EMPLOYMENT TRIBUNALS

Claimant: Miss K Nguyen

Respondent: British Telecommunications plc

HELD AT: Liverpool **ON:** 23 and 24 September 2019

BEFORE: Employment Judge Horne

REPRESENTATION:

Claimant: Mr A Moosa, trade union representative
Respondent: Mrs R Osman, solicitor

JUDGMENT having been sent to the parties on 18 October 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Complaints and issues

1. The claimant is a former employee of the respondent. Her employment ended with a dismissal which took effect on 13 July 2018.
2. By a claim form presented on 24 June 2018 the claimant raised a single complaint of unfair dismissal. In a separate claim form the claimant complained of race discrimination, but that complaint was withdrawn. A judgment dismissing the withdrawn complaint was sent to the parties on 22 August 2019.
3. At the outset of the hearing we discussed the issues that I would have to decide in order to determine whether the dismissal was fair or unfair. The issues are:
   3.1. Whether or not the respondent can prove the sole or principal reason for dismissing the claimant;
   3.2. Whether or not that reason related to the claimant's conduct;

3.3. If so, whether the respondent acted reasonably or unreasonably in treating that reason as sufficient to dismiss the claimant.

4. Had the dismissal been found to be unfair, further issues would have arisen in relation to the claimant's remedy.

Evidence

5. I heard oral evidence from Miss Garton and Mr Ash for the respondent. The claimant gave oral evidence on her own behalf but did not call witnesses.

6. I considered documents in an agreed bundle running to 430 pages plus inserts.

Facts

7. The respondent is a very large company with some 75,000 employees. It sits at the head of a group of companies in the communications sector. Within the respondent's corporate group is a telephone and broadband provider trading under the "BT" brand. BT competes against a number of other providers, such as TalkTalk. The respondent also has a business with an effective monopoly over communications infrastructure, such as telephone and broadband cables. This business trades as Openreach.

8. It is a requirement of the communications regulator, Ofcom, that these two businesses are kept legally separate. The separation is reinforced by a core principle known as "equivalence". Under the equivalence principle, Openreach must treat BT the same as it would treat any other communications provider.

9. The legal separation between BT and Openreach is often lost on customers. They place their orders with a communications provider, such as BT, who then arrange for Openreach to deal with any infrastructure as part of the service. The customer expects that the broadband provider will provide the cable as well as the access to the data that flows along it. They expect a single point of contact when ringing to complain and do not welcome being passed from one organisation to another.

10. The claimant is a former member of the Royal Air Force. She was employed by the respondent from 21 January 2013 as an engineer with Openreach. From early 2017 she was promoted to the role of Infrastructure Solutions Customer Services Team Member. She worked with other call handlers an office which she called "the floor". Her day-to-day role involved speaking over the telephone to engineers and members of the public about Openreach services. She was expected to be able to deliver high quality customer services, often in the context of a difficult telephone call from a frustrated customer.

11. The claimant was provided with a written job description. Here are some of its relevant provisions:

    11.1. Under the heading, "Key Purpose of the Role", the post-holder was expected to "Deliver 1st class customer experience through helpful, consistent and enthusiastic interaction with [providers], internal colleagues… and members of the public, typically by calls…"

    11.2. Under the same heading, the post-holder was described as having the "Ability to communicate confidently & effectively".

11.3. Under the heading, “Business Impact”, the job description stated, “This role has a significant impact on the relationship between Openreach and its customers and is integral in turning a potentially poor customer experience into a positive outcome by applying excellent customer care skills to efficiently resolve issues and look to continually improve the customer experience”.

11.4. Relevant “Behaviours” included, “Keen and enthusiastic customer service ethic focusing on putting the customer at the heart of everything they do”; “Take ownership of the customer interaction”; “Flexible and able to work in a high pressured environment”.

12. Team members were given guidance on a good telephone manner. The guidance was called “What Good Sounds Like”. It encouraged, amongst other things, filling silences appropriately, listening to the customer, asking diagnostic questions, apologising where necessary, and being proactive in finding out the cause of problems and offering solutions.”

13. It was an important business aim of the respondent that Openreach should strive to achieve high quality customer service in a competitive market and that the Openreach brand should be promoted by the way in which team members interacted with customers over the telephone.

14. The respondent’s Openreach division had a number of written policies and procedures including a written disciplinary policy. That policy offered a definition of misconduct, which included “Behaving in a way that has a negative impact on customers, suppliers or colleagues”. It also had a non-exhaustive list of examples of gross misconduct, which included “unacceptable behaviour towards customers or colleagues”. The policy also provided that a warning might be taken into account even if it was unrelated behaviour when considering what disciplinary sanction to provide. The disciplinary procedure did not specify who within the organisation should choose the manager to hear a disciplinary matter at any particular level.

