EMPLOYMENT TRIBUNALS

Claimant: **Mr R Lockyer**

Respondent: **Royal Mail Group Limited**

Heard at: **Ashford**

On: **22 July 2019**

Before: **Employment Judge Pritchard**

Representation
Claimant: Mr D Percival, Trade Union Associate
Respondent: Mrs A Kent, Solicitor

JUDGMENT

1 The Claimant's claim for unpaid wages is dismissed upon withdrawal

2 The Claimant's claim for a redundancy payment is dismissed upon withdrawal

3 The Claimant's claim for unfair dismissal is not well-founded and is accordingly dismissed

REASONS

1. Reasons having been given orally at the conclusion of the hearing, these written reasons are now provided at the Claimant's request.

Application to amend the claim

2. At the commencement of the hearing the Tribunal considered the Claimant's application to amend his claim to add a claim for wrongful dismissal/notice pay. The application had been initially made by letter to the Tribunal dated 6 March 2019. It was not until 10 May 2019 that the Claimant complied with Rule 30 by copying the application to the Respondent. The Respondent objected to the application. The Tribunal had regard to the principles set down in Selkent Bus Company v Moore 1996 ICR 386.

3. The primary time limit for bringing such a claim expired 14 January 2019.

Although a wrongful dismissal claim arises from the same facts, it would involve a different area of enquiry; in particular, the Tribunal would have to consider whether, on the balance of probabilities, the Respondent could show that the Claimant committed an act of gross misconduct such that it was entitled to dismiss him without notice. This is in contrast to the test to be applied in an unfair dismissal claim in which, broadly speaking, the Tribunal must consider whether the Respondent acted within a band of reasonableness. The Claimant gave no explanation as to why the application had not been made earlier or within the primary time limit. On the one hand, if the application was refused, the Claimant would not be able to pursue his wrongful dismissal claim (although if his unfair dismissal claim was successful, it is likely that any compensation awarded would apply to the notice period in any event); on the other hand, if the application was granted, the Respondent would be required to defend a claim it had not been prepared to defend at the hearing. The Tribunal concluded that the balance of prejudice fell in the Respondent's favour. The application was refused.

The claims

4. Having withdrawn his claim for unpaid wages and his claim for a redundancy payment, the Claimant confirmed that the only remaining claim for the Tribunal's consideration was his claim for unfair dismissal.

The evidence before the Tribunal

5. The Tribunal heard evidence from the Respondent's witnesses: Stephen John Peter (Delivery Office Manager); and Susan Jane Knight-Smith (Independent Casework Manager). The Claimant gave evidence on his own behalf. The Tribunal was provided with a bundle of documents to which the parties variously referred. At the conclusion of the hearing, the parties made brief oral submissions.

The issues

6. The issues were discussed and agreed with the parties at the commencement of the hearing. They were as follows:

    6.1. Whether the Respondent can show the reason, or if more than one the principal reason, for the Claimant's dismissal and that it was for a reason relating to the Claimant's conduct. This will require the Respondent to show that they genuinely believed the employee was guilty of misconduct;

    6.2. Whether the Respondent had reasonable grounds upon which to sustain that belief; and

    6.3. Whether at the stage at which that belief was formed on those grounds, the Respondent had carried out as much investigation into the matter as was reasonable in the circumstances.

    6.4. Whether the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted

6.5. If the Tribunal finds the dismissal was unfair by reason of any procedural defect, whether the Respondent might or would have dismissed the Claimant in any event and whether any compensation should be reduced accordingly (Polkey).

6.6. Whether the Claimant caused or contributed to his dismissal such that any compensation should be reduced.

7. If he were to succeed in his claim, the Claimant said he would seek instatement or re-engagement. The parties were informed that the question of remedy would be considered at a further hearing if the Claimant was successful in his claim.

