YG

Case Number: 3201083/2017

EMPLOYMENT TRIBUNALS

Claimant: **Mr R Barthram**

Respondent: **Citysprint (UK) Limited**

Heard at: **East London Hearing Centre** **On: 18 & 19 January 2018**

Before: **Employment Judge Barrowclough (sitting alone)**

Representation

Claimant: Mr A Angir (Lay Representative)
Respondent: Mrs G Kilcoyne (Head of HR)

JUDGMENT having been sent to the parties on **26 January 2018** and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1. This is a claim of unfair dismissal. The Claimant, Mr Robert Barthram, was employed by the Respondent, Citysprint (UK) Limited as a logistics assistant from June 2014 until 24 May 2017 when, as is accepted, he was dismissed with three weeks' pay in lieu of notice. The Respondent asserts that its reason for dismissing the Claimant was misconduct, and that it acted fairly in treating that as a sufficient reason for dismissing him. I heard evidence from (a) Ms Shelley Parfett, an Acting Service Centre Manager who conducted the Claimant's disciplinary hearing and took the decision to dismiss him; (b) Mr Paul Molloy, a Specialist Services General Manager who heard and dismissed the Claimant's appeal; (c) Ms Hilary Whiteside, an HR Team Leader who advised the Respondent; and (d) the Claimant. I gave judgment in the Claimant's favour at the conclusion of the hearing, and awarded him compensation as set out in the short Judgment.

2. The Respondent operates as a carrier company specialising in same day UK delivery and international overnight deliveries. It has about 960 employees and operates from 42 separate and defined service centres in the UK. The Claimant was originally employed as a logistics assistant at the service centre in South London known as SE1, presumably from its location, from the commencement of his employment in early June 2014 until February 2017, when he was moved or transferred to the service centre in East London. That transfer arose out of an altercation at the SE1 centre in which the Claimant had been involved, and when he was apparently threatening and aggressive towards the service centre manager there called Kandice Kameka. As a result, the Claimant was disciplined for misconduct, received a final written warning, and was moved to East London, since the SE1 service centre manager no longer wished to work with him.

3. The Claimant continued to work as a logistics assistant following that move, although there were some differences in his role thereafter, as Ms Parfett, the East London service centre manager, helpfully explained. The East London service centre, unlike most if not all the other service centres that the Respondent operates, specialises in the transportation of medical supplies including blood, scan samples and results, and organ and body parts. Obviously, different considerations apply in the transport of such items when compared with ordinary goods or packages, including how they are kept, packed and kept cold; and prompt and reliable delivery of such items is essential and not just desirable. As Ms Parfett said, it may be a matter of life or death.

4. The Respondent accepts that up until his move to London East service centre the Claimant had been performing his job well and punctually, and there were no mistakes or failures on his part in terms of performance whilst at SE1 of which I was told. The Respondent also accepts, and indeed it is clear from the contemporaneous documentation in the bundle, that the Claimant's outburst with his service centre manager in February 2017 came at a time when he was suffering from depression and anxiety. He subsequently received medical treatment for that condition, and he repeatedly apologised for his behaviour, and indeed sent a letter of apology to Ms Kameka.

5. On arrival at the London East service centre, the Claimant received fresh training in his role as a logistics assistant. Normally, as I was told once again by Ms Parfett, training as a logistics assistant would or should take two to three weeks for someone starting from scratch; and in the Claimant's case, he had of course already been satisfactorily performing that role, or something fairly similar to it, for about two years. So even though the items being handled at East London could be slightly different and had special issues attached, it should not have taken him that long, it seems to me, to get up to speed. In fact, the Claimant had to receive training from his predecessor in the role, a man called Steven, for some two months; and he was only considered fit and able to work unsupervised and on his own in early May 2017. Thereafter, and as the Claimant accepts, a number of performance problems or issues arose. They are summarised at page 50 of the bundle, which is an email from Ms Daniella Marson, and she references eight particular jobs in May 2017 which had gone wrong, and where the Claimant had made mistakes. The Claimant accepts that such problems did arise, but says that they were at least in part because he was hassled and hurried by a delivery driver called Don, who was I presume transporting the samples or whatever the packages contained; and that the disciplinary procedure concerning him which was initiated by the Respondent was only commenced after he started complaining about Don's treatment of him.