15. On 12 June 2017, the claimant had a telephone conversation with an engineer and, during the course of that conversation, she used a swear word. It is not necessary for me to state exactly how the conversation took place. The call was overheard by her line manager, Mr Kevin Smith, who thought it sufficiently serious to begin an investigation. He conducted a fact-finding interview with the claimant on 26 June 2017. During that interview, the claimant admitted swearing at the engineer. She later signed the record of the meeting as accurate, following which her case was referred to a disciplinary meeting.

16. The manager appointed to conduct the disciplinary meeting was Miss Sarah Garton, a Senior Operations Manager. Within the organisational structure, Miss Garton’s role sat as second line manager in relation to the claimant. Miss Garton had a connection with Mr Smith in that they previously socialised at work events and that they had worked together in various roles over a long period of time.

17. During the meeting, the claimant assured Miss Garton that she had learned from the experience and would improve her telephone manner.

18. Having heard from the claimant, Miss Garton reached a decision. She believed that the claimant's actions during the 12 June 2017 telephone call amounted to gross misconduct. She drew back from dismissing the claimant, preferring to impose a final written warning, which was given to the claimant on 2 August 2017. The final written warning stated, "Any misconduct committed within the following 12 months is likely to lead to dismissal".

19. The claimant was informed of her right to appeal against the warning but did not appeal.

20. On 6 February 2018, the claimant was at work on the floor when she received an incoming call from a customer to whom I will refer as "Ms M". There were between 4 and 6 other call handlers present on the floor at the time.

21. By the time Ms M first spoke to the claimant she was already very frustrated. In order to understand what happened next, it is important to explain the background to the call and the cause of Ms M's frustration. In the days prior to the call, Ms M had been trying to get fibreoptic broadband installed in her house and had placed an order with BT. Separately, she had reported a fault, again via BT, as her existing copper broadband connection was becoming disrupted. She had had no direct contract with Openreach at this point, but an Openreach engineer had called at her house under instruction from BT. The Openreach engineer had advised her that her existing overhead cable needed to be moved to a different telegraph pole that was nearer to her house. Another Openreach engineer had arrived a few days later to carry out that work. On arrival, that engineer had declined to carry out the work without a mobile platform (or "cherry-picker" as it is sometimes known) because of health and safety concerns. He had gone away and informed Ms M that his supervisor would send another team. Ms M had waited for the replacement team, but nobody had come. By the time Ms M had spoken to the claimant, she had already spoken to various BT departments for about two hours. It is not hard to imagine just how annoyed she must have been.

22. The telephone call with the claimant lasted over 30 minutes. It is necessary for me to describe it in some detail.

    22.1. The claimant began by listening appropriately to Ms M's story and asking for basic information such as her postcode and order number. At various points during this early part of the conversation, the claimant showed empathy with the customer, acknowledging the long time that Ms M had spent on the telephone and apologising for the fact that she had had to wait.

    22.2. Ms M told her story a number of times. The claimant asked some diagnostic questions about, for example, the existence of any previous orders. At the same time, the claimant viewed on-screen information about the claimant's order history. The claimant let on to Ms M that she could see that Ms M had had an order placed with BT. She apologised for not being able to give any further information about the order because of the separation of BT from Openreach. As it was, the claimant should not technically have even mentioned that she even knew of the order. Such is the strictness of the legal separation between BT and Openreach that Openreach workers are

prevented from disclosing BT's data to third parties, even data as simple as the existence of an order.

22.3. As the conversation went on, Ms M occasionally interrupted the claimant when the claimant was talking. When Ms M interrupted, she would generally repeat what she had already said. At other times, Ms M was repeating her story and the claimant would interrupt.

22.4. On occasion the claimant raised her voice slightly. This tended to happen when they were both speaking at the same time.

22.5. The claimant informed Ms M that she could pay for Openreach to do a survey. She also repeatedly advised Ms M that she should contact BT. She made the practical suggestion that she could make a complaint to BT who could then raise the matter with Openreach Front Desk. This was done quite calmly but its effect was undoubtedly frustrating for Ms M because Ms M had already been in extensive contact with BT.

22.6. At one point the claimant said, "I apologise that you've been having to wait, I mean it's not our fault that you're waiting". This comment must have been infuriating to Ms M, who would doubtless expect BT and Openreach to work together rather than have one blame the other.

22.7. As the claimant was explaining how the process of instructing Openreach worked Ms M interrupted. The claimant attempted to regain control of the conversation by saying "no, no, listen to me". Her tone of voice at this point was relatively calm.

