EMPLOYMENT TRIBUNALS

Claimant: **Mr V P Summers**

Respondent: **Royal Mail Group Limited**

Heard at: **Leicester by CVP**

On: **Thursday 18 February 2021**

Before: **Employment Judge P Britton (sitting alone)**

Appearances

For the Claimant: **Mr P Berry, CWU**
For the Respondent: **Ms S Lewis, Solicitor**

Covid-19 statement:
This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.

JUDGMENT

The Employment Tribunal Judge gave judgment as follows:-

1. The claim for unfair dismissal succeeds.

2. I find that the Claimant did not contribute to his dismissal.

3. As the Claimant wishes for reinstatement the case will now be adjourned to Thursday 13 May 2021 for a remedy hearing by Cloud Video Platform to start at 10:00 am. Hearing details will be sent to the parties closer to the hearing.

REASONS

Introduction

1. The claim (ET1) was presented to the Tribunal on 25 June 2020. The Claimant had been employed at the Leicester MPU as a Delivery Postman from 21 June 1999 to his summary dismissal for what was stated to be gross misconduct on 11 April 2020. He set out the scenario relating to the circumstances that led up to that dismissal including the various steps in terms of the internal investigation.

2. In due course there was a response (ET3) filed on behalf of the Respondent which went into more detail about the procedural steps in this matter and gave reasons why the dismissal was in all the circumstances fair including that it should be a summary dismissal without notice by reason of gross misconduct.

3. In coming to my decision today I have closely read the agreed bundle of documents before me. If I refer to it, it will be by the suffix Bp followed by the page number.

4. In terms of sworn evidence, I have heard first from Dean Bowles, evidence in chief by way of a witness statement, who is a Mail Processing Unit Manager based at the Leicester Delivery Office (MDU). He was the Manager seized with undertaking the disciplinary process post the initial investigation interview which was undertaken by the Claimant's Line Manager, Jon Reid.

5. Mr Bowles saw the Claimant initially at a formal conduct interview on 25 March 2020 (see Bp 83 onwards for the disciplinary process). The Claimant was accompanied by his trade union representative from the CWU, Darren Jones. The Claimant thereafter had CWU representation throughout the disciplinary process including the appeal. The formal conduct interview continued on 2 April 2020. On 11 April there was a final meeting at which Mr Bowles confirmed that he was summarily dismissing the Claimant without notice for gross misconduct.

6. I then heard from the second witness for the Respondent, Clifton Welch. His evidence in chief was also by a written statement. He is employed by the Royal Mail as an Independent Case Worker Manager based at the Birmingham Mail Centre. He is a very long serving employee of the Royal Mail and he has heard about 400 appeals in the course of his career.

7. The Claimant appealed the decision to dismiss him. Mr Welch heard the appeal on 30 April 2020 as to which see Bp 96. He gave his decision in writing on 4 June 2020 whereby he dismissed the appeal (Bp 96).

8. I then heard from the Claimant under oath. Again, his evidence in chief was by a written statement.

9. Finally, I have had the helpful written submissions of Ms Lewis which accurately set out the law, save for not referring to A v B as to which see below. I also heard the oral closing submissions of Mr Berry and then some further submissions from Ms Lewis.

The law engaged and some background

10. I start with the premise that I am dealing with this case under section 98 of the Employment Rights Act 1996 (the ERA) and in doing so I am particularly guided by the approach, which is long standing in relation to matters of gross misconduct, as set out in **British Home Stores Limited v Burchell** [1980] ICR 303 EAT[1].

11. In this case I am dealing with a Postman with an unblemished record who had some 21 years of service under his belt at the time of the material events

[1] As refined to factor in the range of reasonable responses test as to unfairness of the dismissal.

and his dismissal.

