EMPLOYMENT TRIBUNALS

Claimant: Mr C Hunt

Respondent: Royal Mail Group Limited

HELD AT: Manchester **ON:** 6 April 2017
20 April 2017 (In Chambers)

BEFORE: Employment Judge Hill

REPRESENTATION:

Claimant: **Mr Chris Davies – Family Member**
Respondent: **Mr John McArdle - Legal Executive**

JUDGMENT

The judgment of the Tribunal is that the Claimant's claim is well founded and succeeds.

REASONS

The Evidence

1. The Tribunal was provided with the following:

    (1) An agreed bundle of documents page numbered 1-224

    (2) Witness statement for the Claimant, Mr Hunt.

    (3) Two witness statements for the Respondent: Erica Wilkinson, Appeal Manager and Mr Gerard Dermody, Dismissing Manager

Issues for the Tribunal to determine

2. By a Claim presented on 12 December 2016 the Claimant complained of unfair dismissal in relation to his dismissal by the Respondent.

3. By a response form filed 11 January 2017 the Respondent resisted the claim on the basis that it was a fair dismissal on the grounds of misconduct.

4. At the beginning of the hearing the Tribunal in discussion with the parties agreed that the following issues would need to be determined:

Unfair Dismissal

5. Whether the Claimant was dismissed on the grounds of misconduct pursuant to section 98(4)(ii) of the Employment Rights Act 1996. In respect of that dismissal:

(1) Did the Respondent hold a genuine belief following a reasonable investigation that the Claimant was guilty of the alleged misconduct?

(2) Was it reasonable for the Respondent to hold that genuine belief?

(3) Did the Respondent follow a fair procedure in dismissing the Claimant?

(4) Did the Respondent act reasonably in treating the Claimant's conduct as sufficient reason for dismissing the Claimant?

(5) Was the dismissal fair in all the circumstances of the case and within the band of reasonable responses available to the Respondent?

(6) If the dismissal was unfair on procedural grounds, had a fair procedure been followed would the Claimant have nonetheless been dismissed?

(7) If the dismissal was substantially unfair did the Claimant contribute to his dismissal and to what extent?

Findings of Fact

6. The Claimant was employed as a Mail Processor based at the Respondent’s North West Processing Centre. The Claimant’s employment commenced on 4 October 2013 and he was dismissed for misconduct on 7 September 2016.

7. All the Respondent’s employees are subject to a Conduct Code and a copy of the Code was provided to the Tribunal at pages 22-28 of the bundle. Within this Code the Respondent sets out it’s disciplinary procedure including the possible sanctions following a finding of misconduct. The penalties listed are: warning; serious warning; serious warning with transfer within area; suspended dismissal; suspended dismissal with compulsory transfer within or outside area; dismissal with notice and dismissal without statutory notice (summary dismissal).

8. The Claimant had been subject to disciplinary action on two occasions prior to the final incident that resulted in his dismissal. The first occasion a ‘reprimand’ was

issued and placed on the Claimant's file for 12 months. This was issued on 14 October 2015 for failure to follow a reasonable management instruction. The Claimant disputed the charge but did not appeal the decision. The Tribunal noted that the Claimant was issued with a 'reprimand' but that the term 'reprimand' does not appear in the Respondent's Conduct Code as a possible sanction.

9. The second incident occurred on or around 20 January 2016. Whilst at work, the Claimant injured his back bending down to pick up a parcel. At the time of the incident the Claimant stated that he had strained his back and fell to the floor. After about 10 minutes he informed the First Aider and then reported it to his section manager. The Respondent does not dispute these facts. The Claimant then carried on working the shift. The following night the Claimant spoke to the process manager and informed him that he was in a lot of pain and explained what had happened the previous night. The Process manager called a taxi to take the Claimant to Chorley Hospital.

10. An investigation was carried out after this incident for 'failure to report an accident'. As part of the investigation the Respondent interviewed the first aider, Tony Seddon and the manager Mo Davidson. Tony Seddon confirmed that the Claimant had informed him of the incident approximately 10-15 after the Claimant had lifted the parcel. Mo Davidson confirmed that the Claimant had reported the incident to her.

