



EMPLOYMENT TRIBUNALS

Claimant: Mr R Jones

Respondent: Royal Mail Group Limited

Heard at: Ashford

On: 13th September 2019

Before: Employment Judge Pritchard

Representation

Claimant: Mr H Sheehan, counsel

Respondent: Mr J McArdle, legal executive

RESERVED JUDGMENT

- 1 The correct name of the Respondent is Royal Mail Group Limited and the title to these proceedings is amended accordingly.
- 2 The Claimant was unfairly dismissed.
- 3 Any compensatory award shall be reduced by 75% to reflect the likelihood that the Respondent would have dismissed the Claimant in any event.
- 4 It is just and equitable that any basic and compensatory awards shall be reduced by 50% by reason of the Claimant's conduct before his dismissal and contribution towards it.
- 5 It is just and equitable that compensation is increased by 10% by reason of the Respondent's unreasonable failure to comply with the ACAS Code of Practice.

REASONS

1. The Claimant claimed unfair dismissal. The Respondent resisted the claim.

2. The Tribunal heard evidence from the Respondent's witnesses: Kevin Trueman (Mail Processing Unit Manager); and Allan Rostron (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 oral submissions.

The issues

3. The issues were discussed and agreed at the commencement of the hearing.
 - 3.1. Can the Respondent show the reason for the dismissal and that it was for the potentially fair reason of conduct? This will require the Respondent to show a genuine belief in the Claimant's misconduct.
 - 3.2. If so, was that belief held on reasonable grounds following as much investigation into the matter as was reasonable in the circumstances?
 - 3.3. Did the decision to dismiss fall within a range of responses open to a reasonable employer?
 - 3.4. Was the dismissal procedurally fair?
 - 3.5. If the procedure was defective, was it remedied on appeal?
 - 3.6. Would or might the Respondent have fairly dismissed the Claimant had a fair procedure been carried out?
 - 3.7. Did the Claimant contribute to his dismissal?
4. The Tribunal would consider liability only at this hearing. If the Claimant were to succeed in his claim, a further hearing would be listed to consider remedy.

Findings of fact

5. The Respondent is a large employer with some 120,000 employees. The Claimant commenced employment with the Respondent 20 November 2006 as an Operational Postal Grade postal worker based at the Orpington delivery office.
6. Violence and abusive behaviour to customers and colleagues are examples of gross misconduct within the Respondent's Group Conduct Policy.
7. The Claimant's duties included making deliveries with a delivery partner travelling together to their postal area by van.
8. On the morning of 19 September 2017 a colleague, described in this decision as "Mr X", pushed a four sided metal container up against the Claimant's van. A confrontation followed between the Claimant and Mr X involving physical contact. Following this initial altercation, Mr X left the yard before returning, brandishing a screw-driver, and threatening to stab the Claimant.

9. Shortly after the incident, a manager carried out initial discussions with the Claimant, Mr X and other individuals. The notes record the following:
 - 9.1. The Claimant said while he was driving from the yard, Mr X was abusive and had threatened him. The Claimant said “this has been going on for about a month now and I just wanted to solve it”. That when he got out of his van and confronted Mr X it appeared that Mr X reached for something from his van and his automatic response was to restrain Mr X which he did by pushing Mr X onto bags in the back of the van Mr X had been loading.
 - 9.2. Mr X gave a different version of events. He said that the Claimant had put both hands onto his neck. Mr X said he ran to his car, grabbed a screw driver, and returned to the yard but was calmed down by others.
 - 9.3. The notes record Mr X’s delivery partner saying that the Claimant had grabbed Mr X around the throat;
 - 9.4. Claimant’s delivery partner said that when he looked out, the Claimant and Mr X were both grabbing each other quite roughly;
 - 9.5. A witness to events said that the Claimant got out of his van and grabbed Mr X round the neck
10. The Claimant was suspended.
11. On the evening of 19 September 2017, the Claimant reported the matter to the police.
12. Darren Ager thereafter carried out a formal investigation, holding interviews with the Claimant, Mr X, and others.
13. When interviewed, the Claimant repeated his version of events. In particular, he stated that Mr X had shouted “I will stab you” before he had restrained Mr X. The Claimant was sure others in the yard would have heard what Mr X had said.
14. Others who were interviewed did not witness this initial altercation.
15. By undated letter, thought to have been sent in mid-October, the Respondent invited the Claimant to attend a formal conduct meeting concerning “alleged violent and abusive behaviour, physical assault”. The allegation was described as “Unacceptable Internal Behaviour. Physical Assault”. The allegation was being considered as gross misconduct which could lead to dismissal without notice.
16. Mr Trueman chaired the formal conduct meeting which took place on 19 October 2017. The Claimant attended with his trade union representative. With regard to the initial incident, the notes record the Claimant saying:

