Case No: 3400211/2017

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr A Dair	v	Royal Mail Group Ltd

Heard at: Cambridge **On:** 18 and 19 June 2018

Before: **Employment Judge King**

Appearances:
For the Claimant: Mr Berry (TU Representative)
For the Respondent: Mr Foster (Solicitor)

JUDGMENT having been sent to the parties on 28 June 2018 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant was represented by Mr Berry of the CWU Trade Union, and the respondent was represented by Mr Foster, solicitor. I heard evidence from the claimant and Mr Orvis on his behalf. I heard evidence from Mr Agar, Area Collections Manager of the respondent and Mr Trunks, Independent Case Work Manager. The parties exchanged witness statements in advance and prepared an agreed bundle which ran from pages 1-277 including additional grievance documents added on first morning.

2. At the outset of the claim it was identified as solely that of unfair dismissal. The respondent accepted the claimant was an employee with the requisite service to bring a claim. The claimant accepted that the reason for dismissal was conduct and that he did not rely on any procedural points. There were no issues as to time limits or jurisdiction. The issues were agreed at the outset of the first day as follows:

    2.1 What was the reason for dismissal? The respondent asserts conduct which is a potentially fair reason under s.98(2) of the Employment Rights Act 1996. The respondent must prove it had a genuine belief in misconduct and that is the reason for dismissal. The claimant accepts he failed to correctly record times worked on his signing in sheets.

2.2 Did the respondent hold the belief in the claimant's misconduct on reasonable grounds? The burden of proof is neutral and the claimant's challenges are that it was a job and finish culture, ie operated by custom and practice, disparity of treatment and the failure to deal with the matter under the late absence procedure.

2.3 Was the decision to dismiss a fair sanction within the range of reasonable responses for a reasonable employer given the size and administrative resources of the respondent?

2.4 If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct?

The Law

3. Dismissal under s.95 of the Employment Rights Act 1996 not being in dispute, the claimant has the right not to be unfairly dismissed by the respondent under s.94 of the Employment Rights Act 1996.

4. S.98 of the Employment Rights Act 1996 states that:

> "(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it—
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
>
> (b) relates to the conduct of the employee,
>
> (c) is that the employee was redundant, or
>
> (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
>
> (3) …..
>
> (4) 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 a sufficient reason for dismissing the employee, and

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

5. In conduct cases one must have regard to the case of British Homes Stores Ltd v Burchell [1980] ICR 303 which sets out a three-step test where the respondent must hold a reasonable belief, formed on reasonable grounds following reasonable investigation. Regard must also be had to the ACAS Code of Practice.

6. The respondent's representative referred me to a number of authorities to which I have had regard.

   6.1 Hadjioannou v Coral Casinos Ltd [1981] IRLR 352.

   6.2 Paul v East Surrey District Health Authority [1995] IRLR 305.

   6.3 MBNA Ltd v Jones [2015] UKEAT/0120/15.

   6.4 Securicor Ltd v Smith [1989] IRLR 356.

   6.5 Enterprise Liverpool Ltd v Bauress & Ealey UKEAT/0645/05.

   6.6 SPS Technologies Ltd v Chughtai UKEAT/0204/12.

   6.7 Polkey v AE Dayton Services Ltd [1987] IRLR 503.

Findings of fact

7. The claimant was employed by the respondent from 9 November 1987 until he was dismissed for gross misconduct on 10 November 2016.

8. The claimant started out as a postman until more latterly being in the Revenue Protection team located at Royal Mail Centre, Papyrus Road, Peterborough.

9. The claimant dealt with DSO recoveries and was managed by Joanne Hey. In summary, his role involved policing the commercial bulk mail provision of the Royal Mail to ensure customers had pre-paid the correct amount. The mail would arrive in lorries which were scheduled to arrive within pre-determined time slots. The cut off for the filing of his report was 12.30pm.

