



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

Mr S Rose

v

Volkswagen Financial Services (UK)  
Limited

**Heard at:** Norwich

**On:** 9 and 10 February 2022

**Before:** Employment Judge Postle

**Appearances**

**For the Claimant:** In person

**For the Respondent:** Mr R Barker, Counsel

## JUDGMENT

The Claimant was not unfairly dismissed.

## REASONS

**Background, Claims and Issues**

1. The Claimant brings a claim for unfair dismissal. It is not entirely clear whether the Claimant criticises the procedure leading up to and including the dismissal, or believes that the sanction of dismissal is too harsh.
2. In this case the potentially fair reason advanced by the Respondents is capability.
3. In this Tribunal we have heard evidence from a Miss Hartwell, a General Manager in the Respondent's organisation and from Miss Griffin who is in the HR department. Both giving their evidence through prepared witness statements. The Claimant gave evidence through a prepared witness statement and called no further witnesses.
4. The Tribunal has also had the benefit of two Bundles of documents; one on behalf of the Claimant and one on behalf of the Respondent.

5. The Respondent is a provider of financial and insurance services within the UK motor industry. The Claimant was employed by the Respondent as a Credit Manager from 22 October 2001 which was an office based role with occasional travel. The Claimant's employment with the Respondent terminated effective on 31 January 2019 due to capability after a prolonged period of sickness absence.
6. The background to this case is that the Claimant had issues with two Managers. Namely, his Line Manager and his Line Manager's Manager; Mr Ken Steward and Mr Adrian Miller. As a result of the issues that the Claimant had with those two Managers, the Claimant launched a Grievance. There was a Grievance Hearing following an investigation, on 8 June 2018 and the Claimant was provided the outcome on 27 July 2018, pages 72 – 89 of the Hearing Bundle. By any objective assessment, that is a thorough and detailed outcome and the Claimant's Grievance was not upheld against those two Managers.
7. The Claimant appealed against that and again there was a thorough and detailed Appeal. Details of that and the outcome are at pages 113 and 114 of the Hearing Bundle. The outcome of the Appeal Hearing was on 24 August 2018 and confirmed the Claimant's dismissal.
8. In the meantime, the Claimant had gone off sick with work related stress. As a result of continued absence, there was to be an Absence Review meeting to be conducted by Jessica Hartwell. The notes of that meeting are at 198 – 207 of the Hearing Bundle.
9. The above meeting had followed two Occupational Health referrals, pages 105 – 107 of the Hearing Bundle, on 21 August 2018 and a second one on 24 September 2018, pages 140 – 141 of the Bundle.
10. In summary, those reports said that the Claimant needed to resolve workplace issues with Ken Stewart and Adrian Miller and in fact at the Absence Review meeting the Claimant attended on 23 November 2018 where he was accompanied, the Claimant made it clear he would only come back to work if they sorted out the "*Ken's issues*".
11. In the meantime, throughout the Claimant's absence he was well supported by Miss Griffin with regular telephone discussions on the Fridays and also in relation to any alternative roles within the Respondent. In particular, the support that the Claimant was given during this period was that he was provided with the Respondent's employer's Assistance Programme and there were two referrals to Occupational Health. The Claimant was also provided with details of Stronger Minds in relation to possible counselling and a stress risk assessment. It is clear he was informed of the vacancies within the business and afforded the opportunity of applying for any of those vacancies and that was through an adjusted process that Miss Griffin had arranged. Further, as previously indicated, the Claimant had the benefit of weekly Friday check-in calls with Miss Griffin, rather than with his Managers at the Claimant's request.