[Mr X] shouted abuse at [the Claimant’s delivery partner] and called him a ‘fat wanker’ he was really aggressive. I said ‘what is your problem’ he then replied ‘what are you gonna to do about it, fuck off you four eyed prick’ I

undid my seat belt as he has been starting on us for a while with his comments, so I got out of the van and repeated seriously, what is your problem. He just looked at me angrily, through gritted teeth and threatened to stab me. When he said that, he reached behind and appeared to try and grab something so I instinctively grabbed his arm and pushed him against the van. Straight away he grabbed by neck and pushed me back, I jumped backward as I did not know what was in his hand, but managed to force him down on to some bags in the back of the van and hold him down

17. The Claimant said that Mr X had always abusive and aggressive to him and had threatened to stab him in the past; that when he got out of his van he was going to speak to Mr X, not cause trouble:

“At that point I did not realise that there would be a fight”

“He stepped forward and said I am going to stab you”.

When asked if he felt his actions had helped the situation, the Claimant replied

“How long do you put up with it, how do you make it stop, it had been going on for six weeks and there are only so many times that you can ask him to stop”.

He had wanted to

“Stand up, show I wasn’t scared, wanted it to stop”.

The Claimant confirmed that he had laid his hands on Mr X first but it had been in self-defence.

18. The Claimant presented Mr Trueman with a written account what took place and that hoped the incident had been caught on CCTV.
19. Mr Trueman carried out further interviews before reaching his decision. None those who were interviewed witnessed the initial altercation. Mr Trueman did not consider any CCTV footage that might have been available at the time (after one month, the Respondent’s CCTV footage is no longer available).
20. Mr Trueman concluded that the allegations against the Claimant were substantiated and that the Claimant should be summarily dismissed with effect from 27 November 2017. Mr Trueman prepared a note setting out the reasons for his decision.
21. The Claimant promptly appealed against his dismissal. Mr Rostron held an appeal meeting on 18 December 2017. The Claimant was accompanied by his trade union representative. Mr Rostron told the Claimant that the appeal would be by way of a re-hearing. The thrust of the Claimant’s appeal was that he had been acting in self-defence and that the penalty should have been more lenient. The Claimant again stated that Mr X had said he was going to stab the Claimant and had reached behind for something. The Claimant’s trade union representative made reference

to an employee whose dismissal in similar circumstances had been overturned on appeal because the individual had been acting in self-defence. The Claimant also asserted that CCTV footage should have been considered.

22. Mr X's delivery partner provided a signed hand-written statement. He said he did not see much at the time because he was in the front of the van. He did not see where the Claimant and Mr X had hold on one another. He also said that he had not seen his original statement which had been written by someone else.
23. Before reaching a decision, Mr Rostron carried out further investigations by way of interviews with a number of individuals, none of whom witnessed the initial altercation. The Claimant's delivery partner provided a statement; he had not seen the start of the initial confrontation between the Claimant and Mr X. Copies of the interview notes were sent to the Claimant who provided his responses to them.
24. Mr Rostron's conclusion was that the decision to dismiss the Claimant should be upheld. Mr Rostron communicated his decision to the Claimant on 2 February 2018.
25. Mr X was also dismissed for his part in the incident.