10. The claimant's contract provided he was paid weekly for 43 hours work. In addition, the claimant was paid overtime for additional hours worked outside of his normal contractual hours and his normal shift pattern. This included work as overtime on a Saturday.

11. The claimant had a swipe card and the CCTV was fitted to the external building of the mail centre. The claimant's attendance could therefore be measured by his time swiped at the main gate and by noting his exit time on CCTV. This was not routinely monitored but instead data was collected and stored for a period.

12. Upon arrival at work the claimant would sign the "sign in and sign out" form. This provided in type form his duty number, name, payroll number and duty time. The employee was to sign on, on arrival and manually record the start time and then sign out when he left and manually record the leaving time.

13. The claimant gave evidence that he as a matter of routine would sign in and out on arrival, did not complete his actual start time or actual finish time but his shift times on his arrival. The claimant had therefore signed in and out when he first arrived. The health and safety implications of this course of action were never raised with the claimant during the disciplinary hearing or employment.

14. Evidence was produced by the claimant's Trade Union representative at the disciplinary hearing showing this was wide spread across the respondent's business insofar as individuals would sign in and out on arrival. This was evidenced by copies taken of the signing in sheets after the shifts start time but before the shift finish time, which showed employees and managers adopting this sign in/out process at the same time. It did not show the times were inaccurate, but did show the signing out was being done on arrival not departure. These were produced at pages 109-114 of the bundle. What can also be seen from these documents is there is an example (at least one on every sheet) of an employee manually entering a different start time to the shift time that was printed. Some show a later start time or an earlier start time, or a handwritten amendment to the typed times. There is no suggestion that the claimant was expressly told to restate his shift pattern times or indeed that there was a pattern of employees just really writing their shift times. The evidence pointed to an out time being shown at the start of the shift but adjustments to shift times.

15. At some point during the shift, the claimant would take view as to whether overtime was required to complete his work. He also carried out overtime to assist others when they were on leave. To do this the claimant would manually complete a P552 form which set out his name, pay number, signature and additional hours worked. A declaration was present on this form as follows:

> "I declare that I have worked the overtime/scheduled attendance claimed above. I realise that the information provided will be used to process payment, management information and may be monitored for investigative purposes. I authorise that this is a full and accurate account of overtime/scheduled attendance (SCHALT) performed."

16. The respondent had a code of standards document which was reproduced in full for the bundle. The key parts relate to personal behavior contained within appearance and use of the company funds and property. Under personal behaviour and appearance which was specified under behaviour, behaviour which damages services to customers or the reputation or efficiency of the company is unacceptable including lateness, poor attendance, dishonesty, drunkeness, use of illegal substances and violent or disorderly behaviour or abusive language. It also referred to the fact all

employees should demonstrate punctuality and good attendance.

17. Under use of company funds and property it stated that remember it is a criminal offence to "claim money from the company for hours you did not work".

18. The claimant does not recall having seen that document. The respondent says it was sent to all employees, both in 2012 and 2015. Given that it was sent at intervals of at least 3 years, given the claimant having 29 years' service I find he may well have seen a version of it at some point in his employment history.

19. It matters not, since the claimant confirmed in evidence there was nothing surprising in the contents of the passages quoted above, likewise these are matters of common sense.

20. The respondent has a conduct policy which provides a non-exhaustive list of gross misconduct offences but does not include falsification of timesheets or fraud. It does refer to precautionary suspension for suspected or admitted theft or fraud. It is not the claimant's case that the allegation of fraud should not be gross misconduct which is sensible in the circumstances.

