Case Number: 1401173/2017

EMPLOYMENT TRIBUNALS

Claimant: **Mr R Slater**

Respondent: **Royal Mail Group Limited**

Heard at: **Bristol** **On: 15 March 2018**

Before: Employment Judge Maxwell

Representation
Claimant: Mr Cooper, CWU Representative
Respondent: Mr Powys, Paralegal

JUDGMENT

1. The claimant's claim of unfair dismissal is not well founded and is dismissed.

REASONS

Preliminary

1. By a claim form presented on 1 August 2017, the claimant brings an unfair dismissal claim against the respondent.

2. I heard evidence from the following witnesses

   2.1. Robert Slater, the claimant;

   2.2. Richard Bush, formerly employed by the respondent as shift manager and the dismissal decision-maker;

2.3. Dave Martin, the respondent's Independent Casework Manager and the appeal decision-maker.

3. I was provided with an agreed bundle of documents running to 121 pages, to which was added, by agreement, a further 8 pages.

Issues

4. The issues to be determined were discussed and agreed with the parties at the outset:

   4.1. whether the claimant was dismissed for a potentially fair reason, namely conduct;

   4.2. whether the respondent had a genuine belief in the claimant's guilt of the alleged misconduct, namely theft;

   4.3. whether the respondent carried out a reasonable investigation into the alleged misconduct;

   4.4. whether the respondent had reasonable grounds for its belief in the claimant's guilt;

   4.5. whether the respondent conducted a fair disciplinary process;

   4.6. whether the sanction of dismissal was reasonable;

   4.7. if the claimant was unfairly dismissed:

      4.7.1. the appropriate remedy, the claimant seeking reinstatement;

      4.7.2. whether any compensatory award should be reduced to reflect the prospect the claimant would have been dismissed in any event had a fair procedure been followed[1].

Facts

Background

5. The claimant was employed by the respondent from May 1990, most recently in the capacity of Operational Postal Grade working on night shifts.

6. The respondent's Code of Business Standards includes:

   "Royal Mail Group expects all employees to: Act with honesty at all times"

[1] Whilst the issues originally included contributory fault, in closing argument Mr Powys accepted that given the respondent had called no witness evidence to substantiate the alleged theft and / or cross-examined the claimant on the basis of his guilt, such a finding could not be made.

7. The examples of gross misconduct in respondent's Conduct Policy include theft.

Investigation

8. On a date between 25 and 28 February 2017, Zlatka Koeva, the manager of the respondent's canteen, told Mr Bush that an employee had stolen chocolate bars. Ms Koeva followed this up with an email of 2 March 2017, which included:

   8.1. being told by Jeffrey Williams in 2015 that the claimant had stolen chocolate bars;

   8.2. herself witnessing the claimant picking up a chocolate bar and walking away without paying for it on 23 February 2017 - although she didn't see this clearly and "was not very sure so decided to wait";

   8.3. herself witnessing the claimant picking up two bars of Twix, but only paying for a bottle of Coke on 25 February 2017.

9. Being relatively new to the business, Mr Bush raised this alleged theft with the respondent's Security Help Desk. Having waited, then chased a response and heard nothing, Mr Bush made enquiries of colleagues as to who he might take this up with. Mr Bush was given the contact details for David Lynch, the respondent's criminal investigation manager.

10. On 24 March 2017, Ms Koeva reported another chocolate theft to Mr Bush. her email sent in the early hours that day described the claimant picking up a bottle of Lucozade and a "Craw mini biscuit", both of which he paid for, but also him taking a chocolate bar in a purple wrapper which he did not pay for and sought to "hide". Ms Koeva produced receipts to show payment was made for the Lucozade and biscuit, but not the chocolate.

11. In an email of 27 March 2017, Mr Lynch said that given the low value involved, the respondent would not seek to bring a criminal prosecution and suggested the matter was dealt with "in the ops line by way of the conduct code".

12. On 5 April 2017, again by email, Ms Koeva reported a further incident in which she said the claimant put a Snickers, a KitKat and a Twix in his pocket, but only paid for the Twix. She produced a receipt showing only the Twix.