Findings of fact

8. The Claimant was employed by the Respondent as a postman, having commenced employment on 17 July 1989.

9. The Respondent's Conduct Policy provides, among other things:

> ***Gross Misconduct***
>
> *…. the following examples show some types of behaviour which in certain circumstances could be judged to be gross misconduct:*
>
> - *Intentional delay of mail*
>
> ***Repeated breaches of the policy***
>
> *Where an employee has a number of misconduct cases upheld it may be necessary to take more severe action than a particular breach of conduct calls for by itself. For example, someone who has a number of current serious warnings may face dismissal. In such cases, when the person is invited to the conduct meeting to deal with the latest breach, the invitation letter will make it clear what conduct penalty is being considered and that this is because of the number of previous penalties. However, this is not an automatic reason for more severe action.*

10. The National Conduct Procedure Agreement between Royal Mail Group and CWU and Unite-CMA provides, among other things:

> ***Delay to mail***
>
> - *Unintentional delay*
> - *Unexcused delay*
> - *Intentional delay*
>
> ***Unintentional delay***
>
> *Royal Mail Group recognises that genuine mistakes and misunderstandings to occur and it is not our intention that such*

cases should be dealt with under the Conduct policy beyond informal discussions for the isolated instance

Unexcused delay

Various actions can cause mail to be delayed, for example carelessness or negligence to loss or delay of customers' mail, breach or disregard of a standard or guideline. Such instances are to be distinguished from intentional delay (see below), although they may also be treated as misconduct and dealt with under the Conduct Policy, outcomes may range from an informal discussion to dismissal.

Intentional delay

Intentional delay of mail is classed as gross misconduct which, if proven, could lead to dismissal. The test to determine whether actions may be considered as intentional delay is whether the action taken by the employee knowingly was deliberate with an intention to delay mail.

Where proven, such breaches of conduct can lead to dismissal, even for a first offence; indeed, intentional delay is a criminal offence and can result in prosecution.

11. The Claimant's performance at work was not entirely satisfactory. On 31 May 2018, he was issued with serious warning valid for 12 months. On 2 August 2018, he was issued a suspended dismissal penalty valid for 24 months. The Claimant was informed that: "… going forward any breach of standards will lead to your dismissal". The Claimant did not appeal against those sanctions. During cross examination, the Claimant alleged for the first time that he had been threatened with dismissal should he choose to appeal. There was no evidence in his witness statement to this effect and the Respondent's witnesses were not cross-examined on the point. The Tribunal finds that had the Claimant been threatened as he alleges, he would have included this in his claim to the Tribunal and in his witness statement. The Tribunal does not accept the Claimant's evidence in this regard. It is clear from the evidence that the Claimant was a challenging employee.

12. The Tribunal accepts that the issue of mail integrity is one of the key fundamental aspects of the Respondent's service.

13. The Respondent offers a premium service which guarantees that an item posted Special Delivery (SD) will arrive at 9 am or 1 pm the following day. The Tribunal accepts the Respondent's evidence that it is vitally important for such deliveries to be made by the specified time: not only must the Respondent compensate the sender of SD items if the delivery is not made by the specified time, but reliability of service is one of the attributes which allows the Respondent to compete in the market place.

14. Postal staff on delivery duties carry an electronic device known as a Personal Delivery Assistant (PDA). The PDA allows the bar code on a postal item to be scanned and for the time of delivery to be recorded when

triggered by the recipient's signature. The data produced by the PDA is captured on the Respondent's electronic system. A failure to deliver on time would be noted as a failure warranting further investigation by management.

15. The Claimant as an extremely experienced postman. He knew full well the importance of the requirement to ensure that SD items were delivered by the specified time.

16. At the beginning of the working day, the Claimant would prepare his delivery round in Ashford High Street. Not least because he was best placed to do so, having knowledge of his round, he would list deliveries as he thought fit having regard to the required delivery times of SD and other time critical items.

17. Given the importance the Respondent places on the requirement for SD items to be delivered by the specified time, the PDA shows a notification on screen at noon if SD items remain to be delivered by 1 pm. This notification is cleared upon the next operation of the PDA unit.

18. On 12 September 2018, the Claimant was required to make a delivery to a bank. The bank required the postal item to be at the counter. This meant the Claimant had to queue before he was able to obtain a signature from the recipient bank confirming that the delivery had been made. The Claimant knew of the bank's requirement and that he might have to queue. The bank's signature was obtained at 1.01 pm; in other words, the delivery was made just one minute late. The Claimant, who did not wear a watch, thought he had started queuing in the bank at about 4 minutes before 1.00 pm (although the Tribunal was told that the time would have been displayed on his PDA). The late delivery was recorded on the Respondent's system and an investigation commenced.