12. Finally, there was mediation between the parties which unfortunately the Claimant declined to be involved with.
13. Following the Absence Review meeting, there is a summary which the Claimant accepts was an accurate summary of the position at the time; pages 208 – 210 of the Hearing Bundle.
14. The Claimant was then invited to a formal meeting to discuss his continued absence and his intransience in not returning to work. This was originally scheduled for 10 December 2018 but was rescheduled for 17 December 2018. The letter inviting the Claimant to that meeting gave the Claimant the opportunity to be accompanied which he ultimately was and also informed the Claimant that one outcome of the meeting was possible termination of his employment.
15. It is clear at that meeting the Claimant was given every opportunity to consider his position and once again mediation was emphasised and offered. However, again the Claimant was not willing to undertake mediation and at that stage it appeared that the Claimant had not applied for any alternative roles within the Respondent. The Claimant's attitude was that he felt that his career had ended and he could not see the way forward. The minutes of that meeting are at pages 251 – 255 of the Hearing Bundle and are a fair and accurate reflection of what was discussed at that meeting.
16. Ultimately, because of the situation and the continued absence of the Claimant and his unwillingness to return to work under any circumstances, the Respondents took, no doubt the reluctant decision given the Claimant's length of service, to terminate his employment and a letter was sent to the Claimant on 21 December 2018; pages 259 – 261 of the Hearing Bundle.
17. The Respondents, as a gesture to the Claimant given the Christmas period, delayed his effective date of termination until 31 January 2019.
18. Furthermore, the Claimant in the letter of dismissal was advised of his right of Appeal and the Respondents, because of the Christmas period, extended the period in which the Appeal could be lodged. Ultimately, the Claimant, for reasons best known to himself, did not lodge an Appeal.

### **The Law**

19. The Law in this matter is relatively straightforward. The potentially fair reason to dismiss is capability. The Tribunal then have to consider Section 98(4) of the Employment Rights Act 1996 ("ERA").
20. That section deals with fairness which depends on whether in the circumstances an employer acted reasonably in treating it as a sufficient

reason to justify dismissal of an employee, to be determined in accordance with equity and substantial merits of the case.

21. When dealing with Section 98(4) ERA 1996, employers will have at their disposal what is known as the range of reasonable responses in matters such as conduct or capability of an employee. It is inevitable that different employers will choose different options. In recognition of that fact and in order to provide a standard of reasonableness that Tribunals can apply, the band of reasonable response approach has been formulated and this requires the Tribunal to ask the question,

Did the employer's actions fall within the range or band of a reasonable response open to an employer?

22. That is not what I would have done on the circumstances. Therefore, in dealing with Section 98(4) ERA 1996, it is now well trodden ground that answering the questions posed should be seen as follows:

- 22.1 Firstly, the starting point should always be the words of s.98(4) ERA themselves; and

- 22.2 Secondly, in applying the section I must consider the reasonableness of the employer's conduct, not simply whether I consider the dismissal to be fair. In judging the reasonableness of the employers conduct I must not substitute my decision as to what was the right course to adopt for that employer. In many, though not all cases, there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another view.

23. So the function of the Tribunal, or me as the Judge, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of a reasonable response which a reasonable employer might have adopted. If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside that band, it is unfair.

## **Conclusions**

24. Looking at the facts of this case it was clear the Claimant was unhappy with the outcome of the Grievance process. However, that is irrelevant to the reason for the subsequent dismissal. The Respondent / Claimant had exhausted the internal process in this respect and it is clear that the relevant people had been interviewed and findings made in respect of the outcome of that Grievance.
25. There was no more that could reasonably have been expected of the Respondents in resolving a workplace issue that apparently blocked the Claimant's return.

26. It would appear that the Claimant was intransigent and would remain off work until in his view the issues were resolved to his satisfaction with his Line Managers. The Respondents quite reasonably offered alternatives, particularly mediation which the Claimant declined. They offered support through the Employer Assistance Programme. They offered stress counselling. They carried out a stress risk assessment and the Claimant was provided with weekly updates on vacancies and kept in touch at his request with the Respondent's HR department rather than with his Managers, namely with Miss Griffin of HR.
27. None of these worked in terms of the Claimant's position appearing to move in terms of going back to work. Occupational Health Reports made that clear.
28. The Claimant also did not help himself when the vacancy list was supplied, in not actively applying for vacancies. It is also strange that if the Claimant felt the dismissal was so unfair, he did not pursue an Appeal.
29. Taking all those matters into account, it is clear that the Respondent, faced with the position they did with an intransigent employee who did not wish to return to work unless in his mind the issues were resolved to his satisfaction with his Line Managers, then the Respondents were faced with a complete lack of alternatives that the Claimant wished to pursue, in terminating the Claimant's employment.
30. That falls within the range of a reasonable response of a reasonable employer and in those circumstances the dismissal is fair.

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Employment Judge Postle

Date: 21 February 2022.....

Sent to the parties on: .....

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For the Tribunal Office