal, which concerned whether the 24 CNA3s might have been recorded in error or by a copying/pasting error Mr Claesson said this: "Having investigated further I have checked all the CNAs and none of them were incorrect numbers, but there were several instances where there were no calls." He went on to say, "…as part of my investigation I have checked the phone records on the day the calls were made. There is no record of the numbers being called. If they did go to the wrong number there would be a record of the numbers being called. I have found that this was also checked during the

investigation that led to the disciplinary hearing. I have also called all numbers and the contact was the lead driver on the quote."

34. Mr Claesson dealt with the question of whether there might have been connection problems. He noted that no tickets were logged with IT and neither Mr Parkins or Mr Maxwell had any recollection of further issues with the claimant's telephone.

35. Mr Claesson acknowledged that Mr Parkins made a mistake in the disciplinary hearing in saying that the 27 calls that were being considered were all made over 3 days in December when they were made over 9 days in December and one day in November. He said that he had taken that into consideration but did not consider that the duration had any impact on the allegations made against the claimant. Mr Claesson also agreed to discount one reference in the list of calls having regard to the claimant's explanation about that.

36. Mr Claesson dealt with the allegations against Mr Maxwell whom the claimant alleged wanted her to go and so the investigation he conducted was unfair. Mr Claesson said that he found no evidence of the claimant being targeted by Mr Maxwell. He noted that other investigations had taken place with other team members with a suspicion of potential misconduct. He noted also that the initial investigation was conducted by Chris Walker and Mr Maxwell. He found that the investigations were conducted fairly.

37. Mr Claesson addressed the claimant's case that other reasons such as workload, bereavement, divorce and problems with her manager might account for the errors. In respect of workload he noted that the claimant had volunteered for overtime in December and that the system of delegation of work was a fair process.

38. Mr Claesson concluded:

> "In summary, I have reviewed all of the evidence and investigated every point you have raised. I have checked every reference number, phone number, call log, emails and potential duplicate bookings relating to them. I have found that of the list of 27 references, 3 were discounted during the disciplinary and for the purpose of my investigation I have discounted another relating to it being your previous customer. There was an error made in the disciplinary hearing when it was stated that the issues arose over a period of three days in December when they were actually from one day November and nine days in December, which was clarified to you in the letter dated 3rd February. I have also looked into whether the memos were copied in error and have found no indication of this, however if they were copied in error there would still be a record of the call being made on the log.
>
> In conclusion I have found that the company did follow a fair procedure in line with the company's formal disciplinary process, that all the information was considered and the decision to terminate your employment based on all the evidence for an act classed as gross misconduct was fair. My decision is that the termination of your employment with effect of 13 January 2016 will not be overturned."

39. Subsequently Mr Claesson produced a spreadsheet analysing the calls (183-185 a). I understood this to have been prepared for the purposes of the tribunal hearing. He had adopted a "traffic light" system of colour coding. A number of the calls were coded green or yellow. He explained that those coded green show there was no problem for those coloured yellow the claimant might be given the benefit of the doubt. Apart from these, there were 13 in respect of which he contended there was no satisfactory explanation.

40. In submissions counsel for the respondent pointed out that even on the evidence produced by the claimant in the tribunal 8 of the instances still could not be explained by the claimant. Further to that, the respondent relied upon the judgment in British Home Stores Ltd v. Burchell [1978] IRLR 379 and in particular in what has become the classic test in conduct cases to the passage in which the tribunal said "there must be established…that the employer, at this stage which he formed that belief on those grounds, at any rate at 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." In other words, counsel was referring to the need for the tribunal to consider the entire process carried out by the employer in considering whether the investigation was reasonable.

41. Reference was also made to the case of Taylor v OCS Group Ltd [2006] IRLR CA. There had been debate in the authorities until that point as to the adequacy of appeals depending upon whether they were appeals by way of review or rehearing. A quotation from the head note in that case draws together the essential reasoning of the Court:

> "What matters is not whether the internal appeal was technically a rehearing or a review but whether the disciplinary process as a whole was fair. The task of the tribunal is to apply the statutory test and, in doing so, they should consider the fairness of the whole of the disciplinary process. If they find that an early stage of the process was defective and unfair in some way, they will want to examine any subsequent proceeding with particular care. But their purpose in so doing will not be to determine whether it amounted to a rehearing or a review but to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at the early stage."

42. The respondent's submissions in summary following that point were that Mr Parkinson and Mr Claesson undertook detailed investigations i.e. in the disciplinary and appeal hearings and, on the basis of the facts as they found them, the decision they reached had to be considered reasonable.

43. In written submissions Mr Ainscough set out a very helpful summary of the legal principles and reminded me, as I reminded myself, that it is not for this tribunal substitute its decision for that of the employer.