22.8. The claimant quoted Ms M a price of £218.00 for a survey to be done directly through Openreach. She also explained, twice, that the lead time for the survey would be 25 working days. Ms M told the claimant that she had already paid BT £129.00 for the visits that she had had so far. The claimant continued to suggest paying for a direct Openreach survey as an alternative to complaining to BT. This part of the conversation went round in circles for several minutes.

22.9. During the call it became relatively clear that what Ms M needed was a service (re-routing the cable) that only Openreach could physically carry out. What was less clear was how the service should be arranged and who should pay for it. One possibility was that the re-routing work lay outside the scope of Ms M's existing order with BT, in which case one solution might have been for Ms M to commission that work directly with Openreach. This is what the claimant believed. It must, however, have been reasonably obvious to the claimant that another possibility existed. The alternative possibility was that the cost of re-routing the cable was included as part of Ms M's existing order with BT, for which Ms M had already paid £129.00. In that event it would be BT's responsibility to instruct Openreach to carry out the work, and Ms M would have nothing more to pay.

22.10. About two thirds of the way into the conversation, Ms M started audibly and quite obviously crying. Although Ms M's distress had in all probability been brewing for some time, it is fairly clear what finally made her burst into tears. It happened when Ms M reminded the claimant that she had already

paid for an engineer to visit her home. The claimant replied, “But you didn’t pay *us* anything”.

22.11. Shortly afterwards the claimant offered to cancel the £218.00 survey. Ms M continued, however, to show an interest. She gave an explanation that did not appear to make sense. The claimant replied, “Sorry, you’ve completely lost me there”. Later she added, “Sorry, I’m just a bit confused about what you want to be honest, so would you like me to raise the order for you?”. Ms M agreed, but then changed her mind when the claimant reminded her of the 25-day lead time. The conversation then ended cordially but without Ms M’s problem having been resolved.

23. At no point during the conversation did the claimant ask Ms M for a break so she could speak to a colleague or to Mr Smith.

24. As it turned out, the claimant did have a facility available to her that could well have enabled her to resolve Ms M’s difficulty. She could have sought Ms M’s consent to join a three-way conversation with BT. A three-way conversation would have greatly improved the chances of resolving whose responsibility it was to send the Openreach engineers back to Ms M’s house. The claimant did not know that this option was available to her. It was never suggested to her during the disciplinary process.

25. There was a further solution the claimant might have explored. She could have offered to pause the conversation and ring Ms M back the next day to check whether BT had sorted out the issue for her independently. Again, these suggestions were not put to her during any part of the disciplinary process.

26. Mr Smith overheard parts of the conversation. He did not interfere. It was close to the time that he needed to go home. So Mr Smith went home and, as he later told the investigation, he decided to listen to the conversation in full at a later time. Once he had listened to the audio-recording, he passed the matter to another first line manager, Mr Crawford, to investigate.

27. The claimant in due course was invited to a fact-finding meeting with Mr Crawford. Together Mr Crawford and the claimant listened to the audio-recording of the telephone call. Mr Crawford then asked the claimant a number of pre-prepared questions. The record of the meeting included this exchange:

> Mr Crawford: “Talk me through how you would do this with a difficult customer.”
>
> Claimant: “Try and listen to them, to show understanding, apologise, come up with solution to their problem. It is frustrating because every call I had that day was from someone who had been put through incorrectly by BT and you can’t just say they’re wrong.”

28. The claimant confirmed that she had had to raise her voice a little bit because the customer was worked up. She added, “I thought that was the best way to respond at the time”.

29. Mr Crawford asked the claimant, “At the end of the call you raised an order for a survey but still advised the customer to contact BT. Can you explain why you did this?”. The claimant answered, “Because she wanted me to raise an order. I

thought the best idea was to ring BT but she still wanted us to provide a solution so I suggested she speak to BT while we sent an invoice to her so she can decide whether she wants to go ahead with it and I provided her with two options".

30. One topic that interested Mr Crawford was the claimant's disclosure of BT's confidential information to Ms M. He pointed out that the claimant should not have told Ms M of the existence of the BT order.

31. Following the fact-finding meeting, Mr Crawford decided that the evidence warranted referral to a second line manager for consideration of disciplinary action. By letter dated 21 February 2018, the claimant was invited to a disciplinary meeting. The letter set out what disciplinary allegations the claimant would have to face. The allegations were:

    "

    - Failure to provide a customer with the required quality of service
    - Unprofessional and inappropriate behaviour

    In that when dealing with a customer on 6 February 2018 you acted in an unprofessional and inappropriate manner whilst dealing with a customer, thereby not providing the required quality of service our customers expect."

32. The invitation letter did not contain any specific allegation of mis-selling. It did, however, enclose a copy of Mr Crawford's report with an embedded record of the fact-finding meeting. That record contained a numbered list of questions and answers. These included Mr Crawford's question about why the claimant had raised an order for a survey at the same time as advising Ms M that she needed to contact BT.