21. The respondent has a conduct agreement which deals with late attendance. This provides that:

> "Recording Attendance Times
>
> All employees should record their attendance daily by the locally recognised method. Attendance times should be recorded accurately and they should let their manager know why they are late or going to be late. Manager should keep a record of late attendance."
>
> "Consequence of late attendance
>
> Late attendance should normally be dealt with, with the right word at the right time. If this does not bring about the desired improvement the manager should consider arranging an informal discussion. When informal discussion does not bring about the desired improvement the matter should be dealt with formally under the conduct policy."
>
> "Consequence of being late for extra duty
>
> Late attendance for attendances outside the normal hours will be dealt with pay being calculated for the actual hours worked."
>
> "Time loss through unexcused late attendance
>
> Employees have a responsibility to make up lost time however it would then be reasonable to require the occasional late attendee to do so especially where they are making extra effort that they complete their scheduled duty by the normal finish time. Each case should be dealt with on its own merits. Lost time must be made up before overtime becomes payable. Where the staff has been delayed because of their own late arrival, on occasions an employee would be expected to work beyond their normal finishing time without payment for example where an

> OPG was completing a delivery or collection or an engineer finishing some urgent maintenance work."

22. The claimant was subject to an investigation following an anonymous complaint to Joanne Hey in June 2016. This was escalated by Joanne Hey to the Royal Mail Group Security for an investigation. The investigation conducted checks from 29 May 2016 to 23 July 2016 to check swipe card entry times and from CCTV, exit times against the relevant signing in and out sheets and overtime sheets. A table of the 31 instances where the timesheets did not reflect reality in that period was re-produced for the bundle.

23. On 11 August 2016 the claimant was interviewed under PACE (as the respondent was undecided as to whether a criminal prosecution would follow). The interview was recorded but not transcribed. The discs were provided to the claimant later (as set out below) but a report was prepared which summarised the interview. The claimant was recorded as having said:

> "He said he was aware that he had been arriving for work late on frequent basis and that he'd been leaving before the times the he had recorded as completing his overtime work. However he claimed that the reason for him leaving early had been due to him having worked his meal reliefs. He accepted that as he was usually the first member of staff to attend for duty within the DSA/Revenue Protection Area of the MC each morning and that he had been trusted to attend for duty at the correct time and if not then record his correct duty start times on the signing on sheets."
>
> "The claimant stated that he did not mention his late attendances with Miss Hey and admitted that if he had recorded his actual duty start times on the signing on sheets and that this would have been picked up and would likely have resulted in conduct code action being instigated against him. The claimant stated that he did not believe his actions had been fraudulent …"

24. The claimant challenged this report during the course of these proceedings as he had no recollection of stating these matters in the investigation interview, but this was not challenged at the dismissal and appeal stage.

25. As a result of that interview the claimant was suspended. The claimant attended a fact-finding interview with Joanne Hey on 16 August 2016 and was accompanied by his Trade Union representative. The claimant highlighted he took his meal relief breaks at the end of his shift as agreed by management so that he could leave early instead, and the case was escalated by Joanne Hey to Mr Agar.

26. By letter dated 14 September 2016 the claimant was invited to a formal conduct meeting (disciplinary hearing) on 22 September 2016. The charges were:

> "1. That between 27 May and 23 July 2016 you fraudulently claimed payment for overtime worked.
>
> 2. That between 27 May and 23 July 2016 you falsified signing on sheets

by failing to correctly enter your time of attendance to commence work."

27. The claimant was told in that letter that the matter was being treated as gross misconduct and provided with documentation in advance of the meeting.

28. The claimant was the first person in his unit to arrive when his shift started at 6.00am. The claimant at no point declared to his manager that he was coming in late and did not record this manually as other colleagues had been shown to do. The times of his lateness was in the worse instance 1 hour and 12 minutes late and one that is recorded as a mere 3 minutes. There were predominantly over 30 minutes late during the period of investigation.

29. The claimant raised during the meeting of the job and done culture which the respondent had accepted had been in the business historically, but no longer existed. The claimant said this was custom and practice. Minutes of the meeting were taken and subsequently amended by the claimant but not agreed in full. Both versions were provided in the bundle for the purposes of this hearing.