6. In any event, those performance issues led to the Claimant being invited to attend a disciplinary hearing in a letter dated 19 May 2017, which is at page 60 in the bundle and which I quote from. It is to the Claimant at his home address from Shelly Parfett, and it commences:

> *"Dear Robert, …*
>
> *Concerns have been raised in regards to your performance. There have been a number of missed bookings and mistakes which have resulted in a cost to the business as well as having a serious impact on our clients and their patients. After further investigation, I am now inviting you to a formal disciplinary hearing. …"*

And it proceeds thereafter.

7. That meeting took place five days later on 24 May. It was conducted by Ms Parfett, the local service centre manager. She told me that she had been aware from the time of the Claimant's arrival in February that year that the Claimant was suffering from anxiety and depression and that she had tried to be supportive of him, particularly since she too has suffered from those conditions. Ms Parfett also said that for 80% of the time, or about four days in five as she put it, the Claimant was an excellent and indeed a dedicated hard worker, and that it was only when personal issues or problems arose, which was on about one day in five on average, that the Claimant made mistakes. She accepted that those mistakes were not malicious or intentional, but rather because the Claimant could not effectively help himself due to his anxiety and depression. Ms Parfett also said that the Claimant was violently sick immediately before the disciplinary hearing, but that she believed him to be well enough to attend and participate in the disciplinary, and that he said he wanted to get it over and done with; although there is no such exchange or discussion recorded in the notes of the meeting, which are completely silent on that point. Finally, Ms Parfett was aware of the existence of the final written warning on the Claimant's file, but she was not aware of why or for what reason it had been imposed.

8. At the conclusion of that disciplinary meeting, Ms Parfett informed the Claimant that she was dismissing him from his employment, with three weeks' pay in lieu of notice. The Claimant was extremely upset by that decision, apparently virtually suicidal, and would not leave the Respondent's premises for some hours thereafter. Ms Parfett confirmed her decision to dismiss the Claimant in her letter to him dated 31 May 2017, which is at page 66 in the bundle and which once again I will quote from, in this case the second and third paragraphs, which read as follows:

> *"The purpose of the hearing was to discuss the concerns that had been raised over your performance. There had been a number of missed bookings and mistakes which had resulted in a cost to the business as well as having a serious impact on our clients and their patients.*
>
> *Having thoroughly investigated the allegations and taken into account your evidence, I have decided to issue you with a further Written Warning. Unfortunately, as you currently have a live Final Written Warning on file, your employment will be terminated according to our disciplinary policy."*

9. The Claimant appealed against the decision to dismiss him. His extensive grounds of appeal are set out in the email at pages 69 and 70. For present purposes I need only quote ground one of the appeal, which is as follows. Under the heading *"Inappropriate use of the Conduct Disciplinary Policy in dealing with a performance issue"*, it reads:

> *"I received by email a copy of a document entitled Disciplinary Policy and Procedures with the letter inviting me to a disciplinary hearing.*
>
> *The policy relates to 'standards of conduct.'*
>
> *The matters raised by the company in the disciplinary hearing on 24th May related entirely to matters of performance. To be clear, an allegation of poor performance is completely different to the alleged misconduct of an employee.*

> *The company has not used its' performance management policy and procedure to deal with my perceived poor performance, and this error has the consequence of turning the termination of employment into an unfair dismissal."*

10. The Claimant's appeal hearing was chaired by Mr Molloy and took place on 22 June 2017. Mr Molloy, assisted by Ms Whiteside of the Respondent's HR department, reserved his decision at its conclusion. That decision was provided in Mr Molloy's email of 13 July 2017, when he dismissed the Claimant's appeal. I need only quote the section in that email dealing with ground one of the appeal, which is at page 79 in the bundle. In response to the point raised by the Claimant, Mr Molloy replied as follows:

> *"Our disciplinary policy covers both conduct and capability in one policy and although Shelley mentions performance issue it's not about capability but performance based on his conduct point one is not upheld."*

That sentence does not in my view make any sense at all, and completely fails to address the issue about which was the appropriate procedure to have been applied in the Claimant's case, which had been raised in the appeal. The sentence was, I was told, supplied to Mr Molloy by Ms Whiteside, hence the reference to *"his"* rather than *"your"* conduct.

