Case Number: 3201387/2017

JJE

EMPLOYMENT TRIBUNALS

Claimant: **Mr J R Shanley**

Respondent: **Royal Mail Group Plc**

Heard at: **East London Hearing Centre**

On: **4 July 2018**

Before: **Employment Judge Barrowclough**

Members: **Ms Madeline Long**
Mr Michael Wood

Representation

Claimant: Mr Percival (Trade Union Representative)
Respondent: Mr Hartley (Solicitor)

JUDGMENT

This is the unanimous Judgment of this Tribunal in relation to the Claimants case. I say in advance that I have been writing our decision and reasons at considerable speed with I'm afraid, deleterious effect on my handwriting, so do not be surprised if there are substantial gaps. Hopefully they will be resumed thereafter but in any event, these are our reasons.

REASONS

The Claimant Mr John Shanley brings two claims for determination by the Tribunal against Royal Mail Group Plc, his former employers. Those are unfair dismissal and discrimination arising from a disability in breach of Section 15 (1) of the Equality Act 2010.

We heard those claims over the course of the last two days when we heard evidence from the Claimant himself and from Mr Anthony Parsons, a manager of the Respondent's Stansted Airport Hub which took the decision to dismiss him and from Mr Alan Rostrom, an independent Caseworker Manager employed by the Respondent who heard and dismissed the Claimant's appeal. The Claimant was represented before us by his union representative, Mr Percival and the Respondent by their solicitor Mr Hartley, and we thank both for their assistance. A number of matters were agreed or at least not in dispute before us. The Respondent accepts that it employed the Claimant continuously from January 2003 until his summary dismissal on 23 July 2017 and that he had an effectively clean disciplinary record. The Respondent also accepts that at all relevant times, the Claimant had a disability within the Equality Act Section 6, namely Type II Diabetes and that it was aware of that fact. The Respondent asserts that its reason for dismissing the Claimant was misconduct, which is a potentially fair reason within Section 98 of the Employment Rights Act and that reason was not challenged by the Claimant or on his behalf. What the Claimant does challenge is whether the Respondent adopted and followed a fair investigation and disciplinary procedure, whether it had reasonable grounds for dismissing and whether the sanction of dismissal was disproportionate and unreasonable, particularly in the light of his lengthy good service as well as asserting that at least part of the reason for his dismissal was in consequence of his disability of diabetes which he says cannot be justified under Section 15 (1)(b) of the Act. That summary more or less encapsulates the list of issues which was helpfully agreed by the parties and a copy of which is at pages 34-36 of the agreed bundle. In terms of the applicable law, Section 15 provides that a person discriminates against a disabled person if he treats that person unfavourably because of something arising in consequence of his disability and cannot show that the treatment is of proportionate means for achieving the legitimate aim. The Respondent contends that its treatment of the Claimant was unrelated

to his diabetes, but that even if it was so related, that his dismissal was justified. The Claimant disputes all that, all be it Mr Percival accepted sensibly in argue, that the Respondents enforcement of its disability and harassment policy amounted to a legitimate aim, though he does say that dismissal was disproportionate. In relation to unfair dismissal, both representatives sensibly accepted that this is a classic British Home Stores virtual case, the issues to be determined are: Did the Respondent genuinely believe on reasonable grounds after an appropriate investigation, that the Claimant was guilty of misconduct; if so, did the Respondent follow a fair procedure and did dismissal fall within the range of reasonable responses open to it?. There are subsidiary issues of contributory fault and of a Polkey deduction in the event that the unfair dismissal claim succeeds. The facts on the evidence we heard will be fresh in the minds of all those present in Tribunal today and we will do no more than summarise the relevant matters in this extempore Judgment. As noted, that Claimant started work with Royal Mail in January 2003 as an operational postal grade Postal Worker based at Chelmsford Mail Centre before transferring to the Stanstead Air Mail Hub as a Screener in May 2010. Some time in 2013/2014, it matters not when, the Claimant successfully applied for the role of Mail Screening Coordinator which although non managerial, involved important duties in relation to suspicious packages and the like. The Claimant had been diagnosed with Type II diabetes in 2002 and informed Royal Mail of that fact when he joined them. His condition was initially controlled by diet although after 2008 he started taking tablets before moving onto insulin injections at some point in the last 5 years. In late 2016 and as a result of a blood test, it was discovered that the Claimant had low B12 vitamin levels which like diabetes can, he says, cause irritability and other related symptoms. The Claimant kept his employers informed of his medical condition as it evolved. The first incident with which the Tribunal is concerned took place in October 2016. Briefly, this involved the Claimant and a colleague called Dave Champkin who had informed the

