EMPLOYMENT TRIBUNALS

Claimant: Mr N Armstrong

Respondent: Royal Mail Group Ltd

Heard at: Leicester

On: Wednesday 21 and Thursday 22 February 2018

Before: Employment Judge P Britton (sitting alone)

Representation
Claimant: In person
Respondent: Mr M Foster, Solicitor

JUDGMENT

1. The claim of unfair dismissal fails and is dismissed.

2. The Claimant was of wrongfully dismissed and the Respondent will pay damages to the Claimant by way of 3 months' salary.

REASONS

Introduction and allowing the amendment

1. This is primarily a claim of unfair dismissal. To turn it around another way, it was until I allowed an amendment (to which I shall come to towards the end of this judgment) to also permit a claim of wrongful dismissal –non payment of notice pay.

2. In summary, the Claimant brought his claim (ET1) to the tribunal on 14 August 2017. He had been employed by Royal Mail for a long time commencing his career on 26 March 1986. By the time of material events, he was a Delivery Sector Manager in charge of the Royal Mail operating out of Leicester with a network of depots such as Loughborough.

3. The Claimant was summarily dismissed by way of a finding of gross misconduct on 26 April 2017. Essentially, for reasons which are set out in some detail, his contention was that he was unfairly dismissed.

4. By its Response (ET3) Royal Mail pleaded that the dismissal (for reasons which were comprehensively pleaded) was a fair one. It was not addressing at that

stage the issue of whether or not nevertheless this was a wrongful dismissal contrary to common law, as to which the tribunal has jurisdiction under Section 3 of the Tribunals Act 1996.

5. Let me stop there. A claim of wrongful dismissal is a different legal animal from a claim of unfair dismissal. Whereas in relation to unfair dismissal the claim has to be adjudicated upon adopting the range of reasonable responses test, a claim for wrongful dismissal is to be determined by a Judge objectively. That is to say whether the relevant employee by his actions behaved such as to show a repudiation of a fundamental term of the contract, ie trust and confidence, meaning that that employee should forfeit the usual notice pay that he would otherwise be entitled to.

6. I have permitted an amendment for the Claimant to bring a claim of wrongful dismissal applying the guidance of Mr Justice Mummery (as he then was) in the case of ***Selkent Bus Company Ltd -v- Moore 1996 ICR 836 EAT***. In summary, what I determined towards the end of this hearing was as follows.

6.1 The Claimant has no legal knowledge of the sophistications of employment law.

6.2 That when he ticked his ET1 to denote that he was bringing a claim for unfair dismissal, that he thought that in the body of his pleading a claim for monies due would mean all his losses. In other words, although he did not articulate it, including the notice pay that he otherwise might have received.

7. I had before me closing submissions by Mr Foster (for which I am most grateful) in which he had worked on the assumption that there was a wrongful dismissal claim and which he thus addressed. When it became clear that Mr Armstrong really was wishing to bring such a claim, I looked to the book that he had brought along with him, which he has tried to use as an assist so to speak – it is a legal action group book on issues to do with employment dismissals - and I noticed there was nothing in it about breach of contract. That is perhaps because the sophistication of wrongful dismissal is something well known to specialist legal practitioners but perhaps not otherwise frequently thought about. I decided that although this claim is out of time, nevertheless there was no prejudice to the Respondent because I have heard all the evidence and Mr Foster had addressed it and therefore I decided that in the interests of justice it was fair for me to permit the amendment.

The legal framework: unfair dismissal

8. Section 98 of the Employment Rights Act 1996 (the ERA) is engaged. First of all the employer has to show me, and it has the burden of proof in that respect, that it had a reason coming within Section 98(2) which it genuinely believed in. Such a reason for the purposes of the tribunal would be conduct.

9. Second under Section 98(4) ERA (albeit the burden is neutral), I still work on the premise (as I think most legal practitioners must inevitably do) that it is really for the employer to show the tribunal that it in deciding to dismiss the Claimant, it acted fairly.