12. From my many years of experience as an Employment Judge, I am well aware of the status of being employed by Royal Mail and that there is little turnover in terms of employees, and because there are benefits to being such as a Postman as Mr Berry reminded me. There is the respect that the job carries. The fact that it is recognised in our society that a Postman is a very trusted individual in the community who performs frequently more than merely delivering the post. It is a position of great trust. It also is relatively well remunerated and has benefits that many employees in this modern day and age do not have such as the pension scheme. and institutionalised type of employment relationship much of which is historical given the long history of the Royal Mail. The significance of course being that to be dismissed for gross misconduct as in this case and relating to what appeared to be from the disciplinary charges, wilful, deliberate disregard of security and the protection of the post whilst out delivering, is something that would obviously have substantial potential career ending implications.

11. Thus it engages the case of **A v B** [2003] IRLR 405A EAT and the requirement that the Respondent, given its size and administrative resources, will in terms of the investigation and consideration of dismissal investigate to a high standard and focus as much on the evidence that is exculpatory as that which points to guilt. The fact that as it is Mr Summer has got himself alternative but lower paid employment as a waste disposal operative but without such as the pension benefits enjoyed with the Respondent, is not the point.

12. I of course remind myself as per the jurisprudence of the key issues for me to determine. First did the employer have a genuine belief that the Claimant was guilty of the act of gross misconduct? That is an objective test. The burden of proof is on the Respondent.

13. In that respect Mr Bowles and thence Mr Welch genuinely believed that the Claimant was guilty of misconduct but the core point is did they have the evidence based upon a reasonable investigation to justify that belief?.

14. If they did then engaged is **British Home Stores Limited v Burchell** and thence **A v B.** That is to say was a sufficiently full enquiry undertaken in this matter? The burden of proof is at this stage neutral. Now that of course engages section 98(4). The Respondent is a very large undertaking with considerable resources including a security division which has, as per the historical role of the Royal Mail, its own statutory investigatory powers, including rights of entry. Did it sufficiently follow up issues raised by the Claimant and his trade union representative? Did it act fairly as per s98(4) in dismissing the Claimant that is to say not just taking into account its size and administrative resources but also having regard to equity and the substantial merits of the case? This is of course as per the range of reasonable responses test. I do not substitute my own view. But the test is of course within the framework of s98(4).

15. As regards the appeal I discussed with Ms Lewis the well known case of **Taylor v OCS Group Ltd[2]**. She said that it did not add anything. Well with great respect to her, and she has done her best, I do not agree.

[2] 2006 ICR 1602, CA.

16. Cross referencing to the appeal, it is clear that the CWU representative was making clear as per the representation throughout the disciplinary process that there were very significant shortcomings in Royal Mail's investigation.

17. Mr Welch told me that his role included a re-hearing. Thus, apropos **OCS v Taylor** did he probe for shortcomings sufficiently? Furthermore, given the long standing and exemplary service of the Claimant, did he take into account the reference to remorse and that this would not happen again, as per the CWU's additional submissions post the appeal meeting but before Mr Welch's decision. It is significant that in Mr Welch's decisions and his rationale for making them he makes no reference whatsoever to the remorse point.

18. In terms of the disciplinary process, including the appeal process, the Respondent's comprehensively documented procedure was followed. Mr Berry does not argue to the contrary. As he succinctly has put it, the substance is the issue not the process.

19. The facts can be taken short. Before I do that, I have been taken to the policies of the Royal Mail and I do not for one minute disagree with the proposition of Ms Lewis that the security of the mail, and in terms of the obligations of Royal Mail, is fundamental to the public being able to trust such a highly regarded and longstanding institution. The Claimant and Mr Berry do not disagree.

Findings of Fact

20. On 28 February 2020 the Claimant was undertaking his duties as a Delivery Postman with a colleague, Ms Ozcan, who is known as Dilarra. The Claimant did not normally drive the Fiat van. It was driven by Ahmed, otherwise known as Mr Churchia. The Claimant and he had been trained up to drive a Royal Mail van about six months previously. Prior thereto the Claimant had at least two years not doing that role because of a road traffic accident. He explained all of that to the internal enquiry and to this Tribunal.