13. Later on 5 April 2017, Mr Orme, one of the respondent's managers, conducted a "seeking an explanation" meeting with the claimant in connection with the alleged theft of chocolate from the canteen. The claimant denied the allegations, although he said there had been occasions when he had forgotten to pay for his dinner and subsequently returned to do so.

14. In the course of the hearing in the Employment Tribunal, Mr Cooper for the claimant put to Mr Bush in cross-examination an email of 5 April 2017 from

Chloe Thomas of the respondent's HR department in which she refers to the claimant as "the individual that has been stealing chocolate bars", suggesting this demonstrated the outcome was predetermined. Mr Bush said those were her words, not his, and he was aware of the need to remain impartial. I accept the evidence of Mr Bush and do not find that he sought to keep an open mind on whether the claimant was guilty of this misconduct.

15. An investigatory meeting took place on 6 April 2017, with Mr Orme asking the questions and Mr Bush as notetaker. The claimant attended accompanied by his trade union representative. The claimant denied the allegations, referred to pulling an orange card from his pocket when paying for items in the canteen (the inference being perhaps the witnesses had seen this), and repeated that he had returned to pay for his dinner on occasions when at first he had forgotten to do so. At the end of this meeting, Mr Bush handed the claimant a letter advising that he was subject to a "precautionary suspension".

16. Mr Orme decided there was a case to answer. Furthermore, since Mr Orme believed the appropriate penalty for the misconduct alleged may exceed his authority, he referred the matter upwards to Mr Bush. The claimant was advised of these decisions in a letter of 7 April 2017.

17. On 11 April 2017, Mr Bush interviewed Ms Koeva and her answers, which were recorded on hard copies of the emails she had sent previously, included:

    17.1. not having challenged the claimant in February 2017 because she was worried he would shout and "feel" for her safety;

    17.2. a detailed account of circumstances (the physical geography and their respective positions) applying to her observation of the claimant in March 2017;

    17.3. she had no recollection of an occasion when the claimant had forgotten to pay for his dinner.

18. Mr Bush also obtained a statement from Mr Williams, who said he had witnessed the claimant on several occasions in 2015 picking up two bars of chocolate and then only paying for one. Mr Bush interviewed him on 12 April 2017, again writing notes on a hard copy of the document produced by the witness. Asked why he hadn't reported the matter at the time, Mr Williams said he didn't want the claimant to lose his job. Asked why he hadn't challenged the claimant, Mr Williams said he did not want a confrontation.

Disciplinary

19. By a letter of 13 April 2017, the claimant was invited to a disciplinary hearing in connection with "alleged chocolate bar thefts from the canteen". The letter enclosed the documentary evidence relied upon, advised of the claimant's right to representation, and warned he was at risk of dismissal.

20. The claimant's disciplinary hearing took place on 18 April 2017, with Mr Bush as decision-maker. The claimant was again accompanied by his trade union representative. The claimant has a stammer and in part for this reason, submitted a written statement. The points made by the claimant included:

    20.1. why had Mr Williams only come for forward after Ms Koeva, he should have come forward sooner;

    20.2. why was he not approached at the time, if he had done something inadvertently this could have been put right;

    20.3. the passage of time made it difficult for him to recollect and defend himself;

    20.4. he had no recollection of the specific occasions in February and March 2017;

    20.5. on 5 April 2017 he was offered a receipt, which was unusual and he didn't accept it;

    20.6. why had Sylvia Lewis not been interviewed;

    20.7. there was only one occasion when he had forgotten to pay and gone back, this was when he had fish fingers and complained;

    20.8. he couldn't think why anyone would want to accuse him in this way, but perhaps he upset someone;

    20.9. the orange card in his pocket may have been mistaken for a chocolate bar;

    20.10. Sylvia Lewis buys multipacks of chocolate, shares them with him, he puts them in his pocket, and perhaps this was seen;

    20.11. was there a stock check;

    20.12. he was not functional, suffering grief following the death of sister;

    20.13. he might have forgotten to pay for something but wouldn't have done seen deliberately;

    20.14. he was financially comfortable and had no need to steal.

Having heard from the claimant and his representative, Mr Bush adjourned to make further enquiries.