10. What this really means (as indeed Mr Foster has so helpfully provided in his skeleton submissions) that I must approach this matter in terms of the well-known

test in ***British Home Stores Ltd -v- Burchell [1980] ICR 303 EAT***. So I have to determine whether, in deciding to dismiss the Claimant, the reason was one which could be justified by the employer, so to speak, in terms of having undertaken an investigation commensurate with the seriousness of the accusations and in the process allow the opportunity for the Claimant to have a full opportunity to explain himself and know the case he had to meet; the right to be represented by a colleague or trade union official at the disciplinary hearing; offered, and if accepted taken, an appeal hearing.

11. I stop at that stage and say that I have no doubts whatsoever that this approach was fairly adopted by the Respondent. As is clear from the bundle before me there was a very full investigation by a Mr Brooks, who is classed as an independent investigator under Royal Mail's procedures and who would have come to the case with a completely fresh face and is highly trained in undertaking such investigations.

12. There was then what I might describe as a peer review by Mr Malloy who undertook some further investigation himself, and then the completed investigation was presented as per the disciplinary procedure to the first witness I heard from, Warren Cabot, who decided that there was a case to meet and thence heard the disciplinary hearing. I have no doubt from the comprehensive documentation before me that in doing so he had a very detailed written report indeed from Mr Brooks with all 13 witnesses that he interviewed fully proofed. He had the additional investigation notes of Mr Malloy and he conscientiously read all the same, and he permitted a very full hearing before him at which Mr Armstrong was represented by an experienced trade union official.

13. When it came to the appeal, I heard from the second witness for the Respondent, Clifton Welch[1]. I have no doubt from hearing from him that he carefully considered the grounds of appeal as submitted by the Claimant, including a detailed statement and a letter that the Claimant had sent to the Chief Executive of Royal Mail, and that he went about his task conscientiously. Therefore what it means is that in terms of the test in ***Burchell***, the Respondent so far meets it.

14. The Claimant in the course of the investigation proceeding asked that the Respondent interview some witnesses on his behalf. This was in fact pursued by Mr Brooks, albeit he did not interview two of those put forward by the Claimant. He interviewed the other four. Thus, those now interviewed as part of the second limb so to speak of the investigation were:

- Jack Mitchell
- Jenny Eddershaw. the Claimant's PA
- Neil Tarbottom
- Mark King

15. Not interviewed was Amanda Sergeant who had been a senior manager prior to the Claimant at Leicester and because it was not thought that she could really contribute much to the issues. I do not know why Luke Marshall was not interviewed. But suffice it to say that for reasons I shall come to in terms of the overall fairness of the process , I do not think that this fatally undermines it; and I have noted that of the new witnesses interviewed, two supported the Claimant (namely Mitchell and King) but the other two did not. I will come back to the significance of that in due course.

[1] All witnesses before me gave sworn evidence in chief by a witnesses statement: they were and in order of appearance: Warren Cabot (statement running to 257 paragraphs); Clifton Welch and finally the Claimant.

16. Albeit, as the Claimant is not represented, I thoroughly probed the evidence in accordance with the overriding objective, it is not my function to substitute my own view in terms of the unfair dismissal. The jurisprudence is absolutely clear on the point. I have to address the issue in terms of whether or not the dismissal was fair within the range of reasonable responses of a hypothetical employer of the size and administrative resources of Royal Mail and having regard to equity and the substantial merits of the case. What I might have done is not relevant to the issue of unfair dismissal.

17. I am now going to give a summary of my findings distilled from the evidence and sufficient for the parties to understand by decision.

Findings of fact

18. The Claimant has clearly given sterling service to Royal Mail for many years with an impeccable record.

19. Royal Mail has been transformed over the last few years in particular. In the process it had become much more top down driven. Indeed at the time of material events, Royal Mail micromanaged even managers at the level of the Claimant. It has now stopped doing that to some extent. It was clearly a regime in which there was pressure upon delivery cascaded downwards from the very top. I have no doubt that it put managers like the Claimant under great pressure. He accepts, and the evidence is quite overwhelming to this effect, that his management style is that of a driven senior manager who has a forceful style in wanting the best out of his managers. In that sense even he would accept that he does not take prisoners but then that is true of many senior managers. He is firm when there are shortcomings. He has his finger on the pulse. However I also note that his door was always open and his managers clearly were in all the time with issues. He was not afraid of getting his hand dirty; if necessary he would still do a delivery round. His appraisals in the past had been first-rate.

