Neutral Citation Number: [2022] EAT 2

Case No: EA-2020-000921-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 1 September 2021

Before :

HIS HONOUR JUDGE MARTYN BARKLEM

- -

Between :

MR I MBOLA	**Appellant**
- and -	
ROYAL MAIL	**Respondent**

- -
- -

Mr S Bennett (instructed by Free Representation Unit) for the **Appellant**
Mr S Peacock (Weightmans LLP) for the **Respondent**

Hearing date: 1 September 2021

- -

JUDGMENT

SUMMARY

Unfair Dismissal

An ET erred in concluding that a dismissal was fair when it had misrecorded that the Claimant had admitted the misconduct alleged. In fact there were two aspects of misconduct, one of which the Claimant had denied throughout. The other aspect was arguably not gross misconduct, that is conduct for which dismissal would have been within the range of reasonable responses. Even it were, the ET had not dealt with the point.

HIS HONOUR JUDGE MARTYN BARKLEM:

1. In this judgment I will refer to the parties as they were below. The appeal is against the dismissal by an employment tribunal sitting at London South (Employment Judge Truscott, QC, sitting alone) on 21 January 2020 of the claimant's claim of unfair dismissal. The appeal was sifted straight to a full hearing by HHJ Auerbach, who commented simply that the appeal was arguable for the reasons set out in the grounds of appeal. Those grounds have been settled by Mr Simon Bennett, a volunteer acting through the Free Representation Unit, who represented the claimant at the hearing before the Employment Tribunal. Mr Bennett has settled the skeleton argument on the appeal an appeared today. Mr Peacock, a solicitor, appeared for the respondent. I am grateful to them both for their written and oral submissions.

2. The essence of the argument set out in the notice of appeal is that the tribunal erred in law in failing to identify the precise reason for dismissal, the claimant having argued before the tribunal that the real reason for his dismissal had been the fact that he lied to his manager and that the respondent did not in fact believe that he had "intentionally delayed the mail", which was the more serious charge. It was said that the tribunal had been obliged in the circumstances to consider and reach a conclusion on the issue because, so it is argued, dismissal would have been outside the range of reasonable responses following a finding merely that the claimant had lied to his manager.

3. The background facts of the case were not in dispute. Put shortly, on 20 March 2019 the claimant, a postman, left Epsom Delivery Office in his Royal Mail vehicle to undertake his deliveries. About 20 minutes later, his delivery manager, Mr Datta, telephoned him on his mobile and informed him that two tracked parcels intended for delivery to addresses on his route had been left behind. The claimant confirmed that he would return to the delivery office to collect and deliver the items later that day but failed to do so. On the following morning, the claimant was approached by Mr Datta,

who asked whether he delivered the two items the previous day. The claimant said that he had, which was untrue. In fact, the items were delivered by the claimant later that day.

4. When the truth about the late deliveries came to light, a disciplinary process began. The claimant was told that he faced two charges, the first being intentional delay of mail, namely the two tracked items, and the second being untruthful when asked if the items had been delivered. "Intentional delay of mail" is one of a number of offences said in the respondent's code of conduct to amount to gross misconduct for which summary dismissal would be warranted. However, in a written agreement with the Communications Workers Union, it is spelled out that delay to the mail could be unintentional, unexcused or intentional. The latter was described as "whether the action taken by the employee knowingly was deliberate with an intention to delay mail". Delay which is "unexcused" may amount to misconduct and subject to sanctions up to and including dismissal. However, only intentional delay is characterised as gross misconduct.

5. At the disciplinary hearing which followed, the claimant explained that he had forgotten to return to collect the items because he had received a telephone call from social services regarding him not being able to see his children following the breakdown of his marriage. This he said had caused him to be stressed out, such that he was not thinking straight and that he forgot about collecting the two items. He accepted that he had told Mr Datta the following morning that he had delivered the items even though he had not, but the effect of his case was that effectively he had been taken by surprise, it had not been his intention to be untruthful and that he was still stressed.

6. Ms Barter, the disciplinary officer, rejected the explanation given. She stated that she did not believe that the claimant had simply forgotten that he had to deliver the items and believed that he had made a conscious decision not to return to the delivery office in the hope that the undelivered items would not be noticed. She considered that his lack of integrity was confirmed the following

day when he chose deliberately not to tell the truth by stating that the items had been delivered when they had not. In her conclusion, she stated that "I found that Mr Mbola had in fact intentionally delayed the mail". As this was a finding of gross misconduct, she decided to dismiss the claimant but gave two weeks' notice. The claimant appealed and, following a rehearing, Ms Turley dismissed the appeal. She again, specifically found that the claimant's actions amounted to intentional delay of the mail.

