



EMPLOYMENT TRIBUNALS

Claimant: Mr R Sikander

Respondent: Royal Mail Group Ltd

Heard at: Bristol

On: 2 & 3 September 2019

Before: Employment Judge Christensen

Representation

Claimant: represented himself

Respondent: represented by Ms Kent of Weightmans Solicitors

JUDGMENT having been sent to the parties on 30 September 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

REASONS

1. The claimant has brought a claim of unfair dismissal. He presented a claim on 4 June 2018. He worked for the respondent as an Operations Postal Grade (OPG) at Bristol mail centre. He started work there on 10 September 2013 and was dismissed for gross misconduct on 20 February 2018. He was dismissed for
 - taking unauthorised absence on 16 May 2017
 - making allegations of bullying and harassment in June 2017 which were not in good faith.
2. Both of these are stated by the respondent in their Conduct Policy to be matters that can amount to misconduct and for which an employee may be dismissed.

Case Management issues

3. The claimant appeared and gave evidence. The respondent had two witness statements. One was from Ms Byford – who made the decision to dismiss

the claimant. The other was from Ms Milligan. Ms Milligan did not appear at the tribunal and is currently under a sick note. I agreed to consider her evidence on the basis that the weight that I should give it reflected the claimant's inability to challenge her evidence. I asked the claimant to tell me which issues he would wish to challenge.

4. There were two bundles prepared – one a 'main' bundle and one a supplemental bundle. This was to comply with the page limit set.
5. We concluded evidence and submissions at end of Day 1. I told the parties that if any further documents came to light before I gave judgement on day 2 I would consider them.
6. Claimant sent in some emails from June 2017 between himself and Rebecca Evans. I am satisfied that these emails do not assist me in determining the issues before me. The respondent sent in an email relating to the issue of whether Ms Byford was known to be too harsh on employees from ethnic minorities. I confirm that this email, written yesterday evening, does not assist me in determining the issues before me.

Issues

7. These are set out in the Case Management Order of Judge Ford on 28 November 2018. After discussion it was agreed to include issues relating to contributory conduct and Polkey. I explained to the claimant how the provisions in relation to both of these operated. It was also agreed that it would be helpful to identify the specific unfairnesses contended for by the claimant.
8. The unfairness contended for by the claimant were clarified at the hearing and they are
 - That Mr Bellamy should not have conducted the fact find because the claimant was in conflict with him
 - That the process took too long – the unauthorised absence took place in May 2017, the Bullying and Harassment complaint made by the claimant was made in June 2017 and the claimant was dismissed in February 2018
 - That there had been a breach of confidentiality – the claimant was handed notes of a fact-finding interview on 11 December by a Mr Mooney rather than Mr Watkins the manager who had conducted the interview.
 - That the claimant had concerns about Ms Byford being too harsh on employees from ethnic minorities.
 - That the claimant should have been notified in advance of the fact-finding meetings and should have been asked to sign a slip at the meeting agreeing his attendance.

- That a document was included as part of the fact-find that had purported to be signed by the claimant but that the signature on the document was not his,
- That the respondent should have examined CCTV to confirm that he had spoken with Mr Austin regarding his leave