33. In preparation for the disciplinary meeting, the claimant's union representative< Mr Rob Aldritt, asked for a copy of the audio file of the telephone conversation with Ms M. The respondent's reply was that it was not possible to provide a copy in advance of the hearing (because it would take ten days to process the request), but that Mr Aldritt was welcome to attend the respondent's premises and listen to the recording for himself. The offer was later re-iterated to him, following which, he listened to the recording. The claimant was not present at the time.

34. The second line manager appointed to chair the disciplinary meeting was Miss Garton, who, it will be remembered, had imposed the earlier final written warning. The claimant did not object to Miss Garton's involvement.

35. The disciplinary meeting took place on 5 March 2018. The claimant was accompanied by Mr Alldritt.

36. During the meeting, Miss Garton took the claimant through the disciplinary allegations. She did not concentrate on exactly the same aspects of the claimant's conduct as Mr Crawford had done. For example, she ignored the claimant's disclosure of the BT order to Ms M. Instead, she asked detailed questions of the claimant about her telephone manner. Particular points of concern in Miss Garton's mind were the claimant talking over Ms M and

repeatedly offering Ms M a service when she did not understand what Ms M's requirements were.

37. Following the meeting Miss Garton made some further enquiries. She examined the claimant's coaching records to see if there were any identified concerns about the claimant's telephone manner. There were none.

38. Miss Garton then set about making her decision. She did not think it was misconduct for the claimant to have given out BT information. She did, however, think that the claimant had misconducted herself. In Miss Garton's opinion, the claimant had made Ms M's experience worse during the call by over-talking, talking dismissively to her, and by offering her a service when she did not know whether the customer would need it or not.

39. Miss Garton did not see the claimant's behaviour as a training or performance issue. She came to this view for three reasons. First, there was no reference to the claimant's telephone manner in her coaching records. Second, she remembered that the claimant had already assured her, at the time of the final written warning meeting, that she would improve her telephone manner. Third, the audio recording of the call demonstrated, in Miss Garton's opinion, that the claimant was capable of responding appropriately when she wanted to. She thought that the claimant had made a deliberate choice to offer a service that she did not know whether the customer needed or not in an attempt to bring the call to an early conclusion

40. In Miss Garton's view the claimant's behaviour during the call with Ms M was sufficiently serious to amount to misconduct. On its own, Miss Garton thought, her conduct would merit a warning. But Miss Garton took the view that the claimant's conversation with Ms M should not be looked at on its own. The claimant was already on a live final written warning. When the warning was taken into account, the right sanction in Miss Garton's opinion was dismissal with notice. She considered alternative sanctions such as demotion to the role of engineer, but thought that that would not be appropriate. Engineers, in her view, had customer facing roles. Their job included speaking face-to-face to members of the public. On the strength of what she had heard in this telephone conversation with Ms M, Miss Garton felt that she could no longer trust the claimant to be the public face of Openreach. She therefore decided to dismiss the claimant with notice. Her decision, and the rationale for it, were set out in a letter dated 18 April 2018, which the claimant received the same day.

41. The claimant appealed, initially by e-mail that evening, followed by a letter dated 24 April 2018. There were 13 grounds of appeal, but it is sufficient for me to highlight a few of them:

    41.1. It was unfair to link the call with Ms M to the incident that had resulted in the warning.

    41.2. Miss Garton was not impartial and her decision showed determination to prove guilt.

    41.3. The claimant had not had access to the audio recording of the Ms M conversation.

    41.4. Lack of support and training.

41.5. Mr Smith did not actually believe that the claimant had misconducted herself during the call with Ms M. Had he been concerned about her behaviour, he would have intervened at the time.

41.6. It was unfair to find that the claimant had mis-sold a service without a specific accusation to that effect in the disciplinary invitation letter.

42. The respondent's disciplinary procedure provided that an appeal against dismissal should be heard by the employee's third line manager. In the claimant's case, the most natural person to hear the appeal would have been Ms Caroline Gradwell, a General Manager and Miss Garton's line manager. Ms Gradwell and Miss Garton were not just close working colleagues but also good friends outside of work. Recognising that her impartiality might be compromised, Ms Gradwell arranged for the appeal to be heard by Mr Ash, the Sales General Manager. I accept Mr Ash's evidence that it was not uncommon for managers to avoid a personal connection by nominating another equivalently-graded manager to conduct a hearing. Mr Ash himself had had virtually no interaction with the claimant by the time the appeal was allocated to him.