21. Subsequent to the hearing, the claimant submitted a further statement, which included:

    21.1. sometimes Ms Lewis paid for the claimant's dinner;

    21.2. he had an issue with the canteen staff about the quality of food, amount and price.

22. By an email of 18 April 2017, Ms Thomas alerted Mr Bush to the risk that his participation in this process as both notetaker and decision-maker could give rise to a conflict of interest. She advised, however, "we can take a risk but a learning point is that you should in no way be involved if you are picking up at 2nd line". Having received that advice, in view of the stage then reached, Mr Bush decided to continue.

23. On 21 April 2017, Mr Bush interviewed Ms Lewis, this included:

    23.1. she brought in food to avoid the expense of the canteen and shared this at "the frames";

    23.2. she had not paid for the claimant's food.

24. The disciplinary hearing was resumed on 2 May 2017. There having been a concern the claimant may not have received all the copies of evidence he should, some time was spent by Mr Bush on this occasion going through the various statements to ensure the claimant and his representative had them, including a copy of the recent interview with Ms Lewis. The claimant said that Ms Lewis was "forgetful" and his representative argued she should not have been interviewed without a CWU representative; although no complaint was made about the questions asked of her. The relevance of the till receipts was disputed. Mr Bush then adjourned to consider his decision.

25. Having been sent notes of the disciplinary meeting, the claimant commented upon these in his letter of 5 May 2017. Of the 5 bullet points, only one relates to the accuracy of the record, and this was a point about sequencing of question and answer.

26. Mr Bush found the claimant guilty of theft. This decision was confirmed in writing by the respondent's letter of 11 May 2017, attached to which was a 4-page report summarising Mr Bush's reasoning. Essentially, Mr Bush preferred the evidence of Ms Koeva and Mr Williams, finding their accounts of what they saw and reasons for not raising this sooner or challenging the claimant, to be credible. Mr Bush was not persuaded by the claimant's explanations (such as the Orange card) and found some inconsistency in his evidence.

27. Mr Bush acknowledged the claimant's long service and previous clean record. He decided, however, to summarily dismiss because trust had been lost.

Appeal

28. The claimant appealed against his dismissal and this was heard by Mr Martin on 31 May 2017. The claimant was again supported by this trade union. His grounds of appeal largely repeated or expanded upon points made at the disciplinary. Whereas the claimant had previously alluded to reasons why the witnesses might not have told the truth, he now alleged deliberate collusion between them. The claimant also complained about the lack of "physical evidence", there not being two witnesses to the theft as they did not claim to witness the same incident, and Mr Bush being the decision-maker given his prior involvement and alleging predetermination.

29. The claimant in evidence to this Tribunal confirmed that Mr Martin was an independent manager and went through all of the appeal grounds.

30. Before making his decision, Mr Martin interviewed Mr Bush and sent a copy of this to the claimant for his comments, which were provided.

31. The decision not to uphold the claimant's appeal was provided by Mr Martin's letter of 4 July 2017, enclosing a 7-page document summarising his reasons, in which he addresses the claimant's grounds.

Law

32. Pursuant to section 98(1)(a) of the **Employment Rights Act 1996** ("ERA"), it is for the respondent to show that the reason for the claimant's dismissal was potentially fair and fell within section 98(1)(b).

33. If the reason for dismissal falls within section 98(1)(b), neither party has the burden of proving fairness or unfairness within section 98(4) of ERA, which provides:

    In any case 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 sufficient reason for dismissing the employee, and

    (b) shall be determined in accordance with equity and the substantial merits of the case.

34. Where the reason for dismissal is conduct the employment tribunal will take into account the guidance of the EAT in **BHS v Burchell [1978] IRLR 379**. The Tribunal must be satisfied:

34.1. the respondent had a genuine belief that the claimant was guilty of the misconduct;

34.2. such belief was based on reasonable grounds;

34.3. such belief was reached after a reasonable investigation.

35. The employment tribunal must also be satisfied that the misconduct was sufficient to justify dismissing the claimant.

36. The function of the employment tribunal is to review the reasonableness of the employer's decision and not to substitute its own view. The question for the employment tribunal is whether the decision to dismiss fell within the band of reasonable responses, which is to say that a reasonable employer may have considered it sufficient to justify dismissal; see **Iceland Frozen Foods v Jones [1983] IRLR 439 EAT**.