11. During the investigatory meeting with the Claimant stated that he had spoken to Mo Davidson and said "I have just hurt my back, Mo said what do you mean you have hurt your back, I said I bent down in a cage to try and pick up a parcel, I then felt my back go". He was asked what Mo Davidson had said to him and he had said that he could not remember but that he returned to work.

12. Mo Davidson confirmed during her interview that the Claimant had reported the facts as above to her. She was then asked "Did Craig say he'd had an accident on duty?" she said no and that she had asked him 3 or 4 times whether he had touched a box or lifted anything and asked him if he was reporting it as an accident and that Craig had said no. However, she went on to say that the Claimant had said to her that he was not going to report it but thought he should as the last time he did not report an accident before going of sick. She asked him if he was going off sick and he said no.

13. The Claimant was invited to a formal disciplinary meeting on 13 February 2017 and charged with a breach of health and safety, namely failing to report an accident on duty to a section Manager. As a result the Claimant received a Serious Warning which was placed on his file for 2 years.

14. The Claimant appealed the decision on the grounds that he had reported the incident to Mo Davidson and she had agreed that he had. The outcome of the appeal was; "On the night of the 20th January 2016 you failed to report an accident to your line manager. Within your time at NWPC you have been counselled on at least two occasions regarding reporting accidents in a timely manner. The penalty issues has also included consideration of your current conduct record. Your appeal is therefore rejected and your penalty stands."

15. On 9 August 2016 the Claimant attended work and arrived late. His manager, Peter Whelan, spoke to him and the Claimant apologised and started work. Later in the evening the Claimant went for his break at 9.45 and was due to return at 10.00 pm. The Claimant returned from his break 2 or 3 minutes late. His manager reprimanded the Claimant again but on this occasion the conversation became "heated". Mr Whelan confirmed during the investigation that both parties raised their voices but that he felt that the Claimant was louder.

16. The facts are not much in dispute. Both parties accept that the Claimant was late back from his break and that when Mr Whelan challenged the Claimant a heated discussion ensued. The Claimant asked to speak to his union representative and was refused; Mr Whelan suggested taking the conversation off the operational floor to discuss in his office however the Claimant refused. Neither party alleged that any physical nor non-physical threats were made and there were no allegations of gesticulating. These facts were accepted by both the Claimant and the Respondent during the course of this hearing. The Tribunal finds that a heated discussion did take place between the parties and that both parties raised their voices.

17. After the incident, Mr Whelan told the Claimant to go home and subsequently 'precautionary suspended' him. He remained suspended until his dismissal. The Respondent's Conduct Policy (page 25 of the bundle) allows for precautionary suspension and states:

'precautionary suspension should only be considered when a serious incident occurs…….The manager should meet with the employee to seek an explanation of the facts of the case. If the manager believes that the incident is serious and there is a reasonable belief that the serious breach might be repeated and or there is a risk to people, property, mail or the good image of Royal Mail Group then the manager should send the employee home. Where an employee has been sent home the manager must contact HR Services Advice and Support to discuss the facts of the case. The manager then decides what appropriate action to take given the circumstances'. In this case HR Services were not contacted. The Respondent stated that this was because they do not work during the night shift although no explanation was given as to why they were not contacted the following day or at any time during the period of suspension.'

18. During the Claimant's suspension, an investigation was carried out and the Respondent interviewed the Claimant and Mr Whelan along with several witnesses. All witnesses including the parties confirmed that there was a heated discussion. Several witnesses stated that both the Claimant and Mr Whelan were shouting/raising voices at each other.

19. The Claimant attended a conduct interview on 31 August 2016. The Claimant was represented by his union representative. Mr Gerard Dermody conducted the hearing. The Claimant was dismissed without notice for inappropriate behaviour and informed of the decision on 7 September 2016. Mr Dermody said in his witness statement and in evidence that he would not have dismissed him for this offence alone but took his previous two warnings into account.

20. The Claimant appealed the decision on the grounds that no action had been taken against Peter Whelan; the weight attached to the previous warnings and the fact that the Claimant considered those warnings to be unfair; procedural issues around the suspension, a cooling off period; and a culture of shouting in the unit.