Claimant of the identity of the winner of the popular TV Bake Off programme which had been aired on that evening, but which the Claimant had not yet seen. It is not disputed that the Claimant told Mr Champkin to fuck off for having done so and appeared at least, to be angry and upset. The incident ended then and it was only on the next day that the Claimant says that he discovered that Mr Champkin had apparently been upset at being spoken to and treated in that manner . The Claimant says that everything he had said and done was in fact in the form of a rather heavy handed joke which had unfortunately backfired, that he had not intended to upset Mr Champkin in any way, to whom he apologised immediately and profusely once he became aware of the situation; that they shook hands on it and that nothing thereafter resulted. It is certainly correct to say that no disciplinary action whether formal or informal resulted. The Claimant goes on to say that he then applied for the role of Deputy Manager at the hub which had originally been advertised around the time of September 2016, at which he applied for in the following January. That application appears to have still been pending at the time of the next incident which took place on 2 March 2017. During the nightshift on that day, there was as is once again accepted by the Claimant, a heated exchange between him and two work colleagues Mr Khan and Mr Cormack. That arose during a busy night at the hub when the Claimant shouted to and approached Mr Martin who was Messrs Khan and Cormack's manager and effectively suggested that they were not pulling their weight. When Messrs Khan and Cormack learned of that, they were aggrieved and upset and there was an exchange of words between them and the Claimant; the Claimant saying in effect that they started swearing at him at the conclusion of which the Claimant accepts that he twice told them to fuck off, he says as he was walking away. Both Mr Khan and Mr Cormack then submitted complaint forms alleging bullying and harassment by the Claimant which are at pages 92 and thereafter in the agreed bundle. Mr Cormack's complaint was date stamped by the Respondent on 6 March, Mr Khan's on 10 March. Both submitted letters

giving their version of the incident together with their complaint forms. More or less simultaneously, Mr Champkin submitted his own bullying and harassment complaint form dated 3 March and date stamped 8 March. That mentioned not only the earlier incident to which we have already referred, but also detailed a further incident on 22 February 2017 when he says, the Claimant was aggressive, rude and shouted at him; that he was doing nothing in response to a polite enquiry by Mr Champkin as to how the Claimant was and as a result of which Mr Champkin had taken sick leave. Finally, Mr Champkin's written complaint and concerns included the possibility that the Claimant might be about to be appointed as his manager and could use that power to further bully him as he states in that form. Mr Qureshi, a manager of the Stanstead Airport Hub was asked by the Respondent's employee relations case management team to investigate and he interviewed a number of people including the three complainants and the Claimant and a number of others as detailed in the agreed chronology. Notes of those interviews conducted by him are at pages 105-134 in the bundle. Mr Qureshi concluded that that the complaints were well founded, recommended that the Claimant be temporarily relocated and that an investigation under the Respondent's conduct policy be undertaken. That duly happened and Mr Whitmore, the Network Reporting Manager at Stanstead undertook a fact finding interview with the Claimant on 6 April 2017 at which the Claimant was accompanied by Mr Simpson his union representative. Notes of that interview were subsequently provided to the Claimant who returned them duly amended and approved. Mr Whitmore then interviewed Mr Qureshi before passing the case up to Mr Parsons on the basis that the potential penalty for the matters alleged against the Claimant lay outside his current authority. Mr Parsons then writes to the Claimant on 3 May last year, charging him with four offences of bullying namely the three already detailed and a further charge involving Marta Rodriguez which charge was subsequently dismissed by Mr Parsons at the disciplinary hearing or thereafter. The formal conduct interview between Mr Parsons

