



EMPLOYMENT TRIBUNALS

Claimant: Mrs V Lillie

Respondent: E.ON UK PLC

Heard at: Leicester

On: 21 & 22 September 2022

Before: Employment Judge Cansick

Representation

Claimant: Mr B Uduje, Counsel

Respondent: Ms I Baylis, Counsel

RESERVED JUDGMENT

The claimant's claim of unfair dismissal is not well-founded and is dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent as a Complaints Resolution Manager. The respondent is a large energy supplier in the UK.
2. The claimant claims she was unfairly dismissed. The respondent denies this was the case and that the claimant was dismissed for a fair reason, that being misconduct.
3. The claimant was represented by Mr Uduje of Counsel. The claimant gave sworn evidence and Mr Richard Mattock, a former employee of the respondent, gave evidence for the claimant. The respondent was represented by Ms I Baylis of Counsel. The respondent's sworn witness evidence was given by Ms Melanie Clarke, the disciplinary officer and Ms Chantel Hobson, the appeal officer.

4. I also had access to an agreed bundle of documents which ran to 361 pages.

Name of the Respondent

5. The name of the respondent was incorrectly on the ET1 as E.ON Energy Solutions Limited. With the agreement of the parties I ordered the name be changed to E.ON UK PLC, the correct name of the respondent.

Issues to be decided

6. At the start of the hearing an agreed list of issues was placed before me by the parties. The issues for the hearing are summarised as follows:

6.1. What was the principal reason for dismissal? The respondent states it was gross misconduct for call and work avoidance. The claimant challenges such and believes the real reason was to avoid a redundancy payment. I need to decide whether the claimant had committed misconduct.

6.2. If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will decide, in particular, whether:

6.2.1. there were reasonable grounds for that belief;

6.2.2. at the time the belief was formed the respondent had carried out a reasonable investigation;

6.2.3. the respondent otherwise acted in a procedurally fair manner;

6.2.4. dismissal was within the range of reasonable responses.

6.3. If the claimant was unfairly dismissed is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

6.4. If the claimant was unfairly dismissed would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal. If so, to what extent?

7. It was agreed that if I found that the claimant was unfairly dismissed then remedy would be dealt with at a separate hearing. However, I requested that matters in 6.3 and 6.4 be considered at this hearing. Both the claimant and respondent were invited to address such in their evidence and submissions at the hearing.

Findings of fact

8. The respondent is a large energy supplier and employs around 10,000 people within its UK operations. The claimant started her employment with the respondent on 1 January 2015 as a Customer Service Advisor. The claimant shortly after

became a Complaints Resolution Manager, based at the respondent's Leicester Office. She held this position at the time of her dismissal.

The Investigation

9. On 20 July 2020, the respondent began an investigation into allegations made against the claimant. The investigating officer was Ms Kiera Peacock (People Lead at the respondent). Ms Peacock had been asked by the claimant's line manager, Mr John Foster (People Lead at the respondent), to investigate two allegations. The first allegation was in regard to call and work avoidance and the second allegation was in regard to bullying and harassment.
10. The investigation report was completed on 6 August 2021 by Ms Peacock. Ms Peacock details in the report that the allegations were as follows:
 - (i) *Call avoidance. Vilpa has not been calling customers prior to closing their complaints.*
 - (ii) *Call avoidance. Vilpa had not spoken to customers when calling them and not attempted to call customer back.*
 - (iii) *Work avoidance. Vilpa has not taken the required actions on complaints prior to closing them.*
 - (iv) *Unacceptable behaviour towards employees or third parties whilst acting or appearing on behalf of the Company, including but not restricted to, discrimination, abusive or insulting behaviour, assault/violence, intimidation, indecency and any form of victimisations, bullying or harassment.*
 - (v) *Conduct yourself in a manner consistent with the proper performance of your duties and the maintenance of good working relationships.*
11. Ms Peacock detailed that as part of the investigation she held interviews with John Foster (People Lead), Louise Pepper (Complaints Manager), Nicola Fletcher (Complaints Manager) and Lavern Robinson (Complaints Manger). She also considered written statements from Colette Bryan (People Lead), Amiena Cox (Complaints Manager) and John Foster (People Lead).
12. Ms Peacock detailed that due to the amount of evidence considered it had been collated in a spreadsheet. That spreadsheet was 67 pages. The evidence considered included:
 - Complaint ID's for 81 complaints resolved by the claimant between 21 June 2021 and 16 July 2021.
 - Details of 34 closed complaints reviewed between the above dates.
 - 'MI data from qlik" showing 15 outbound calls made by the claimant between the above dates.
 - Screenshots of "NICE" call recordings and "CCP" activity on relevant dates.

