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EMPLOYMENT TRIBUNALS

Claimant: Mr Thileephan Sri Kathirgama Sampanther

Respondent: Excellent Entertainment Ltd

Heard at: East London Hearing Centre (by CVP)

On: 30 October 2020

Before: Employment Judge Housego

Representation

Claimant: In person

Respondent: Did not attend and was not represented.

JUDGMENT

1. The Claimant was unfairly dismissed by the Respondent.
2. The Respondent is ordered to pay to the Claimant the sum of £18,268.85.

REASONS

Adjournment request by Respondent

1. The Respondent applied for an adjournment of the hearing:

From: Anthony Thompson [mailto:(email address given)]

Sent: 29 October 2020 17:08

To: EastLondonET <eastlondon@Justice.gov.uk>

Cc: (Claimant's email address)

Subject: Mr T Sri Kathirgama Sampanther v. Excellent Entertainment Limited - case number: 3200748/2020 - URGENT

EXTREMELY URGENT

Dear Sirs,

We refer to the hearing listed for 30 October 2020.

The Respondent requests a postponement of the hearing tomorrow in order to compile its evidence. The Respondent's main witness is

unable to provide a witness statement at the present time.

In the circumstances, no one will be attending the hearing on the Respondent's behalf.

Please can you put this email before an employment judge as a matter of urgency.

Yours faithfully,

Anthony Thompson
Solicitor
Head of Employment Law
Lyca Group of Companies"

2. I refused this request for a number of reasons:
 - 2.1. The request was made only after 5pm on the day before the hearing.
 - 2.2. There was no reason given as to why the main witness was unable to provide a witness statement, nor was he identified, nor was it indicated when such a statement was likely to be made available.
 - 2.3. This was a CVP (virtual) hearing, and it would have been simple for the application to have been made by joining the hearing, and to give full reasons.
 - 2.4. There was no evidence that the Respondent had done anything in connection with the claim subsequent to filing the ET3 and grounds of resistance on 28 August 2020.
 - 2.5. It was not suggested that the Covid-19 pandemic had hindered the Respondent in any way.
 - 2.6. It is now approaching a year since the Claimant was dismissed.

Summary

3. The Respondent says that it dismissed the Claimant for gross misconduct. It says that he contacted a competitor and offered to sell to them its customer database. The Claimant denies that he did this, and says that they had no good reason to think that he did.

Evidence

4. I heard oral evidence from the Claimant. The Respondent did not attend, and so I did not hear oral evidence from Marc Payne, Group Head of Fraud, Revenue Assurance and DPO, who investigated, or from Alex Yohanan, the Respondent's UK HR Manager, who suspended and then dismissed the Claimant, or from Paul Mallett, Global Head of Talent Acquisition & HR, who

heard the Claimant's appeal.

5. The Respondent had not provided any documents to the Claimant or to the Tribunal. The Claimant provided the letters of suspension and of dismissal, and a 2 line email dismissing his appeal, and other papers about the effect on the Claimant of his dismissal.

Law

6. No sophisticated legal analysis is required. The reason put forward is conduct which is a potentially fair reason for dismissal (S98(2) of the Employment Rights Act ("the Act")). Was that the reason? If yes, did the Respondent have a genuine belief on reasonable grounds of misconduct by the Claimant? If yes, was it gross misconduct (or misconduct justifying dismissal)? Was dismissal within the range of responses of a reasonable employer? Was the dismissal procedurally fair? If not what were the chances of dismissal if there was a fair procedure? If there was an unfair dismissal did the claimant cause or contribute to his dismissal by his conduct?

7. In deciding fairness Section 98 (4) of the Act provides "*.... the determination of the question whether the dismissal is 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*". There is no burden of proof, for it is an assessment of the fairness of the actions of the employer. It is not for the Tribunal to substitute its own view for that of the employer. The test in *Burchell* (reference below) is whether the employer had a genuine belief in misconduct on reasonable grounds, after proper investigation.

8. I have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures ("the ACAS Code").

9. Compensation for unfair dismissal is dealt with in sections 118 to 126 inclusive of the Act. Potential reductions to the basic award are dealt with in section 122. Section 122(2) provides: "*Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce the amount accordingly.*"

10. The compensatory award is dealt with in section 123. Under section 123(1) "*the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer*".