21. Erica Wilkinson an Independent Casework Manager conducted the appeal hearing on 22 September 2016. The Claimant was represented by his union at the hearing. The Claimant had also raised a grievance against Craig Richie who was involved in sanctioning the suspension and this was dealt with at the appeal hearing.

22. Ms Wilkinson found that there was no dispute that there was "what appeared to be a heated discussion between both the Claimant and Mr Whelan and whilst some witnesses state that they did hear Peter Whelan raise his voice there is considerably more evidence that Craig Hunt was the main protagonist'. As a result she reduced the sanction of summary dismissal to dismissal with notice on the grounds that although she was satisfied the charge had been proved and warranted the penalty of dismissal but formed the view that dismissal with notice would have been more appropriate.

Main Issues in Dispute

Suspension

23. The Claimant alleged that he should not have been suspended. The Tribunal finds that the Respondent's policy does allow for suspension in situations where a 'serious' incident occurs and that a manager should meet with the employee to seek an explanation of the facts of the case. If the manager believes that the incident is serious and there is a reasonable belief there is a risk to people, property, mail or the good image of the Royal Mail Group then the manager should suspend the employee. Further it states that the manager ***must*** contact HR services Advice and Support to discuss the facts of the case. The Respondent provided no evidence that such a fact finding interview took place or that the manger sought advice from HR Advice and Services. The explanation that HR services were not available during the night shift was considered unacceptable by the Tribunal. The procedures the Respondent are relying upon themselves are very clear and uses the word must. The Tribunal finds that even if the manager had not been able to contact HR Services on the night in question that it was incumbent upon them to seek advice at the earliest opportunity. This was never done and indeed whilst the procedure states that suspension should only last for as long as necessary the Claimant never returned to work. The Respondent provided no explanation for this and there was no evidence to support that the suspension criteria had been met. Indeed Joe Fannon, who sent the Claimant home, said that he considered in order to conduct a fact fining meeting he felt both Peter Whelan and Craig Hunt should be removed from the area (page 188 of the bundle). It is the case that Mr Whelan was not removed or suspended.

Cooling off Period

24. The Respondent's policy states that a 'cooling off period' may be allowed in situations where an employee refuses to obey a reasonable instruction. The

Respondent's rationale is that it provides and employee with an opportunity to reconsider. There was a lot of confusion about whether a cooling off period was appropriate in this case. The Claimant clearly understood that he was entitled to one and it would appear that Mr Whelan believed that one had been offered. Mr Whelan stated in his witness evidence to the Respondent that he had offered a 'cooling off period' by asking the Claimant to go to his (Mr Whelan's) office. The Claimant said in evidence he did not take this as a cooling off period and saw it more as a threat 'being taken into the office'. The Tribunal finds that the company's procedures do not allow for a cooling off period in these types of circumstances and in any event would not have altered the course of events. The heated discussion had already taken place.

Previous warnings

25. In this case the Tribunal does not consider that it is able to look behind the warnings previously given. However, on the ordinary level of reasonableness the Tribunal finds that the second serious warning may have been unreasonable but there was insufficient evidence to demonstrate that it was manifestly unfair.

Sanction and inconsistent treatment

26. The Claimant argues that the sanction applied was too severe in the circumstances and that there were other options available to the Respondent including further warnings, coaching or training. The Respondent's policy sets out the penalties available and likely timescale a warning will remain live. These are: warning – 12 months; serious warning; serious warning with transfer within area; suspended dismissal; suspended dismissal with compulsory transfer within or outside area – 12 – 24 months and Dismissal with notice and finally dismissal without statutory notice (summary dismissal)

27. The disciplinary policy allows for a number of 'serious warnings' to be given and therefore is akin to a written warning. The Tribunal considers this is confirmed in that the letter informing the Claimant of the outcome of the serious warning there was no indication in that letter that any further breach or similar breach may lead to dismissal. (Page 98 bundle)

28. The policy also makes specific references to 'repeated breaches of the policy'. Where it states *"Where an employee has a number of misconduct cases upheld it may be necessary to take more severe action than a particular breach of conduct calls for by itself. For example, someone who has a number of current serious warnings may face dismissal. In such cases when the person is invited to the conduct meeting to deal with the latest breach the invitation letter will make it clear what conduct penalty is being considered and that this is because of the number of previous penalties. However, this is not an automatic reason for more severe action."*

29. The ACAS Code states *"A first or final written warning should set out the nature of the misconduct or poor performance and the change in behaviour or improvement in performance required (with timescale). The employee should be told how long the warning will remain current. The employee should be informed of the*

consequences of further misconduct, or failure to improve performance, within the set period following a final warning. For instance that it may result in dismissal or some other contractual penalty such as demotion or loss of seniority."