Findings of Fact

9. On 8 & 9 May the claimant approached Mr Austin & Mr Williamson to discuss the flexi time he had accrued because he wanted to leave early on 16 May. Mr Austin told the claimant he should speak to Mr Williamson.
10. On 16 May 2017 the claimant left work early because he had an appointment to attend a recruitment exercise by A&S Police for Special Constables. The claimant's line manager was Mr Williamson and his Shift Manager was Mr Austin.
11. On 17 May Mr Austin asked the claimant why he had not been in work for his full shift the day before. The claimant told Mr Austin that Mr Williamson had authorised the leave. Mr Austin spoke to Mr Williamson who confirmed that he had input the leave onto the system but had not authorised it and had been told by the claimant that Mr Austin had authorised it.
12. The claimant met with Mr Austin and Mr Williamson on 17 May to discuss the situation and Mr Austin and Mr Williamson concluded that the claimant was not answering their questions clearly regarding which one of the them had actually authorised the leave the day before.
13. A fact finding Meeting took place on 25 May. This was conducted by Mr Bellamy. The claimant was represented by his union representative Mr Callaway. The claimant was not sent any advance notice of this meeting, notifying him of its purpose and was not asked to sign anything at the meeting confirming that he understood what the meeting was about. Witness interviews were also conducted with Mr Austin and Mr Williamson.
14. There is a document in the bundle that purports to record a fact finding meeting on 9 January 2017 and be signed by the claimant on 12 February 2017. The claimant's position is that no such meeting took place and that someone had forged his signature on this document and that it was understood by the respondent's investigators that this document had been incorrectly dated and should refer to the 9 June. The issue of whether the claimant had or had not signed it was addressed at the appeal hearing.
15. In his interview Mr Williamson's position was that the claimant had told him that Mr Austin had authorised the leave and that in the discussion on 17 May the claimant did not respond to the questions put to him regarding who had actually authorised the leave. Mr Austin's position was that he had categorically not authorised the leave on 16 May and had told the claimant to speak to Mr Williamson.

16. On 15 August, a decision is made to refer this matter to a formal process. The fact finding outcome states this. *"in summary I find that this could have been nipped in the bud early however since then I feel that Suleman has tried to go on the offensive and has further tried to imply other managers of lying...I believe Suleman inferred to Ian that Marcus had authorised the two days off and this is why Ian booked them but I find it very hard to believe that Ian booked 5 Fridays off without red flagging it....I feel this could warrant going formal with a real possibility of a serious conduct penalty. Believe there is a possibility that lines had got crossed with regards to the two days (16th and 19th May) but this linked with the additional 4 Friday's makes it more likely that Suleman is at least partially hiding the truth. For this reason and the fact that I can't conduct the formal process if I feel a serious penalty may be issued I have decided to pass this fact finding onto the formal process with a manager further down the line"*
17. On 8 June the claimant raised a Bullying and Harassment complaint against Mr Williamson and Mr Austin. The claimant is Muslim, and he presented his complaint on the basis that eight events amounted to religious discrimination. These are set out in a letter of 8 June and further set out in the case report dated 20 July relating to his complaint.
18. Because of this Bullying and Harassment complaint, any further progress on the investigation into the unauthorised leave was put on hold. This on the basis that the respondent had concluded that it needed to resolve the issue of whether or not Mr Austin and/or Mr Williamson were bullying or harassing the claimant on the grounds of his religion because that may have an impact on the issue of the dispute on whether either of them had authorised the leave on 16 May.
19. An Independent Case Worker – Rebecca Evans was appointed to investigate this Bullying & Harassment complaint. The claimant was interviewed by her on 19 June. She told him in the interview that if the complaints were found not to have been brought in good faith this may lead to disciplinary sanction. This is consistent with the respondent's written policy.
20. That investigation concluded on 20 July. All relevant parties were interviewed. and Ms Evans prepared a careful and full report explaining what her investigation revealed and how and why she has reached the conclusion that she has. In essence Ms Evans concludes that the accounts of the witnesses when interviewed were more credible than the claimant's and therefore rejected all but one of the claimant's complaints.
21. Ms Evans upheld one of the claimant's eight complaints – that Mr Austin had made inappropriate comments relating to domestic issues that the claimant was experiencing with his wife in a meeting which embarrassed the claimant. The report recommends that Mr Austin is counselled in relation to these comments.
22. The other complaints were not upheld; Ms Evans concludes that the claimant should be investigated for raising complaints not in good faith under the Bullying & Harassment policy. In relation to these Ms Evans concludes *"I have reached the view Mr Sikander has raised the elements of his complaint"*

to 'annoy, irritate, distress, damage or otherwise harm the reputation and/or integrity' of Mr Austin"