20. This case is very much about the fine dividing line between firm management in an environment that clearly expected results and overstepping the mark so as to display bullying/harassment. I do not have to rehearse Royal Mail policies, they are first-rate in their coverage as such things as zero tolerance for bullying; hence the bullying and harassment procedure and its interface to the conduct policy, which is the same as a disciplinary policy. This policy cannot be faulted. It provides a very thorough series of checks and balances in terms of the integrity of any investigative process.

21. What did the employer uncover? It starts with three managers, known as DOMs, who reported to the Claimant. They are Matthew Heseltine, Mubarak Patel and David Purser. They all complained on the same day (namely 16 October 2016) under the bullying and harassment procedure and described bullying by the Claimant. Mr Purser had in particular been keeping a meticulous diary of material events in relation thereto. Suffice it to say that their complaints are objectively serious ones. Thus it is no surprise that it was decided by the management that these could not be dealt with under the informal bullying and harassment procedure (I am well aware when those engage including such as mediation) but needed to go down the route of an investigation, which is why Andy Brown was imported, and to whom I have referred, to undertake the task circa 28 October.

22. He then went about first interviewing the complainants and then undertook

the first interview with the Claimant on 10 November. Stopping there, at that stage the Claimant was in complete denial and came hard on that he considered that the three of them had 'fabricated' the complaints against him. I will return to that in due course.

23. Mr Brown had completed his report by circa 12 December 2016. At that stage, the decision was taken by the Delivery Director, Stephen Malloy that the charges were now so serious that the Claimant should be suspended. In this particular case, I am not asked to deal with whether or not the suspension was warranted, suffice it to say that given the proximity of the Claimant to these line managers and the seriousness of the allegations, I cannot see that within the range of reasonable responses test, it was wrong to suspend the Claimant.

24. Further interviews, including with the Claimant and which I have already touched upon were undertaken by Mr Malloy. The picture that emerged was mixed. Some of those interviewed did not recognise the complaints that were being made against the Claimant[2]. Inter alia, this perhaps goes more than anything to Mr Mubarak Patel: the allegation that the Claimant would shout repeatedly in meetings is simply not supported by the weight of the evidence. It is an example.

25. On the other hand, there were witnesses who corroborated that the Claimant (who had only been running Leicester for about 6 months at the time of these complaints) had an overbearing management style which caused distinct unhappiness and uneasiness amongst the majority of the team who reported to him. I need only say that although two witnesses in the five that I have referred to who were additionally interviewed at the Claimant's request, may have not said this , it is to be noted that inter alia his own PA (Jenny Eddershaw) did not come up to the proof that he might have expected. She paints a picture of a manager who could reduce people to tears. The Claimant obviously hoped that a trade union official (Mr Trotter) would support him as well. For instance, on the issues relating to 18 October 2016; but he did not. The same goes for instance to Mandy Palmer. Albeit the Claimant may say she did not like him from the word go, there is a similar pattern in terms of the evidence she provided and how she herself was reduced to tears, and that in relation to Mr Purser, who was also found in tears (I think it was by Jenny Eddershaw) and corroborated by the evidence of for example Mr Sweet and how Mr Heseltine.

26. Suffice it to say that therefore, in terms of the investigation, overall the Respondent was not acting unreasonably in believing that the weight of the evidence supported that the Claimant's manner on occasion to members of staff was overbearing and unfortunately went over the acceptable boundary into bullying.

27. The core findings supported by the evidence were first that circa July 2016, Mr Heseltine who was on secondment to Leicester from Loughborough phoned in to the Claimant that he was unwell. The evidence is that Mr Heseltine was suffering mental stress. His wife had produced twins; it seems that was unexpected; he was having to cope with all of that and he got himself unwell. He was also very worried as to the security of his job. There does not seem to be that much dispute between Mr Heseltine and the Claimant as to the content of the discussion. The Claimant mishandled it, despite that he had had a lot of training in how to handle matters such as mental stress and he had himself undertaken disciplinaries and things of that nature on many occasions. It was at least crass for him to have suggested to Mr Heseltine that he would be better off not going sick because it might reflect on

[2] The Claimant has prepared a chart which is before me of those interviewed and the tally of those supporting the allegations as broken down and those who did not.

him poorly in terms of the security of his future employment with Royal Mail.