30. The investigation had a number of elements:

- Late arrival and inaccurate recording on the signing in and out sheets.
- Leaving earlier than recording on the signing in and out sheets.
- Leaving early on a Saturday when overtime was claimed for each full shift in full.
- Claiming overtime for periods the claimant was not on shift.

31. By letter dated 3 November 2016 the claimant was invited to a decision meeting as the investigation was concluded on 9 November 2016.

32. The respondent's Mr Agar was the dismissing officer. He prepared a six-page report outlining his deliberations, considerations of points raised and his conclusions. The claimant accepted what he had done but did not consider his actions to be fraudulent. Upon balance Mr Agar concluded that the claimant knowingly claimed overtime for hours he did not work in breach of its business standards and gross misconduct.

33. He found that signing on sheets by failing to correctly enter the time of attendance was proven. Mr Agar decided the claimant should be dismissed without notice. Mr Agar gave evidence which was unchallenged that he applied his mind to penalty he considered the seriousness of the charge, the time it had gone on for, the claimant's position of trust which had been abused for personal gain and that he had not been remorseful. Mr Agar stated that he had lost trust and confidence in the claimant rendering dismissal an appropriate sanction.

34. On 10 October 2016 the claimant appealed stating the penalty was too harsh, mitigation including the length of service and conduct record had not been taken into account and he had been singled out for common practice in Royal Mail.

35. Mr Trunks was appointed to hear the appeal. By letter dated 21 November 2016 he invited the claimant to an appeal hearing on 30 November 2016. The appeal was treated as a complete re-hearing.

36. Upon the claimant's request the appeal hearing was rescheduled to 6 December 2016 to allow him to be accompanied. Agreed minutes of the appeal were produced at the bundle and the claimant was represented. The claimant confirmed in the appeal, that Joanne Hey had never said anything which lead him to conclude coming in late and not letting her know, and not signing in accurately was okay. He got the work done though so it was okay to put full time hours for overtime authorised and agreed, and then go home early once the work was completed.

37. During the appeal the claimant produced new evidence from Mr Gilbey that manners of the job and done rule, and a memorandum going out to staff to remind them of the need to accurately report time together with some email correspondence.

38. By letter dated 30 December 2016 the claimant was provided with discs from the PACE interview and additional evidence. Also by letter of 31 December 2016 copy payslips were send by Mr Trunks. Mr Trunks then interviewed staff and sent copies of those interviews to the claimant by letter dated 3 January 2017 inviting his comments. By email dated 4 January 2017 the claimant provided some comments in response to those documents.

39. By letter dated 8 January 2017 Mr Trunks rejected the claimant's appeal. He provided a 6-page report explaining his investigation, deliberations, inclusions and his decision. The appeal was very thorough. He relied on admissions in the PACE interview, concluding that if Miss Hey had been aware of his lateness she would not have allowed the claimant to book overtime. Mr Trunks concluded that Royal Mail had to be able to trust its employees to work unsupervised and that the trust was being abused by the claimant so his continued employment would be untenable.

40. The claimant commenced ACAS early conciliation and submitted a claim to the Tribunal on 7 March 2017 which forms the basis of this case today.

Conclusions

41. I firstly remind myself that I must not substitute my view for that of the respondent. The test is not would I have dismissed the claimant but did the respondent act within the band of reasonable responses in all the circumstances.

42. It is a particularly sad case that the claimant has been with the respondent for this length of time and has effectively been there from boy to man, and his employment history should come to an end with a dismissal for gross misconduct, but this is not relevant to the legal principles. Turning back to the issues;

    2.1 What was the reason for dismissal?

43. The respondent asserts the dismissal was for conduct reasons. The claimant accepts he failed to correctly record his times worked on the signing in and out sheets. The claimant puts forward no other reason for his dismissal other than he was singled out.

44. In circumstances where he admits the conduct alleged it is clear the dismissal was for conduct reasons. This is a potentially fair reason under s.98(2) of the Employment Rights Act 1996.

