



EMPLOYMENT TRIBUNALS

Claimant

Mr P Kanapathipillai

v

Respondent

Royal Mail Group Limited

Heard at: Watford

On: 1 November 2021

Before: Employment Judge Alliott (sitting alone)

Appearances

For the Claimant: Mr Nathaniel Decker (Legal representative)

For the Respondent: Mr Steve Peacock (Solicitor)

JUDGMENT

The judgment of the tribunal is that:

1. The claimant was not unfairly or wrongfully dismissed and his claim is dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent as an Operational Postal Grade on 11 November 2002. He was dismissed with immediate effect on 14 September 2020. By a claim form presented on 23 December 2020, following a period of early conciliation from 29 November to 17 December 2020, the claimant brings claims of unfair dismissal and a claim for notice pay (wrongful dismissal). The respondent defends the claims.

Issues

2. What was the reason, or if more than one, the principal reason for the claimant's dismissal?
3. Was that a potentially fair reason?
4. If so, was the dismissal fair taking into account s.98(4) Employment Rights Act.
5. Wrongful dismissal: Was the claimant in fundamental breach of his contract of employment such that the respondent was entitled to determine the contact summarily.

The law

Unfair dismissal

6. What was the reason, or if more than one, the principal reason for dismissal?
7. Was that a potentially fair reason?
8. Did the respondent genuinely believe in the reason and was that belief based on reasonable grounds following a reasonable investigation?
9. Was the dismissal fair in all the circumstances taking into account the size and administrative resources of the respondent and the matters set out in s.98(4) of the Employment Rights Act? In particular, was the decision to dismiss within the band of reasonable responses of a reasonable employer? It is not for the tribunal to substitute its view for the view of the employer.

Wrongful dismissal

10. Was the claimant in fundamental breach of the contract of employment? In this case the respondent relies on the implied term of mutual trust and confidence.

The evidence

11. I have been provided with a hearing bundle running to some 207 pages. In addition, I had witness statements and heard evidence from the following:
 - 11.1 Mr Paul Johnson, Delivery Office Manager and Dismissing Manager.
 - 11.2 Ms Anita Madden, Independent Case Manager, who heard the appeal.
 - 11.3 The claimant.
 - 11.4 The claimant's wife.

The facts

12. The claimant was injured in August 2019 when he tore a tendon in his right shoulder. He went off sick on 2 September 2019 and at all material times remained off sick.
13. In June 2020, the claimant was assessed by Occupational Health. He was rated currently unfit for his substantive role because of his symptoms but the last report I have states:

“He is fit to do an adjusted indoor role with minimum manual handling.”

14. There was a conflict of evidence between the claimant and the respondent on whether the claimant was trying to return to work in an adjusted role. The claimant said that he was seeking to return to light duties whereas the evidence that Mr Johnson had from Mr Wayne Millard, his line manager, was that every time Mr Millard spoke to the claimant he was stating that his pain was such that he could not return to work. On this matter I prefer the evidence of Mr Millard. It was only after the 4th August incident that the claimant started to say he could perform indoor duties.

15. In July 2020, the claimant says that he was rung by Mr Millard and offered ill-health medical retirement. That may well have happened. Its relevance is that the claimant at some stage has suggested the reason that Ms Kelly Bickerstaff reported seeing what she saw in the shop in Cheshunt was due to annoyance that the claimant had not taken ill-health medical retirement. I reject that argument and find that this was not her motivation.
16. On 4 August, the claimant was present in a Nisa local store in Cheshunt that was run by his cousin. He was seen there by Ms Kelly Bickerstaff, a Manager who knew the claimant but was not his line manager. Ms Kelly Bickerstaff reported what she saw to the claimant's line manager, Wayne Millard, and the matter was passed to Mr Amarjit Johail for investigation.
17. Ms Kelly Bickerstaff provided a written statement as to what she had seen. This states:

“On Tuesday 4 August 2020 I was shopping in Cheshunt. At approximately 13.00 I entered the Nisa supermarket near Cheshunt Pond, on entering the store I noticed a man who I know to be a postman at Waltham Cross, Pathamaraja (Pat). Pat was carrying a crate of soft drinks and walked behind the till. Pat is off long-term sick as he has an injury to his shoulder which is preventing returning to work, which is why I thought this was strange he appeared to be working in this store. Pat then proceeded to hide behind the till area, once he had seen me. He continued to do this until I left the shop.”

18. Mr Wayne Millard provided two statements. These state as follows (with one correction):-

“On Wednesday 5 August 2020, at 10.21 hours, I was contacted by Pathamaraja (Pat) via mobile phone. Pat started by apologising for missing my call yesterday, it was at this point I informed Pat he would be invited into the unit this Saturday for a fact-finding interview, regarding allegations of him working in a Nisa shop in Cheshunt.