44. Mr Ainscough made a number of specific points of criticism of the procedure adopted by the respondents. He submitted that Mr Claesson had made a glaring error to find that a majority of calls had shown some wrongdoing when compared

with the subsequent spreadsheet. Allied with this he submitted that the respondent had failed to send the spreadsheet to the claimant.

45. In my judgment this was a criticism that went beyond the procedural. The compilation of the spreadsheet after the appeal had been determined might be relevant to the question of reasonable grounds for belief. It does not seem to me that creating a spreadsheet after the appeal can render the process unfair of itself. What it might do is demonstrate that the reasoning of the employer's officers was lacking. In my judgment the difficulty with that argument is that, even if the respondent came to a more nuanced view of the culpability of the employee by the preparation of the spreadsheet, it does not undermine the principal conclusion that the claimant was guilty of some fraudulent activity unless the spreadsheet wholly exculpated her.

46. In terms of the fairness of the procedure it does not seem to me that the subsequent creation of the spreadsheet which was not then sent to the claimant renders the procedure unfair unless there was some, as it were, further appeal open to her within the respondent's process.

47. Mr Ainscough relied upon criticisms of Mr Maxwell. Even had those been well founded, since Mr maxwell was not the decision-maker at either disciplinary or appeal stage it is difficult to see how they could render the process unfair. Since both Mr Parkins and Mr Claesson had undertaken independently some investigations into the calls being made or not, that point of criticism was rendered even weaker. It seems to me that the same conclusion can be reached in relation to the allegation that the respondent was wrong to delegate the checking of the calls to another manager.

48. Although the respondent appears to have a zero tolerance approach to commission fraud the evidence suggested that the managers considered what sanctions might ensue if only a small number of errors were upheld.

49. The claimant criticised the respondent for not permitting her to be present while checks were carried out. I can understand that that might not allay any suspicions that the claimant had in respect of investigation. The question is whether it rendered the process unfair.

50. A number of more minor points were made: that Mr Parkins had been wrong about what he said about the claimant being allowed to read emails, an error which he himself acknowledged; that Mr Claesson was not familiar with the procedure - an allegation clearly not borne out on the evidence; and finally that Mr Harivel's information supported the idea of an unfair distribution of work - again, not borne out on reading his interview as a whole.

51. Finally, Mr Ainscough submitted that inconsistencies in Mr Claesson's evidence pointed to a flawed procedure.

52. I begin my conclusions by saying that, in my judgment that last submission can best be described as ambitious. The test for fairness under section 98(4) puts no burden of proof on either party. Evidence about the disciplinary process in order that the tribunal can consider the 3rd stage of BHS v Burchell may come from

either party. If the evidence shows that the respondent has and follows a process, up to and including any appeals, which is a process which a reasonable employer could reasonably adopt then that part of the test is likely to be satisfied.

53. Taking into account all the claimant's arguments to say that the process was not reasonable in this case is to go beyond an objective appreciation of what the respondents did here. It appears to me that the respondent undertook a thorough procedure. Whilst there were errors, particularly in terms of the provision of documentation at the disciplinary stage by Mr Parkins, these were remedied at appeal.

54. It was not in dispute that the reason for the dismissal was conduct. In my judgment the respondent can say that it genuinely believed that there was misconduct here. Unless I were satisfied that Mr Parkins and Mr Claesson had not been truthful when saying that the calls were checked and that telephone numbers that were stated by the claimant to be invalid turned out to be valid that fact in itself tends to establish genuine belief. There was no basis on which I could hold that their evidence was not truthful.

55. Even at the very last stage of the case, i.e. after the production of the spreadsheet, there remained a number of instances of significant breaches of the respondent's call procedure by the claimant for which no proper explanation was ever offered to the respondent. In my judgment the claimant cannot then maintain that the respondent did not have reasonable grounds for their genuine belief.

56. It was not an issue between the parties before me, but for the sake of completeness I record that had it been suggested to the contrary, for misconduct of this nature which took place in these circumstances I do not consider that any reasonable employer could have failed to consider dismissal. Put another way, the sanction of dismissal was one which lay within the range of reasonable responses.

57. It is for those reasons that I dismissed the claim. I conclude by repeating my thanks to the parties for their assistance in enabling me to prepare these reasons in writing. I recognise that they are being sent to them outwith the period in which reasons normally would be provided and I thank the also for their forbearance in that. I apologise for the delay which in substantial part is due to the pressure of other judicial work.

Employment Judge 16 March 2017

REASONS SENT TO THE PARTIES ON

23 March 2017

FOR THE TRIBUNAL OFFICE