13. The claimant, accompanied by her Trade Union Representative, was interviewed by Ms Peacock on 30 June 2021.
14. In her conclusion to the Investigation Ms Peacock found in regard to call avoidance, that clear expectations were set at a trust meeting between Mr Foster and the claimant on 24 May 2021. It has been made clear that all customers were to be called back prior to resolving a complaint. The evidence considered, however, showed that between 21 June 2021 and 16 July 2021 the claimant had resolved 81 complaints but only 15 outbound calls were made.
15. It was detailed that the claimant had argued that she had been told by another advisor, called Ms Dorin Toc, that she did not need to call aged complaint customers before resolving a complaint. Ms Peacock, however, considered that there was no evidence such has been discussed with “Leads” and also an examination of Ms Toc’s call behaviour did not reflect that was what Ms Toc herself was doing.
16. The claimant was also detailed to have argued that Mr Foster had told her she did not need to follow the customer contact process when she joined the written complaints team. Ms Peacock concluded this was not the evidence of Mr Foster and was contrary to the expectations set at the 24 May 2021 meeting.
17. The claimant also argued that there had been persistent issues on the “CCP system” that meant calls had not been logged. The investigator concluded there was no evidence produced showing that the claimant had logged there were CCP issues.
18. Ms Peacock noted that on 14 July 2021 the claimant had made four outbound calls to four different customers. She did not have conversations with those customers or try to call the customers back later in the day.
19. In regard to work avoidance Ms Peacock detailed she had examined 34 closed complaints and fifteen of them required additional work.
20. In regard to the bullying and harassment allegation Ms Peacock found that three advisers (Ms Louise Pepper, Ms Lavern Robinson and Ms Nicole Fletcher) had approached Mr Foster individually about comments the claimant had made. These comments were detailed earlier in the report to include “John has no backbone”, “John sweeps things under the carpet” and “John’s on his soap box again”. The claimant argued in her interview that these were opinions and were not meant to upset Mr Foster.
21. Ms Peacock recommended there was a formal case to answer on all of the allegations.

The Disciplinary Hearing

22. By a letter dated 6 August 2021, the claimant was invited to attend a disciplinary hearing on 20 August 2021. The claimant was informed the hearing would be conducted by Ms Melanie Clark (a People Lead with the respondent at that time). The claimant was informed that:

The hearing is being held to consider the following allegation/s against you.

1. You have not been calling customers prior to closing their complaint.

2. You have not taken the required actions prior to closing their complaint.

3. You have not spoken to customers on the phone when they answered and have not tried to call them back if you were experiencing IT issues.

4. Unacceptable behaviour toward fellow employees of third parties whilst acting or appearing to act on behalf of the Company, including but not restricted to, discrimination, abusive or insulting behaviour, assault/violence, intimidation, indecency and any form of victimisation, bullying or harassment.

5. Conduct yourself in a manner consistent with the proper performance of your duties and the maintenance of good working relationships.

23. Details of the investigation were enclosed. The claimant was also informed she had the right to be represented at the hearing. Copies of the disciplinary procedure and employee rules were also enclosed. The claimant was informed that: "In your case the allegations against you amount to gross misconduct and therefore, you should be aware that dismissal without notice is one potential outcome".

24. The claimant attended the disciplinary hearing on 20 August 2021 and was accompanied by her Trade Union Representative. The hearing was adjourned so the disciplinary officer could consider the case further, including the claimant's evidence. The hearing was reconvened on 25 August 2021 at which the claimant was summarily dismissed.