Applicable law

26. 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).
27. The reason for the dismissal is the set of facts or the beliefs held by the employer 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.
28. 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.
29. 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:

- 29.1. The employer must show that he believed the employee was guilty of misconduct;
 - 29.2. The Tribunal must be satisfied that he had in his mind reasonable grounds upon which to sustain that belief; and
 - 29.3. 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.
30. The requirement for procedural fairness is an integral part of the fairness test under section 98(4) of the Employment Rights Act 1996. When determining the question of reasonableness, the Tribunal will have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures. That Code sets out the basic requirements of fairness that will be applicable in most cases. Under section 207 of the Trade Union & Labour Relations (Consolidation) Act 1992, in any proceedings before an Employment Tribunal any Code of Practice issued by ACAS shall be admissible in evidence and any provision of the Code which appears to the Tribunal to be relevant to any question arising in the proceedings shall be taken into account in determining that question.
31. 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.
32. 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.
33. In Tayeh v Barchester Healthcare Ltd ICR D23 it was held that where an employee faces disciplinary proceedings relating to more than one charge, a Tribunal must consider whether the employer regarded the charges as being cumulative or standing alone. If the charges are cumulative, in the sense that all of them together formed the principal reason for the dismissal, it will be fatal to the fairness of the dismissal if any significant charge is found to be taken into account without reasonable grounds.
34. 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.

35. 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 its procedural fairness and thoroughness, and the open-mindedness of the decision maker; see Taylor v OCS Group Ltd [2006] IRLR 613 CA.
36. The Polkey principle established by the House of Lords holds that if a dismissal is found unfair by reason of procedural defects then the fact that the employer would or might have dismissed the employee anyway goes to the question of remedy and compensation reduced to reflect that fact. Guidance as to the enquiry the Tribunal must undertake was provided in Ms M Whitehead v Robertson Partnership UKEAT 0331/01 as follows:
 - 36.1. What potentially fair reason for dismissal, if any, might emerge as a result of a proper investigation and disciplinary process? Was it conduct? Was it some other substantial reason, that is, a loss of trust and confidence in the employee? Was it capability?
 - 36.2. Depending on the principal reason for any hypothetical future dismissal would dismissal for that reason be fair or unfair? Thus, if conduct is the reason, would or might the Respondent have reasonable grounds for their belief in such misconduct?
 - 36.3. Even if a potentially fair dismissal was available to the Respondent, would he in fact have dismissed the Appellant as opposed to imposing some lesser penalty, and if so, would that have ensured the Appellant's continued employment?
37. In Hill v Governing Body of Great Tey Primary School UKEAT/0237/12/SM the Employment Appeal Tribunal held that a "Polkey deduction" has these particular features. First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between these two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done. The question as to what a hypothetical fair employer would have done is not the test: the Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand.
38. Section 122(2) of the Employment Rights Act 1996 provides that where the Tribunal finds that any conduct of a Claimant before the dismissal was such that it

would be just and equitable to reduce the amount of the Basic Award, the Tribunal must reduce that amount accordingly.

39. Section 123(6) of the Employment Rights Act 1996 provides that where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the Claimant, it must reduce the amount of the compensatory award by such proportion as it considers just and equitable.
40. Section 124A of the Employment Rights Act 1996 together with 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 provides that where an employer has unreasonably failed to comply with the Code of Practice, a Tribunal may, if it considers it just and equitable in all the circumstances to do so, increase the compensatory award by up to 25%. Similarly, where an employee has unreasonably failed to comply with the Code, a Tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce the compensatory award by up to 25%.

Conclusion

41. The Claimant did not suggest that the Respondent had an ulterior motive for dismissing him. Nevertheless, the Tribunal reminds itself that the burden of showing the reason for dismissal lies on the Respondent, not the Claimant. Having heard evidence from the Respondent's witnesses, the Tribunal is satisfied that the decision makers held a genuine belief that the Claimant had committed the two aspects of the act of misconduct alleged: actions in getting out of his vehicle and confronting Mr X; and physically assaulting Mr X. The Respondent has therefore shown that the reason for dismissal was for the potentially fair reason of conduct.
42. The Claimant's main challenge to the fairness of his dismissal is that the Respondent's belief was not held on reasonable grounds following as much investigation as was reasonable in the circumstances. In particular, the Claimant's case is that inadequate steps were taken to investigate his assertion of self-defence which would require consideration of the reasonableness of his perception of imminent threat.
43. The Respondent had conflicting evidence in this regard: in essence, that of the Claimant and that of Mr X. The Respondent did not consider what the CCTV footage might have shown, taking the view that it was unnecessary in light of the witness evidence which had been produced. The Tribunal finds this surprising: such footage might have shown whether Mr X reached behind him before the start of the initial scuffle, or whether Mr X advanced towards the Claimant or vice versa. By the time of the appeal, the CCTV footage was no longer available. It was never put to the Claimant that he was being deliberately untruthful about his claim of self-defence. Nor does it appear that Mr X or any other witness was questioned specifically about the Claimant's assertions that Mr X had reached behind him. The Respondent took into account the fact that no one overheard Mr X say to the Claimant "I am going to stab you" before the scuffle broke out. However, there is little evidence to suggest witnesses were asked if they heard it.