19. On 20 September 2018, the Claimant attended a fact find meeting. The manager holding the fact find meeting concluded that there was a case to answer.

20. Mr Peter then invited to attend a formal conduct meeting. The allegation set out in the letter was "failure to follow the correct procedures concerning sign for items". The C was told that he should be aware that:

    - *I will take into consideration your conduct record which is currently suspended dismissal 2 years for failing to obtain a signature and follow 'sign for' procedures. Also a one year warning for failure to secure your vehicle.*

    - *This formal notification is being considered as gross misconduct. If the conduct notification is upheld, one outcome could be your dismissal without notice.*

21. The formal meeting took place on 5 October 2018 chaired by Mr Peter. The Claimant was accompanied by his TU representative. Mr Peter decided that the Claimant should be summarily dismissed. The Claimant's employment ended on 15 October 2018. Mr Peter provided the Claimant

with written reasons for his decision. It is clear from that letter, and from his evidence to the Tribunal, that Mr Peter had "totted up" the Claimant's previous disciplinary history, and considered the Claimant's general attitude to management, in reaching his decision that the Claimant should be summarily dismissed. In particular, Mr Peter said that if he had been considering this allegation of misconduct in isolation, such a procedural error would normally result in a sanction short of dismissal. Mr Peter was concerned that if the Respondent did nothing, the Claimant would be back on a further disciplinary charge at some time in the future.

22. The Claimant subsequently appealed. Sue Knight-Smith heard the Claimant's appeal on 24 October 2018. The Claimant was accompanied by his TU representative. Ms Knight-Smith conducted the appeal by way of a re-hearing and made it clear that she would consider anything the Claimant had to say.

23. After the appeal hearing, Sue Knight-Smith held a telephone conversation with Mr Peter to gain his understanding as to how he had reached his decision that the Claimant should be dismissed. In particular, Mr Peter said that he had dismissed the Claimant because of this 'continual failure' to follow correct procedures.

24. By letter dated 17 October 2018, Ms Knight-Smith informed the Claimant that his appeal had been unsuccessful and provided written reasons for her decision.

Applicable law

25. Under section 98(1) of the Employment Rights Act 1996, it is for the employer to show the reason for the dismissal (or if more than one the principal reason) and that it is either a reason falling within section 98(2) or for some other substantial reason of a kind such as to justify the dismissal of the employee holding the position he held. A reason relating to conduct is a potentially fair reason falling within section 98(2).

26. The reason for the dismissal is the set of facts or the beliefs held by the employee which caused the employer to dismiss the employee. In determining the reason for the dismissal, the Tribunal may only take account of those facts or beliefs that were known to the employer at the time of the dismissal; see W Devis and Sons Ltd v Atkins 1977 ICR 662.

27. Under section 98(4) of the Employment Rights Act 1996, where the employer has shown the reason for the dismissal and that it is a potentially fair reason, the determination of the question whether the dismissal was fair or unfair 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 must be determined in accordance with equity and substantial merits of the case.

28. When determining the fairness of conduct dismissals, according to the Employment Appeal Tribunal in British Home Stores v Burchell 1980 ICR 303, as explained in Sheffield Health & Social Care NHS Foundation Trust v Crabtree [2009] UKEAT 0331, the Tribunal must consider a threefold

test:

28.1. The employer must show that he believed the employee was guilty of misconduct;

28.2. The Tribunal must be satisfied that he had in his mind reasonable grounds upon which to sustain that belief; and

28.3. The Tribunal must be satisfied that at the stage at which the employer formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.

29. It is not for the Tribunal to substitute its own decision as to the reasonableness of the investigation. In Sainsburys Supermarkets v Hitt [2003] IRLR 23 the Court of Appeal ruled that the relevant question is whether the investigation fell within the range of reasonable responses that a reasonable employer might have adopted.

30. Nor is it for the Tribunal to substitute its own decision as to the reasonableness of the action taken by the employer. The Tribunal's function is to determine whether, in the particular circumstances of the case, the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted. See: Iceland Frozen Foods v Jones [1982] IRLR 430; Post Office v Foley [2000] IRLR 827.