11. Potential reductions to the compensatory award are dealt with in section 123. Section 123(6) provides: "*where the tribunal finds that the dismissal was to*

any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.”

12. There is provision for increase in compensation of up to 25% if the Acas code is not followed by an employer which unfairly dismisses an employee.

13. I have considered the cases of Post Office v Foley, HSBC Bank Plc (formerly Midland Bank plc) v Madden [2000] IRLR 827 CA; British Home Stores Limited v Burchell [1980] ICR 303 EAT; Iceland Frozen Foods Limited v Jones [1982] IRLR 439 EAT; Sarkar v West London Mental Health NHS Trust [2010] IRLR 508 CA; Sainsburys Supermarkets Ltd. v Hitt [2002] EWCA Civ 1588; Software 2000 Ltd v. Andrews & Ors [2007] UKEAT 0533_06_2601; and Polkey v A E Dayton Services Ltd [1988] ICR 142 HL. The range of responses of the employer is not infinitely wide but is subject to S98(4): Newbound v Thames Water Utilities [2015] EWCA Civ 677, paragraph 61. It is unfair to dismiss automatically by reason of gross misconduct: Department for Work and Pensions v Mughal (Unfair Dismissal: Reasonableness of dismissal) [2016] UKEAT 0343_15_1406. Mezey v South West London and St George's Mental Health NHS Trust [2007] EWCA Civ 106: suspension is not a neutral act (paragraphs 11-13). I have considered the guidance in Software 2000 Ltd v. Andrews & Ors [2007] UKEAT 0533_06_2601 about remedy.

14. The reason given by the Respondent was misconduct which is a potentially fair reason for dismissal. The first question is whether that was the reason. If it was the reason the issue is whether it was fair, or not. Those questions are determined by the findings of fact.

15. If the reason is shown to be misconduct, the starting point for the issue of fairness is the words of section 98(4) themselves. In applying that subsection the Tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal the Tribunal must not substitute its own view of the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the Tribunal is to determine in the particular circumstances of each case whether 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 the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

16. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances. A helpful approach in most cases of conduct dismissal is to identify three elements (as to the first of which the burden is on the employer; as to the second and third, the burden is neutral): (i) that the employer did believe the employee to have been guilty of misconduct; (ii) that the employer had in mind reasonable grounds on which to sustain that belief; and (iii) that the employer, at the stage (or any rate the final stage) at which it formed that belief on those grounds, had carried out as much investigation as was reasonable in the circumstances of the case. The band of reasonable responses test applies as

much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss.

Findings of fact

17. The Respondent's grounds of resistance describe the company and the Claimant's role within it, as follows: *"The Respondent is a premier, digital ethnic entertainment provider. Its set top box connects via the internet to over 450 live channels and movies in over 25 languages. At all material times, the Claimant was a Network Engineer. His role was managing the Lyca TV subscriber base, overlooking the apps development team in Sri Lanka for Apple and Android, ensuring the streaming of the content on the Lyca TV from various content suppliers and managing the website for Lyca TV."*

18. Mr Sampanther started with the company on 13 March 2016.

19. The Respondent was in discussion with YUPPTV for the sale to it of LycaTV. In November 2019 Mr Sampanther was asked by the CEO of LycaTV, Sunil Rohra, to assemble a database of customers. He had not the authority to do so himself, and got in touch with IT in Sri Lanka to obtain the data, remodelled it and provided it to Sohil Rohra and others as requested.

20. The Respondent's case is that:

"On 10 November 2019, the Respondent was notified by the CEO of YUPPTV that on 07 November 2019 at 2:44 pm he had received a LinkedIn message from the Claimant's account offering the Respondent's customer database for sale. The message read,

'RE: LycaTV

***Hi sir,
are you going to take LycaTV customer base (sic)? how much you are going to offer if it's coming from me? for entire customer base (sic)?'***

At the time the message was sent, the Respondent and YUPPTV were conducting negotiations about the potential sale and purchase of LycaTV. The Claimant was aware that the potential sale was in the offing."

21. On 11 November 2019 Alexander Yohanan, HR manager, suspended Mr Sampanther, delivering to him by hand a letter, stating that this was for alleged dishonesty and breach of confidentiality.

