



EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT

V

RESPONDENT

Mr B Budhwani

Royal Mail Group

Heard at: London South
Employment Tribunal

On:

16 September 2020

Before: Employment Judge Hyams-Parish (Sitting alone)

Representation:

For the Claimant: In person

For the Respondent: Ms S Keogh (Counsel)

RESERVED JUDGMENT

The claim of unfair dismissal is not well founded and is dismissed.

REASONS

Claims and Issues

1. By a claim form presented to the Tribunal on 7 January 2020, the Claimant brings a claim of unfair dismissal.
2. The issues which the Tribunal needs to determine were agreed at the outset of this hearing and are as follows:
 - a. Did the Respondent genuinely believe the Claimant to be guilty of misconduct?
 - b. Was that belief based on reasonable grounds?

- c. At the time of forming that belief, had the Respondent carried out as much investigation as was reasonable in the circumstances?
- d. Was it reasonable for the Respondent to regard that conduct as gross misconduct on the facts of the case?
- e. Did the dismissal fall within the range of reasonable responses open for the Respondent to take?
- f. Was the dismissal procedurally fair?
- g. If the Claimant's dismissal was unfair, should there be a "Polkey" reduction in the compensation awarded and if so, by how much?
- h. Did the Claimant contribute to the dismissal and if so, by how much, if any, should any basic and compensatory awards be reduced?

Practical matters

3. This case was conducted using the HMCTS video conferencing facility called CVP. This is because at the time of this hearing, no in person hearings were being held due to COVID 19. Both parties agreed to this.
4. During the hearing, we heard evidence from the Claimant and the following witnesses for the Respondent:
 - Charlotte Jarvis ("CJ") – Deliver Office Manager / Dismissing Officer
 - Steven Potter ("SP") – Independent Case Work Manager / Appeal Officer
5. The parties had agreed a bundle of documents consisting of 173 pages to which we were referred throughout the hearing. References to numbers in square brackets in this judgment are references to page numbers in the agreed bundle.
6. As there was insufficient time to give a decision at the conclusion of the case, unfortunately my decision had to be reserved.

Background findings of fact

7. The following findings of fact were reached by the Tribunal, on the balance of probabilities, having considered all the evidence given by witnesses during the hearing, together with the documents referred to. Only findings of fact relevant to the issues necessary for the Tribunal to determine, have been made. It has therefore not been necessary to determine every fact in dispute where it is not relevant to the issues between the parties.

8. Until his dismissal, the Claimant was employed by the Respondent as an Operational Postal Grade (i.e. postman) based at the Anerley Delivery Office. He commenced employment on 16 July 1990 and therefore had been employed for 30 years.
9. The Respondent operated a conduct policy which provided as follows at page 5 [46]:

Some types of behaviour are so serious and so unacceptable, if proved, as to warrant dismissal without notice (summary dismissal) or pay in lieu of notice. It is not possible to construct a definitive list of what constitutes gross misconduct and in any event all cases will be dealt with on their merits. However, the following examples show some types of behaviour which in certain circumstances could be judged to be gross misconduct:

Theft

Violence

Abusive behaviour to customers or colleagues

Criminal acts against Royal Mail Group or its employees

Intentional delay of mail

Deliberate disregard of health, safety and security procedures or instructions

Unauthorised entry to computer records

A serious or persistent breach of the Continuous Disclosure and Communications Policy or the Share Dealing Policy

10. As part of the responsibilities on all postal operatives delivering mail, is the requirement to deliver quantities of direct D2D (door to door) marketing leaflets (unfortunately what some might refer to as “junk mail”). In her evidence to the Tribunal, CJ said D2D items are received by the Respondent through private contracts with companies, who pay for delivering such items. The D2D items are usually time-sensitive, to tie in with television or radio adverts, for example. She said they are an essential part of the Respondent's business, especially in light of the competitiveness of the mail sector where customers can simply choose another mail delivery operator if they are not happy with the service they receive. She said that usually, D2D items will arrive in the office the week before they are due to be delivered. On the Monday of the week they are due to be delivered, the usual process is for D2D items to be sorted into frames. Each delivery duty has its own frame containing all of the addresses for that delivery duty. The D2D items should be sorted so that each address contains a D2D item. The D2D items are then delivered throughout the week alongside live mail. By way of example, CJ said if house numbers 2, 4 and 6 on a street had mail

due to be delivered on that Monday, the likelihood is that they would also receive their D2D item on that Monday. If house numbers 1, 3 and 5 did not receive any mail until Wednesday, then in all likelihood they would also receive their D2D item on the Wednesday, and so on.