23. The claimant appealed this decision and the appeal was handled by Mr Philip Hulme. Mr Hulme produced a report on 30 November 2017 which reached this conclusion. *"In conclusion and as per RE's [Ms Evans] findings, with the exception of allegation 7 I do not consider there is any credible evidence to support the allegations SS has made against MA or that he had treated him unfairly because of his religion. In terms of RE finding that SS complaint had been made in bad faith RE qualified this with the reference to the Stop B&H Procedure and determined SS raised Allegations 1,2, 4, 5 & 6 in order to annoy irritate distress damage or otherwise harm the reputation and/or integrity of MA. I do not consider there to be any evidence of weight to support these claims moreover believe SS complaints in respect of allegations 2,3, & 6 to have been highly speculative and wholly implausible. My conclusion is similarly that the complaint is vexatious in respect of the allegations cited above however in my view this out to have included all the allegations that were not upheld i.e. allegations 3 & 8 that were not reflected in RE's conclusion. In this respect I regard RE's conclusion to have been somewhat lenient nonetheless could not be viewed as being inherently unfair. Finally and as advised in the B&H procedure I believe this merits further investigation under the conduct code"*
24. Thereafter a fact-finding meeting took place on 11 December with Mr Watkins. This was to find facts in relation to the possibility that the claimant had made unfounded bullying allegations. This was explained to the claimant at the beginning of the meeting but he was not written to before and had not confirmed the purpose of the meeting. He was accompanied by his union representative.
25. The minutes of that meeting were given to the claimant by a Mr Mooney – rather than Mr Watkins himself – in December. This is one of the procedural matters complained of by the claimant.
26. A decision was then taken on 27 December to refer matters to Ms Byford as Conduct Investigation Manager because Mr Watkins did not have sufficient authority to be able to dismiss the claimant and the matters that were being investigated could lead to his dismissal. Ms Byford had that authority.
27. Ms Byford wrote to the claimant on 22 January 2018 to call him to a formal conduct meeting on 25 January. The letter sets out the charges and explained that *"you are now being invited to a formal conduct meeting to discuss allegedly making these allegations in bad faith"*
28. In response the claimant sent a reply slip indicating that he would not be able to attend on 25 January *"I am not refusing ready for cooperation if someone from different office or not from BMC [Bristol Mail Centre] will take on the conduct case I want independent person who can lead this case.*
29. The meeting was rearranged and took place on 29 January. The claimant was represented by his union representative. I am satisfied that Ms Byford

was a properly independent person to conduct the hearing, the claimant gave no further details of his concern regarding lack of independence. The claimant was accompanied by his union representative. In that meeting the claimant's position was the Mr Williamson was lying about the fact that he had not authorised the leave on 16 May. He also argued that he had raised his Bullying and Harassment complaint between 24-26 May rather than on 8 June.

30. In this regard I asked the claimant whether he had anything that would establish that – the respondent had given him the same opportunity but I wanted to be sure. The claimant said he may have something in his sent items and I indicated that if he was able to find that over night I would look at it on day 2. In the event the claimant was not able to do so. The only email that I have seen is the one dated 8 June by which the claimant raises his complaint.
31. In that meeting the claimant claimed that he was not aware that bringing allegations of bullying not in good faith could result in conduct action. I am satisfied that the respondent was able to conclude that he was aware of this because Ms Evans told him so on 19 June and it appears in her report and further that the claimant's union represented confirmed that he had explained this to the claimant.
32. Thereafter Ms Byford interviewed Mr Williamson, Mr Austin and Mr Callaway, Mr Bellamy and Ms Bal. In his interview Mr Austin commented that he believed the claimant had raised the Bullying & Harassment complaint as a form of retaliation for the fact finding into the claimant taking unauthorised leave on 16 May and *'I felt disappointed almost disbelief after everything I had done for him. And to put it down to racism and religion was beyond belief. I took it as a slur on my integrity'*.
33. In the interview with Mr Bellamy, Ms Byford investigated whether the claimant or his representative had raised any concerns about Mr Bellamy conducting the initial fact finding due to a conflict of interest. The report says this *"Mr Bellamy replied Mr Sikandar had not said anything before or during the fact finding interview about Mr Bellamy conducting the interview. Mr Bellamy said 'Stan Calloway had been his representative and could verify that Suleman had made no complaint of him doing the interview at any time during the interview, but since the interview I have heard that he has said something about a conflict of interest and he thinks I shouldn't have done the interview'. Ms Byford asked Mr Bellamy what the reason for the conflict of interest was supposed to be. Mr Bellamy replied 'there was no conflict of interest I was not previously involved in the case and heard as it as an independent manager..."*
34. In the interview with Ms Bal, Mrs Byford followed up the issue raised by Mr Bellamy in his report 15 August. At the initial fact find, Ms Nirmal Bal had confirmed that Mr Austin had told her that the claimant would be leaving early on 16 May. In his report Mr Bellamy writes this *"Finally to address the Nirmal statement she states that Marcus authorised the leave and that he told her about it in advance. I find this troubling as it contradicts all the other statements...For the reasons above I believe the statement from Nirmal*