30. In this case whilst the Claimant was informed in his invite letter to his final disciplinary hearing that dismissal was a possible consequence he was never informed after his previous disciplinary hearings that a further breach of the Code of Conduct may result in his dismissal.

31. What is clear from the Respondent's policy is that it is accepted by the Respondent that a person may have more than one serious warning on file. There is no 'final written warning'. There is in effect no way of a person knowing when a warning is the 'final warning'. In ***Wincanton Group Plc v Stone & Others [2013] IRLR 178*** the EAT stated that a final written warning implies that any further misconduct will often be met with dismissal and it is likely to be an exception that it will not. It would appear from the Respondent's policy that 'suspended dismissal' is an option short of dismissal which may be akin to a final written warning which may be given in circumstances where a person has committed several breaches or the misconduct is so serious that a serious warning would not be appropriate.

32. The Respondent in this case did not provide any evidence of why or how sanctions are applied. More importantly in this case looking at the individual circumstances and the range of reasonable responses open to an employer, the Respondent was unable to provide any satisfactory evidence as to how it applied its policy or whether the Claimant would have been aware prior to this incident taking place that any further breaches would likely result in dismissal.

33. Both Mr Dermody and Ms Wilkinson were very clear that the only reason dismissal was considered appropriate in this case was because of the Claimant's previous disciplinary record. No evidence was provided to show that the Claimant's behaviour was considered so serious that a further serious warning could not have been given. The Respondent's policy does allow for a further more serious penalty to be awarded short of dismissal; 'suspended dismissal'. This option was not considered and no explanation was provided as to why it was not considered reasonable in the circumstances.

34. The Respondent argued that the Claimant had constantly fallen below the standard required and that there had been three separate occasions when disciplinary action had been taken. The Tribunal has already noted that the first offence resulted in a 'reprimand' which does not form part of the Respondent's procedure and the second occasion resulted in a serious warning of which a person may have more than one according to their own procedure.

35. Whilst the Respondent argued that the behaviour displayed by the Claimant was serious they accepted that there was no physical or verbal threats made; there was no foul language used and that both parties to the discussion raised their voices. Despite stating that they considered the behaviour of the Claimant was in breach of their code of conduct no action was taken against the manager involved who would have been required to demonstrate a higher degree of self-control.

36. The Tribunal finds that the sanction applied was not proportionate and falls outside the band of reasonable responses available to an employer in these circumstances. A Respondent should be guided by their own disciplinary policy and should ensure that the penalty imposed is commensurate to the misconduct committed by the employee. The Tribunal finds that the Respondent failed to do this and imposed a sanction that was not commensurate with the misconduct committed. The Claimant was never made aware either in writing or through the Respondent's own policy that further breaches would likely result in dismissal.

37. At appeal the sanction of dismissal without notice was not considered appropriate and was replaced with dismissal with notice. Ms Wilkinson did not provide an explanation other than 'totting up' as to why she did not consider any other sanction and in particular suspended dismissal. Further Ms Wilkinson accepted in evidence that Mr Whelan "should not have raised his voice" and that he should be "leading by example". When asked what action had been taken she said that he had been offered coaching and counselling to better manage. The Tribunal finds this to be a completely inconsistent approach to what the Respondent alleges was a serious breach of its conduct policy. On the one hand the Claimant was suspended and disciplinary action taken and on the other Mr Whelan was not suspended and offered coaching and counselling to manage better.

The Law

Unfair Dismissal

38. Section 98 of the Employment Rights Act 1996,

(a) did the Respondent have a potentially fair reason to dismiss?

(b) did the employer act reasonably or unreasonably in dismissing the Claimant for the reason given?