11. On 17 September 2019 the Claimant was suspended from his duties due to a serious complaint about his conduct. Essentially what was alleged against the Claimant was that he had taken out of his mail round, a large number of D2D items mail that he had been given personal responsibility for delivering. He was accused of leaving the items next to a recycling bin. The cardboard box containing the D2D items next to the recycling bin was a box that had been used to house D2D items the week before, and was labelled accordingly. It was suggested that this was a deliberate act on the part of the Claimant aimed at concealing what he had done so as to increase the risk of what he is alleged to have done, going unnoticed.
12. On 20 September 2019 a fact finding interview was held with the Claimant by Debbie Carey, the Claimant's line manager. The Claimant was provided with a record of that interview and took the opportunity to provide his own handwritten notes giving his account of what had happened.
13. Following that fact finding meeting, Ms Carey remained concerned about the seriousness of the allegations. For this reason, she escalated the matter to a higher level of management so that consideration could be given to whether disciplinary action was required.
14. The Claimant was asked to attend an interview with CJ on 2 October 2019. Her letter said the following:

Dear Mr Budhwani

Invitation to a Formal Conduct meeting

Following your fact-finding meeting on 20/09/2019 concerning Intentional delay of mail You are now being invited to a formal conduct meeting to discuss the removal of your Door 2 Door items that was later found by the bin on the 16th September 2019

Please attend a formal conduct meeting to consider the conduct notification(s) listed below.

1. Intentional delay of mail

The meeting will take place at 9:00am on 2nd October 2019 at Southwark, MPU, Mandela Way, SE1 5SE.

During the meeting you have the right to be accompanied by a trade union representative or by a work colleague normally from the same work location. It is your responsibility to arrange this and I suggest that you contact this person before the day.

At this meeting you will be given every opportunity to fully explain your actions and present any evidence or points of mitigation in relation to your case, before a decision is made.

I enclose details of the investigation and copies of relevant witness statements and other documents that will be referred to during the formal conduct meeting. I have also enclosed a guide that explains what to expect at the meeting.

You should be aware that:

- ***I will take into consideration your conduct record which is currently Clear***
- ***This/these formal notification(s) is/are being considered as gross misconduct. If the, conduct notification is upheld, one outcome could be your dismissal without notice.***

Please acknowledge receipt of this letter by signing one copy and returning it to me in the envelope provided within three working days. The second copy is for your retention.

I recognise that being faced with conduct action can be a stressful time and I would like to remind you that the Feeling First Class: Support services are available 24 hours a day on 0800 6888 777 if you feel that you require support.

Yours sincerely

***Charlotte Jarvis
Southwark MPU***

15. The Claimant attended his disciplinary hearing with a trade union representative, Steve Beadle. The Claimant admitted that he had taken the D2D items he was responsible for (a Subway contract) out of their original box and emptied them into two different boxes, one of which was from a different D2D contract (Pizza Hut) from the previous week (i.e. from a completely different contractor company), and that he left them outside the manager's office, by the recycling bin. He stated that he had wanted to discuss the items with the manager, as the original box did not have a label on it, but she was on the phone so he left them outside of the office / next to the recycling bin.
16. When asked why he had emptied the Subway items from the box they were in, into two separate boxes, the Claimant stated that he did not believe the items were for his delivery round as the original box did not contain a label. He wanted to show them to the manager but they were 'heavy' so he split them. The Claimant also admitted during interview that when Ms Carey found the Pizza Hut box containing the Subway items by the recycling bin and asked him whether they were his, he pointed to the second box of Subway items (as he had split them) and said "no they're mine".

