EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102867/2019

Held in Glasgow on 20 and 21 May 2019

Employment Judge: Laura Doherty

Mr R Rafferty	**Claimant** **Represented by:** **Mr A Donnachie - Trade Union Representative**
Royal Mail Group Limited	**Respondent** **Represented by:** **Ms L McKenna - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claimant was not unfairly dismissed, and the claim is dismissed.

REASONS

1. The claimant presented a claim of unfair dismissal on 10 March 2019. The respondents accept the claimant was dismissed; their position is that he was dismissed for misconduct, and the dismissal was fair.

2. The issue for the tribunal is to consider the fairness of the dismissal under Section 98 of the Employment Rights act 1996 (the E RA). This involves considering whether the respondents adopted a fair procedure, and whether the sanction of dismissal was one which fell within the band of reasonable responses open to the employer.

3. The remedy sought is reinstatement.

4. For the respondents the tribunal heard evidence from Mr Christopher Mullen, the investigating officer, Mr Graham Turnbull, the disciplinary officer, and Mrs Colette Walker, the appeals manager.

5. The claimant give evidence on his own behalf.

6. The parties lodged a joint bundle of documents.

Findings in Fact

7. From the evidence and information before it the tribunal made the following findings in fact.

8. The respondents are a large organisation engaged in the business of delivering mail.

9. The respondents have a policy by the name of *'Our Business Standards'* which among other things, sets out the standards of conduct which employees are expected to adhere to. This policy provides that breaking any of the respondent's Business Standards may be dealt with under their Conduct Policy. Under the heading 'Behaviour', the policy provides that; '*Behaviour which damages service to customers, our reputation or efficiency is unacceptable. This includes lateness; attendance; dishonesty; drunkenness….*

   Possessing, selling and using alcohol and illegal drugs at work are not allowed, nor is the misuse of psychoactive substances.'.

10. The respondent's employees are familiar with this policy which is readily available to them, and which is regularly the subject of training.

11. The respondents also have the *'Royal Mail Group Conduct Policy'* (the Conduct Policy), which sets out the respondent's disciplinary procedure (page 114). That policy provides that 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 would warrant by itself. The policy states that, for example, someone who has a number of current serious warnings may face dismissal.

12. The policy sets out the disciplinary procedure which is to be followed. This involve a fact-finding stage, a disciplinary hearing or 'Conduct' stage and an appeal stage.

13. The policy provides that following a Conduct hearing the manager should let the employee know their decision as soon as possible, normally face-to-face were practical, and he/she should also notify the employee of the decision in writing.

14. The policy also provides for an appeal process. It states that every employee has the right to appeal against a Conduct penalty and if the employee wishes to appeal they should tell the manager who imposed the penalty within 3 working days. The policy provides that the appeal hearing will then be arranged and held as soon as possible, and within 4 weeks for major penalties.

15. The claimant, whose date of birth is 28 February 1966, has been employed by the respondents since 30 September 1984. The claimant has held various positions with the respondents during the course of his employment and has worked on different shift patterns.

16. Prior to his dismissal the claimant was working in the Glasgow Delivery Office, on night shift. The claimant's income from his employment was £508 per week before tax, which equates to £469.25 after tax.

17. On 5th July 2018 while working on night shift the Claimant was found to be under the influence of alcohol at his place of work. When this was found to be the case, he was immediately precautionary suspended by Mr Stewart Douglas, the night shift manager at the Glasgow Delivery Office.

18. Mr Christopher Mullen, the area works manager was asked by Mr Douglas to conduct a fact-finding investigation under the respondent's policy.

19. Witness statements were obtained from Mr Gary Maguire, Mr Thomas Boyle, and, Mr John McPaul. All of these witnesses expressed the view that the claimant was under the influence of alcohol while at work on the night shift of

5th July. A statement of the claimant's suspension was also produced, which recorded that the claimant admitted that he had been drinking.

20. Mr Douglas wrote to the claimant on 6 July confirming that he had been placed on precautionary suspension with full pay, and he was asked to attend a fact-finding interview on 9 July. The letter advised the claimant that while on suspension he could seek help from the HELP Adviceline which was available 24 hours a day.

21. The claimant attended the fact-finding interview on 9 July, accompanied by his Trade Union representative, Mr Vinnicombe. Notes of this are produced at pages 37/38.