43. This is a convenient moment to mention a post on the respondent's intranet platform, which the claimant says demonstrates a close connection between Mr Smith, Ms Gradwell and Miss Garton. All three of these individuals were named in the post. The intranet platform was intended to display purely work-related content and the subject-matter of this particular post was no exception. There is nothing about this post to call into question the ability of any of these individuals to make decisions independently of the others. In any event, the post did not link any of them to Mr Ash.

44. The claimant attended the appeal meeting accompanied by her trade union representative. By the time of the meeting, the claimant had not only had a chance to listen to a recording of the conversation with Ms M, but she had also prepared a very detailed transcript highlighting areas where she thought she had behaved appropriately during the call. Opening the appeal meeting, Mr Ash checked with the claimant whether or not she had had sufficient opportunity to listen to the recording and she confirmed that she had.

45. During the appeal meeting, the claimant and Mr Ash discussed each of the points that the claimant had raised in her appeal letter.

46. Following the appeal meeting Mr Ash sought further information about the amount of training that the claimant had received. He obtained a week-by-week analysis of the claimant's initial training records and a summary of her ongoing training, support and appraisal.

47. Having carried out his further enquiries, Mr Ash decided that the decision to dismiss should stand. Mr Ash's overview of the claimant's conduct was that the claimant had behaved "rudely" and "contemptuously" towards the customer during the call. She made the customer's experience worse and had contributed to the customer starting to cry. He was also concerned that she had offered a service to Ms M, without knowing whether Ms M actually needed the service or not. He believed that the claimant could have helped Ms M to achieve a satisfactory resolution by convening a three-way conversation with BT or by

offering to call her back the following day to check whether the Openreach engineer had arrived.

48. Mr Ash separately considered each of the claimant's grounds of appeal and reached the following conclusions:

    48.1. In Mr Ash's opinion there were sufficient similarities between the claimant's conduct on 6 February 2018 and her behaviour that had resulted in the final warning to justify taking the warning into account.

    48.2. Mr Ash did not think that Miss Garton was determined to secure a finding of guilt. In his view it was significant that, in the first disciplinary investigation, Miss Garton could have dismissed the claimant, but had chosen to reduce the sanction to a final written warning.

    48.3. Mr Ash had confirmed with the claimant that she had had a sufficient opportunity to listen to the audio recording.

    48.4. Having carried out his further enquiries, Mr Ash was satisfied that the claimant's training had been more than adequate to ensure that she was equipped to manage the call with Ms M.

    48.5. It was Mr Ash's belief that the claimant worked in a "call centre". His experience of call centres was that there would be typically 20 to 30 call handlers working at any one time. (As will be apparent from my earlier findings, Mr Ash's belief was mistaken: the floor could not reasonably be described as a call centre and there was only a maximum of 6 call handlers working there at the time of the claimant's call to Ms M.) Working on that misunderstanding, he reasoned that Mr Smith could not reasonably be expected to monitor or interfere with every call.

    48.6. Although there had been no explicit allegation of mis-selling, Mr Ash was satisfied that the claimant had been given adequate notice that this was an element of the misconduct that Miss Garton would be considering. This was because it was clearly referred to in the pack that accompanied the disciplinary invitation letter.

49. His decision made, he sent his outcome letter to the claimant along with a careful and detailed rationale.

50. Neither Miss Garton nor Mr Ash actually enquired to see whether or not Ms M ultimately needed to have a directly-purchased Openreach survey carried out or not.

Relevant law

51. Section 98 of ERA provides, so far as is relevant:

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal and
>
> (b) that is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

> (2) A reason falls within this subsection if it…(b) relates to the conduct of the employee…
>
> (4) 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 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.

52. The reason for dismissal is the set of facts known to the employer, or the set of beliefs held by him, that causes him to dismiss the employee: *Abernethy v, Mott, Hay and Anderson* [1974] ICR 323, CA. The focus is on the reason of the decision-maker: *Orr v. Milton Keynes Council* [2011] EWCA Civ 62. After judgment in this case was sent to the parties, but before the written reasons were finalised, the Supreme Court handed down its judgment in *Royal Mail v. Jhuti* [2019] UKSC 55. That decision adds a qualification to the *Orr* principle. Where a person in the hierarchy of responsibility above the employee determines that she (or he) should be dismissed for a reason but hides it behind an invented reason which the decision-maker adopts, the reason for the dismissal is the hidden reason rather than the invented reason.

53. Where the reason for dismissal is the employee's misconduct, it is helpful to ask whether the employer had a genuine belief in misconduct, whether that belief was based on reasonable grounds, whether the employer carried out a reasonable investigation and whether the sanction of dismissal was within the range of reasonable responses: *British Home Stores Ltd v. Burchell* [1978] IRLR 379, *Iceland Frozen Foods Ltd v. Jones* [1983] ICR 17.

