



EMPLOYMENT TRIBUNALS

Claimant: Mr. G. J. Adamson

Respondent: Royal Mail Group Ltd

Heard at: Southampton ET **On:** 2 March 2022

Before: Employment Judge King

Representation

Claimant: In person

Respondent: Ian Hartley – Solicitor

JUDGMENT having been sent to the parties on 11 March 2022 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

The Claim

1. By his Claim Form, which was received by the Tribunal on the 3 July 2019, the Claimant brings a claim of unfair dismissal against the Respondent arising from his summary dismissal on the 27 April 2019.

The Issues

2. The issues in the Claimant's claim of unfair dismissal were agreed before EJ Harris on 9 April 2021 and are as follows:
 - a. What was the reason for the Claimant's dismissal on the 27 April 2019? The Respondent asserts that it was a reason related to conduct, which is a potentially fair reason for dismissal under section 98(2) of the Employment Rights Act 1996.
 - b. Did the Respondent hold a genuine belief in the Claimant's misconduct on reasonable grounds and following as reasonable an investigation as was warranted in the circumstances?

- c. Was the decision to dismiss a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with these facts?
- d. Did the Respondent adopt a fair procedure?
- e. If it did not use a fair procedure, would the Claimant have been fairly dismissed in any event and/or to what extent and when?
- f. If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct?
- g. In the event of the Claimant succeeding in his claim of unfair dismissal, should the Tribunal order reinstatement or re-engagement?
- h. In the event of the Claimant succeeding in his claim of unfair dismissal and being awarded compensation, what Basic Award is payable and would it be just and equitable to reduce the Basic Award because of any conduct of the Claimant before the dismissal? If so, to what extent?
- i. If there is a compensatory award, how much should it be? The Tribunal will decide:
 - i. What financial losses has the dismissal caused the Claimant?
 - ii. Has the Claimant taken reasonable steps to replace his lost earnings, for example by looking for another job?
 - iii. If not, for what period of loss should the Claimant be compensated?
 - iv. Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
 - v. If so, should the Claimant's compensation be reduced? By how much?
 - vi. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did the Respondent or the Claimant unreasonably fail to comply with it? If so is it just and equitable to increase or decrease any award payable to the Claimant and, if so, by what proportion up to 25%?
 - vii. If the Claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce his compensatory award? By what proportion?

Evidence

3. The Tribunal heard evidence on behalf of the Respondent from:
 - a. Andrew Masterman, Delivery Line Manager;
 - b. Joe Miranda, an Independent Casework Manager;
4. The Tribunal heard Claimant give evidence on his own behalf.

5. The Tribunal has had the benefit of a bundle of agreed documents of 170 pages. Documents referred to in this Judgment are denoted by their page number in square brackets.

Finding of Fact

6. The Claimant was employed by the Respondent as an Operational Postal Grade (“OPG”) from the 1 March 2017 to the 27 April 2019. He was summarily dismissed by the Respondent on the 27 April 2019 for alleged misconduct. The misconduct alleged against him was smoking in his Royal Mail van contrary to the Respondent’s Driver’s Manual and Smoking Policy.
7. The Respondent is a British public limited company which provides postal and courier services. It employs in the region of 137,000 people throughout the UK.
8. It is supported by a centralised Human Resources service which is physically located in Sheffield but which provides advice and support to managers throughout the UK in relation to staffing issues and HR policies and procedures.
9. A subset of the centralised HR resource in Sheffield is a team of approximately 25 Independent Casework Managers. They are independent of local management structures and their function it is to hear appeals by employees against certain sanctions including dismissals as well as complex grievances.
10. The Respondent publishes a Conduct Policy which outlines the approach to be taken if an employee does not meet the expected standards of conduct. It is updated from time to time. This has been provided in the bundle at [38]. It prescribes that the authority to give warnings and serious warning lies with ‘first and second line level’ managers. More serious penalties including dismissal should be given by second level managers. The policy provides a list of examples of types of behaviour which, it says, “in certain circumstances could be judged to be gross misconduct”. The list includes “Deliberate disregard of health, safety and security procedures or instructions”.
11. The Claimant had previously received ‘counselling’, or coaching, from Julian Baker, one of the managers, in December 2018. This coaching was on Royal Mail processes and procedures, with specific focus on smoking whilst on duty. This coaching session was put in place after a member of the public reported seeing the Claimant smoking whilst on duty, in a company vehicle on 29 December 2018. The Claimant signed a note, following this counselling session, confirming it had taken place and that

he understood what had been discussed [72]. The Claimant confirmed “he would not ever smoke in a Royal Mail Van again”. He also confirmed that he understood that “smoking while sitting in a Royal Mail van was potentially a dismissal offence”.