22. In the course of that interview Mr Mullen asked the claimant if he had been drinking before attending his overtime shift. The claimant replied yes, that he been drinking at home. Mr Mullen then asked if his manager had noticed or spoken to the claimant about his condition. The claimant replied that he could not remember, but that as someone with an alcohol problem he could hide it well.

23. In the course of that interview the claimant admitted that he had had a drink while at work. He was asked how much alcohol he had consumed, but replied that he was not sure, and he was just topping up the drink he had had at home.

24. Mr Mullen asked the claimant how often he drank at work. The claimant replied that it was not very often, and only when something happens, normally at home, that triggers him to start drinking, and he explained he had had a disagreement with his brother.

25. In the course of the interview the claimant accepted that he had been found to be drinking or under the influence of alcohol at work twice before. The claimant advised that he had received a one-year reprimand for being AWOL and a two-year warning for being under the influence of alcohol, and that both penalties were still live.

26. Mr Mullen asked the claimant if he was receiving any help with his alcohol problem. The claimant replied that he had been attending counselling for addiction with GCA for 9 weeks, but that his counsellor was on leave when his issue with his brother occurred. The claimant said he had expected the respondents to contact his counsellor for an update on how he was, but his counsellor told him that she had never been contacted by the respondents.

27. Mr Mullen concluded that the matter should proceed to a Conduct hearing, as that the potential penalty was out with his level of authority, and therefore he referred the matter on for consideration of Conduct proceedings. Mr Mullen wrote to the claimant confirming this on 12 July, and he provided him with a copy of his notes of the fact-finding meeting of 9 July.

28. In the meantime, the claimant's cautionary suspension was continued, and Mr Douglas wrote to the claimant on 9th July confirming this. He gave as his reasons for continuing the suspension that there were currently two Conduct penalties for the same offence and this may be a repeated breach of the Conduct, which could result in consideration of a dismissal interview.

29. Mr Graham Turnbull, the Weekend Shift Manager was appointed to deal with the Conduct procedure. This was the first serious Conduct matter he had dealt with, and he was inexperienced in dealing with this level of discipline under the respondents Conduct Policy.

30. Mr Turnbull reviewed the claimant's suspension and invited him to a return to work meeting on the 23 July. This was an informal meeting; no notes were taken. The claimant told Mr Turnbull that he had been at a very low ebb following his suspension, and that he had had suicidal thoughts. He explained that he was attending for counselling and that he was managing not to drink. Mr Trumbull took the view that the claimant could return to work, and he revoked the claimant suspension allowing the claimant to return to work on 23 July.

31. As part of the Conduct procedure Mr Turnbull was passed all of the notes of interviews and witness statements which had been obtained at the fact-finding stage.

32. Mr Turnbull wrote to the claimant on 6th September inviting him to attend a formal Conduct interview. He was advised that he was being charged with; *'Being visibly under the influence of alcohol. Repeated breaches of Conduct.'*

33. The claimant was also advised that due to the number of previous penalties that dismissal may be considered in the claimant's case.

34. The claimant attended the Conduct meeting accompanied again by Mr Vinnicombe. A note taker took notes of the meeting and these are produced at Document 17.

35. It was confirmed at the commencement of the meeting that the claimant was subject to a live one-year reprimand, and a 2-year serious warning. Both of theses were for alcohol related offenses.

36. In the course of the meeting the claimant was asked if he had any work-related issues, and respondent that work had been 'great 'and it was just personal.

37. Mr Turnbull asked the claimant about what support he had been given. The claimant responded that he had been given EHS (Employee Health Support) but that he had not found this good. He said he was working night shift, and they had not phoned at times when he was available. He said that when he had spoken to them he found them to be of no benefit as they did not seem interested. The claimant said he had voiced concerns to Tommy Boyle, his line manager. Mr Turnbull asked what happened regarding his. The claimant said that he was under Glasgow Council to Alcohol (GCA), which suited his needs better. Mr Turnbull asked the claimant if this was helping. The claimant said was, but it was an *ad hoc* attendance, and not enough to keep away from drink.

38. Mr Turnbull asked the claimant if he received support from Tommy Boyle in March 2017, which was his 1st reprimand. The claimant said no, as he was getting G CA support from their counsellor.