7. The form ET1 completed by the claimant was extraordinarily brief. The box marked unfair dismissal was ticked, but in the box for the background and details of the claim was written merely, "I am not happy the way dealing with case". It was left to the respondent to set out the background in the ET3. There was no case management before the hearing, which was held on 21 January 2020 and took a day.

8. The tribunal heard from the claimant, Ms Barter and Ms Turley. Their witness statements are in the bundle before me. I have read the claimant's statement with particular care. It is broadly consistent with the disciplinary meetings, asserting that he had forgotten about the two items which he had been told to collect and deliver due to stress consequent upon the call from social services about his children. Although the statement refers to a lack of understanding as to how Ms Barter could have come to the conclusion that the delay of mail was intentional, there is nothing in it to suggest that the claimant's case was that disciplinary and appeal officers had found only that the second charge had been made out. Mr Bennett explained to me today that the thrust of his cross-examination of the two witnesses had been to suggest that given the consistency and plausibility of the claimant's explanation, they could not reasonably have found that the delay was intentional. He accepted, though, notwithstanding this, that it would have been open to the witnesses genuinely to have found that the claimant's explanation was untrue.

9. In the written reasons, the tribunal set out the background facts in considerably more detail than I have here. It is necessary only to set out in full the section at the end of the reasons:

> "**DISCUSSION and DECISION**
> 45. There was no dispute by the Claimant that he had failed to take out two tracked items on his delivery on 20 March 2019. There was also no dispute by the Claimant that he had received a call from his manager regarding the two items and that he informed his manager that he would return to the delivery office to take the items out later on in the day. Further, there was no dispute by the Claimant that he failed to return to the delivery office on 20 March 2019 and that the items remained undelivered. The Claimant confirmed that despite being paid until 17:10 to complete his overtime, that he finished at 14:39 giving him ample time to return to the delivery office to deliver the two items. The Claimant also confirmed that when asked by his manager on 21 March 2019 that the items had been delivered, that he had been untruthful and told his manager that he had delivered the items when indeed he hadn't. The Tribunal noted that the Claimant said [118]" I wouldn't let you down or the customers. I always deliver everything."
> 46. Conduct was the reason for the dismissal and it is a potentially fair reason.
> 47. It was appropriate for the Respondent to characterise the conduct as gross misconduct. The Respondent's policies identify the misconduct which the Claimant admitted as gross misconduct,
>
> 48. Turning to the issues, the Tribunal determined them as follows:
> Did the Respondent have reasonable grounds for its belief that the Claimant was guilty of this misconduct? The Claimant admitted his misconduct.
> Had the Respondent carried out as much investigation as was reasonable in the circumstances? It had. Extensive investigation was not required.
>
> Was the procedure followed by the Respondent within the range of reasonable options open to a reasonable employer? The Tribunal was concerned about the issue of whether there had been a prior warning and how Ms Barter had dealt with it. This matter was addressed on appeal which was a compete rehearing. The Tribunal considered that the Respondent had taken account of the personal circumstances put forward by the Claimant. The overall procedure fell within the range of reasonable responses with any defects in the initial stage being cured at the appeal stage.
>
> 49. Was the decision to dismiss a fair sanction; that is, was it within the range of reasonable responses? The Claimant admitted committing the offence, his dismissal would likely fall within the range on reasonable responses open to the employer. In addition, in the light of his dishonest reply to his manager and the fundamental breach of trust that that involved, the dismissal of the Claimant did fall within the range of reasonable responses open to a reasonable employer. The Claimant's main complaint was that his personal circumstances were not properly taken into account but they were to the extent necessary.
> **CONCLUSION**
> 50. The Claimant's dismissal was not unfair. The claim is dismissed."

10. These paragraphs have been the subject of most of the submissions. Mr Bennett submits that the judge was simply wrong in law to have recorded that conduct was the reason for the dismissal. He

referred me to paragraphs 17 to 20 of **Robinson v Combat Stress** [2014] UKEAT/0310/14/JOJ, a decision of the Employment Appeal Tribunal, then then president, Langstaff J, presiding:

> "17. It is often necessary in a jurisdiction which is entirely statutory to remind ourselves of the wording of the statute. Whatever glosses may be put upon it by cases, it is that wording which is central. Section 98 of the **Employment Rights Act 1996** begins as follows:
>
> '(1) In determining for the purposes of this Part 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.'
>
> 18. Some observations. First, the reason for dismissal is a set of facts, or it may be beliefs, which the employer actually has for making the dismissal which occurred when it occurred. The section requires identification of that reason, not whether there might have been a good reason for the dismissal which in fact occurred. Second, the reason is not 'capability' or 'conduct' or 'redundancy' or 'breach of enactment', though it must be capable of falling within a category to which some or one of those labels would be appropriate. They are broad summary categories. The reason to be focussed on by the Tribunal is the reason which the employer actually had, not the one which he might have had albeit that the same broad label could be applied to it. Third, where the reason for dismissal is a composite of a number of conclusions about a number of different events, it is the whole of that reasoning which the Tribunal must examine, for it is that which the employer held as the actual reason for its dismissal of the employee.
>
> 19. We turn to section 98(4). The opening words provide:
>
> '[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.'