should be discounted from my decision however I do believe this should be followed up in any formal procedure that follows”

35. Ms Byford therefore followed this up with Ms Bal in a further interview and in which she expressed some level of uncertainty regarding her precise recollection of events but in essence continued to maintain that Mr Austin had called her to say that claimant would leave early on 16 May.
36. Ms Byford wrote to the claimant on 16 February to confirm her decision was to dismiss him. She writes this *“my conclusion is the charge of unauthorised absence on 16 May is upheld and that Mr Sikandar deliberately set out to deceive both his line manager Mr Williamson and his shift manager Mr Austin in that he attempted to insinuate to each other that they had given permission for him to take flexi time. Throughout my investigation Mr Sikandar has suggested that Mr Williamson, Mr Austin, Mr Calloway and Mr Bellamy have been dishonest in their [sic] accounts, I conclude that Mr Sikandar has used deceit in his attempt to take time off on the 16 May 2017 and therefore broken the bond of trust held by Royal Mail Group. In my conclusion to the seven allegations of bullying & harassment brought in bad faith all are upheld, my conclusions following extensive investigation is that Mr Sikandar brought about these unfounded allegations following the incident of unauthorised absence by means of retribution, Mr Sikandar was unable to explain any other motive for his actions other than to state that the bullying & harassment allegations were true...Mr Sikandar was fully aware of possible outcomes of bringing about allegations in bad faith even though he stated he was not appraised of this, the evidence suggests that this is not the case.* She sets out that she has taken into consideration his previously clean record and whether a lesser penalty of suspended dismissal might be appropriate. She sets out that because the trust required of him in his position as a deputy manager and team leader on shift was now broken, and in light of the determination that he had made bullying & harassment allegations in bad faith, contrary to the respondent’s policy, a penalty of summary dismissal was appropriate.

Appeal

37. The claimant appealed this decision and the appeal was heard on 15 March before Ms Milligan. He was represented by his union.
38. At this meeting his concern regarding the issue of the document with the seeming incorrect date on it and on which the claimant’s position is that he did not sign it and that his signature has been forged, are raised. The document on its face says that it is dated 9 January and there is a signature placed against the claimant’s name with the date 12 February inserted. The claimant’s union representative indicated that the correct date of the document should be 9 June 2017.
39. Thereafter Ms Milligan interviewed Ms Bal who confirmed her recollection of being told by Mr Austin that Mr Sikandar would be leaving early on 16 May.
40. In the outcome letter with report dated 18 April, Ms Milligan reflects the totality of all the evidence before her and confirms that she is conducting a rehearing. She reflects the points relating to procedural irregularities relating to the

failure to have received invite letters to a number of meetings, that Mr Sikandar had not signed the fact-finding notes and that he argued that his signature had been forged. She concludes *"I do believe the signature is similar to that of Mr Sikandar and he had in addition noted the pages with SS at the bottom of each page. I agree that there is no letter inviting Mr Sikandar to a fact finding interview in the papers and this is a failing on the part of the manager concerned which I shall feed back as a learning point....I agree that the paperwork in this case is not easy to follow and is in disarray. As part of the appeal process Independent Casework Managers provide feedback and learning point on each case and I shall do so with the managers concerned in this case and highlight the issues as appropriate"*