39. Mr Turnbull asked the claimant about what support he was getting. The claimant said he did not feel that EHS is was good. He explained that he was now on antibus medication which could make him violently ill if he drinks. The

claimant said he was not offered anything by EH S and found his own counsellor to be a better help. He said that he did phone feeling 1st Class (the respondents employee helpline) but that he was not offered a programme. He said he was with G C A, so he felt he did not need both.

40. Mr Turnbull asked the claimant what steps he had undertaken since the 2nd serious warning with Mr Boyle on 3 March 2018. The claimant said he was seeing his GCA counsellor, his GP, he has been on antibus medication since July/ August, and that he goes to an addiction clinic when he is breathalysed every 2 days.

41. Mr Turnbull asked the claimant what his relationship was like with Tommy Boyle, and what support he been given. The claimant said that he had nothing against Mr Boyle, but he was only offered ATOS.

42. In the course of the interview the claimant accepted that he had been drinking alcohol on shift.

43. Mr Vinnicombe on behalf of the claimant made the point that more could been done to assist the claimant after his return to work meeting when the suspension was lifted, and that the suspension had been too long.

44. The claimant also made the point that he functioned pretty well, and that he was good at hiding his drinking.

45. At the conclusion of the meeting Mr Turnbull carried out some further investigations by requesting the OH referrals and return to work interview notes for the claimant.

46. Having considered all the material before him, Mr Turnbull decided that the appropriate sanction was a dismissal. In reaching this conclusion Mr Turnbull took into account the fact that the claimant had been drinking alcohol at work and had been under the influence of alcohol. He also took into account that the claimant was under two live Conduct penalties. One had been issued in September 2017 which was which was a one-year Reprimand for being under the influence of alcohol, and one on 14 March 2018, which was a 2-year

serious warning for being missing from the point of duty, which was also alcohol-related.

47. Mr Turnbull took into account that the claimant had been receiving support out with work with his alcohol problem, but had been unable to avoid a repeat incident, and that he was unable to control his problem resulting in the incident on 5 July.

48. Mr Turnbull concluded that due to the repeated breaches of Conduct the claimant had shown that he was unable to control his alcohol problem and the effect of this was that it could cause a health and safety issue if he were allowed to continue to work for Royal Mail. In considering this point he attached some weight to the fact that the claimant stated he was good at hiding his drinking at work which in Mr Turnbull's view was likely to make it more difficult for managers to identify the problem.

49. Mr Turnbull took into account the claimant's length of service which was very considerable. He noted from the claimant's records that he had been subject to 4 other conduct during that period which had now expired.

50. Mr Turnbull considered whether a sanction short of dismissal was appropriate, in particular a suspended dismissal, but decided in view of the repeated breaches of Conduct that this was not appropriate.

51. Mr Turnbull concluded that given the gravity of the offence, which occurred while there were two live warnings and the fact that there were 3 breaches of Conduct meant that dismissal with notice was the appropriate sanction.

52. Mr Turnbull said he spoke to his line manager for guidance, but ultimately the decision to dismiss was his.

53. Mr Turnbull wrote to the claimant on 26 October by Special Delivery mail confirming his decision. His letter stated the claimant would be dismissed on the grounds of repeated breaches of Conduct, each of which was identified.

54. The claimant was advised of his right to appeal.

55. It was Mr Turnbull ‘s intention to meet with the claimant face-to-face to deliver his decision face to face, prior to the claimant receiving written confirmation of the decision to dismiss. Mr Turnbull came in early to work to meet with the claimant in order to deliver his decision. However, the claimant, with the authority of his manager, intercepted Mr Turnbull’s letter while working night shift, before Mr Turnbull had the opportunity of meeting with him.

56. The claimant intimated his intention to appeal the decision on 28th October on the grounds that the penalty was too harsh.

57. Mr Turnbull did not immediately pass the claimant’s appeal on to the appropriate section.

58. Despite being prompted to do so by Mr Donnachie a Trade Union Representative, and by his line manager, Mr MacPherson, Mr Turnbull did not do so. The reasons for his delaying passing on the appeal papers where in part his inexperience, in that he did not know where he was supposed to send the appeal documentation, and that he intermittently forgot about it due to pressure of work.