and the Claimant took place on 8 May when once again Mr Simpson was in attendance and Mr Parsons then interviewed or re-interviewed a total of seventeen individuals; that is the complainants and a number of others as set out in the witness statements which appear between pages 191and 232 in the bundle. Following that interview or re-interview process, Mr Parsons wrote to the Claimant on 4 July enclosing copies of all the interview notes or statements and inviting his comments and/or responses and in fact, both Mr Simpson and the Claimant duly replied on 12 and 14 July respectively, their comments appearing at pages 234-249 in the bundle. Mr Parsons determined that the allegations of bullying against Messrs Khan, Cormack and Champkin were made out and had in fact occurred and decided that they amounted to gross misconduct under the Respondent's policies and procedures and that the Claimant should be summarily dismissed. Those matters and conclusions as set out in Mr Parsons comprehensive dismissal letter dated 22 July which runs from page 251-265 in the bundle and which set out details of his further investigations and interviews, his thought process, his consideration and his conclusions in relation to all the points raised by the Claimant and by his union representative and also the reasons why he considered dismissal to be the only proper sanction in the circumstances. The Claimant duly appealed against that determination as was his right and Mr Rostrom conducted the appeal hearing on 29 August 2017 when the Claimant was accompanied by Mr Martin, a senior union representative. The Claimant's grounds of appeal are at pages 266, namely

(a) that it was contrary to precedent ;

(b) that the Respondent's procedure had not been followed;

(c) that the penalty was too harsh;

(d) that the conclusion was incompatible with the facts.

On appeal, that effectively reduced as is accepted, to a challenge to the Respondent's procedure adopted by the Respondent and a challenge to the factual basis upon which the decision to find the matters proved had been reached. Mr Rostrom like Mr Parsons conducted his own further investigation by way of re-interviewing Mr Qureshi, Mr Cormack and Mr Champkin and also speaking to a Ms Gower. Once again, notes of those interviews were submitted to the Claimant for his comments and response and the Claimant duly replied on 25 September 2017. Mr Rostrom however upheld M Parson's determination and decision and dismissed the Claimant's appeal under cover and for the reasons contained in his letter dated 28 September, which is at pages 296-304 in the bundle. We focussed first on the unfair dismissal claim. Misconduct is alleged and relied upon by the Respondent and that was not challenged by the Claimant or on his behalf. There was a wealth of evidence to support that being the Respondent's reason for dismissal and we find that it has certainly been established as their reason for dismissal on the appropriate balance of probabilities test. We turn then to the elements of the Birchell test and, once again, there was no challenge to the Respondent in the form of Messrs Parsons and Rostrom having genuinely believed that the Claimant had bullied and harassed the three complainants and that that amounted to gross misconduct. Was that belief held on reasonable grounds? This is really the heart of the case. The Claimant asserts that he did not behave as is alleged by the three complainants who in effect, certainly in the case of Mr Khan and Mr Corrmack, he says started it and who he suggests were acting in concert if not quite in a conspiracy against him, at least in part because of his application to become a manager which was still outstanding. He further says that there was no proof or at least no adequate or sufficient proof or evidence upon which the Respondent could properly rely or find the allegations of bullying and harassment against him proved. The Respondent's argument is that this case is analogist to an allegation of racial or sexual harassment in that these usually occur or allegedly occur or happen in

private with few if any witnesses and that in those circumstances, it is appropriate and necessary to interview others in the team unit or workplace concerned to assess where the balance of likelihood of reliable evidence or truth lies. It was for that reason that both Mr Parsons and Mr Rostrom interviewed individuals themselves following what they accept to have been the less than perfect original investigation by Mr Qureshi and that the Claimant had every opportunity not only to comment on those statements subsequently obtained, but also to make representations in relation thereto as part of the disciplinary process. Additionally, the Claimant was invited to nominate or identify witnesses who he said should be interviewed as character witnesses or as having relevance and being able to speak about him and that duly happened. It was on the basis of all that material that the Respondent determined that the allegations were found proved and it is submitted that it was reasonable for the Respondent to do so and to adopt that approach. We agree. We bear in mind that there was certainly some materials supportive of the Claimant in those interviews whilst it is also right say that there was a good deal of evidence which supported and suggested that his alleged behaviour towards the three complainants was not out of character or unlikely. In those circumstances, it cannot be said, we find, that the Respondent's conclusions or the manner in which they approached the matter were unreasonable, which after all is all they have to show under the Birchell test. We do not think that any legitimate criticism can be levelled at the investigations undertaken by the Respondent which it could be said could properly be described as exhaustive. It therefore follows that the three elements of the Birchell test are in our judgment established. In terms of the procedure and for substantially the same reasons as apply to the investigation, we find that the procedure adopted was a reasonable one. Mr Percival in submissions raised the valid point that all the pro-forma questions put by the Respondent to the various witnesses interviewed by Messrs Parsons and Rostrom focussed on the character and behaviour of Mr Shanley, the Claimant alone, rather than that of the three