37. The band of reasonable responses test applies as much to the **Burchell** criteria as it does to whether the misconduct was sufficiently serious to justify dismissal; see **Sainsbury's Supermarkets v Hitt [2003] IRLR 23 CA**.

38. Where an appeal hearing is conducted then the **Burchell** criteria must also be applied at that stage, in accordance with the decision of the House of Lords in **West Midlands Co-operative Society v Tipton [1986] IRLR 112** and the speech of Lord Bridge:

> **"A dismissal is unfair if the employer unreasonably treats his real reason as a sufficient reason to dismiss the employee, either when he makes his original decision to dismiss or when he maintains that decision at the conclusion of an internal appeal."**

39. After an appeal, the question is whether the process as a whole was fair ; see **Taylor v OCS Group Limited [2006] IRLR 613 CA**, per Smith LJ:

> **46. […] In our view, it would be quite inappropriate for an ET to attempt such categorisation. What matters is not whether the internal appeal was technically a rehearing or a review but whether the disciplinary process as a whole was fair.**
>
> **47. […] The use of the words 'rehearing' and 'review', albeit only intended by way of illustration, does create a risk that ETs will fall into the trap of deciding whether the dismissal procedure was fair or unfair by reference to their view of whether an appeal hearing was a rehearing or a mere review. This error is avoided if ETs realise that their task is to apply the statutory test. In doing that, they should consider the fairness of the whole of the disciplinary process. If they find that an early stage of the process was defective and unfair in some way, they will want to examine any subsequent proceeding with particular care. But their purpose in so doing will not be to determine whether it amounted to a rehearing or a review but to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at the early stage.**

Conclusion

Reason

40. There has been no challenge to the reason for dismissal, and I am satisfied it was a genuine belief on the part of Mr Bush that the claimant was guilty of theft.

Investigation

41. Whilst there was an initial delay in the investigation following the report by Ms Koeva to Mr Bush at the end of February 2017, this was because Mr Bush was waiting to receive advice from the Security Helpdesk. I am satisfied this is a genuine and reasonable explanation. Furthermore, the delay did not detract from the thoroughness of the enquiries made thereafter.

42. All relevant witnesses were interviewed. Ms Koeva was central, since she was the only witness to the recent, 2017, allegations. Mr Williams was also important as he was relied upon as witness to the 2015 allegations. No other potentially relevant witness was found by the respondent. When, however, in the course of the disciplinary investigation and hearing, the claimant himself identified another person as potentially being able to give relevant evidence, Ms Lewis, she too was interviewed.

43. The claimant's main argument, ventilated domestically and before the Tribunal, concerned the lack of "physical evidence", by which he appears to mean CCTV, a stock take, or being caught 'red-handed' with stolen chocolate in his pockets.

44. Unfortunately, there was no CCTV coverage in the canteen and so this evidence did not exist and could not be obtained.

45. The claimant was not apprehended by a manager with stolen chocolate in his pockets.

46. The respondent could have undertaken a stock check and did not do so. Given, however, the small number of items allegedly stolen and the period over which this was alleged to have occurred, the probative value of such an exercise is far from obvious. In reality, whatever the result of such an after the event stock take, the matter was still likely to turn on whether the eye-witness evidence of Ms Koeva and Mr Williams was accepted or not. Although some reasonable employers might have taken this step and carried out a stock check, I am satisfied that some other reasonable employers would not.

47. The claimant had and full opportunity, which he took in a vigorous manner, to understand the allegations and give his own account.