59. The claimant’s appeal was eventually passed on to the relevant appeal section in December 2018. Lorna Walton who was a Production Control Manager intimated the appeal to the relevant section on 11 December, and contacted Mr Turnbull asking him for the relevant paperwork, which Mr Turnbull supplied this. The appeal documentation was forwarded to the respondent’s Appeals section on 14 December. An email of 11th December (page 57) from the respondents’ appeal section to Miss Walton stated among other things;

*‘Due to changes to legislation in April 2014 we have **60 days** to deal with an appeal, starting from the date the appeal is requested.*

This is <u>extremely important</u> as any delay will impact on the period of time the appeal manager has to complete their investigation and could result in further escalation by the employee involving legal action if not processed correctly.’

60. The respondents employ a number of Independent Case Worker Managers to deal with appeals. Appeals are allocated from a central point to Case Workers contingent on geographical location. The Case Worker has a target of 60 days within which to deal with an appeal.

61. The claimant's appeal was allocated to Ms Colette Walker, who is based in Belfast. She received all of the paperwork which had been generated in the course of the fact-finding, and Conduct procedure. Ms Walker wrote to the claimant on 20th December with a copy of all of this documentation and asked him to attend an appeal hearing on the 7th of January 2019.

62. The claimant attended this hearing accompanied by his Trade Union representative, Mr Donnachie. Notes of the appeal hearing are produced in the bundle at document 24.

63. The appeal which Miss Walker conducted amounted to a rehearing of the claimant's case, and he was advised of this at the beginning of the appeal hearing.

64. At the commencement of the hearing Ms Walker set out the background, and chronology of events, and confirmed the conduct for which the claimant had been dismissed.

65. Ms Walker then asked the claimant to expand on his points of appeal, and Mr Donnachie made representations on his behalf.

66. Four point appeals emerged. The 1st was that the delay in the appeal been dealt with had affected the claimant's health. The delay was out with the respondent's procedural timetable, and there was no good reason for it, as Mr Turnbull had been prompted to deal with the appeal but had failed to do so timeously.

67. The 2nd ground of appeal was that the claimant had received a letter advising him that he had been dismissed rather than having a face-to-face discussion with Mr Turnbull, and it was the claimant's opinion that Mr Turnbull did not intend to tell the claimant of his decision face-to-face. The way in which the decision was delivered had an effect on the claimant's health.

68. The 3rd ground advanced was that the claimant had received no benefit from Occupational health. He advised that they did not telephone at the times when they said they would, and they contacted him on Monday mornings when he would have been sleeping after working nightshift. The claimant explained that he had spoken to O.H. but he carried on receiving assistance from his counsellor at GCA. He explained to Ms Walker the steps that he had been taking, which included that after the July incident he attended the Community Addictions Team in Glasgow and had been taking antialcohol abuse medication. This medication required him to be breathalysed on a regular basis.

69. The claimant said that he had been alcohol free since July 2018 with only one slip.

70. The 4th ground of appeal was that Mr Boyle, who was the claimant's line manager at the time, did not provide him with support following the claimants Conduct case in 2017.

71. Subsequent to the appeal hearing the claimant produced documentation from the September 2017 Conduct hearing, which included a note of the Conduct meeting with Mr Boyle, in which it is noted that he stated .. *'I explained that as he has filled in an EHS referral he would receive confirmation of an interview via the post and he must attend. I also informed Mr Rafferty that I being his 1st line manager I would take responsibility for his welfare and have registered via to EHS to oversee his appointments our forthcoming and that he attends.'*

72. Mr Donnachie said the claimant had asked for support from Mr Boyle, and he had contacted Feeling 1st Class.

73. Mr Donnachie also referred to the claimant's lengthy service with the respondents, and submitted that up to the last 2 years, has had over 30 years of a good conduct record. He said the claimant was a good worker; he had experienced some personal problems which he had not mentioned before. Two of his close friends had committed suicide, this had affected him deeply. The claimant had previously been a social drinker but his drinking had been affected by these events. Mr Donnachie submitted that if the claimant had

received help from Mr Boyle, and Mr Turnbull had not delayed the appeal, the claimant would be in a better place.

74. Ms Walker asked the claimant if he had any documentation from any of the support professionals or his GP, which he would like to present as part of his appeal, and a subsequent to the appeal hearing, the claimant sent a letter from the Addiction Team which confirmed that he was prescribed anti-alcohol abuse medication and was engaging with GCA for counselling. He also produced a letter from GCA confirming he had attended but that further counselling was not required a present.