21. He explained that he had not been told when he undertook that training that apart from ensuring the electronic locking of the vehicle, that he was to also check all the doors manually. He said he could not remember ever having been shown the various security policies relating to such as the vehicles that are before me. What I do note, and the Royal Mail should learn from this, is that I did not have before me in the bundle any reference to the training of the Claimant. There are therein no training records for him. As to the documentation that the Respondent had put in the bundle and in particular referencing the locking procedures when driving a Royal mail van, all of which I assume comes off its intranet, there is no evidence by way of signature for receipt or an induction, or a further induction on resuming training, that the Claimant had ever actually seen it. To turn it round another way there is no evidence that the Royal Mail can prove that he did. In my experience as an Employment Judge it is invariably normally the case that with large organisations where such as security procedures are paramount, that there is regular checking, that employees are up to speed; refreshers; and proof that they have received the necessary documents. I repeat that there is none before me viz the Claimant.

22. The CWU representative at particularly the dismissal appeal hearing made the valid point that in the modern day and age it is the norm for drivers to secure

their vehicles using electronic locking. So in order for the Respondent to say that he failed to as a matter of course also physically check that it was locked ie by pulling on the door handles, and thus was in that respect guilty of misconduct, was submitted to be unreasonable without the Respondent showing evidence that he knew that to be the case and which it could not do.

23. So, going back to 28 February, usually the Claimant did not drive the van. Ahmed did. But on that day Ahmed was off duty and so the Claimant was going to drive the van. Dilarra was not. Thus the primary responsibility for the security of the vehicle would have been with the Claimant. This is not in dispute.

24. What happened on this occasion is that while he and Dilarra were out of the vehicle delivering mail a witness or two, as to which the Respondent never got any real details, saw something suspicious and alerted the Police. What the Police obtained from those witnesses is the number plate of at least one vehicle which was acting suspiciously. What the Respondent never did, and I shall come back to it, was to check that out ie use the Royal Mail Security and interview the witnesses. The Police involvement in this case is to put it mildly perfunctory given the severity of loss of mail, which might include recorded delivery and could include valuables. I shall also briefly return to that.

25. In any event the Claimant locked the vehicle electronically, of that he is sure. He was to say it at every round of the internal proceedings. He was consistent. Dilarra was only interviewed informally on one occasion. She was never re-interviewed to for instance find out exactly where she stood when the Claimant said he locked said vehicle. Was she out of sight and around a corner? The Claimant said she was not. The employer never checked it out. Why does it matter? Well Dilarra got back to the vehicle just ahead of the Claimant. It was raining; she had her hood up. She cannot remember from that statement whether she used her fob, because she had one as well to open the vehicle. What is clear is that the vehicle was now insecure. The back van doors were either open or easily opened without the need for the electronic device. Somebody had been in the van and stolen the mail. The Claimant phoned his employer and the Police and stayed at the scene with Dilarra. The Police were the first to arrive, followed by Mr Reid and another Manager.

26. What then happened is the four of them went back to the office for a post mortem, so to speak. Dilarra was sent home to resume work doing deliveries the following day. The Claimant gave his first explanation; namely that he was sure he used the electronic fob to lock the vehicle. He noticed the lights flashed the once to indicate it was locked. Most important of all, and which seems to have been missed by Mr Bowles and thence Mr Welch, he said that he heard the locks click. He repeated that in the interview on 3 March (Bp67), conducted by Mr Reid. He was never to change that evidence.

27. There and then on the 28th February the decision was made that he should be relieved from his duties as a postman. Instead he would undertake supervised duties, I assume back in the sorting office.

29. He was not formally suspended.

30. That brings me to the investigation of Mr Bowles culminating in his decision to summarily dismiss the Claimant on 11 April. In the context of the investigation, he spoke to Karen Darmody who is the Security Manager for the postcodes including Leicester. Her report is to be found at Bp 80 dated

31 March. The following self evidently emerges from it.

31. The only intelligence she could get out of the Police as to what happened started off with a Police receptionist on the enquiry phone desk. She then spoke with the Policeman who was allocated the investigation. Her report does not give any indication as to the length of experience of that Policeman and whether he had any expertise on the subject of breaking into vehicles. What turned out in terms of a catalogue of woe is that the Police, despite the fact that they had got intel to the effect that the vehicle acting suspiciously in the immediate locale of the Royal Mail van had false number plates, they did not swiftly follow it up. By the time the scent was on the trail so to speak it is to be deeply regretted that the Police had failed to stop the vehicle being delivered to a breaker by somebody and scrapped.