28. As to mitigation, the Claimant may well have had in his mind the pressure downwards as to delivery and that Royal Mail might want to weed out weak management. But there are ways of dealing with this. In particular when he was dealing with matters, Mr Cabot was very worried indeed, and repeatedly says so in his conclusions which were very through in terms of the outcome of the disciplinary hearing, that it alarmed him the way that the Claimant even on his own admission dealt with matters with Mr Heseltine. The Claimant might have said that he was doing this out of pastoral concern but it rather fits in with the pattern as Mr Cabot saw it to be because that brings in Mr Purser.

29. Whether or not the idea of taking voluntary retirement might have come from Mr Purser to start with, the weight of the evidence that was uncovered was that the Claimant was thereafter putting Mr Purser under pressure to take voluntary redundancy, the implication being that otherwise he could be out and it may be that this is because, like Mr Heseltine, he was failing. Again, Mr Cabot was looking at the weight of evidence as established by Mr Brooks. The point is there is no doubt that Mr Purser was reduced to tears. It was seen by other employees.

30. Back to Mr Heseltine, and the events of 18 October 2016. By now he was clearly failing. The week before he had been on the foundation university course which Royal Mail was sponsoring (I think at Loughborough). This is basically to upskill managers. It is not a degree course in the full sense of that word. Mr Heseltine would be expected to still keep on top of his job. The issue then becomes that he was supposed to have produced a management presentation on the Monday, which the Claimant expected would include slides. Mr Heseltine at short notice being unavailable, it was put back to the Tuesday for 10 am. It then got put back by Mr Heseltine, who curiously said that he could not make 10 am as he was studying the timetables to get transport. This was the first that the Claimant knew that for some reason Mr Heseltine no longer had a motor car at his disposal. The meeting was put back to 11am.

31. As it is, Mr Heseltine was transported in by the newly arrived graduate trainee, Mr Sweet: he had only been with Royal Mail for about 3 weeks. When they arrived, taking the point short, Mr Heseltine put his head around the door of the conference room where the Claimant was now in another meeting which was overrunning. Of course if Mr Heseltine had got there for 10 am this would not have happened because that meeting did not start until thereafter. Understandably the Claimant told him he would have to wait.

32. The core point then becomes this. After the wait of approx 30 – 45 minutes, the Claimant being now free asked Mr Heseltine to join him in his room. Mr Heseltine came in with Mr Sweet. The Claimant asked Mr Heseltine if he had got his presentation ready and the slides to go with it. Mr Heseltine explained that he had not done the slides. The Claimant therefore said that he wanted to see him alone. He denied that this was for the purposes of giving him in the vernacular ‘a bollocking’, but I have no doubt that he clearly intended to have firm words with him. It is his style, which is obvious from the evidence. Again, it is a question of where the boundaries are drawn. Would it have been inappropriate for Mr Armstrong to question Mr Heseltine? No. Had Mr Heseltine got a mental health problem which had required intervention, albeit he had raised the issues I have already referred to in July? The answer to that is no. He had declined a request to see occupational health: 3 times it seems. From an objective point of view (and this will engage on the wrongful dismissal claim), I do not buy that Mr Heseltine would

have been somehow frightened to see occupational health because of Mr Armstrong. If he had a fear, I suspect it was as to what impact a finding by OH that he might have a mental health problem could have on his future with Royal Mail. Maybe he was in that sense wrong in his thinking, because I have no doubt, given Royal Mail's disability policy which fits in with its equality and diversity policy, that it is most unlikely it would have been held against him.

33. Be that as it may, what then happened is that when the Claimant, for reasons which I think are reasonable, asked to see Mr Heseltine alone to discuss the shortcoming, the latter refused and wanted Mr Sweet in the room. Was the Claimant acting unreasonably in refusing that request? The answer is no. An experienced manager like Mr Heseltine surely would have appreciated that it would have been highly inappropriate for a 3 week rookie to be in a meeting involving one senior manager criticising another. Royal Mail via the evidence before me now accepts that.