44. The Tribunal concludes that with regard to the allegation of physical assault, the Respondent carried out an inadequate investigation. It fell outside the range of reasonable responses that a reasonable employer might have adopted in the circumstances. The blameworthiness of an unprovoked physical assault is one thing, the blameworthiness of acting in self-defence in the belief of an imminent threat for personal safety is quite another. The Respondent was duty bound to investigate the self-defence aspect more fully and/or with greater diligence.
45. It appears that Mr Trueman in particular relied on statements of various individuals gathered shortly after the incident which were not approved by the individuals, as clearly illustrated by Mr X's delivery partner who made his position clear at the appeal stage. Mr Trueman also appeared to rely on the statement of the witness to whom reference is made at paragraph 9.5 above and whose statement appears to have been prepared in similar circumstances.
46. In light of the findings above, the Tribunal concludes that the Respondent's belief, albeit genuine, was not held on reasonable grounds.
47. The inadequacy of the investigation was not remedied on appeal. The further investigation carried out at the appeal stage as to the self-defence aspect of the case remained inadequate. In evidence to the Tribunal Mr Rostron said "I did not believe the Claimant's version of events. I did not believe [Mr X] reached for anything like he alleged". In his written deliberations at paragraph 3.14 Mr Rostron states "... albeit accept Mr Jones did release [Mr X] once his own perception of threat had passed". This is illustrative of the Respondent's muddled thinking with regard to the self-defence aspect of the Claimant's case.
48. Turning to the allegation of unacceptable internal behaviour which was said to relate the Claimant confronting Mr X which escalated to physical assault. The Claimant acknowledged that he had confronted Mr X for the reasons described above. The Tribunal is satisfied that with regard this aspect of the allegation, the Respondent adequately investigated and properly considered the extent of the provocation to which the Claimant had been historically subjected by Mr X (and the extent to which the Claimant had provoked Mr X) and concluded that the Claimant's actions were blameworthy. On the day in question Mr X had initially used abusive language towards the Claimant's delivery partner, not towards the Claimant. The Respondent held a reasonable belief based on reasonable grounds that the Claimant had confronted the Claimant without sufficient justification for doing so.
49. Mr Rostron's evidence was that this aspect of the Claimant's behaviour alone amounted to gross misconduct. However, despite this evidence to the Tribunal, it is clear that the Respondent treated both aspects of the allegations cumulatively in that both of them together formed the principal reason for the dismissal.
50. Given the shortcomings identified above, the Tribunal finds that the Claimant was unfairly dismissed.
51. Turning to Polkey, given the paucity of evidence as to the self-defence aspect of the physical assault, the Tribunal would be required to sail on a sea of speculation to determine whether the Respondent could and would have fairly dismissed the

Claimant. However, with regard to the confrontation element of allegation, the Tribunal finds it highly likely, with a 75% likelihood, that the Respondent could and would have dismissed the Claimant fairly by reason of this conduct alone. The Tribunal concludes that it would be just and equitable for any compensatory award to be reduced by 75%.

52. Similarly, by confronting Mr X in the circumstances, the Claimant was guilty of blameworthy conduct and the basic and compensatory awards will be reduced by 50% by reason of his conduct before his dismissal and his contribution to it.
53. The Respondent unreasonably failed to comply with the ACAS Code of Procedure in that they did not carry out any necessary investigations to establish the facts of the case. Compensation will be increased by 10%.
54. It is hoped that the parties can agree settlement in this case. If they do so, they must inform the Tribunal promptly. However, in the meantime this case will be listed for a remedy hearing with a half day allocation.

Employment Judge Pritchard

Date: 25 September 2019