32. This meant of course that the opportunity to look inside said vehicle to undertake the usual forensic tests was lost. More important to see if it contained any evidence of the utilisation of an electronic device to enter the Royal Mail van. Yet this Policeman was able to tell Ms Darmody that :

> "Reported no visible damage to the vehicle and it was this PC's belief the vehicle was unsecured at the time of the theft."

32. But within the range of reasonable responses vis **Burchell,** including sufficiency of investigation to found a reasonable belief in gross misconduct, and factoring in **A v B**, the following applies.

33. The Royal Mail has its own security service. It has its own powers, long historical to undertake its own investigations into such as theft of mail from a Royal Mail vehicle. So what did it do? Did it look into whether or not it was tenable for the Policeman to observe that it was "unsecured at the time of the theft". What evidence did the Policeman impart to Ms Darmody to justify that statement? Her report is silent. Why is it significant? Because from the very start of the internal process the Claimant and his CWU representative were pointing out the obvious, namely that we live in an age where use of sophisticated electronic devices to illegally enter motor vehicles is endemic and widely publicised including which vehicles are most vulnerable. Checked was that the vehicle had no signs of forced entry but of course it would not have if it was electronically illegally opened using a device. That the fob used by the Claimant worked was never in dispute.

34. What the Respondent via Ms Darmody; Mr Bowles and latterly Mr Welch did not do was to make nationwide enquiry starting presumably with HQ, and via it if necessary to the insurers, as to whether there had been any reports of Royal Mail vans, and in particular Fiats, of which the Respondent has many, being electronically illegally entered including the then theft of mail. Why do I say that? It because if one took at its highest what the Claimant was saying, and I stress he repeated it every time he was interviewed, then the Respondent would at that stage within the range of reasonable responses, given its size and administrative resources, have needed to thoroughly check it out and not simply rely on the opinion of a Police man of unknown expertise particularly when that Police force had failed to act quickly as to the provenance of the vehicle with false plates. Mr Bowles agreed with me when I asked him that it would have been possible for him to have made the enquiry or have asked Ms Darmody to do so.. The point is obvious. If there was such a history, it would lend weight to the Claimant's defence . If there was not it would undermine his defence. So within the range

of reasonable responses, applying **Burchell** and **A v B** I conclude given its size and administrative resources that this was a material failure.

35. That brings me to that this level of investigation would be even more necessary given that the suspicious vehicle turned out to have false number plates. Would not it beg the question to a reasonable employer of the size of Royal Mail and with its security element that possibly there was a sophisticated criminal operation at work on that day in that part of Leicester? I elicited the most honest answer from Mr Bowles who told me that therefore because of those shortfalls in the enquiry he “could not rule out that it was a criminal act”.

36. There appeared, however, to be a fall back position deployed by the Respondent to the effect that nevertheless he was in any event guilty of gross misconduct by not physically checking the door locks anyway. Bu that brings me back to that the Claimant, as he explained in the disciplinary hearing had “only been back working on the rounds for six months. He rarely drove”. He had not been told of the need to physically check the vehicle was locked by trying the door handles even when electronically locking the vehicle. What he did was to follow the custom and practice of Ahmed. He explained how Ahmed when he got out of the vehicle would look to make sure the doors were shut by watching the vehicle when he electronically locked it. He clicked the fob and if the lights flashed once and the doors sounded clunk, that was it. If on the other hand they continued to flash it would alert that there might be a problem with such as a seat belt blocked in a door or some other obstruction, and so Ahmed, or for that matter the Claimant would check and then make sure they got the single flash and the clunk. It does not appear that Ahmed gave evidence to the investigation.