22. By a letter bearing the date of 26 November 2019 Mr Yohanan dismissed Mr Sampanther. The letter refers to a meeting held on 27th November 2019, and so the letter appears to have been written before the meeting took place. The letter is reproduced below. Mr Sampanther's evidence is that Mr Yohanan had the letter in his hand during that meeting, which lasted only 5-10 minutes. He said early on that he had already come to a conclusion, but after listening to Mr Sampanther Mr Yohanan said that he would discuss the matter with management and let him know. The letter arrived on 29 November 2019, with no

further communication from the Respondent.

EXCELLENT ENTERTAINMENT LTD

Private & Confidential

Thileephan Sri Kathirgama Sampanther
131, Fullwell Avenue, Ilford
IG16 2JG

26/11/2019

Termination of your contract

Dear Thileephan,

I am writing to confirm the outcome of the disciplinary hearing held on the 27th of November 2019 at the head office in accordance with the organisation's disciplinary procedure. The organisation has decided to terminate your employment with immediate effect without notice.

As you are aware, this hearing was held in relation to the allegation of dishonestly attempting to sell the LycaTV customer database to the CEO of YUPP TV and negotiating a sum for this. We discussed the matter fully at the hearing. The organisation has considered all the evidence before it and has taken your explanations into account.

I can confirm that the organisation has established to its reasonable satisfaction that you have attempted to commit customer data theft.

While we listened to your representations, and although you did deny ever contacting anyone, the investigation has affirmed that you did open linked in (the website where the third party was contacted on the 7th of November), after inspection of the CCTV, it appears as though you were the only one on your desk for the 7th of November who accessed your computer, since you work on customer databases and you have access to this information, the organisation was not able to find any mitigating factors for a lesser sanction, as it has now lost trust and faith in your abilities to do your duties.

This letter, therefore, gives formal notification of the summary dismissal of your employment for gross misconduct.

Your dismissal will take effect as of today's date 27th of Nov 2019. All terms and benefits associated with your employment will cease as of the end of today.

You have the right to appeal against the decision to summarily dismiss you on the ground of gross misconduct. If you wish to appeal, you should do so in writing to Paul Mallett (paul.mallett@lycamobile.com) within five working days of being informed of the termination of your employment, stating the grounds for your appeal.

Yours Sincerely,



Alexander Yohan
HR Manager
Lyca group of companies

Excellent Entertainment Ltd
Walbrook Building, 195 Marsh Wall, London E14 9SG, UK.
Phone: +44(0)20 7536 6450 Fax: +44(0)20 7536 6451
Registered Company Number: 09672003

23. On 02 December 2019 Mr Sampanther appealed, giving full reasons set out below, and a hearing date was set for 09 December 2019:

1/22/2020

Gmail - Appeal against the decision - Work Termination made by Lyca Group(Excellent Entertainment) on 27/11/2019



Sampanther Thleephan <thleephan@gmail.com>

Appeal against the decision - Work Termination made by Lyca Group(Excellent Entertainment) on 27/11/2019

4 messages

Sampanther Thleephan <thleephan@gmail.com>
To: paul.mallett@lycamobile.com

Mon, Dec 2, 2019 at 1:10 PM

Sampanther

Thleephan Sri Kathirgama

131 Fullwell Avenue Ilford IG6 2JG
074122689389

Paul Mallet
Global HR Head
Lyca Group

Dear Paul

Appeal against the decision - Work Termination made by Lyca Group (Excellent Entertainment) on 27/11/2019

I, Thleephan Sri Kathirgama Sampanther worked for Lyca TV(Excellent Entertainment) since 14/03/216 (3 years and 8 months) and was suspended on 11/11/2019 and terminated on 27/11/2019.

I wish to appeal against your unfair decision made by terminating my employment due to an assumption that you discovered anonymous LinkedIn message sent to YUPP TV CEO. This is completely wrong decision mad with wrong information. I have no any connection with above Linked-in message and the message sent from different LinkedIn Portal that is not mine. Anyone can create a new LinkedIn / mail and send any messages mentioning someone else name to get revenge or any other purpose.

Please consider below my arguments

You mentioned that I used LinkedIn on 07/11/2019 in my computer, according to my knowledge I did not use my LinkedIn very long time.I have mentioned this in the disciplinary hearings. In this case you need to investigate properly with IT support professionals.