12. On 5 April 2019, the Claimant’s delivery partner, Luke Kennedy, made a verbal report about the Claimant smoking in a company vehicle. This report was made to the late shift manager, Stuart Hardie. On 6 April, Mr. Hardie reported this to the Delivery Office Manager, Brian Gunter.
13. Mr. Gunter requested a written statement be provided. As Mr. Kennedy was on holiday until 15 April, no statement was taken until then.
14. The Claimant was placed on suspension on 15 April.
15. Mr. Gunter’s manager, Nick Jukes, Delivery Line Manager, carried out a fact finding meeting on 18 April. The Claimant was invited to this meeting and attended. Notes of the meeting are at [82] and [83]. During the meeting, the Claimant admitted smoking in a company vehicle.
16. Mr. Jukes passed the case to Andrew Masterman, Delivery Line Manager, as Mr. Jukes felt it might warrant a penalty that was above his grade to issue.
17. Mr. Masterman carried out a Formal Conduct Interview on 23 April. The Claimant was invited to this meeting and attended. At the meeting the Claimant accepted he had been smoking in a company vehicle. He said he was doing so in order to save time. He confirmed he had read and understood the Respondent’s policy on smoking.
18. The Claimant was invited to a conduct decision meeting on 26 April. The Claimant was unable to attend and the meeting took place on 27 April. At the meeting, the Claimant was dismissed for:
 - a. Failure to adhere to Royal Mail Policy
 - b. Breaking the Law whilst at work for Royal Mail
 - c. Bringing Royal Mail’s name into disrepute
19. The Claimant appealed his dismissal. The appeal meeting took place with Joe Miranda, an Independent Casework Manager. The Claimant attended this meeting, which took place on 13 May.
20. At his appeal hearing, the Claimant said he wished to retract everything he had said in relation to this dismissal. The Claimant raised the issue that his dismissal was in fact due to him not being a member of CWU, which is the relevant Trade Union. It was the Claimant’s case that the Trade Union had brought pressure on Luke Kennedy in order to make Mr. Kennedy give a statement.

21. When pressed regarding the issue of whether he now denied that he had been smoking in the company vehicle, the Claimant accepted that he had been smoking in a company vehicle almost every day since January 2019.
22. Mr. Miranda asked Mr. Masterman for clarification of the investigation process. Mr. Masterman explained the delay in the report being made was due to no appropriate person being available when Mr. Kennedy made his verbal report. I accept this as a reasonable explanation. The written report only confirmed the verbal report in writing.
23. Mr. Miranda did not seek to interview Mr. Kennedy as he did not feel that this was necessary in light of the Claimant's admissions that he had been smoking in a company vehicle.
24. The Claimant's appeal was dismissed in relation to:
- a. Failure to adhere to Royal Mail Policy
 - b. Breaking the law whilst at work for Royal Mail
25. The appeal was allowed in respect of:

- a. Bringing Royal Mail's name into disrepute

26. The Claimant's appeal against his dismissal therefore did not succeed.

The Law – Unfair Dismissal

27. Under section 98(1) of the Employment Rights Act 1996 ("ERA") it is for the employer to show the reason for the dismissal and that it is either for a reason falling within section 98(2) or for some other substantial reason of kind such as to justify the dismissal of the employee.
28. An employee can bring a complaint of unfair dismissal to the Tribunal if they have completed at least two years continuous employment at the date of termination in accordance with section 108 ERA.
29. Section 111 ERA further provides that when bringing a complaint, the claim form must be presented to the Tribunal within 3 months of the effective date of termination, (or such further time as the Tribunal believes to be appropriate if it accepts that it was not reasonably practicable to present the claim within the 3 month period).
30. The Tribunal has been referred to the test for the minimum standards to be expected in a misconduct dismissal set out in *British Home Stores Ltd v Burchell* [1978] IRLR 379.

31. The Tribunal should also have reference to the ACAS Code of Practice on Discipline and Grievance Procedures 2015, and take account of the whole process including any appeal: *Taylor v OCS Group Ltd* [2006] IRLR 613.