39. Section 98(4) provides that the determination of the question whether the dismissal is fair or unfair (having regard to the reasons 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.

40. When determining cases of misconduct the Tribunal has settled case law to assist it in drawing conclusions. In particular in cases of misconduct guidelines have been set out by Arnold J in British Home Stores Ltd v Burchell [1978] IRLR 379. Essentially the Tribunal must determine the following:

1. Did the Respondent reasonably believe that the Claimant was guilty of misconduct at the time of the dismissal?

2. Did the Respondent have in mind reasonable grounds to sustain that belief? and

3. At the stage the Respondent formed that belief had it carried out as much investigation into the matter as was reasonable in the circumstances?

4. Whether the dismissal falls within the 'range of reasonable responses' of a reasonable employer.

41. In conduct cases the 'range of reasonable responses' test applies in conduct cases not only to the decision to dismiss but also to the procedure by which that decision was reached. ***J Sainsbury Plc v Hitt [2003] ICR 111 CA***.

42. In cases where an employer is relying upon previous warnings as a 'totting up' dismissal the Tribunal is assisted by ***Davies v Sandwell Metropolitan Borough Council 2013 ERLR 374*** where the Court of Appeal stated that an employer was able to rely on a final warning where it was given in good faith; that there were prima facie grounds for imposing it and that it was not manifestly inappropriate to impose it. The starting point should always be S.98(4) ERA with the question being whether it was reasonable for the employer to treat the conduct reason taken together with the circumstances of the final written warning as sufficient reason to dismiss the Claimant. It is not for the Tribunal to reopen the final warning and consider whether it was legally valid save in exceptional circumstances.

43. Tribunals do not have the power to decide whether a warning should have been given or not but they can determine whether a warning was given in bad faith, or whether there were prima facie grounds for imposing it or whether it was manifestly inappropriate. Unless a warning was given in bad faith or manifestly inappropriate, it will have been validly issued. Consequently, if the warning was valid, Tribunals should then assess whether it was reasonable for the employer to take it into account when deciding to dismiss.

44. If it is found that a warning is manifestly inappropriate the Tribunal is required to consider the extent to which an employer relied upon it in making the decision to dismiss and must be considered when deciding whether the dismissal was fair or unfair. ***Bandara v BBC UK EAT/0335 15 JOJ***

Submissions

Respondent

45. The Respondent relied upon BHS v Burchell and submitted that the Respondent had a genuine belief in the Claimant's behavoiur was inappropriate based on reasonable grounds and based upon comprehensive witness evidence. Further that the Claimant appealed and that the appeal was a rehearing and considered all the evidence again. The Respondent submitted that the investigation was thorough including interviewing 10 witnesses and that at the appeal stage

further emails were sent to witnesses and that further investigations would have made no difference.

46. In respect of the potential procedure issues the Respondent submitted that the fact that HR advice was not sought before suspending the Claimant it did not render the investigation unfair and neither did the failure to allow a cooling off period. The Respondent submitted that the cooling off period was not something that was ordinarily given in these types of situations but rather in cases where someone was refusing to follow a reasonable management instruction in order to allow them time to reconsider. This was a case whether the 'inappropriate behaviour' had already occurred so a cooling off period would have made no difference.

47. With regards to the penalty of dismissal the Respondent referred the Tribunal to Iceland Frozen Foods Ltd v Jones 193 ICR 17 EAT. The Respondent submitted that the decision to dismiss fell within the band of reasonable responses open to a reasonable employer. The Respondent said that the Claimant had two live warnings on his file and that although the Claimant had disputed these warnings in his evidence that it was not for the Tribunal to go behind these warnings and that they were given in good faith and that the Claimant had not provided any evidence to the contrary or that the warnings were manifestly unfair.

48. The Respondent said that in total there had been three separate issues of conduct and that the Claimant had shown an inability to comply with the Respondent's conduct policy. He was aware of the standards required and that Royal Mail had very clear standards of behaviour and that the Claimant was in breach of those standards.

Contributory fault

49. The Respondent submitted that in the event that the Tribunal found the dismissal to be unfair that the Claimant had contributed 100% to his dismissal and that any compensation should be reduced to zero.