17. During the disciplinary hearing, the Claimant was shown a copy of an email CJ had received from Liam Murphy, who said that another member of staff (who did not want to be named) said that the Claimant had previously placed his D2D items onto a colleague's D2D items and had been found out because the D2D items he had left had also contained live items of mail, which would have been for the Claimant's delivery duty. The Claimant was informed that Mr Murphy had also spoken to Mr Gaynor, who said that he had '*witnessed*' the Claimant "*adding his D2D items onto other walks down the aisle of his walk*".
18. Following the disciplinary hearing, the Claimant was sent a copy of the minutes and invited to comment. The Claimant returned the notes with his amendments.
19. Following the disciplinary hearing, CJ carried out some further investigations by interviewing, Ms Carey, Mr Murphy and Mr Gaynor. Mr Gaynor told CJ about an incident when he said "*we were working next to each other...I was noticing through the week that my D2D wasn't going down, even though I was delivering them. I also noticed his letters was with D2Ds in my box...I thought it was a mistake...then Saturday I still got D2Ds left over I didn't know why as I had done every call. When I was out on delivery I was finding his letters inside my D2Ds when delivering*". He went on to state that "*I see him going around all the frames with a big bundle of D2Ds putting them in everyone's boxes, so spreading it out across the unit. I didn't say anything as I was new*".
20. In CJ's interview with Ms Carey, Ms Carey confirmed to me that she put the D2D items for the week out on 16 September 2019. When she put the D2D items out she would match the stickers on the boxes to the corresponding delivery duty. She stated that there was one box that didn't have a sticker on it and so she matched up all the other boxes with their delivery duties, according to their stickers, and the only delivery duty left without any D2D items was a delivery duty called 'Selby', which was due to be covered by the Claimant. Ms Carey said she placed the box without the sticker next to the Claimant's frame (a work station) for him to sort into his delivery.
21. Ms Carey told CJ that, on 16 September, she had found two boxes of D2D items outside the manager's office and next to the recycling bin. The items inside the box were due to be delivered that week (Subway) but were in old boxes from the previous week (Pizza Hut). Ms Carey said she shouted "*Who left their D2D by the bin?*" around the office and nobody answered. She then walked around the office to check which delivery duty / station was missing D2D items. She said she reached the Claimant's delivery station and noticed that the box under his station was "*different from all the other boxes in the unit*" as it seemed "*smaller*". The Claimant was asked whether the boxes she was holding were his D2D items and he answered 'no' and pointed to the box under his station, stating that those items were his.

22. Ms Carey told CJ that she looked at the box under the Claimant's station and noticed that the items inside the box (Subway) again did not match the labels on the boxes (Pizza Hut from the previous week). The Claimant was asked where the original box was (that should have contained all of the Subway items due for delivery that week) and the Claimant asked whether they could go into the manager's office. Ms Carey said she asked the Claimant again where the original box was and he left the delivery office before returning with the original box, at which point they continued their discussion in the manager's office. Ms Carey asked the Claimant why he had put the D2D items by the bin and he said they were not his, as there was no label on it. She said she had explained to the Claimant that the box without a sticker was his and that he should deliver the D2D items.
23. A copy of the notes of CJ's further meetings were sent to the Claimant and he was given an opportunity to comment on them. The Claimant provided five pages of handwritten comments in response to what was said during the investigatory interviews with Ms Carey, Mr Murphy and Mr Gaynor.
24. CJ wrote to the Claimant inviting him to a further meeting on 12 November 2019. Following that meeting, CJ wrote to the Claimant informing him that he would be summarily dismissed. In her decision report, she wrote as follows [sic]:

Deliberations

Mr Budhwani raised the point that the door 2 door items wasn't his as there was no clear label on the box to state that they was for his duty, On the day of the incident the covering Dom Debbie Carey explained to Mr Budhwani that there was only 1 box that she herself placed out that had a label missing, and when she checked the contract sheet to the walks with boxes only 1 walk was missing and that was where the 1 box went which was Selby Mr Budhwani walk. I again explained this to Mr Budhwani and showed him the evidence where Debbie was working out and ticking off on the contract sheet.