37. So given the lack of any training record to contradict the Claimant, it would not be within the range of reasonable responses for the Respondent to dismiss him. It then boils down to a Catch 22 scenario. The Claimant would not admit that it was a possibility that he might have failed to secure the vehicle when he left it, perhaps failing to notice if the lights were flashing more than once. He was not prepared to accept that of course because he was very clear that it had not happened. So, the Respondent also dismissed him on the basis that he would not admit it was a possibility and therefore there was a breach of trust and confidence. Mr Berry makes the good point as a very experienced trade union representative, that he has seen this trap before. That is to say if an employee says “well I suppose it is possible that I missed the lights flashing twice”, then that puts the employee in an invidious position of having to partially admit fault when he is in fact resolute that he was not at fault. Therefore, Mr Berry advises against what he describes as “entrapment”. Now I do not go that far as a Judge. But what I do say is this. If an employee states genuinely, clearly, and consistently this defence as in this case, an employer of the size and administrative resources of the Respondent is not acting reasonably if it in effect requires him to admit guilt in order to avoid dismissal. What is needed is a thorough investigation. If a reasonable conclusion flowing therefrom is that the Claimant is wrong in his denials, even when confronted with the evidence, then it may well be that trust and confidence is so undermined as to justify dismissal.

38. But such were the shortcomings of the investigation that the Respondent would not be acting within the range of reasonable responses in taking that approach in this case. It did not have the evidence to conclude that "deliberately left insecure… and accessible in an unattended, unlocked vehicle…" (see Bp 51 for this amongst the list of misconduct offences)..

39. Another reason given by the Respondent for the decision that he should be dismissed for gross misconduct was that he had failed to show any remorse. But Mr Welch had from the trade union representative on behalf of the Claimant as at 20 May the following (Bp101):

> "He has asked for completeness that I respond on his behalf, insofar as Mr Bowles's comments as outlined below Mr Summers has no comments other than he did show remorse and is still at a loss of how the vehicle was opened. He feels given a corrective punishment he would never ever fall foul of this kind of situation ever happening again…"

40. So how can the Respondent fall back on the position that the dismissal is justified because it cannot have trust and confidence because the Claimant has not shown any remorse? Mr Welch does not refer to that at all in his outcome decision. When I asked him why not I found his answer concerning for somebody who is so experienced. He said: "yes I make no reference but yes I considered it but I can't put every single detail in a report". But this was a singularly important detail because it goes to the underlying premise of the Respondent's fall back on lack of trust and confidence. I conclude that somebody of the experience of Mr Welch could be expected to have referred to it in his decision. That he did not leads me to conclude that he did not take it into consideration.

Conclusion

41. It follows that I conclude having regard to section 98(4) and the jurisprudence to which I have referred that that the Claimant was unfairly dismissed.

Contribution

42. The Respondent argues that the Claimant contributed to his dismissal inter alia in particular by failing to check the security of the van ie door locks. I do not need to hear from Mr Berry on this point. From my findings of fact, and of course we are now out of range of reasonable responses as it does not apply at this stage, I find objectively that to advance contribution is an untenable argument. The Respondent never undertook a sufficiently reasonable investigation to contradict the Claimant when he said he did leave that vehicle secure. Before me he was consistent and compelling. It follows that I do not find that there was any contributory conduct by the Claimant.

The way forward

43. The Claimant wants reinstatement. This engages section 114 and in particular 116(1)(b) of the ERA. A factor in considering whether it is not just and equitable to order his reinstatement is if he has contributed to his dismissal. But I have found that he has not. Therefore 116(1)(b) cannot apply. Thus it means that the Respondent will have to show that it is not practicable to reinstate him.

44. I make it clear that the Claimant wants reinstatement because of the attractiveness of the job; that he had been in it for so long; the fact that he grew up in the area where he primarily delivers and knows the community; that he has friends and family in the Royal Mail; and that now he is back at the bottom, so to speak, in terms of employment in a Waste Disposal Operative role with lower wages and none of the benefits, such as the pension scheme, that he enjoyed with Royal Mail.

45. The Respondent reserves it position until it has had time to digest this judgement and reasons. But I will at this stage list a further hearing, to maintain momentum, for the purposes of first determining the reinstatement issue, and second, in the alternative, assessment of compensation if that is not practicable.

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Employment Judge P Britton

Date: 29 March 2021

Notes
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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