48. For the reasons set out above, I am satisfied that a reasonable investigation was conducted.

Grounds

49. I am satisfied the respondent had reasonable grounds for its belief:

    49.1. the respondent had eye witness accounts from Ms Koeva and Mr Williams, which tended to support the finding made;

    49.2. the respondent was entitled to prefer the evidence of Ms Koeva and Mr Williams over that of the claimant;

    49.3. whilst the claimant complained of the late reporting, especially by Mr Williams, understandable and potentially credible explanations for this and the lack of any contemporaneous challenge were given;

    49.4. although the claimant made reference to having complained about the quality, quantity and / or price of canteen food, he did not pursue this with any vigour at the disciplinary hearing as providing a motive for Ms Koeva and Mr Williams to fabricate evidence against him;

    49.5. by the time of his appeal, the claimant was alleging collusion between Ms Koeva and Mr Williams, the respondent could, however, reasonably, reject the claimant's proffered explanation of having complained about the food, as providing any remotely credible reason for those witnesses to conspire and lie;

    49.6. the respondent was entitled to identify some tension, in the claimant's evidence, seeking to 'have it both ways', in firmly denying having put any chocolate in his pockets that wasn't paid for, but then giving reasons why he might be forgetful and saying that any taking would have been inadvertent;

    49.7. the respondent was also entitled to consider that whereas a witness might be uncertain or mistaken about what the claimant did with chocolate in his pocket on one occasion, repeatedly making the same mistake would seem unlikely;

    49.8. in her account of the latter occasions it is apparent that Ms Koeva was paying close attention;

    49.9. the claimant's account of already having chocolate in his pockets or the orange card do not, reasonably, tend to explain the observations reported by Ms Koeva and Mr Williams;

    49.10. the evidence of Ms Lewis on paying for meals was not consistent with that of the claimant.

50. My function in determining the claimant's unfair dismissal claim in this regard, is to review the evidence relied upon by the respondent and consider whether that provided a proper basis for the finding made, which I am satisfied it did, notwithstanding the lack of what the claimant refers to a "physical evidence".

For the avoidance of doubt, however, this Tribunal has made no finding of fact that the claimant was guilty of theft.

Procedure

51. The claimant argued that it was difficult for him to recollect and respond to the allegations because too much time had passed. With respect to the 2015 allegations, the dates of which were identified only vaguely in any event, this is a fair point. Had the respondent sought, in 2017, to pursue only allegations related to 2015, I may have come to the conclusion this was unfair. The respondent was, however, entitled to purse the 2017 allegations; at the time of the investigation these were far from historic and a response could, reasonably, be expected from the claimant. In that context, the evidence about 2015 assumed a corroborative quality, and an enquiry into the same was justified.

52. As to the disciplinary hearing, whilst best practice would have suggested another manager deal with this, I do not find that Mr Bush's participation takes the procedure outwith the band of reasonableness. The claimant was advised that Mr Bush would be dealing with the disciplinary in Mr Orme's letter of 7 April 2017. At this time the claimant was supported and represented by his trade union. No objection was made to Mr Bush being the decision-maker at any point prior to his dismissal. The first complaint about this matter appears to be made in the claimant's appeal. I am not persuaded that Mr Bush being the decision-maker resulted in unfairness:

    52.1. the respondent's conduct policy appears to allow for the manager who investigated alleged misconduct, also to preside at the disciplinary hearing;

    52.2. the claimant's complaint might have carried more force if made before his dismissal;

    52.3. as above, I am satisfied that Mr Bush sought to keep an open mind;

    52.4. the claimant's appeal was thoroughly and carefully considered by an independent manager and the procedural defect, if any, was remedied.

53. The claimant also made various complaints about the documents sent containing typographical errors, reply envelopes not being included, and the witness statements having to be printed by his union. The claimant also pointed to some documents referring to "alleged" misconduct and others omitting that word. None of these failings affected the substantive fairness of the process, and nor was I persuaded the outcome was predetermined.

54. The respondent followed its own procedure. The allegations were explored thoroughly, during the investigation, disciplinary and on appeal. The claimant

had the support and representation of his trade union throughout. The claimant engaged with the process in a very full way.

55. For the reasons set out above, I am satisfied a fair procedure was followed.

<u>Sanction</u>

56. In most employment contexts, one instance of theft will be treated as amounting to gross misconduct, even if the amount involved is small. This is because the employment relationship will tend to be undermined by an offence of dishonesty. In this case the need for honestly is emphasised in the respondent's business code and theft is cited as a specific example of gross misconduct in its disciplinary procedure.

57. Notwithstanding the claimant's long service and previous good record. I am satisfied that the sanction of summary dismissal was within the band of reasonable responses.

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Employment Judge Maxwell

Date: 15 March 2018