31. As stated in London Ambulance Service NHS Trust v Small [2009] IRLR 563:

> *"It is all too easy, even for an experienced Employment Tribunal, to slip into the substitution mindset. In conduct cases the claimant often comes to the Employment Tribunal with more evidence and with an understandable determination to clear his name and to prove to the Employment Tribunal that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the Employment Tribunal so that it is carried along the acquittal route and away from the real question – whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal."*

32. Wincanton Group plc v Mr L M Stone and Mr C Gregory UKEAT/0011/12/LA is authority for the proposition that if a Tribunal is not satisfied that a first warning was issued for an oblique motive or was manifestly inappropriate or, put another way, was not issued in good faith nor with prima facie grounds for making it, then the earlier warning would be valid. The judgment states that where the earlier warning is valid then the Tribunal should take into account the fact of that warning and not to go behind that warning to take account of factual circumstances giving rise to it. The appeal judgment reminds Tribunals that a final written warning always implies, subject only to the individual's terms of a contract, that any misconduct of whatever nature will often and usually be met with dismissal, and it is likely to be by way of exception that that will not occur. Also see: Davies v Sandwell Metropolitan Borough Council [2013] EWCA

Civ 135 in which the Court of Appeal held that only in the exceptional case of bad faith or a manifestly inappropriate warning should a Tribunal conclude that it was unreasonable to rely on it.

33. In Taylor v OCS Group Ltd [2006] IRLR 613, the Court of Appeal stressed that the Tribunal's task under section 98(4) of the Employment Rights Act 1996 is not only to assess the fairness of the disciplinary process as a whole but also to consider the employer's reason for the dismissal as the two impact on each other. It stated that where an employee is dismissed for serious misconduct, a Tribunal might well decide that, notwithstanding some procedural imperfections, the employer acted reasonably in treating the reason as sufficient to dismiss the employee. Conversely, the Court considered that where the misconduct is of a less serious nature, so the decision to dismiss is near the borderline, the Tribunal might well conclude that a procedural deficiency had such impact that the employer did not act reasonably in dismissing the employee. As the court made clear in that case, defects in the original disciplinary hearing and pre-dismissal procedures can be remedied on appeal. It is not necessary for the appeal to be by way of a re-hearing rather than a review but the Tribunal must assess the disciplinary process as a whole and where procedural deficiencies occur at an early stage, the Tribunal should examine the subsequent appeal hearing, particularly it procedural fairness and thoroughness, and the open-mindedness of the decision maker.

Conclusion

34. The first consideration is whether the Respondent has shown the reason for the Claimant's dismissal and that it was for a potentially fair reason relating to conduct.

35. Mr Peter appears to have muddled matters somewhat by stating in the disciplinary invitation letter that the allegation, taken together with the previous disciplinary history, was being considered as gross misconduct. Mr Peter, having found the Claimant guilty of having made the late delivery, then went on to find that the combination of the disciplinary offence in question together with the recent disciplinary history led to a finding of gross misconduct. He also had regard to the Claimant's attitude towards management.

36. However, Mr Peter was clear in finding that the Claimant making a late delivery, taken in isolation, would normally result in a one or two year penalty, not dismissal. The fact is that Mr Peter found that the Claimant guilty of an act of misconduct by making a late delivery to the bank. When "totting up" as he put it, in other words taking into account the Claimant's recent disciplinary history, he determined that the Claimant should be dismissed. In the Tribunal's view, the fact that Mr Peter described the reason for the dismissal as gross misconduct is nothing to the point. Nor is the fact that the Claimant was not suspended from duty. This is not a wrongful dismissal claim. Section 98 of the Employment Rights Act 1996 does not distinguish between misconduct and gross misconduct; it is sufficient that the reason relates to the employee's conduct. Mr Peter genuinely believed the Claimant was guilty of an act of misconduct.

37. Ms Knight-Smith clearly held a genuine belief in the Claimant's

misconduct. She found that by making the late delivery, the Claimant could have been guilty of gross misconduct justifying summary dismissal.

38. Having heard the Respondent's witnesses, the Tribunal finds on the balance of probabilities that they held a genuine belief that in failing to deliver the SD item by 1.00 pm when he was aware that he should do so, the Claimant committed an act of misconduct (whether or not properly categorised as gross misconduct taken alone or together with the other disciplinary matters on record). The Tribunal finds that the Respondent has cleared this first hurdle of the test for unfair dismissal.