25. Prior to the disciplinary hearing the claimant had submitted documentation in ten appendices numbering 46 pages.

26. Confirmation of the outcome of the disciplinary hearing was sent to the claimant in a letter dated 25 August 2021 from Ms Clarke. In that letter the documents submitted by the claimant were detailed as:

Appendix A – Call recording and call logging issue

Appendix B – Written Squad No Contact Process

Appendix B1 – Email from Mandy Simpson

Appendix B1A – Email from Nicole Case

Appendix C – Complaints that need more work

Appendix C1 – Chat Transcript ID: 17568493

Appendix C2 – Chat Transcript ID: 17581011

Appendix D – Spreadsheet in relations to tabs from Investigation Officer.

Appendix E – Email sent to Squad from John re-moving forward

Appendix F – Statement in regard to Bullying and Harassment.

27. In the outcome letter Ms Clarke made findings on the individual allegation as detailed below:

Call avoidance – Not calling customers prior to closing their complaints

- Claimants defence that calls not recorded on the system
28. Ms Clarke considered further details from another system called “NICE”. This recorded the claimant making 11 calls between 21 June and 16 July 2021. This was less, not more, than from the system detailed in the investigation. Ms Clarke also considered another report that showed how many calls were made in comparison to those connected. It showed that 25 calls had been made and 15 had connected. Ms Clarke concluded that while 81 complaints were closed, 25 calls were made of which 15 connected. Calls should have been made for all closed complaints.
29. Ms Clarke noted that she had considered evidence submitted by the claimant in appendix D, where the claimant had commented that of the 34 individual complaints analysed in the investigation she had called back 28 of them. This was noted as being inconsistent with the number of calls made.
30. The claimant’s argument that there had previously been problems with the recording system in August 2019, was also considered. It was noted by Ms Clarke that there was no other evidence to support this was the case.
- Claimant's defence of another process of not contacting customers before closing complaints.
31. Ms Clarke detailed she had considered appendices B, B1 and B1A submitted by the claimant. These were in regard to an earlier process of contacting customer before closing complaints. She noted that this was not in line with the process agreed with Mr Foster on 24 May 2021 where all customers were to be contacted before complaints are closed. It was this that should have been followed.
32. Ms Clarke also noted that of the 34 individual complaints reviewed there was no evidence of 27 being called back.
33. The disciplinary officer concluded the allegation was founded.

Call avoidance – Claimant has not spoken to customers when calling them and not attempted to call them back.

34. Ms Clarke detailed that she had considered the explanation for the calls put forward in the claimant’s appendix D. She concluded the allegation was founded and noted in the outcome letter:

We’ve reviewed five calls across three different days during your hearing. For the first customer, you said that you had system problems on this day which is why you weren’t heard speaking when the call was answered by the customer. You went on to state that you called the customer back following this call. You weren’t able

to provide any evidence of this. For the second customer, you confirmed that you don't leave a voicemail message when a call goes to a customer's answering machine as you believed this was an accepted way to work. When asked to provide evidence of this process, you weren't able to do so. For the third customer you've said that you had system problems. You confirmed that you had every intention of calling the customer again after the failed first call and yet failed to account for why the actions you took did not demonstrate this. For the fourth and fifth customer you've said that for both of these calls, you attempted to call each customer again after the failed call. You could not provide any evidence to demonstrate that these secondary calls were made to either customer.

Work avoidance – Claimant has not taken required action on complaints prior to closing them.

35. The disciplinary officer reviewed Appendix D submitted by the claimant, including responses regarding specific calls. Having considered the evidence produced by the claimant, Ms Clarke concluded the complaint was founded.

Unacceptable behaviour

36. The disciplinary officer considered the complaint was founded.

Conduct yourself in a manner consistent with the proper performance of your duties and the maintenance of good working relationships

37. The disciplinary officer found the complaint was founded on the basis of the four other allegations being founded and that any one of the allegations would also have been enough to found this allegation.
38. Ms Clarke concluded that the claimants employment be terminated with immediate effect, with the last working day being 25 August 2021. Ms Clarke stated in the letter:

I have considered all sanctions available to me instead of dismissing you, which may have included issuing you with a written warning and determined that these were not appropriate sanctions based on the overwhelming evidence that you have not been making calls to customers as expected/instructed and you have also demonstrated no responsibility for what you said during the conversation with colleagues.