75. After the appeal hearing had concluded Ms Walker carried out some further investigations. She emailed Mr Turnbull with a number of questions, and followed this email up with a telephone call, from which she produced summary notes of his answers (page85/86). She asked if Mr Turnbull if he could comment on what the claimant had said at the appeal to the effect that he had experienced difficulties in his personal life over the last 2 years which had affected his drinking, which was normally social drinking. Mr Turnbull respondent to the effect that the claimant had a reputation for heavy drinking even prior to the last 2 years.

76. Ms Walker also asked Mr Turnbull to provide her with his account of how he considered the evidence before him in taking the decision to dismiss the claimant, which Mr Turnbull provided.

77. On 22nd of January Ms Walker wrote to the claimant providing him with copies of her email and telephone enquiries with Mr Turnbull and asked for his comments on them. These were provided by Mr Donnachie, who commented among other things, that the claimant was very hurt by Mr Turnbull's statement about him being a heavy drinker which he considered to be unprofessional and suggested that the decision to dismiss was based on personal assumptions and unfounded accusations. He submitted that Mr Turnbull did not take into account that the claimant had abstained from alcohol and was receiving counselling.

78. Ms Walker also undertook enquiries with OH to ascertain the dates upon which the claimant had been contacted. She found these were not all on a Monday morning.

79. Ms Walker then considered all the evidence which she had, including the mitigation provided by the claimant. Having done so she decided that the decision to dismiss should stand, the appeal should not be upheld.

80. Ms Walker issued a written report with her decision, in which she noted all the steps which had been taken, and she dealt with each of the appeal points raised in the course of the hearing.

81. In relation to the point about delay she concluded that the delay in forwarded the appeal was wrong, but that it was explained by Mr Turnbull's inexperience and the fact that he had at times forgotten about the appeal. While acknowledging that the appeal process had been delayed, and that this was a regrettable, she did not conclude that the delay altered the facts of the case or mitigated the seriousness of the claimant's breach of the respondents Standards.

82. Ms Walker accepted that Mr Turnbull had intended to deliver his decision face-to-face, and had come into work early to do so, but that that this did not happen because the claimant had intercepted the letter. She noted that respondents Conduct Policy provides that if practical the manager should let the employee know the decision face-to-face, but this does not always happen, and the point had no bearing on her consideration of the claimant's appeal.

83. In relation to the 3rd point, which was the inadequacy of OH Assist, Ms Walker referred to the appointments which had been made. She noted that a referral had been made following the September 2017 Conduct and that the referring manager was advised of this and asked to discuss and agree with the claimant that he would attend. The claimant was advised of the date and time the appointment, but he failed to attend that appointment. The matter was referred back to the referring manager to discuss with the claimant, and to ascertain if he still required support. A further appointment was made for the

claimant on 30 October which was rearranged for 11 November 2017, which the claimant attended by telephone. He told OH that he was receiving other support and they advised him to continue with that. Ms Walker concluded only one appointment had been made on a Sunday, and this was rearranged for another day and some advice that had been given to the claimant.

84. Ms Walker concluded that the claimant had taken advice from OH Assist in November 2017, and that he sought support from the appropriate services, however she concluded that the most recent breach of conduct due to being under the influence of alcohol had occurred in July 2018.

85. In relation to the appeal point about Mr Boyle's involvement Ms Walker concluded that Mr Boyle would not have been able to influence the appointments or to oversee them, as he was not the referring manager. Ms Walker took the view that even if Mr Boyle had promised something which he could not deliver, it remained the claimant's obligation to avail himself of the help which had been offered, and that he had been offered assistance and had taken up external counselling.

86. Ms Walker consider the points made about claimant's personal issues against the chronology of the Conduct reprimands, and the counselling and treatment which the claimant had received.

87. She concluded that notwithstanding this, the respondents could not continue to employ the claimant following repeated breaches of Standards due to alcohol abuse while at work. She concluded that the claimant had consistently breached the Standards, having two Conduct warnings on the record, and thereafter being under the influence of alcohol while at work on 5 July.

88. Ms Walker concluded that the claimant had availed himself of appropriate support to enable him to abstain from alcohol, and she took into account that he advised he been alcohol free from July 2018 with one slip. She also took into account the steps which the claimant was taking in receiving antialcohol prescription medication. She considered however that she had to take a balanced view. She concluded the respondents had tried to correct the

claimant's behaviour in applying penalties under the Conduct Policy but regrettably the claimant had repeatedly breached Standards.