39. The Tribunal must next consider whether the genuine belief was held on reasonable grounds following as much investigation in the circumstances. The Tribunal is bound to have sympathy with an employee, a long-serving employee in this case, who makes a delivery just one minute late after queuing for a few minutes before he could obtain a signature. However, the Tribunal must not adopt a substitution mindset. The question is whether, in the circumstances of the case, the Respondent had reasonable grounds to conclude that the Claimant had committed an act of misconduct.

40. The Claimant submits that there was more that the Respondent could have done to investigate his blameworthiness: in particular he says that if he had received training he would have been told that he could have swiped the bar code of the SD item as soon as he entered the premises. However, there was no evidence before the Tribunal to suggest this would be the instructions he would have received in training. In this case there was very little to investigate: the delivery was one minute late. The Respondent appears to have accepted that the Claimant was in the bank a few minutes before the specified time and that aspect required no further investigation. In the Tribunal's view, the investigation fell into the band of reasonableness.

41. The Claimant clearly knew of the requirement for items to be delivered before the specified time (indeed, the Claimant had made in the region of 1,500 successful special deliveries). No policy or procedure was required for the Respondent to reach that conclusion: the Claimant was an extremely experienced postman. He had been doing the same round for some 14 months, using a van for about 12 months. He planned the sequence of his own deliveries. Although he sought to excuse the late delivery because of his late departure from the depot caused by having only just returned from holiday, the Claimant told the Respondent that his round was "doable" (and told the Tribunal that he could have delivered the item up to one hour earlier that day). He knew of the SD deliveries he had to make that day. He knew he usually had to queue at the bank but arrived just a few minutes before the delivery had to be signed for in order for the Respondent to comply with its guarantee to the sender. He was able to divert from his planned route to ensure timely delivery of SD items.

42. Ms Knight-Smith concluded at the appeal stage that to suggest the dismissal was for being one minute late was not a true reflection of what actually happened. She found that the failed delivery of 12 September need not have happened. The Claimant chose to ignore the noon PDA alert and left the delivery until the last moment despite being well aware of

the potential delay due to bank protocols.

43. The Tribunal finds that the Respondent's genuine belief was held on reasonable grounds.

44. Turning to the decision to dismiss. On the face of it, the decision to dismiss the Claimant might appear harsh. However, the question is not whether the decision was harsh but whether the decision fell outside the band of reasonableness.

45. The Respondent's witnesses made abundantly clear the seriousness of even a one-minute delay in delivering an SD item. The Respondent was following its own policies, in particular regard was had to the extract above regarding "repeated breaches of the policy".

46. As to Mr Peter muddling matters at the dismissal stage, the Tribunal finds that any defects were remedied on appeal. Ms Knight Smith was an impressive witness. The Claimant was given the opportunity to put forward any points he wanted on appeal. The Tribunal finds it highly likely that Ms Knight-Smith approached the Claimant's appeal with an open mind and considered not just the Claimant's points of appeal but re-heard the case to reach her own conclusion.

47. In evidence, Ms Knight-Smith said that she had adopted a two-stage approach to her decision making: firstly, was the Claimant guilty of the allegation in question; secondly, if so, what was the appropriate penalty? In particular, Ms Knight-Smith took a different view to Mr Peter. Whereas Mr Peter had combined together all the disciplinary matters, past and present, to reach a conclusion that the Claimant had committed an act of gross misconduct, Ms Knight Smith took the view that the present issue alone was sufficiently serious to amount to gross misconduct. She took into account the Claimant's long service and the Claimant's live disciplinary warnings and determined that dismissal was the appropriate penalty.

48. The Claimant submitted that the Claimant's delay in making the delivery was unintentional and should not have been visited with disciplinary action. The Tribunal finds that the Respondent did not act unreasonably in concluding that the delay was not unexcused for the reasons expressed above.

49. The Tribunal concludes that the decision was within the band of reasonableness.

50. The Tribunal concludes that the Claimant was not unfairly dismissed.

Note

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant and respondent in a case.

Employment Judge Pritchard

Date: 23 July 2019