Mr Budhwani admitted to placing the 2 boxes of door 2 doors by the bin, and when Debbie approached Mr Budhwani and says these are your door 2 door, Mr Budhwani says no and points to what is left of the door 2 door contracts and says these are his, It is my belief that if Mr Budhwani truly believed these door 2 door contract wasn't his, he would of taken the full box to the manager and showed that there was no label on the box, he wouldn't of split the items in to 3 different boxes and left 1 by his frame, The 3 boxes that Mr Budhwani placed his door 2 door items in all had last week date on, and different duty numbers on, the 2 boxes Mr Budhwani placed by the bin was not his duty number, but the 1 box he left by his frame although last week date had his duty number on, it is my belief that this was calculated by Mr Budhwani.

Consideration of serves has been taken in to account, and the fact the Mr Budhwani conduct record is clear,

Conclusions

In Summary Mr Budhwani admitted to placing the door 2 door items by the bin, if Mr Budhwani truly believed the items not to, be his then he would of taken them to the manager as a whole, not leave some in a box by his frame, and place the rest by the bin, Mr Budhwani has worked. for Royal Mail for 29 years, and in my interview with him had a clear understanding of what is expected of him with the door 2 door process. 'Mr Budhwani Was not remorseful and got angry stating the Domdumps door 2 door items weekly in the bin. I looked in to this as part of my investigation and found this to be untrue along with other accusations Mr Budhwani had made. I interviewed an OPG from the unit who stated that he has seen Mr Budhwani do place door 2 door items under other frames before, it is my belief that Mr Budhwani has done this more than once.

Decision

After careful consideration of all the available evidence and comment has been upheld

Consideration was made for a suspended dismissal, however given the nature and importance of our customers mail and the implication this behaviour could have on Royal Mail I don't believe this penalty is right for the severity. It is also my belief with Mr Budhwani not showing any signs of remorse or creativeness, and that he has been seen doing like this before, that dismissal be the most appropriate outcome.

25. The Claimant appealed against his dismissal. That appeal was heard by SP, who upheld the decision to dismiss.

Law

Unfair dismissal

26. The law relating to the right not to be unfairly dismissed is set out in s.98 Employment Rights Act 1996 ("ERA"). Section 98(1) says as follows:

(1) In determining....whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(4) 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 a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

27. What is clear is that there are two parts to establishing whether someone has been unfairly dismissed. Firstly, the Tribunal must consider whether the employer has proved the reason for dismissal. Secondly, the Tribunal must consider whether the Respondent acted fairly in treating that reason as the reason for dismissal. For this second part, neither party bears the burden alone of proving or disproving fairness. It is a neutral burden shared by both parties.
28. The burden of proof on employers to prove the reason for dismissal is not a heavy one. The employer does not have to prove that the reason actually did justify the dismissal because that is a matter for the Tribunal to assess when considering the question of reasonableness.
29. In a conduct case, it was established in the well-known case of **British Home Stores v Burchell** that a dismissal for misconduct will only be fair if, at the time of dismissal: (1) the employer believed the employee to be guilty of misconduct; (2) the employer had reasonable grounds for believing that the employee was guilty of that misconduct; and (3) at the time it held that belief, it had carried out as much investigation as was reasonable.
30. In another case called **Iceland Frozen Foods Ltd v Jones**, it was said that the function of the Employment Tribunal in an unfair dismissal case is to decide whether in the particular circumstances 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 outside the band, it is unfair.
31. In **Sainsburys Supermarket Ltd v Hitt** it was said that the band of reasonable responses applies to both the procedures adopted by the employer, as well as the dismissal.
32. Finally, in **London Ambulance NHS Trust v Small** the court warned that when determining the issue of liability, a Tribunal should confine its

consideration of the facts to those found by the employer at the time of dismissal. It should be careful not to substitute its own view for that of the employer regarding the reasonableness of the dismissal for misconduct. It is therefore irrelevant whether or not the Tribunal would have dismissed the employee, or investigated things differently, if it had been in the employer's shoes: the Tribunal must not "substitute its view" for that of the employer.