89. Ms Walker took into account that the respondents were a competitive business and rely on their employees to adhere to their Business Standards in relation to the personal behaviour at work. She considered the impact on other employees if the claimant were to be returned to his employment. She concluded that this would ignore those Standards and give potential opportunity for further breaches. Ms Walker took into account the claimant's length of service, and she considered imposing a penalty less than dismissal, but concluded on balance, taking into account all of the elements before her, that the decision to dismiss should be upheld.

90. Ms Walker wrote to the claimant on 12th February confirming this decision and providing her reasons for it.

91. After his employment came to an end the claimant did not feel able to engage either with the Social Security services, or the search for alternative employment. He did not feel able to register with the Social Security office until March 2019. By that point he had been certified by his GP as unfit for work. The claimant continues to be certified as unfit for work and is in receipt of a fit note which expires on 3 June. This states that the reason for the claimant unfitness for work is alcohol dependence. The claimant currently feels depressed and is taking medication. He hopes that he will be able to return to work but feels unable to look for alternative employment at present.

92. The claimant does not possess a driving licence, which will restrict the type of employment is able to obtain.

93. The claimant is currently receiving income support.

Note on Evidence

94. There were no significant issues of credibility or reliability arising from any of the evidence which the tribunal heard. The tribunal was satisfied that all the witnesses were credible and reliable on all material points.

95. There was a suggestion in cross examination that Mr Turnbull deliberately delayed the appeal. Mr Turnbull denied this, and in the tribunal's, view candidly give evidence to the effect that he did not know where to send the papers, and that he intermittently forgot about the appeal because of pressure of work. Mr Turnbull's inexperience of dealing with serious Conduct matters was consistent with the notion that he delayed because he did not know what to do with the appeal.

96. While a great deal may not turn on it, the tribunal also accepted that Mr Turnbull had intended to deliver his decision face-to-face to the claimant, and this did not take place only because the claimant intercepted the decision letter while working on nightshift.

97. The Tribunal also accepted that Ms Walker was subject to a 60 day Royal Mail imposed target to deal with appeals.

Submissions

Respondent's submissions

98. Mr McKenna for the respondents produced written submissions which she supplemented with oral submissions.

99. She invited the tribunal to make particular findings in fact, and she addressed the tribunal on the law.

100. Ms McKenna submitted that the respondents had established the substantive reason for dismissal, had carried out a proper investigation, had reasonable grounds which to conclude the claimant was guilty of the conduct for which he was dismissed, and the dismissal was procedurally fair. In considering Mr Turnbull's failure to forward the appeal documentation until December she submitted the tribunal would have to consider whether this prevented the claimant the opportunity of demonstrating that the reason for dismissal was not sufficient (*London Central Bus Co Ltd v Manning 2013 WL 7090830*, and *Westminster City Council v Cabaj (1996) ICR 971*). The appeal was in any event a complete rehearing and could cure any earlier defect (Taylor v OCS Group Ltd (2006) IRLR 613).

101. Ms McKenna submitted that the dismissal was fair, but in the event the tribunal was not with her on that any compensatory award should be reduced on the basis of the principles to be derived from *Polkey v AE Dayton Services 1988 ICR 142* and on the grounds of contributory conduct. She also submitted that the claimant had failed to mitigate his loss.

Claimant's submissions

102. Mr Donnachie referred to the claimant's difficult relationship with alcohol. The claimant had experienced some tragic and difficult events in his life, which he had found it hard to talk about, particularly in the context of a disciplinary hearing.

103. The claimant had however asked for help, and this had not been forthcoming. He had asked Mr Boyle for help, but Mr Boyle had done nothing to support him. The claimant had not obtained any help from occupational health.

104. The procedure adopted by the respondents had been defective in that they were under a legal obligation to deal with the appeal within 60 days, and Mr Turnbull failed in this for no good reason. The legal obligation was referred to in the emails of December 2018

105. Furthermore, the claimant had taken steps to combat his addiction and had been alcohol free for a considerable period by the time the appeal took place.

106. Proper account should be given to the fact that the claimant had 35 years of service and dismissal in this case was too harsh.