Claimant

50. The Claimant was presented by a lay representative who was family member. The Claimant's main concerns were that he had not been given a cooling off period; his previous warnings were unfair; that the behaviour did not amount to gross misconduct it was merely a heated discussion; that the suspension was an over the top reaction to a minor incident; that the Respondent had chosen the highest sanction that of dismissal, when there were other options available to them.

51. The Claimant argued that the treatment of the Claimant was inconsistent with how Mr Whelan was treated and that the facts were the same.

Conclusions

52. The Tribunal finds that the Respondent did have a potentially fair reason to dismiss, namely conduct.

53. The Tribunal finds that the Respondent did hold a genuine belief that the Claimant was guilty of the alleged misconduct. It was accepted by both parties that the Claimant had had a heated discussion with his manager.

54. The Tribunal also finds that the Respondent carried out a reasonable investigation carrying out 10 interviews with witnesses and emailing 4 more during the appeal. The Tribunal is satisfied that the investigation itself was detailed and it is clear to the Tribunal and was accepted by the Respondent that there was a heated discussion between the Claimant and Mr Whelan and that both raised their voices. It was submitted by the Respondent that it is unacceptable behaviour by the Claimant to raise his voice at his manager and a breach of their code of conduct. The Claimant asserted that is equally unacceptable for a manager to raise his voice at the Claimant and indeed that a manager should be held to a higher account of their conduct and the Respondent agreed. No action was taken against Mr Whelan for his part in this incident and the Tribunal finds that that is inconsistent treatment of the Claimant.

55. The Respondent gave a great deal of weight to the Code of Conduct and the standard of behaviour expected from all employees. However, the Tribunal finds that the Respondent has not implemented the disciplinary process fairly against each party and in particular that no action at all was taken against Mr Whelan.

56. Considering whether the Respondent acted reasonably in treating the Claimant's conduct as sufficient reason for dismissing the Claimant the Tribunal finds that by the Respondent's admission that in itself it would not have been sufficient reason to dismiss the Claimant. The tribunal has therefore considered whether the previous warnings when taken together with the final act of misconduct is sufficient reason for dismissing the Claimant. The tribunal finds that because the Respondent's disciplinary procedure lacks clarity and that there were other options available such as a suspended dismissal that the decision to dismiss falls outside of the band of reasonable responses. The tribunal finds that the final act did not amount to gross misconduct and cannot be considered to be so based on the fact that the Respondent failed to take any action against Mr Whelan who it accepted should not have behaved in the way that he did and the fact that the Respondent stated that the final act in itself would not have resulted in dismissal. Although the Respondent reduced the penalty from summary dismissal to dismissal with notice on appeal the tribunal finds that the sanction was outside the band of reasonable responses and the Respondent was unable to explain to the tribunal how it applied the sanctions available to it; it is clear from the Respondent's disciplinary procedure that it allows for further serious warnings to be issued or for a suspended dismissal which would have been more reasonable and appropriate in the circumstances of the case. The Respondent relied on the previous warnings but could give no evidence on why in this case they considered a reprimand which was not part of their procedure and one serious warning sufficient to warrant dismissal for a further act of misconduct. The tribunal has reminded itself not to substitute its own view for that of the Respondent, however, looking objectively at the facts of this case the act of misconduct was relatively minor; no action was taken against the other party involved who was more senior than the Claimant and his previous serious warning

was unrelated to this incident. The Tribunal therefore finds that the dismissal was unfair.

Contributory Fault

57. In order for a deduction to be made for contributory fault the Tribunal must be satisfied that the Claimant's conduct was culpable or blameworthy. ***Nelson v BBC (no 2) [1980] ICR 110***. However, the tribunal finds that the Claimant did contribute to his dismissal. The Claimant admitted that he engaged in a heated discussion with his manager and although the conduct did not amount to gross misconduct the Tribunal finds that raising his voice to a manager was foolish. The tribunal considers that the extent to which the Claimant contributed to his dismissal was 25% and this reduction will apply to both the basic and compensatory awards.

Employment Judge Elayne Hill

4th July 2016

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

13 July 2017

FOR THE TRIBUNAL OFFICE

[AF]