33. In a gross misconduct case, a Tribunal must consider both the character of the conduct and whether it was reasonable for the employer to regard that conduct as gross misconduct on the facts of the case. Here, the employer's rules and policies are important because a particular rule which makes clear that a certain type of behaviour is likely to be categorised as gross misconduct, may make it reasonable for the employer to dismiss for such behaviour.
34. If an unfair dismissal complaint is well founded, remedy is determined by sections 112 onwards of the ERA. Where re-employment is not sought, compensation is awarded by means of a basic and compensatory award.
35. Section 123(1) provides that the compensatory award can be reduced if the Tribunal considers that a fair procedure might have led to the same result, even if that would have taken longer (**Polkey v A E Dayton Services Limited [1988] ICR 142.**)
36. The basic award is a mathematical formula determined by s.119 ERA. Under section 122(2) it can be reduced because of the employee's conduct:

Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

37. A reduction to the compensatory award is primarily governed by section 123(6) as follows:

Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.....

38. The leading authority on deductions for contributory fault under section 123(6) remains the decision of the Court of Appeal in **Nelson v British Broadcasting Corporation (No. 2) [1980] ICR 111.** It said that the Tribunal must be satisfied that the relevant action by the Claimant was culpable or blameworthy, that it caused or contributed to the dismissal, and that it would be just and equitable to reduce the award. What is clear is that contribution can only arise in relation to matters known about at the time of dismissal and which the Respondent can show in fact contributed to the dismissal.

Analysis, conclusions and associated additional findings of fact

Did the Respondent genuinely believe the Claimant to be guilty of misconduct?

39. I have concluded that the Respondent genuinely believed that the Claimant was guilty of misconduct.

Was that belief based on reasonable grounds? At the time of forming that belief, had the Respondent carried out as much investigation as was reasonable in the circumstances?

40. The Claimant did not argue that the investigation was deficient or that there were lines of enquiry that should have been pursued by the Respondent. In fact the basis of the Claimant's defence, both at the time and during the Tribunal proceedings, was that the Respondent's belief was wrong and that the Respondent wrongly formed the view, on the basis of what he said to them, that he was guilty of misconduct. However, it is not for me to go behind the decision or conclusions reached by the Respondent unless such conclusions were such that no reasonable employer, faced with the same evidence, could reach; or that it was reached having undertaken inadequate investigations. I have concluded that the Respondent was faced with compelling evidence from which it appropriately drew conclusions. I do not consider that there was any further investigation that could or should have been conducted by the Respondent.

Was it reasonable for the Respondent to regard that conduct as gross misconduct on the facts of the case?

41. The Respondent relied on its conduct policy which stated that intentional delay of mail was considered an act of gross misconduct. I conclude that it was perfectly reasonable for the Respondent to treat this as an allegation of gross misconduct.

Did the dismissal fall within the range of reasonable responses open for the Respondent to take?

42. I do not consider that the Respondent's decision to dismiss fell outside the range of reasonable responses open to it. I was told by the Respondent witnesses that a significant amount of trust and confidence is placed in their postal delivery workers to ensure that mail is delivered. That trust and confidence was breached. The Respondent correctly considered the serious allegations against the Claimant, his responses to them and reached a decision that was reasonably open to them. I am satisfied that the Respondent took the Claimant's long service into account, considered sanctions short of dismissal but concluded that they were inappropriate in

the circumstances.

Was the dismissal procedurally fair?

43. The Claimant did not allege that the dismissal was procedurally unfair. I concluded that the process applied to the Claimant was fair in all the circumstances and certainly fell within the range of reasonable responses.
44. For all of the above reasons, I conclude that the dismissal was fair and therefore the Claimant's claim must fail.

.....
Employment Judge Hyams-Parish
20 October 2020