54. In applying the test of reasonableness, the tribunal must not substitute its own view for that of the employer. It is only where the employer's decision is so unreasonable as to fall outside the range of reasonable responses that the tribunal can interfere. This proposition is just as true when it comes to examining the employer's investigation as it is for the assessment of the decision itself: *J Sainsbury plc v. Hitt* [2003] ICR 111.

55. The tribunal must consider the fairness of the whole procedure in the round, including the appeal: *Taylor v. OCS Ltd* [2006] IRLR 613.

56. Particular considerations arise when the employer has taken account of a prior disciplinary warning in deciding to dismiss an employee. In *Wincanton Group plc v. Stone* UKEAT 0011/12, Langstaff P reviewed authorities on the subject and gave guidance for use in future cases. I set out what I believe to be the relevant parts of the guidance here:

> We can summarise our view of the law as it stands, for the benefit of Tribunals who may later have to consider the relevance of an earlier warning. A Tribunal must always begin by remembering that it is

> considering a question of dismissal to which section 98, and in particular section 98(4), applies. Thus the focus, as we have indicated, is upon the reasonableness or otherwise of the employer's act in treating conduct as a reason for the dismissal. If a Tribunal is not satisfied that the first warning was issued for an oblique motive or was manifestly inappropriate or, put another way, was not issued in good faith nor with prima facie grounds for making it, then the earlier warning will be valid. If it is so satisfied, the earlier warning will not be valid and cannot and should not be relied upon subsequently. Where the earlier warning is valid, then:
>
> (1) The Tribunal should take into account the fact of that warning.
>
> …
>
> (3) It will be going behind a warning to hold that it should not have been issued or issued, for instance, as a final written warning where some lesser category of warning would have been appropriate, unless the Tribunal is satisfied as to the invalidity of the warning.
>
> (4) It is not to go behind a warning to take into account the factual circumstances giving rise to the warning. There may be a considerable difference between the circumstances giving rise to the first warning and those now being considered. Just as a degree of similarity will tend in favour of a more severe penalty, so a degree of dissimilarity may, in appropriate circumstances, tend the other way. There may be some particular feature related to the conduct or to the individual that may contextualise the earlier warning. An employer, and therefore Tribunal should be alert to give proper value to all those matters.
>
> …
>
> (6) A Tribunal must always remember that it is the employer's act that is to be considered in the light of section 98(4) and that a final written warning always implies, subject only to the individual terms of a contract, that any misconduct of whatever nature will often and usually be met with dismissal, and it is likely to be by way of exception that that will not occur.

Conclusions

Reason for dismissal

57. The first question I have to decide is whether or not the respondent has proved the sole or principal reason for dismissal. When examining the reason I concentrated on the thought processes of Miss Garton and Mr Ash. At the time of reaching my decision, the *Jhuti* decision had not yet been handed down, but I do not think it would alter my analysis. This is not a case where it is alleged that any other person (such as Mr Smith) deceived the decision-maker into believing that she was dismissing the claimant for a different reason.

58. The reason for dismissal was the belief held by Mr Garton and Mr Ash that:

    58.1. the claimant had behaved inappropriately during the telephone call with Ms M; and

58.2. had done so during the currency of a live final written warning for speaking inappropriately during a telephone call.

59. This was a reason that plainly related to the claimant's conduct. I must therefore decide whether the respondent acted reasonably or unreasonably in treating that reason as sufficient to dismiss.

Reasonable investigation

60. In my view Miss Garton and Mr Ash reached their decisions following such investigation as it was reasonable for an employer to carry out. When assessing the quality of the investigation I started from the standpoint that the respondent is a very large organisation that could be expected to devote considerable administrative resources to its disciplinary investigations. Next, I took an overview. The respondent conducted a fact-finding meeting, a disciplinary meeting and an appeal meeting, all conducted by different managers, all acting independently of each other. At the disciplinary and appeal meetings the claimant was accompanied by a trade union representative. At the appeal stage, Mr Ash did not just examine grounds of appeal, but considered almost all the evidence that had been available to Miss Garton. Unless there was some particular defect in the process, I would find this to be a reasonable procedure.

61. This brings me to the claimant's specific criticisms of the investigation:

61.1. *Disciplinary allegations too vague.* The claimant argues that the disciplinary allegations were too vague and did not include a precise allegation of mis-selling. In my view there is some merit in that criticism. There could have been more concentration in the disciplinary invitation letter as to exactly what aspects it was of the claimant's behaviour during a 30 minute call that fell under the heading of "failure to provide a customer with the required quality of service and unprofessional and inappropriate behaviour". It ought to have been clear to the claimant from the fact find meeting that Mr Crawford was concerned about the fact that the claimant had offered a survey that required a payment when she did not know whether it was needed or not, and was at the same time telling the customer that she needed to go back to BT. It could not have come as a surprise to the claimant that it would be taken into account in the subsequent disciplinary meeting.