34. The issue then becomes what happened. This is where I think it is back to the Claimant's style. Mr Sweet was told to stay by Mr Heseltine but the Claimant ordered him to leave. Again, I do not think that was unreasonable. Mr Heseltine then went off to get a trade union official: as luck would have it Mr Trotter was just outside.

35. It is there that things went wrong. Mr Trotter did not come up to proof in terms of the Claimant's expectation in fact he supported Mr Heseltine, which therefore meant that Mr Cabot had two witnesses to one. Thus, it can be taken simply. The Claimant clearly resented the presence of Mr Trotter and folded his arms and sent them out. Mr Heseltine found that intimidating and afterwards he was essentially a mental wreck on the journey way back to Loughborough whilst being driven by Mr Sweet.

36. That then brings back in the issue of Mr Purser and his fears about voluntary redundancy. Suffice it to say that Mr Cabot had out of the Brooks enquiry the evidence that in terms of whatever had been discussed between him and the Claimant on voluntary redundancy and otherwise his future; he was reduced to tears after that meeting, as inter alia witnessed by Jenny Eddershaw.

39. So corroborative evidence – the one to the other and the evidence of others, ie Eddershaw and Trotter. That leaves Mubarak Patel. He like the other two was clearly a failing manager. The Claimant out of the best of reasons in terms of serving his lords and masters, was wanting them to all improve because he in turn had to answer in this driven culture to management above him.

40. Mr Patel says that in the telephone conferences that they had every morning, he was being belittled by the Claimant for his shortcomings. The Claimant denied that. However, the weight of the evidence is that although there was no shouting (and Mr Patel may have embellished in that respect what happened[3]), that there was clear evidence that he was being singled out and that it was having an impact upon him.

41. As to the disciplinary hearings, the Claimant says that he was fully remorseful. I have heard him today and I now understand far more why Mr Cabot and then Mr Welch were not convinced. It is not that the Claimant did not express himself to be regretful for his actions, but he did not really accept, other than that it shocked him that people saw it in the way they described (ie particularly the three

[3] My observation.

complainants) that the way he had approached matters was wrong. That is the dilemma. Therefore, Mr Cabot followed by Mr Welch, even though they had these expressions of remorse, were not convinced that they meant that he had changed his ways and they could in that respect trust him if they allowed him to continue in the employment.

42. I explored with them whether they thought about transferring the Claimant to another region, even demoting him and sending him back to school, so to speak, to relearn or improve upon his skills so that it did not happen again. They did not think that they could safely do that. I ought to then factor that the experienced trade union official at the appeal did not at all raise issues as to the shortcomings of the investigation, although the Claimant has before me. I have no doubt, and it fits with the lines of question from Mr Foster and indeed the evidence of Mr Welch, that this was because the trade union had decided upon a tactic, ie there was sufficient evidence to show the findings, therefore the approach to take was to highlight the stated remorse rather appeal on the basis that the factual findings of the investigation were unfair.

43. What is my conclusion on the unfair dismissal front? Before I get there I need to refer to the fourth of the disciplinary charges. It is an allegation that the Claimant "interfered with a witness". What is it about? Before the Claimant was suspended, he had of course been informed that he was under investigation and the nature of the allegations coming from the three complainants. He was told that he should keep it confidential. I have no doubts, and here I share the view of Mr Cabot in particular, that it would be inconceivable that the Claimant as a very senior manager would not appreciate that in those circumstances whatever the temptation, he should not contact potential witnesses. The way to deal with it would be to raise who he wanted interviewed in due course, as indeed he was to do.

44. As it is, the Respondent was informed by Miss Rylands (Bp 344), and this was before the Claimant was suspended, that he had been in contact with a manager (Neil Tarbottom) who worked at Kettering. She said, put at its simplest, that he contacted Tarbotton; they had a discussion about the fact that he was under suspicion so to speak; and her take on it all was that she had been told by another employee (Lesley Whittington) that there had been this contact, and that Neil had been told by the Claimant in terms of any criticism "that he hadn't and that he needed to say he had been a great DSM etc". I note so far that this is hearsay evidence. Kerry Rylands and Lesley Whittington were never interviewed. When it comes to NT, when he was interviewed he denied that the Claimant had told him what to say. Indeed he was very firm: and his own evidence when given to the investigators did not otherwise help the Claimant in that he did not like being managed by the Claimant and he said why.