Consideration

107. An employee has the right not to be dismissed unfairly in terms of Section 94 of the Employment Rights Act 1996 (the ERA).

108. Section 98 of the ERA provides that it is for the employer to establish the reason for dismissal. In terms of Section 98(2)(b) conduct is a potentially fair reason for dismissal.

109. Section 98 (4) provides;

'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.*

110. The tribunal reminded itself that while the initial burden of proof rests with the respondents to establish the reason for dismissal, the burden of proof in considering the reasonableness of the dismissal under section 98 (4) is neutral.

111. The tribunal also reminded itself that an objective test of reasonableness applies to the respondent's conduct of a disciplinary investigation (*Sainsbury's Supermarket Ltd v Hitt (2003) ICR 111-* referred to by Ms McKenna).

112. In considering a dismissal for misconduct the starting point for the tribunal is the case of *British Home Stores v Burchell 1980 ICR 303*, referred to by Ms McKenna. What was said in that case was;

'What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the grounds of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds on which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed

that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all circumstances of the case'.

113. There are therefore three limbs to the test set down in *Burchell*.

114. The first is that the employer had a genuine belief in the claimant's guilt.

115. The claimant was dismissed for being under the influence of alcohol at work, and for having repeated breaches of the respondents Conduct Standards. In the course of the disciplinary procedure the claimant very candidly accepted that he had been under the influence of alcohol at work on 5 July. There was no dispute that at that point he was subject to two live warnings, both for alcohol-related offences. In the circumstances the tribunal had no hesitation in concluding that the respondents had a genuine belief in the claimant's guilt.

116. Nor, in circumstances where the offence was admitted, did the tribunal have any hesitation in concluding that the second limb of the *Burchell* test had been satisfied and that the respondent's belief was based on reasonable grounds.

117. The tribunal then went on to consider whether at the point when the respondents formed that belief, they had carried out a reasonable investigation. This includes consideration of whether the respondents had adopted a reasonable procedure.

118. The Tribunal was satisfied that there was a fact-finding investigation during which statements were obtained and the claimant was interviewed while accompanied by his T.U. representative. He was thereafter called to a Conduct hearing, prior to which he was advised of the charges against him and provided with all the documentation which the respondents relied upon in bringing those charges. The claimant attended that meeting accompanied by his T.U. representative and was able to put across his case.

119. Thereafter the claimant was advised of the decision in writing and was given the right to appeal. He exercised that right. The appeal comprised of a rehearing of the case. The claimant attended an appeal hearing accompanied by his Trade Union representative. He was again given all the documentation which the appeal manager had in advance of the appeal hearing and he was

allowed to put forward his points of appeal. The appeal manager carried out further investigations, and she provided the claimant with the outcome of her investigations with Mr Turnbull. The claimant was given the opportunity, which he took, of commenting on these before the appeal decision was taken.

120. All these steps taken by the respondents were reasonable judged against the objective standard of a reasonable employer and are consistent with the respondents' obligations under the ACAS Code.

121. There was effectively no complaint about the procedure adopted by the respondents on the part of the claimant, other than that there had been a delay on the part of Mr Turnbull in forwarding the appeal, and that he had not delivered his decision to dismiss the claimant face-to-face.

122. The tribunal considered the delay in forwarding the appeal against the objective standard of reasonableness in the conduct of the overall disciplinary procedure.

123. Firstly, the tribunal did not conclude that the respondents were under a legal obligation to deal with the appeal within 60 days. In reaching this conclusion the tribunal takes into account the terms of the email of 11th December which made reference to this, however the tribunal was not directed to any authority which supported the conclusion that as a matter of law the respondents required to complete the appeal process within 60 days. Rather, the tribunal preferred the evidence of Ms Walker who explained that she was subject to a 60 target in dealing with appeals.

124. However, regardless of whether or not the respondents were subject to a legal obligation to deal with the appeal within 60 days, there was no dispute that Mr Turnbull had delayed in sending off the appeal paperwork.

125. The tribunal was satisfied that the delay in forwarding the appeal had been brought about by inexperience and pressure of work as far as Mr Turnbull was concerned.

126. The tribunal keeps in mind that in assessing the reasonableness of the dismissal under section 98 (4) of the ERA not every procedural flaw is capable

of rendering the dismissal unfair. What the tribunal has to consider is whether the procedural defect denied to the claimant employee an opportunity of showing that the employer that the reason for dismissal was a sufficient reason for the purposes of section 98(4) of the ERA (*London Central Bus Co Ltd supra*).