Pat denied working elsewhere and said he felt I wasn't supporting him, by saying this. I informed Pat he was seen by another manager working in the shop, hiding behind the till, when he saw her, proceeded to hide behind a counter, until she left. I also informed him I visited the shop myself yesterday and spoke to a female member of staff, who told me Pat was working there and he was on the late shift.

Pat denied all the allegations, I explained he would have every opportunity to put forward his side of the allegation on Saturday. Pat went on to say he could prove he was not working there as he wasn't being paid and he could prove this by bank details.

Pat did confirm he attends the shop and helps out by standing in there but doesn't get paid for it.”

19. The second statement from Mr Millard states as follows:-

“On Wednesday 5th August 2020, at approximately 12.40 hours, I attended the Nisa shop in Cheshunt Pond, EN8, where I spoke to the same female employee from my visit the day before. When I asked if Pat was working today, she said she can't say anything and called another employee, who came out to see me. I asked him if Pat was working today, he claimed not to know what I was talking

about and repeatedly said “I don’t know”, several times. As I was not getting anywhere, as the employee was clearly being evasive, I left the shop and returned to my office.”

20. On 5 August 2020, the claimant was sent a letter inviting him to a fact finding meeting on 8 August 2020.
21. On 8 August 2020, the claimant attended the fact finding interview which was conducted by Mr Amarjit Johail. The claimant was accompanied by his trade union representative. It is fair to say that the claimant challenged the accuracy of the notes of that interview. However, it does not appear that the claimant challenged the following which is recorded as being said by the claimant’s union representative-

“He does not remember what he was doing at the time. He remembers seeing Kelly, he wanted to avoid being seen by her as he was sick, he did not want her to mistakenly think he was working there, as he clearly recognises that it did not look good, he wanted to avoid being seen to avoid any misunderstanding, this attempt by him was not successful.”

22. In oral evidence the claimant denied hiding which is a clear inconsistency in the evidence presented on his behalf. Further, I note in passing, that in that interview the claimant is recorded as saying that he drove to the shop whereas his wife gave evidence to the effect that he was dropped by his son.
23. Following that interview the claimant was sent the notes of the meeting for approval. The claimant challenged them and put in his own notes recording his recollection of the meeting.
24. On 22 August 2020, Mr Johnson wrote to the claimant inviting him to a formal conduct meeting. This set out the allegation made as follows:-

“• Gross misconduct - Dishonesty in claiming to be sick with a shoulder injury whilst working for another employer – whereby on 4th August 2020 you were witnessed by a manager performing manual lifting and carrying at the Nisa store in Cheshunt Pond EN8.”

25. The meeting was arranged for 27 August. The claimant was informed he could be accompanied by a trade union representative and all the relevant witness statements referred to above were sent to the claimant along with other relevant documents. The claimant was warned that he was being considered for gross misconduct and told that one outcome could be his dismissal without notice. The claimant clearly had all the relevant interviews as he provided not only manuscript comments on those witness statements but also detailed commentary on them. All of those documents are paginated and clearly form part of the hearing bundle considered by Mr Johnson prior to the disciplinary hearing. In addition, further documents appear to have been provided for the disciplinary hearing by the claimant. In particular, two letters from the shop owner and a co-worker stating that the claimant did not work there along with some medical evidence which the claimant relied upon in support of his contention that he was not physically able to carry a tray of drinks.

26. Prior to the disciplinary hearing, Mr Johnson conducted an interview with Kelly Bickerstaff. Following that interview he wrote up the notes and sent it to her and she added in a further comment in manuscript. The relevant part that she told Mr Johnson is as follows:-

“KB stated that Mr Pathamaraja was carrying a case of what appeared to be soft drinks before then going behind the till area ready to serve, he then ducked down, when he saw me.

27. The claimant then had a formal interview on 28 August 2020 with Mr Johnson. Mr Johnson made handwritten notes and wrote up his notes after the meeting. In essence, the claimant’s case was that Ms Bickerstaff had fabricated the story against him and that it was all not true.
28. In particular, he suggested that the reference to Pat could be misidentification as there were many individuals who could be called Pat. However, I observe that it would be odd for an employee to deny a Pat working at the shop if it was a different individual and this appears to have been the information available to Mr Johnson from Mr Millard.
29. On again, the claimant disagreed with the notes of that hearing and was given the opportunity to put in his own recollection of what was said during the course of that disciplinary hearing.
30. Following the disciplinary hearing, Mr Johnson made the decision to dismiss the claimant summarily without notice. In oral evidence he stated that the claimant was not being truthful and that that impacted upon his trust in the claimant. I find that Mr Johnson did genuinely come to this conclusion and had good grounds on which to do so.
31. I have a three page decision report prepared by Mr Johnson which is very thorough. I do not quote from it here other than to record his conclusions and these are as follows:-

“I strongly believe that it has been sufficiently proven that Kanapathipillai Pathamaraja has demonstrated he breached the Royal Mail Attendance standards by performing a manual lifting and handling task whilst on long term sick absence with a right shoulder. Notification from a medical professional indicates he is currently unfit for such a task.