45. Why does this trouble me? It is because nevertheless Mr Cabot followed by Mr Welch concluded he had interfered with a witness. Interfering with a witness speaks for itself. I actually invited both of them to agree with the word 'nobbling' and both said yes. But there was as is now obvious a fundamental investigative failure. Given the size of Royal Mail it was outside the range of reasonable responses to have not fully have investigated this allegation. Therefore the finding on this allegation was unfair.

46. However, the charges were discreet. It was particularly made plain that each was to be seen in that sense not as a cumulative charge but as an individual charge. In fact, the way I see it, and Mr Cabot and Mr Welch did not disagree with me, is that there were three charges that in effect could be seen to go together

because each one corroborated the other and that is the bullying and harassment charges viz MH, MP and DP. In that sense they are wholly distinct from the witness interference charge. Both made plain that absent the interference charge, they would in any event have dismissed the Claimant because of the other three proven allegations. Vice versa, Mr Welch in particular said that if he had only been dealing with the witness interference charge, he would not have dismissed the Claimant.

47. This brings in the line of authority ending with ***Tayeh -v- Barchester Healthcare Ltd [2013] EWCA Civ 29 EAT***.[4] That is to say the tribunal has to consider whether the employer regarded the charges as being cumulative or standing alone. If the charges are cumulative in the sense that all of them together formed the principal reason for the dismissal, it would be fatal to the fairness of the dismissal if any significant charge were found to have been taken into account without reasonable grounds.

49. However, if each charge stood on its own[5], for example independent acts of gross misconduct each meriting dismissal – then they would require separate consideration in determining whether it was reasonable to dismiss. It might be reasonable to dismiss for one of the charges even if it was not reasonable to dismiss for the other. (If for example one had been properly investigated, but the other had not). That is the distinction. And in this case for the reason I have given it applies; thus the failures on the witness interference front do not render the dismissal unfair.

Conclusion

50. I repeat, it is not for me to assess what I would have done in the factual circumstances in terms of the summary dismissal or the conclusions prior thereto. Suffice it to say that within the range of reasonable responses test, the Respondent had sufficient to conclude on a balance of probabilities that that which had occurred in relation to Heseltine, in particular in July 2016; Purser overall; and MP in relation to the conference calls, did go over the dividing line between firm management and become bullying and harassment.

51. Thus, in terms of the Respondent's own disciplinary policies, and given that the Claimant did not fully take ownership but had these caveats to his admissions, therefore I find that it was fair within the range of reasonable responses to dismiss him.

Wrongful dismissal

52. It is an objective test. What is clear is that the Claimant conscientiously believed that what he was actually doing was in the best interests of Royal Mail and it was the way he had always managed people underneath him. There is clear evidence from what he has told me that he was motivated by pastoral concern in some respects. It is interesting to note that he always externally went out on a limb for his team. He would not throw them to the wolves so to speak in terms of discussions with senior management.

53. Thus I do not consider that his behaviour in that context was such as to be a fundamental repudiation of the contract of employment. Therefore I draw a distinction between finding that this was an unfair dismissal in terms of the range of

[4] See the commentary under the heading "Multiple reason for dismissal" commencing at paragraph 3.18 in IDS Handbook Unfair Dismissal – September 2015 edition.

[5] In this case the BMH charges on the one limb and the witness interference on the other

reasonable responses test but on the other hand that it was a wrongful dismissal in that he should have been paid his notice pay. As per contract, that would be 3 months' salary. Therefore I am ordering that the Respondent will pay the Claimant 3 months' salary by way of compensation for wrongful dismissal, which I assume will be paid net.

Holiday pay

54. Ticked on the file before me was holiday pay. In fact what it really was about was that if the Claimant won his unfair dismissal, then he wanted to be compensated for the holiday entitlement that he would have then been entitled to. Obviously it falls by the wayside given my findings.

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Employment Judge P Britton
Date: 24 May 2018.

JUDGMENT SENT TO THE PARTIES ON

24 May 2018

FOR THE TRIBUNAL OFFICE

Notes
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions
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