61.2. *Miss Garton not impartial.* Miss Garton's had a social connection and close working relationship with Mr Smith. In view that connection by itself would not prevent Miss Garton from being able to hear the case independently. If there was any unfairness caused by the connection between Miss Garton and Mr Smith I would find that it was cured on appeal by Mr Ash.

61.3. *Mr Ash not impartial.* This brings me to a related criticism. It is the claimant's case that Mr Ash was not impartial because he was chosen by Ms Gradwell. I disagree. Mr Ash worked in a different part of the business from both the claimant and Miss Garton and had had virtually nothing to do with the claimant before hearing the appeal. There is nothing to suggest that Ms Gradwell did anything to influence Mr Ash's independent decision-making.

61.4. *Mr Ash not sufficiently experienced in Infrastructure Solutions.* I agree with the claimant that there was a shortcoming in the claimant's appeal, in that Mr Ash did not have enough working knowledge of Infrastructure Solutions to reach a fully-informed decision on the claimant's grounds of appeal. One example is the claimant's point that Mr Smith should have intervened in the telephone call. When dealing with that point Mr Ash based his conclusions on a mistaken factual assumption. His misunderstanding may have caused him to form a more serious view of the claimant's conduct than the facts actually merited. The fewer calls Mr Smith had to monitor, the easier it would have been for him to intervene had he believed that the claimant's behaviour during her call was seriously amiss.

In my view this was a minor flaw in the process. It was a consequence of Ms Gradwell's decision to bring in a substitute appeal manager from a different part of the business. The benefit of greater independence would inevitably come at the cost of reduced in-depth knowledge and the greater possibility of misunderstandings such as these. It was relatively small part of Ash's overall reasoning and, in my view, does not take the entire investigation outside the range of reasonable responses.

61.5. *Lack of advance access to audio recording.* In my view the claimant had a fair opportunity to consider the contents of the audio recording during the disciplinary process. I must assess the whole procedure in the round, including the appeal. The claimant listened to the recording during the fact-find meeting, the claimant's trade union representative listened to it before the disciplinary meeting, and the claimant had studied the recording in considerable depth by the time her appeal was heard.

61.6. *Failure to discover whether or not Ms M actually needed a directly-commissioned survey.* The claimant contends that Miss Garton or Mr Ash should have investigated the question of whether Ms M needed the £218.00-priced survey that the claimant had offered her. In my view this line of enquiry was not necessary. Miss Garton and Mr Ash both based their decision on what they believed the claimant's own state of knowledge to have been at the time of the phone call. What was important, in the decision-makers' minds, was not whether the survey was objectively necessary, but whether the claimant herself had believed that it was necessary at the time of selling it to Ms M. On this question, it was reasonable to take the view that they already had all the evidence they needed. The claimant had undeniably told Ms M over the telephone that she did not know whether or not Ms M needed the survey.

62. Overall my view is that the respondent did undertake an investigation of a kind that a large employer could reasonably carry out.

<u>Reasonable grounds for belief</u>

63. The next question I have had to consider is whether or not Miss Garton and Mr Ash had reasonable grounds for their belief that the claimant had acted inappropriately during this telephone call. In my view they did. In particular:

63.1. The claimant could be heard talking over Ms M and occasionally raising her voice. There is no doubt that this was a difficult conversation, but

it was not just Ms M interrupting the claimant; the claimant also interrupted Ms M.

63.2. The claimant could be heard offering the survey even though the customer had said twice that she had already paid for a visit by BT. It appeared obvious from the recording that claimant that there was at least a doubt in the claimant's mind as to whether that survey was needed. The claimant appeared to be underlining that fact in the telephone call itself by saying she did not understand what it was that the customer wanted, but she nevertheless went on to offer the survey.

63.3. Whilst it was not the claimant's fault that Ms M was so frustrated, there was a reasonable basis for believing that these two aspects of the claimant's handling of the call had contributed to Ms M's starting to cry. In particular, the timing of Ms M bursting into tears was significant. The claimant had just said, "But you didn't pay *us* anything". In one sense, this comment was simply a stark statement of the reality of the situation, which was not the claimant's fault. Neither the claimant nor Ms M could help the fact that Openreach was legally separate from BT and the contractual responsibility to provide the Openreach service lay with BT and not Openreach. But there was another aspect to the comment that was just as maddening, which the claimant ought to have recognised. It was the claimant's job to try, wherever possible, to look for a solution to the customer's problem, rather than deflect responsibility. Her comment gave the appearance of doing the latter.