Decision.

Taking everything into account, from the balance of evidence, the breach of standards and the possibility of a recurrence, I have made the decision that the appropriate penalty is:

- Dismissal without notice (summary dismissal)”

32. Mr Johnson then sets out the reason for his decision and his consideration as to the appropriate outcome or penalty. They can be referred to if necessary.
33. The claimant appealed. The appeal was handled by Ms Madden. Ms Madden conducted the appeal by way of a complete rehearing. It is clear to me that Ms Madden is extremely experienced in conducting appeals having

undertaken some 220 appeals during her time with the respondent. Once again, the claimant basic proposition was that the evidence of Kelly Bickerstaff was fabricated and that it was orchestrated in order to get him to leave the organisation. One point being made was that Ms Bickerstaff had no reason to be in the Cheshunt area to go into the shop as that would not be logical given where she was working and the fact that she was supposed to be at work at the time and/or it was not on the way home.

34. I do not quote from the notes of the appeal hearing.
35. Ms Madden suspended the appeal hearing in order to make further enquires of Ms Bickerstaff and Mr Millard. In particular, she dealt with why Ms Bickerstaff happened to be in the Cheshunt area. Ms Madden was informed by Ms Bickerstaff that she was on annual leave, that she had accompanied her partner to take a bicycle to a repairers that was there and had used the opportunity to go into the shop to buy some sun cream, which I find was a perfectly acceptable explanation.
36. She reiterated that she had seen the claimant carrying a tray of soft drinks, that he went behind the enclosed till area and that she saw him there ready to serve customers until he saw her.
37. Mr Millard provided information that he spoke to the claimant on several occasions who told him he could not attend work due to being in so much pain. Once again, Mr Millard recited that he had spoken to the same lady on two days running who initially confirmed that someone called Pat had worked the afternoon shift but denied it the next day. I find that this is indicative of the fact that the shop employees were closing ranks as it were in order to protect the claimant from the suggestion that he had been working there. In any event, I find that both Mr Johnson and Ms Madden were entirely entitled to reject the evidence from the shop owner and the colleague to the effect that the claimant had not been working there.
38. The further interview notes with Ms Bickerstaff and Mr Millard were sent to the claimant who was given an opportunity to comment in writing on those further interview notes. All the documents were considered by Ms Madden who rejected the claimants appeal. Her decision is contained in a nine-page conduct appeal decision document and I do not quote from it. It can be referred to if necessary. She did consider alternatives but believed the claimant was being dishonest and had accused Ms Bickerstaff of lying and fabricating evidence and his hiding in the shop showed the claimant knew he shouldn't be working. As such dismissal was appropriate. I find that she genuinely came to this conclusion and had good grounds on which to do so.

Conclusions

39. I find that Mr Johnson genuinely believed that the claimant had committed the gross misconduct alleged. I find that the investigation into the matter was not only reasonable but thorough. I find that Mr Johnson had reasonable grounds for his belief.
40. I find that the reason for the claimant's dismissal was gross misconduct. I find that that was a potentially fair reason.

41. I have taken into account the respondent's size and administrative resources which are considerable. I have also taken into account the fact that the claimant was a long-standing (18 years) employee with no previous disciplinary history. The respondent has asserted that the claimant's conduct in appearing to be gainfully employed in a shop whilst on sick leave, even though he was not then in receipt of sick pay having exhausted his entitlement, was in breach of the implied term of mutual trust and confidence in that the claimant could not be trusted, His actions in seeking to hide when observed indicate that he knew he was doing something wrong. Further, the respondent relied upon the claimant denying acting in this manner during the course of the investigation and making allegations against management that they were fabricating evidence against him.
42. I cannot find that the decision to dismiss was outside the range of reasonable responses of a reasonable employer. Further, I find that the claimant was in fundamental breach of contract and as such, the respondent was entitled summarily to terminate his contract of employment.
43. For the foregoing reasons I find that the claimant was not unfairly dismissed and that he was not wrongfully dismissed.

Employment Judge Alliott

Date:29/11/2021

Sent to the parties on: 3/12/2021

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For the Tribunal Office