127. Applying an objective standard of reasonableness, it could not be said that the delay of 6 weeks in forwarding the appeal documentation denied the claimant the opportunity of demonstrating that the reason for his dismissal was insufficient. Notwithstanding the fact that the claimant may have felt stressed by the fact that the appeal was not dealt with more promptly, he was able to attend the appeal hearing accompanied by a trade union representative and make significant representations at that appeal hearing as to why he should not be dismissed.

128. Equally, the fact that the decision to dismiss was not communicated to claimant face-to-face was not a matter which interfered with fairness of the dismissal, applying the standard of a reasonable employer.

129. There was no absolute obligation to deliver the decision face-to-face, and there was nothing to suggest that the fact it was not done in this way prevented the claimant from demonstrating why the reason for dismissal was insufficient.

130. The tribunal concluded that, applying an objective test of reasonableness, at the point when the respondents formed their belief in the conduct for which the claimant was dismissed they had carried out an investigation which was reasonable in the circumstances.

131. Having reached that conclusion the tribunal went on to consider whether the decision to dismiss was one which fell out with the band of reasonable responses open to the respondents.

132. The tribunal began by considering the case of *Ice and Frozen Ltd v Jones 1982 ICR 17*.

133. What was said in that case was;

‘1. The starting point should always be the words of section 57 (3) themselves;

2. in applying the section and Industrial Tribunal must consider the reasonableness of the employer’s conduct, not simply whether they (the members of the Industrial Tribunal) consider the dismissal to be fair;

3. in judging the reasonableness of the employer’s conduct an Industrial Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;

4. in many (though not all) cases there is a band of reasonable responses to the employee’s conduct within which one employer might reasonably take one view, another reasonably take another;

5. the function of the Industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair; if the dismissal falls out with the band it is unfair.

134. The tribunal therefore has to be careful not substitute its view, but rather to apply the objective test of a reasonable employer.

135. Applying that test, it could not be said it was unreasonable for the respondents take into account the nature and gravity of the offence of 5 July, which was a clear breach of the respondents Business Standards. Nor was unreasonable for the respondents take into account the fact that at the point when the claimant was guilty of this conduct, he was already subject to two live warnings, one for one year, and one for 2 years, for conduct of a similar nature.

136. It was not unreasonable for the respondents take the view, as they did, that in view of the repeated breaches of the Standard that the claimant posed a health and safety risk to himself and others. Ms Walker was also reasonably entitled to conclude that consideration should be given to the impact on other

employees of the claimant returning to the respondents having been in repeated breach of their Business Standards.

137. It was not unreasonable for the respondents to balance these concerns alongside the fact that the claimant had sought help and was in the process of receiving treatment, and that he had very significant service, but to conclude that these factors did not outweigh the significance of his conduct, his repeated breaches of Conduct, and their concerns about his health and safety and that of other employees if the claimant were to remain in the business.

138. It was not unreasonable for the respondents to conclude that the claimant had been offered help internally from OH which he not find particularly helpful, but that this was insufficient mitigation when balanced against the other factors in this case. Similarly, it was not unreasonable for Ms Walker to take the view that Mr Boyle could only provide the claimant with limited support, and that the claimant's complaint that Mr Boyle failed to provide adequate support was again insufficient mitigation balanced against the other circumstances of the case, which included the fact that the claimant had been offered O.H Support and had been able to obtain external support and counselling.

139. While the Tribunal accepts that the claimant found Mr Turnbull's comments to Mr Walker at the appeal hurtful, it was not unreasonable for the Ms Walker to reject the notion put forward at the appeal that Mr Turnbull's decision to dismiss the claimant was based on unfounded allegations and gossip, in circumstances where the claimant had admitted drinking and being under the influence of alcohol at work.

140. Having regard to all the circumstances in this case, the tribunal could not conclude, applying the objective test outlined in *Iceland Frozen Foods* that the decision to dismiss the claimant was one which fell out with the band of reasonable responses.

141. The effect of this conclusion is that the tribunal found that claimant's dismissal was not unfair, and the claim is dismissed.

Employment Judge: Laura Doherty
Date of Judgment: 24 May 2019
Entered in register: 31 May 2019
and copied to parties