64. Having reasonably found that the claimant had done these things, it was also reasonably open to Miss Garton to consider that the claimant's behaviour fell within the definition of misconduct in the respondent's own procedure. On their findings, the claimant had behaved in a way that had had a negative impact on a customer.

65. Before leaving the question of the respondent's grounds for its belief, there is one finding that Mr Ash made that I consider to have been unreasonable. It was not reasonably open to Mr Ash to expect the claimant to have found a successful solution for Ms M during that telephone call. Whilst, as I have already stated, there had been potential strategies available such as a three-way call with BT, nobody suggested to the claimant during the investigation or disciplinary meetings that she should have pursued that solution. In this respect Mr Ash was unreasonably conflating imperfection with misconduct.

<u>Reasonable to take into account the earlier warning</u>

66. The claimant did not put to Miss Garton that her final written warning had been given in bad faith. She did argue that the warning was manifestly inappropriate. The basis for the claimant's argument was the personal connection between Miss Garton and Mr Smith. I do not accept the claimant's argument. The claimant would need to demonstrate that the relationship between Mr Smith and Miss Garton was so strong as to make it obvious that Miss Garton should not have been involved in the first disciplinary investigation. Had that been the case, I would have expected the claimant to have appealed against her warning or object to Miss Garton's involvement in the second disciplinary meeting.

67. I have also considered for myself whether there was some obvious reason why the final warning should never have been issued. Some employers may well have considered it harsh to impose a final warning for swearing at an engineer. But I cannot say that the warning was plainly and obviously an excessive response. The claimant was employed specifically for her telephone manner towards all people with whom the respondent worked.

68. Miss Garton and Mr Ash had reasonable grounds for believing that the claimant's conduct towards Ms M was related to the conduct that led to the final warning. Of course, one has to make allowances for the fact that in the earlier call the claimant had been speaking to an engineer and not a member of the public. Nevertheless both telephone calls demonstrated an inappropriate telephone manner with a stakeholder. It was reasonably open to Miss Garton and Mr Ash to connect the two incidents.

Reasonable sanction

.

69. That leaves one question: was the sanction of dismissal within the range of reasonable responses?

70. Before answering the question, I deal with one relatively discrete point raised by the claimant. She argues that any reasonable employer in the respondent's position would have given additional latitude to the claimant because of her military background. Whilst in the Armed Services it would be natural for the claimant to become accustomed to a direct speaking manner, which she would find hard to shake off when working for a civilian company. I am not persuaded by this argument. The claimant had worked for the respondent since 2013 and been extensively trained. The respondent was entitled to hold her to the same standards as it would hold any other employee.

71. I have to remind myself that, where an employee misbehaves during the currency of a live valid final written warning, then the employer can reasonably look at dismissal as the usual outcome and treat sanctions short of dismissal as being the exception rather than the rule. What I must therefore ask myself is whether any reasonable employer would have realised that this was an exceptional case meriting a warning. I must not substitute my view for that of the employer. It is for employers, not Tribunals, to make these sorts of decisions. The tribunal can only interfere if the employer's decision was outside the reasonable range.

72. The importance of this principle is thrown into sharp relief by the facts of this case. If it had been up to me, I would not have dismissed the claimant in these circumstances. Standing in the respondent's shoes, I would have regarded this as an exceptional case. The claimant's conversation with Ms M was no ordinary difficult call. The main cause of Ms M's distress was not the claimant's behaviour but the extraordinary situation in which both Ms M and the claimant found themselves. Ms M had paid for BT to send an Openreach engineer to do some work. When the Openreach engineer did not do that work she phoned BT and was passed to Openreach. The claimant was placed in the position of having to tell Ms M on Openreach's behalf that Ms M needed to go back to BT to get Openreach to do Openreach's work. There was no pleasant way for the claimant to deliver that message. The exceptional difficulty of the claimant's task would be

a weighty factor in deciding whether to dismiss her for her shortcomings in performing it.

73. Unfortunately for the claimant, this is not my decision to make. It was reasonably open to the respondent to view the matter differently. They were entitled to take the view that the claimant had made matters worse by offering the survey when it should have been clear that it might not be needed. They were also reasonably entitled to think that the claimant had misbehaved by talking over Ms M at a time when the call needed sensitivity and patience to have any chance of success. She was on a live final written warning. Whilst I might have made an exception for the claimant, the statutory test of fairness did not oblige the respondent to do so.

74. Overall, I am of the view that the sanction of dismissal fell within the range of reasonable responses. The respondent acted reasonably in treating its belief in the claimant's misconduct as sufficient to dismiss the claimant. The dismissal was therefore fair.

_____

Employment Judge Horne

6 December 2019

REASONS SENT TO THE PARTIES ON

12 December 2019

FOR THE TRIBUNAL OFFICE