2.2 Did the respondent hold a belief in the claimant's misconduct on reasonable grounds?

45. The claimant's challenges here were the job and done culture finish, disparity of treatment and failure to deal with the matter under the late absence procedure. Turning first to deal with the matter under the late absence procedure.

46. Having considered the documents and the findings of fact, I conclude that the respondent was right not to treat this matter under the late attendance policy. In order to have done so, the respondent would have had to be aware of the lateness and given formal counselling on it. The policy requires the claimant to accurately record his attendance times and let his manager know why and the fact of his lateness, the claimant did neither of these things.

47. This is particularly the case where the claimant has confirmed he did not notify his manager and had he accurately recorded them he would have been dealt with under the conduct code. Further, it is noted by Mr Trunks that further in the PACE interview to conclude that if Miss Hey had been aware of the late attendance she would not have permitted the taking of overtime.

48. The claimant worked alone and was trusted to arrive on time. His attendance was frequently not on time and not only by a mere matter of minutes.

49. The policy is also unhelpful to the claimant as it expressly states that lost time must be made up before overtime becomes payable. Employees are on occasion expected to work beyond their normal finishing time without payment. Here he arrived significantly late, did not declare it and then claimed overtime. If he had arrived on time there is a significant chance no overtime would have been needed.

50. Had the claimant been dismissed for lateness, I would have concluded that this was unfair as it is not gross misconduct. He was however dismissed for concealing of the start time in effect.

51. It is not correct to say that the pre-typed shift times is common place or custom practice as the examples produced by the representative all show at least an example of an adjustment to a start time. None show categorically that an employee left early or arrived late in that document. It is unclear what the actual hours were that were worked by them. The

respondent was concerned with the claimant's case before them.

52. The charge was not falsification of timesheets, by incorrectly entering the time and exit time, but focused on the time of attendance to commence work. This charge was proven and accepted by the claimant.

53. The second charge of fraudulently claiming overtime not worked relates in part to leaving early and this is where the claimant relies on the job and done culture. In this respect of Saturday work, even if I were to accept a job and finish culture on those days the claimant's case comes into difficulty in respect of some of the overtime claimed. Some of his overtime relates to covering for others and the respondent's case is there was work that could have been done rather than leaving early.

54. The bigger problem for the claimant is in respect of the times he has claimed overtime, while on his case he has worked through his lunch break in essence and was permitted to go home. On 27 May 2016 the claimant arrived 44 minutes late and left 5 minutes early on a job and done culture principle this may not have been an issue, save for the fact that he then decided to claim one hours' overtime for his lunch break he had not worked when he owed the company 50 minutes anyway that day.

55. There was clearly permission for him to leave early and claim his meal reliefs (lunch breaks), but that permission would have been revoked had Miss Hey realised that he had been 44 minutes late on that day. The claimant accepted this in his PACE interview.

56. A further example is on 10 June 2016 when the claimant arrived 27 minutes late and left 17 minutes early, but again still claimed one hours' overtime. To claim one hour when he has not worked 50 minutes of his normal day for which he is paid already is plainly wrong.

57. Had the job and done culture existed and the meal relief culture also as I have found, and the claimant not claimed overtime on these days the respondent would have had an uphill struggle to show that this is reasonable.

58. The claimant irrespective of the policy knew that it was wrong which is why he accepted in the PACE interview he had not written the correct start time for two-fold reasons, Miss Hey would have dealt with this under the conduct policy and secondly, she would not have permitted overtime.

59. In respect of these admissions alone, ie relating to the start time being inaccurate, the respondent was entitled to conclude that it had reasonable belief on reasonable grounds.