You had a documented conversation about the expectations of calling customers in May 2021 with your people lead and whilst your behaviour improved immediately after this conversation, you did not maintain this change in behaviour. The fact that you failed to maintain the change in behaviour demonstrate to me that if I were

to issue you with a written warning, you would remain at high risk of continuing to display the same or similar unacceptable behaviour.

The Appeal

39. The claimant appealed the decision by a letter dated 25 August 2021. The appeal hearing took place through Microsoft teams on 30 September 2021 and the appeal officer was Ms Chantel Hobson (People Lead at the respondent). The claimant raised five specific grounds of appeal. The outcome of the appeal was detailed to the claimant in a letter dated 18 October 2021. The letter addressed the five grounds of appeal as follows:

(1) That the unacceptable behaviour complaint should have been dealt with separately in accordance with good practice.

40. Ms Hobson concluded that both allegations were part of the same procedure and to consider each separately would have delayed the process. She detailed that each allegation was investigated separately.

(2) The informal investigation was not informal. The claimant felt intimidated and bullied with questions being fired at her. The claimant considered the whole investigative interview was non-objective and unbalanced.

41. It was detailed by the appeal officer that there was no evidence the claimant was bullied or intimidated during the investigation. She considered the claimant was asked open and probing questions. It was noted that the claimant was supported by her Union Representative and was able to adjourn the hearing if needed a break.

(3) The appointment of Ms Clarke as the disciplinary officer was unfair as she worked with Mr Foster on a daily basis so would not be impartial. The claimant's request for another disciplinary officer to be appointed was refused.

42. Ms Hobson detailed that Ms Clarke had only worked alongside Mr Foster for a short time. Ms Clarke was confident she remained impartial. Ms Clarke had sent the claimant an email reassuring her of this. Ms Hobson considered there was no evidence that Ms Clarke was impartial.

(4) Mitigating circumstances that the claimant pointed out at the hearing were ignored, such as unblemished record, underlying IT issue unresolved, and no previous issue of concerns with John Foster.

43. Ms Hobson noted that the claimants conduct had not been brought into question previously. She stated she had taken this into account, but due to the matter being of such a serious nature, the length of service would not be a mitigating factor on the outcome.

44. In regard to the IT issues complaint it was detailed that these were considered in the disciplinary proceedings but evidence did not establish there were such.

(5) That even if the claimant was deemed to have acted outside the code of conduct expected of an E.ON employee, summary dismissal was inappropriate before going down the written warning procedure first. As the claimant was a Union Learning Rep and Branch Officer it is established good practice that disciplinary action being considered is discussed at an early stage with an official employed by the union.

45. It was detailed by Ms Hobson that the disciplinary action taken was based on the evidence and she was comfortable that Ms Clarke took the appropriate action.
46. In regard to the union complaint it was noted that at the disciplinary hearing it was established that the claimant's union representative had discussed with the claimant the disciplinary action being considered. It was further detailed that throughout the process the union representative had been informed and updated on the process.
47. The appeal officer also addressed the claimant had raised issues at the appeal hearing and in a 10 page document she had submitted titled "Response to Outcome Letter, dated 25 August 2021". Ms Hobson addressed the key issues in her letter.
48. Regarding the unacceptable behaviour complaint Ms Hobson considered that the possibility of resolving this matter informally should have been explored. For this reason the finding on that allegation was revoked.
49. The rest of the decision was upheld as was the decision to summarily dismiss based on the upheld findings.

Relevant Law

50. Section 94 of the Employment Rights Act 1996 ("the 1996 Act") confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that she was dismissed by the respondent under section 95.
51. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the respondent shows that it has a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on party, whether the respondent acted fairly or unfairly in dismissing for that reason.
52. Section 98(4) of the 1996 Act addresses fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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 shall be determined in accordance with equity and the substantial merits of the case.

53. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions in **Burchell 1978 IRLR 379** and **Post Office v Foley 2000 IRLR 827**. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonable and unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the event or what decision it would have made, and the Tribunal must not substitute its views for that of the reasonable employer (**Iceland Frozen Foods Limited v Jones 1982 IRLR 439**, **Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 2 3**, and **London Ambulance Service NHS Trust v Small 2009 IRLR 563**).