11. In any unfair dismissal claim where dismissal is accepted, as it is here, there is a preliminary burden on the Respondent employer which is to prove that the reason for dismissal is a potentially fair one falling within Section 98(2) of the Employment Rights Act 1996 ("the Act"). Here the Claimant's conduct is relied upon by the Respondent, as was confirmed at the outset of this hearing; and it was accepted in evidence that the disciplinary procedure, which it is agreed was applied in this case, only makes reference to an employee's conduct, rather than to his or her performance. In my judgment, the reason for dismissal of misconduct put forward by the Respondent in this case was not in fact their real reason for dismissing the Claimant; rather, there is a wealth of evidence to establish that their real belief or reason for dismissing the Claimant related to his performance. I have already highlighted at least some of that evidence in my recital of the relevant facts; but in summary, Ms Parfett, who was the Respondent's dismissing officer, herself absolved the Claimant of any malicious conduct or intentional misconduct in his occasional mistakes at work, the reasons for which, as she knew and appreciated, related to his mental health issues; and in both the disciplinary invitation and the dismissal confirmation letters, she specifically referred to the Claimant's 'mistakes', and that his disciplinary hearing related to and arose from the Claimant's 'performance', rather than from his conduct. That point (and the fact that the Respondent has a separate performance management policy and procedure) was sensibly and correctly raised by the Claimant as the first ground of his appeal, to which the Respondent's answer is, to put it bluntly, nonsensical. In my judgment, it was only then that *'the penny dropped'*, in the sense that the Respondent appreciated for the first time that they had applied the wrong policy and procedure in the Claimant's case; and they have since been attempting to shoehorn this case into an inappropriate and inapplicable policy and procedure. I find that this is not a case of the employer simply applying the wrong 'label' to their reason for dismissal, but rather a deliberate attempt to conceal their true reason. That may well be because the Respondent was anxious to avoid the possibility of a disability discrimination complaint; and, on the evidence I heard and read, they were fortunate to do so. Overall,

the Respondent's real reason for dismissing the Claimant related to and arose from his performance or capability, which is of course a potentially fair reason for dismissal.

12. Accordingly, the next question which arises for determination under Section 98(4) of the Act is whether the Respondent acted fairly in treating that as a sufficient reason for dismissing the Claimant. Manifestly not, in my judgment. First, because, as the Claimant correctly pointed out in his grounds of appeal, they failed to adopt and apply their performance management policy and procedure, which was obviously applicable in a case such as this. Secondly, because as Ms Whiteside herself conceded when I put the question to her, had the Respondent treated the Claimant's behaviour as a capability issue rather than misconduct, they would have adopted a completely different approach, including looking at suitable alternative employment, providing him with further assistance, and seeking to help the Claimant overcome his occasional problems and mistakes at work, which were (as they accept) attributable to his mental health issues.

13. Accordingly, it follows that I find that the Claimant's dismissal was manifestly unfair. I have considered whether it would be appropriate to try to assess what were the chances of a fair dismissal, had a fair procedure been adopted and employed by the Respondent, which is commonly called the *Polkey* principle; but since the procedure to be adopted properly in a case such as the Claimant's is apparently so very different to that which was actually used by the Respondent, it is I think too speculative and uncertain to try to assess sensibly the chances of a fair dismissal. Accordingly, there will be no *Polkey* percentage reduction to the compensation otherwise payable to the Claimant.

14. In terms of compensation, the Claimant's weekly gross pay was agreed as being £375.99, which is £304.97 net of deductions. It was further agreed that, including his notice period, the Claimant had been continuously employed by the Respondent for three years, and that the appropriate multiplier was 3. The Claimant failed to obtain alternative employment from the end of his notice period on 21 June 2017 until 4 January 2018, despite I find making reasonable efforts to mitigate his loss, with the exception of one day in work for a business called 'Hire Station'. The Claimant had started work in what he hoped was a permanent position on 4 January 2018, shortly before the Full Merits Hearing, but at a significantly lower salary. Doing my best, I considered that it would be just and equitable to both parties to compensate the Claimant for his continuing loss at the rate of £154.97 per week for three months until 4 April 2018. The Claimant confirmed that he had applied for and received statutory benefits whilst unemployed, so the Recoupment regulations apply.

Employment Judge Barrowclough

27 February 2018