41. In relation to the two charges she concludes *"I believe Mr Sikandar did finish early on 16 May 2017 without permission and as such the notification is proven. I also believe that Mr Sikandar used deceit to play Mr Austin off against Mr Williamson and when challenged by Mr Austin on 17 May in the presence of Mr Williamson, he was unable to inform Mr Austin and Mr Williamson who authorised the time off as Mr Williamson was also present" and also this "Following my further investigations into this case and evidence I gathered from witnesses I too believe that Mr Sikandar's claim against Mr Austin was not in good faith. Mr Austin's actions towards Mr Sikandar were carried out as per his role as Shift Manager and there is much evidence which indicates that Mr Austin tried to support Mr Sikandar on the shift"*
42. In relation to the penalty she concludes in this way *"I have given careful consideration to what penalty should be applied in this case. I have also taken into consideration the amount of service and clear conduct record for Mr Sikandar at the time this incident occurred. I do understand the seriousness of the situation facing Mr Sikandar by losing his employment, but I do not believe that this is sufficient to detract from the seriousness of the situation or the decision that the penalty is appropriate"*
43. The decision to dismiss is upheld.

Determination of issues

What was the reason for dismissal?

44. The reason was conduct – a potentially fair reason.

Did the respondent act reasonably in dismissing the claimant? Did the employer have a genuine belief in misconduct based on reasonable grounds and had the employer carried out as much investigation as was reasonable in the circumstances?

45. I am satisfied that these questions are answered in the affirmative – the respondent did act reasonably in all the circumstances in dismissing the claimant although I have identified some procedural irregularities that renders the dismissal unfair. I have taken care, given the claimant is unrepresented to ensure that I am apprised of all the potential unfairness that the claimant argues for. I appreciate that the claimant considers the decision against him harsh – perhaps it is but that is not the issue here.

46. Procedural irregularities can mean that a dismissal is unfair and I have considered each of them carefully and taken into account the position of each party.
47. The unfairness contended for by the claimant were clarified at the hearing and they are
48. That Mr Bellamy should not have conducted the fact find because the claimant was in conflict with him. *In relation to this I am satisfied that this issue was investigated by Ms Byford and her investigations revealed that this concern was not raised by the claimant at the time that Mr Bellamy conducted his fact finding and at that time the claimant was represented by his union.*
49. That the process took too long – the unauthorised absence took place in May 2017, the Bullying and Harassment complaint made by the claimant was made in June 2017 and the claimant was dismissed in February 2018. *The process did take a long time but I can discern no unfairness in that. That was a consequence of the procedures needing to be gone through in turn. The respondent properly put the unauthorised absence issue to one side whilst the complaint of Bullying & Harassment was considered against Mr Austin. The claimant appealed the initial outcome of the Bullying & Harassment complaint and once that was concluded there was another small delay to let the two issues be referred to an appropriate level of line manager – from Mr Watkins to Ms Byford. There is nothing unfair or improper in that although I can understand that it must have been stressful for the claimant to have waited so long that was a consequence of ensuring that a proper process was adopted at each point.*
50. That there had been a breach of confidentiality – the claimant was handed notes of a fact-finding interview on 11 December by a Mr Mooney rather than Mr Watkins the manager who had conducted the interview. *I cannot discern anything in this that creates an unfairness to the claimant in the process. His concern is that someone other than Mr Watkins had read the minutes of the investigation meeting. Even were that true it does not impact on the fairness of the decision making as Mr Mooney, whoever he may be, had no part in any of the decisions making process.*
51. That the claimant had concerns about Ms Byford being too harsh on employees from ethnic minorities. *In relation to this the claimant referred me to a letter dated in November 2014 from the Bristol Ethnic Minority Association Council addressed to Ms Byford raising concerns about how she has allocated shifts to staff from ethnic minority backgrounds and that she speaks to them in a rude way. I have also noted the reply slip in my findings relating to the claimant's concern regarding independence. His concern that Ms Byford may be someone who does not deal fairly with employees who are BME is not raised as part of the investigation – if that was his concern, he or his union representative needed to have said that in terms at the time. His desire to have someone independent is understandable but I am satisfied that there is no proper or reasonable basis to conclude that Ms Byford was not independent or is in some way tainted such that she did not conduct an open minded and fair investigation.*