Conclusions

54. There is no dispute between the parties that there was a dismissal in this case.
55. Mr Uduje and Ms Baylis both made oral submissions including on fairness. Ms Baylis also provided me with written submissions. I have considered both their submissions.
56. I find that the respondent held a genuine belief that the claimant was guilty of misconduct. The dismissal and appeal letters were unequivocal. There was nothing in the evidence given by the officers for the respondent which would lead to doubting that they held a genuine belief. I note in the issues presented to me at the start of the hearing if it was suggested by the claimant that the real reason for the dismissal was for the respondent to avoid a redundancy payment. This was not advanced in any detail by the claimant in the hearing. I do not find any basis to conclude the avoidance of a redundancy payment was the real reason for the dismissal.
57. I now consider if the respondent acted reasonably in treating misconduct as a sufficient reason to dismiss the claimant. I have kept in mind throughout that the respondent is a very large employer within the UK who would have access to significant administrative resources. I consider each of the issues identified at the start of the hearing (at paragraph 6.1).

Reasonable grounds for that belief of misconduct

58. I consider there were reasonable grounds for the belief. A considerable amount of evidence was relied on for the allegations of call and work avoidance. This included numerous interviews, statistics from IT/Calling systems (over a period of more than a month) and detailed analysis of 34 complaints. The spreadsheet of evidence considered by the respondent was over 67 pages.

59. The respondent further considered evidence from the claimant that included 46 pages submitted for the disciplinary hearing. The claimant advanced a defence in regard to IT issues, arguing that calls weren't being recorded. She also advanced a defence that she was following a different process as to when to call a client, arguing she had been told to follow this process by a manager and another colleague. All of these defences were considered by the respondent in the process.
60. From the evidence considered it was within the band of reasonable responses for the respondent to find misconduct by the claimant in regard to call and work avoidance.
61. Mr Uduje submitted that a broad brush approach was applied. I do not consider this was the case and such is demonstrated by the amount of evidence considered. Submissions were also made that the respondent considered the allegations with a closed mind. I do not consider this is the case either. The respondent continued to consider the evidence and arguments of the claimant at different stages of the proceedings. That the unacceptable behavior complaint was revoked at appeal, demonstrates the claimant continued to keep an open mind.

At the time the belief was formed the respondent had carried out a reasonable investigation

62. Mr Uduje submitted that the respondent being a big employer should have carried out more of an investigation. I have detailed above the amount of evidence considered. I consider the amount of investigation conducted was in the band of reasonable responses. I also note that at both the disciplinary and appeal stages the respondent investigated and considered issues and defences raised by the claimant.

The respondent otherwise acted in a procedurally fair manner

63. I have not identified any procedural unfairness. The procedure adopted falls within the band of reasonable responses.
64. Mr Uduje submits that not all of the claimant's documentation submitted was considered. It was not disputed by the respondent that every "serial number" referred to was not looked at. It was also accepted by the appeal officer that she had used the claimant's appendix D rather than C, as she considered they covered the same matters. There is nothing presented that suggests that the respondent did not, however, consider the key parts of the claimant's defences. It would not have been reasonable for the respondent to consider every minute detail presented by the claimant.
65. Mr Uduje also submitted that the procedure was irreversibly tainted by considering the call/work avoidance allegations together with the unacceptable behaviour allegation. I consider it was reasonable to consider these together. Each allegation was investigated separately. The appeal officer emphasised, on revoking the finding on the unacceptable behaviour allegation, that immediate dismissal was still made out on the call and work avoidance findings.

The dismissal was within the range of reasonable responses

66. Following the findings of call and work avoidance the respondent detailed that they concluded the only sanction was dismissal. The respondent did in the appeal consider the claimant's previous good record and length of service but concluded the matter was too serious for that to be mitigation. The respondent did consider alternative sanctions but found they would not be sufficient. I conclude that for the misconduct of call and work avoidance dismissal was in the band of reasonable responses.
67. As a result of the above findings I find the dismissal by the respondent was fair. The claimant's claim of unfair dismissal falls to be dismissed.

Employment Judge Cansick

Date: 20 December 2022