I have prepared data base report with support of my technical staff Harsha Daklshinta upon email request made by Lyca Media CEO Sunil Rohra on 06/11/2019 and report submitted to Sunil Rohra CEO on 07/11/2019 and copied Jegajeevan Rajadurai(Operaton manager), Neranda Liyanage (Manager IT Sri Lanka AMG).Check my official emails thleephan@asiamediaglobal.com and thleephan.sampanther@lycatv.tv for the reference.

Third person definitely created this LinkedIn account and sent this message(Offering Lyca TV data base) to YUPP TV to fire me from the organisation. There is only another person knew this report downloaded and submitted except above people that is Palitha Hetigoda is a Technical support staff(Not an IT Professional) working in UK office and given redundancy consultation notice on 07/10/2019. Palitha asked me as well, did you submitted the data base report to management? then I said yes but I didn't share anything with him.

Palitha Hetigoda: Working over six years in Lyca TV along with Raj Jeyaraj and not happy about his redundancy consultation notice because,

- He is having maximum flexible shift, can come and go to office any time any day when ever he wants. there is no restriction.
- This maximum flexible given because of he is working to Raj Jeyaraj continuously over 12 years in other organisations as well before join to Lyca with Jeyaraj
- Working only less than 8 hours instead of company 9 hours policy.
- Preparing his salary time sheet by his own entering in and out time according to his own calculation.

<https://mail.google.com/mail/u/0?ik=d93ef0db8e&view=pt&search=all&permthid=thread-a%3Ar8599786122756632948&siml=msg-a%3Ar86014...> 1/3

1/22/2020 Gmail - Appeal against the decision - Work Termination made by Lyca Group(Excellent Entertainment) on 27/11/2019

- He believes that he can not get any job anywhere in UK with this kind of facility and flexibility.
- Palitha strongly believe he could secure his job if I am not in the organisation.
- Palitha is having full Customer management system(CMS) access(Super administrator) and all payment gate way and bank account access. Recently CEO Sunil asked me in front of the Lycas TV access immediately while he leaving the office end of the consultation of him to block his notice.

According to above circumstance I strongly believe Palitha Hetigoda could be sent this LinkedIn message to YUPP TV with the intention of firing me from the organisation and secure his employment, He still working in the LYCA TV and could damage the business any other way even having full access to all the bank accounts and system. Please do proper investigation and take the necessary action.

I have technically worked with several third party organisations such as hotstar, sunxt and Tentkoitta on behalf of Lyca TV and carefully handled secure data and aware about this GDPR regulation and supported to prepare Lyca TV GDPR.

My pension payment is not up to date, not paid backdated pension fully as agreed by Payroll team and HR, please check and do the needful ASAP.

I am very disappointed and mentally disturbed regarding your unfair decision made against me that is vanished my reputation and career. I am expecting reasonable compensation from you (Lyca Group- Excellent Entertainment) and need to be settled as soon as possible for this damage that your wrong decision made on me.

.Regards
Thileephan Sri Kathirgama Sampanther

Paul Mallett <Paul.Mallett@lycamobile.com>
To: Sampanther Thleephan <thleephan@gmail.com>

Mon, Dec 2, 2019 at 4:16 PM

Dear Thileephan,

I will hear your appeal on 9th December 2019 at 12pm. Please ask for me on arrival on the 2nd floor.

Kind regards, Paul

Paul Mallett
Global Head of Talent Acquisition & HR

Lycamobile UK Limited
Walbrook Building
195 Marshwall
London
E14 9SG
UK

Direct Dial: +44 (0) 207 536 6555
Email: paul.mallett@lycamobile.com

Lycamobile Corporate Video: <http://www.youtube.com/watch?v=ef1bBJGB8H0>

<https://mail.google.com/mail/u/0?ik=d93ef0db8e&view=pt&search=all&permthid=thread-a%3Ar8599786122756632948&simpl=msg-a%3Ar86014...> 2/3

24. After that meeting, which lasted only 5-10 minutes, Mr Sampanther chased up a decision, and on 02 January 2020 Mr Mallet emailed Mr Sampanther:

“Following on from our meeting on 9th December 2019. Having taken time to review your case, I can confirm that my decision is to uphold your termination.