52. That the claimant should have been notified in advance of the fact finding meetings and should have been asked to sign a reply slip for each meeting. *This is a point conceded by the respondent in submissions and in the outcome report arising from the appeal. The respondent submits that this does not impact on the overall outcome of the case. My findings are that the claimant was not asked to sign a reply slip for each fact finding meeting and was not written to in advance of the early fact finding meetings – although the purpose of the meeting was explained to the claimant at the time he had not been written to in advance which is the usual practice of the respondent. I regard it as significant Ms Milligan notes this failure and concludes that the paperwork before her was in disarray. Ms Byford also confirmed that she would always write to an employee in advance of a fact-finding meeting. The claimant raised his concerns about procedural irregularities at the time. I must consider whether, taking into account the size and administrative resources of the respondent the decision to dismiss was fair in all the circumstances. On balance and taking this into account I am satisfied that the failure to follow due process in relation to the meetings of 25 May and 11 December does create a procedural unfairness such that the decision to dismiss is unfair. Good procedure is important and although I also readily acknowledge that even had the respondent attended to these procedural issues (written to the claimant in advance and asked him to sign a reply slip) the outcome would have been no different – with an employer of this magnitude and resource and with an employee with an otherwise unblemished service record who clearly signals that he is troubled by the lack of due process that by any reasonable measure a failure to follow due process in these circumstances creates an unfairness. His witness statement refers to this – ‘there are too many procedural errors....not only must justice be done; it must also be seen to be done’. It is for this reason that I conclude that the dismissal is unfair.*
53. That a document was included as part of the fact-finding that had purported to be signed by the claimant but that the signature on the documents was not his. *This concern is addressed by Ms Milligan – she concludes that the signature is similar even though the claimant says the signature is not his. I consider that Ms Milligan was entitled to reach this conclusion accepting that she nor I are handwriting experts.*
54. That the respondent should have examined CCTV to confirm that he had spoken with Mr Austin regarding his leave. *I am satisfied that such a step falls outside the range of a reasonable investigation as there was nothing relevant to be gained by it. It was accepted by Mr Austin that the claimant had spoken to him about using his flexi time to leave early on 16 May and the CCTV would not have assisted in addressing this issue.*

Was the decision to dismiss a fair sanction – within range for a reasonable employer?

55. I have found the dismissal to be procedurally unfair.

Does the respondent prove that if it had adopted a fair procedure the claimant would have been fairly dismissed in any event?

56. The respondent addressed me on this point in submissions and has argued that in the event of procedural irregularities creating an unfair dismissal there should be a 100% Polkey reduction. I agree with this approach. The investigations carried out by Ms Byford and Ms Milligan investigated every point that was raised by the claimant throughout the process, they were both thorough and fair and their investigations properly put them in a position of being able to conclude that the claimant had committed an act of gross misconduct. The concern regarding the conflicting account from Ms Bal that Mr Austin had told her that the claimant would be leaving early is also addressed.
57. They each take care in their report to consider whether they can impose a sanction less than dismissal and both conclude that because of the breach of trust that they each conclude is shown by the evidence it is proper to dismiss. I am satisfied that absent the procedural failings the same conclusion would have been reached.
58. The claimant is therefore not entitled to any compensation.

Contributory conduct – did the claimant contribute to the dismissal by culpable conduct?

59. In relation to this point the respondent has argued for a 100% reduction and I agree with this approach. The respondent has established that the claimant endeavoured to play one manager against the other to ensure he could attend the selection day for Special Constables and then that he raised a complaint which did not have good faith at its heart as a form of relations. That is all culpable conduct which contributed to his dismissal.

Employment Judge Christensen

30 October 2019