> 20. The determination thus has to have regard to the reason. The reference to the reason is not a reference in general terms to the category within which the reason might fall. It is a reference to the actual reason. Where, therefore, an employer has a number of reasons which together form a composite reason for dismissal, the Tribunal's task is to have regard to the whole of those reasons in assessing fairness. Where dismissal is for a number of events which have taken place separately, each of which is to the discredit of the employee in the eyes of the employer, then to ask if that dismissal would have occurred if only some of those incidents had been established to the employer's satisfaction, rather than all involves close evaluation of the employer's reasoning …"

11. Moreover, Mr Bennett submits, it was simply wrong for the judge to have stated that the claimant had admitted having carried out conduct which was characterised in the policies as gross misconduct (see paragraph 47). The claimant's case had always been that the failure to collect the two items was due to his having forgotten to collect them in the light of later developments; in short, that it was not an intentional delay, which alone is characterised as gross misconduct. The lie to the manager was not itself gross misconduct and would not have justified dismissal.

12. Mr Peacock invited me to look at the case as a whole and at the importance that Royal Mail places on integrity. He submitted that the conduct referred to at paragraph 46 was simply that which had been identified at paragraph 45. It included the untruthfulness with his manager, itself, he submitted, an act of gross misconduct having regard to the integrity issue, which the claimant had accepted doing. Paragraphs 48 and 49 each referred to "personal circumstances" having been considered. That was, he submitted, a reference to the circumstances which the claimant had put forward as the reason for his not collecting the two mail items. He prays in aid a dictum frequently found but here, as it happens, in paragraph 15 of **Robinson**, the case which I cited above. It reads:

> "15. In his response Mr Campbell urges, rightly, that a Tribunal's Judgment should be read as a whole, and a considerable margin given to it when understanding what the Tribunal wished to say. He relies, in particular, on the observations made by Mummery LJ in **Fuller v Brent** [2011] IRLR 414 at paragraph 31. We entirely accept that a Tribunal's Judgment should not be subject to an unduly pernickety critique, as if it were to be expected to be the finest piece of legal draftmanship. It will almost inevitably contain infelicities

> and sometimes conclusions spread liberally throughout the text rather than identified as such at one particular part of its reasoning."

13. Paying due weight to that principle, and indeed to dicta in other cases pointing the other way, it does seem to me that the tribunal has simply failed to grapple with the key issue which it had first to identify, namely the reason for the dismissal shorn of a descriptive label such as conduct. With respect to Mr Bennett, I do not think that the error was in failing to deal with his assertion made in argument that Ms Barter or Ms Turley had not truly believed that the claimant had intentionally delayed the mail but rather in its finding that the claimant had admitted the gross misconduct. I also reject Mr Peacock's submission that paragraph 47 is apt to include the admitted lying as constituting gross misconduct. The wording leads me to conclude that the tribunal could only have been referring to gross misconduct in the form of intentional delay because lying is simply not identified in the disciplinary code. Self-evidently, the claimant had not admitted that, quite the opposite, and although it would have been open to the ET to find that the respondent's witnesses had been entitled to find the intentional delay allegation proved, it did not do so. It seems to me that the reference to personal circumstances is more likely to be a reference to mitigation rather than the explanation which was exculpatory of intentional delay, but whether I am right about that or not, it does not change the position which I have found to prevail.

14. Turning to paragraph 49, I consider that the reference of the second statement to the claimant's "admitting committing the offence" can only be a reference to the intentional delay of mail. If it meant, as Mr Peacock urged on me, the lying, the third sentence starting "In addition, in the light of his dishonest reply" would make no sense.

15. In summary, I conclude that the tribunal's finding, which I hold to be that the claimant had admitted gross misconduct in the form of intentional delaying of the mail, to be an error of law, being plainly contrary the evidence. While I see some force in the argument that the lie could itself have

resulted in dismissal, I am not satisfied that this is what the tribunal found. The matter will have to be remitted. I have no concerns about the ability of the same employment judge fairly to hear the matter again but on balance can see force in the argument that there could be a perception that he would thereby be getting an impermissible second bite of the cherry. Moreover, as this employment judge sits only part time and the case was heard 20 months ago, it is likely to add to the delay to have him rehear the case. I therefore direct that it be remitted to a differently-constituted employment tribunal for rehearing.