I am sorry that this is not the outcome you were looking for, but it draws to a close the appeal process.

Bets (sic) regards, Paul”

25. There was no investigation of any sort, save that Mr Mallet told Mr Sampanther that he had viewed the cctv of Mr Sampanther’s workstation for 07 November 2019 and that it was not clear.

26. All Mr Sampanther was shown by way of evidence was at the dismissal meeting. It was the text message set out above, on a mobile phone.

27. Mr Sampanther’s request to check up on the IP address that was used to set up the LinkedIn account was not followed up. Mr Sampanther showed his own LinkedIn account page to Mr Yohanan, which clearly showed that he had multiple unanswered notifications. He thus demonstrated that he was not a regular or frequent LinkedIn user. The message was not sent from that LinkedIn account but from another with aspects of the Claimant’s name (“Thileephan Sam”).

28. The man under threat of redundancy who was suspected by Mr Sampanther of engineering his departure to create space for him to remain was subsequently dismissed by reason of redundancy.

Conclusions

29. The Respondent clearly had reason to suspect Mr Sampanther. There is no reason to think that they did not get a message from the CEO of YUPPTV. There is no reason for them not to accept that to be genuine. The message above was sent from a LinkedIn account which cast suspicion on Mr Sampanther. Mr Sampanther was in possession of the database apparently being offered for sale.

30. However, the Respondent made no effort to check that this was in fact Mr Sampanther’s doing. It gave no thought to the obvious point that this was not sent from Mr Sampanther’s long standing and little used LinkedIn account. If he was going to set up a new LinkedIn account to approach the CEO of YUPPTV there would be every reason to use an alias. No effort was made to find out when and where the account was set up, or the IP address from which it was sent. Anyone trying to sell such a database would be highly likely to hide his or her identity. Using Mr Sampanther’s name is a simple and obvious way of doing so. Mr Sampanther had (on instruction) emailed the database to a variety of people within the Respondent, any one of whom could have done this, as could someone in the Sri Lanka office. The message does not read as a first message, but no enquiry was made about any previous message.

31. The person who suspended Mr Sampanther dismissed him, having had typed up the dismissal letter the day before the hearing. He had made his mind up in advance. While he said that he would investigate what Mr Sampanther was able to say in a very short meeting either he did not do so, or he did not share it with Mr Sampanther.

32. The person who took the appeal took only 5-10 minutes to hear it. He said that he had viewed the cctv but that it was not clear. He took over a month (29 November 2019 to 02 January 2020) to dismiss the, giving no indication of reasons why, or what information he had considered.

33. The procedure was unfair, for these reasons. It is impossible to consider what might have happened had a fair procedure been followed, and I make no *Polkey* reduction for that reason. I make no reduction for contributory conduct for want of any evidence that it was Mr Sampanther who sent that message. The message reads as if it was not the first, but no enquiry was made of the CEO of YUPPTV about any other message.

Remedy

34. The basic award is based on work from 13 March 2016 – 29 November 2019 = 3 full years. He was under 41 at the date of dismissal, and so the basic award is 3 weeks' pay. He earned £25,000 a year, which is £480.77 a week. $3 \times £480.77 = \mathbf{£1442.31}$.

35. Mr Sampanther obtained alternative employment starting on 05 August 2020, at higher pay. He had no expense in obtaining that employment which was through personal contacts. He did not claim any state benefit. He did some minicab driving in that time, but he had done that while employed and it does not reduce his loss. There is nothing from the Respondent to indicate that he might have been made redundant or furloughed between 29 November 2019 and 05 August 2020 (he was not at risk of redundancy himself). His loss is therefore his lost earnings for that period at an annual salary of £25,000. That is 33 weeks. $£25,000 \text{ divided by } 52 \times 33 = \mathbf{£15,865}$.

36. To this I add the notional loss for loss of statutory rights of 2 weeks' pay, which is £961.54.

37. The total compensatory award is therefore **£16,826.54**.

38. The total amount I order the Respondent to pay to the Claimant is the total of $£1442.31 + £16,826.54$, which is **£18,268.85**.

39. I do not add an uplift as the procedure was followed, even if unfairly.

40. I order the compensatory award gross, and it is for the Claimant to ensure that the appropriate income tax and national insurance is paid on the compensatory award.

Employment Judge Housego

30 October 2020