individual complainants. Since the Respondent's assessment depended upon the individuals concerned past behaviour and character, that might well have been hopeful as we agree however, it was accepted that that point was never raised by the Claimant or by his various union representatives at any stage during the disciplinary process or prior to dismissal or up until Mr Percival's submissions yesterday at the conclusion of the case. Secondly, we bear in mind that the procedure adopted by the Respondent in any such unfair dismissal proceedings, does not need to be perfect and only has to reach a level or reasonable fairness and in our judgment overall it does. We turn finally therefore to the questions of whether dismissal falls within the range of reasonable responses open to the Respondent. We were properly reminded that we must not substitute our judgment for that of an employer in these circumstances, that bullying and harassment are identified and characterised in the Respondent's accepted policies and procedures as examples of gross misconduct, for which the normal penalty is summary dismissal and that the Respondent has a duty of care not just to the Claimant, but also to its other employees, to ensure that they work in a safe environment, free from hostility, bullying and harassment. Additionally, **Mr Hogley** submitted correctly in our view, that gross misconduct is gross misconduct however long an employee has served a particular employer and however unblemished his or her work record may be. Whilst we think it could be said that dismissal in these circumstances and the current circumstances falls at the harsh end of the available spectrum available to the employer, we cannot say that it falls outside that spectrum and for these reasons the unfair dismissal claim must fail and be dismissed. We think we can deal with the Section 15 discrimination claim more succinctly. It is accepted both that the Claimant was disabled and that he was treated unfavourably in being dismissed. We asked the question was that treatment attributable in whole or in part to his disability of diabetes. The Claimant himself said in evidence that the incidence giving rise to the disciplinary process and to his dismissal we not attributable directly to his

diabetes. When interviewed by Mr Parsons, an interview we note that lasted two hours, the Claimant said in terms in relation to his diabetes and B12 deficiency and I quote "*I am not making any excuses. I am not relying on that to cover all my mitigation. It may be an underlying issue but I need to deal with it by coping strategies*". Secondly, no medical or other evidence was ever provided by the Claimant or laid before the Tribunal to support or to link his condition to his behaviour. It is relevant we think to quote the words of the Employment Judge at the telephone case management preliminary hearing as long ago as 2 February this year, when it was noted that the Claimant contended that his medical conditions had affected his mood and should have been taken into account and that had that been done, he would not have been dismissed. Employment Judge Foxwell, correctly we think, then observed that "*The Tribunal will require some evidence showing a link between Type II Diabetes and his mood*". None has been provided; not even a letter from the Claimant's GP or medical advisors who have treated, helped and advised him over the years. The reference to occupational health which occurred at an early stage of the disciplinary process was not pursued and whilst there is some uncertainty and dispute about why the original referral was aborted, it is right to say that the Claimant did not seek another referral or more comprehensive and pro-active referral and did not ask for one during the relevant discussion in Mr Parson's long disciplinary hearing. For these reasons, we find that the Claimant's treatment was, as Mr Parsons asserted at the time, unrelated to his disability however, if we were wrong in coming to that conclusion, we would in any event find that the Respondent's dismissal of the Claimant was justified and fell within a Section 15.1(b) of the Act, in that in our judgment, bearing in mind that the matters raised by Mr Parsons in his dismissal letter at pages 251-265, dismissal of the Claimant was unfortunately proportionate in relation to the legitimate aim of upholding the bullying and harassment policy and procedures and for these reasons, the disability claim

must fail and be dismissed as well. And that as I said at the outset, is our unanimous judgement and those are our reasons.

Employment Judge Barrowclough

17 September 2018