60. The claimant benefitted personally from his misconduct, financially as not only was he in a win-win situation, as described by the respondent on the job and done principle but he was paid additional time. Any employee irrespective of a policy would in my view be entitled to conclude (if they truly turned their minds to it) that to arrive up to an hour late and leave marginally early but then claim an additional hour is wrong. The claimant's evidence was he had not thought about this when I asked him about it but

I do not accept that.

61. On this basis there is no need for me to make a determination as to whether job and done applied in the claimant's case as his own conduct went beyond this. The respondent having reasonably concluded on the claimant's own admission that he concealed his start times and would not have had overtime authorised, so that he wrongly claimed time he already owed the company in those circumstances is enough.

62. Turning to disparity of treatment – I asked the parties to explore this in their submissions and the respondent provided case law to which I have had regard. This allegation arose out of two other colleagues of the claimant accepting that on Saturdays they effectively carried out a job and done culture, they claimed overtime wrongly and that this was lawful. There was no evidence to suggest that they stated inaccurately their start times, in fact as I have referred to the documents earlier provided by the claimant's representative, Mr Gilbey manually amended his start time to the one shown on the printed times (at page 109). This does not tell me the actual start time of his shift.

63. Mr Trunks referred these two individuals under disciplinary action and I am told that there was found to be no case to answer as at least one of them had produced evidence they had worked beyond their shift times without additional compensation, so it was give and take on the face of it.

64. On the face of it this is different as the claimant had no such evidence which he highlighted to his employer that he had done the same. The respondent had his concession on start times that were concealed to avoid conduct proceedings and also to allow him to claim overtime when he was required to work to make up the time he already owed. He had no evidence for his employer to support the fact he had not ever claimed like his colleagues. In his case it was all one way.

65. I have considered that s.98(4) of the Employment Rights Act 1996 requires me to conclude that "equity" in the term to have regard to equity and substantial merits of the case, that similar conduct should be dealt with in the same way. Considering the Coral Casinos and Paul cases, it follows that inconsistent treatment is really only relevant in two scenarios, firstly where the employer has treated similar behaviour less seriously in the past so the employee believes that it would be overlooked (ie a condoning type case) or secondly in circumstances where employees were in truly parallel circumstances arising from the same incident were treated differently.

66. The Court of Appeal in Paul said it would be rare for a case to be unfair on inconsistent treatment alone, and in MBNA v Jones further states that it would be a rare case for there to be a true comparison.

67. Again, this is subject to the reasonable responses test as set out in Securicor Ltd v Smith, the claimant went up first and had multiple occasions in a two-month period. The conduct involved signing in incorrectly which he accepted, claiming hours of overtime that he had not worked on a Saturday, but also more critically and damaging for the

claimant in the week on days in the circumstances that he was already significantly late and left slightly early and knew Miss Hey would not have authorised it had she known.

68. It cannot therefore be said that the circumstances are parallel or that his decision is outside the range to treat the claimant's case differently to his two colleagues subsequently.

69. I therefore conclude that the respondent had a reasonable belief in the claimant's misconduct on reasonable grounds.

2.3 Was the decision to dismiss a fair sanction within the range of reasonable responses?

70. The claimant appealed his decision on the basis of the severity of penalty. He did have 29 years' service and this was the first time he had been subject to formal conduct proceedings.

71. I have concluded the respondent was entitled to find gross misconduct on the claimant's behalf. I have considered whether the claimant's mitigating factors meant he should not have been dismissed.

72. Just because I or another employer may issue a final written warning instead of dismissal does not make the respondent's decision to dismiss unfair. I must not substitute my view and dismissal is within the range of reasonable responses for the respondent to take when faced with the admissions in this case in what is clearly a gross misconduct case. Dismissal is within the range.

73. It therefore follows the claimant was fairly dismissed and his claim for unfair dismissal fails.

74. Given these conclusions there is no need for me to consider contributory fault in the last of the issues identified at the outset.

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Employment Judge King

Date: ……………………………….

Judgment sent to the parties on
09.08.18

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For the Tribunal office