32. Applying *Burchell*, and *Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23, the questions for the Tribunal are:

- a. Did the Respondent genuinely believe that the Claimant was guilty of misconduct?

This overlaps with the task of identifying the principal reason for dismissal.

- b. If so, was that belief based on reasonable grounds?

This considers the information available at the time of the dismissal and appeal decisions and the Tribunal is evaluating whether the view that there was misconduct is a view within the band of reasonable responses.

- c. Had the employer carried out such investigation into the matter as was reasonable?

Again this is a question of the band of reasonable responses. Relevant are the nature of the allegations, the position of the Claimant and the size and resources of the employer. It is wrong to expect a meticulous investigation of the kind that would be done in a criminal enquiry.

- d. Did the employer follow a reasonably fair procedure?

The ACAS Code is relevant here, as are the employer's own procedures. The key point is that an employer acting fairly will give the employee sufficient details of the allegations and the evidence in enough time before the disciplinary hearing to enable the employee to have a fair chance to respond, and there will be a right of appeal to another person if the employee is dissatisfied with the decision. Common errors leading to unfairness include deciding the case on evidence that is not shown to the employee, finding the employee guilty of allegations which are different from those put to him, failing to allow an appeal to an independent person (which can be another manager), or making further enquiries after a disciplinary hearing and failing to go back to the Claimant with the result of those enquiries before taking the final decision.

- e. If all those requirements are met, was it within the band of reasonable responses to dismiss the Claimant rather than impose some other disciplinary sanction such as a warning?

This is an area where Tribunals fall into the trap of substituting their own view for that of the employer. Reference to the employer's disciplinary policy is likely to be important, particularly to any definition of gross misconduct in cases where it is dismissal for a first offence.

Arguments based on inconsistency with other cases are difficult to pursue for Claimants unless the circumstances really are comparable in a way that means it is unreasonable to impose a more severe punishment on the Claimant: *Paul v East Surrey District Health Authority* [1995] IRLR 305.

Further, dismissal for misconduct is more likely to be fair if the Claimant has had a history of warnings and is on a final warning. Where it is a dismissal for gross misconduct the Tribunal has to be satisfied that the employer acted reasonably both in characterising it as gross misconduct, and then in deciding that dismissal was the appropriate punishment: *Brito-Babapulle v Ealing Hospital NHS Trust* [2013] IRLR 854. This makes it important that the employer has considered any mitigating factors.

Discussion

Was the dismissal of the Claimant by the Respondent for the potentially fair reason of conduct?

33. I accept that the Respondent dismissed the Claimant for a reason relating to his conduct for the purposes of s.98(2)(b) of ERA. There was initially no dispute that was the reason for dismissal and no other reason was put forward by the Claimant until his appeal hearing. There is no evidence before the Tribunal that there was any other motive in the mind of the Respondent.

Did the Respondent have a genuine belief that the Claimant was guilty of the allegations which led to dismissal?

34. I accept that both Mr. Masterman and Mr. Miranda genuinely believed the Claimant's guilt of the allegations. There was a report from Luke Kennedy, in which he stated that the Claimant had been smoking in a company vehicle. The Respondent was aware that the Claimant had done this before in December 2018, and was entitled to take this into account when forming a belief on whether the alleged misconduct had occurred. In the investigatory meeting, the Claimant had admitted the misconduct.

Did the Respondent conduct a reasonable investigation?

35. The question for the Tribunal then turns to the application of section 98(4), and whether, in all the circumstances of the case, the Respondent acted unreasonably in treating the conduct relied upon as a sufficient reason to dismiss the Claimant. The Tribunal must avoid substituting its own view of the matter for that of the Respondent. The role of the Tribunal is to assess objectively whether the Respondent's approach fell within the range of reasonable responses.

36. The ACAS Code states that "It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case." The amount of investigation that is reasonable will depend on all of the facts and circumstances of the case. In a case such as this one, where the conduct in question was admitted, the extent of the investigation reasonably required is likely to be less than in a case where allegations are denied or substantially disputed. Notwithstanding the Claimant's admissions, the Respondent carried out a meticulous investigation at all stages of the process. The Claimant was given ample opportunity to provide his account of the matter and to comment on evidence gathered.

37. The Claimant did not challenge the validity of the Respondent's evidence until his appeal hearing. He was also frank in his admission that he had been smoking in the company vehicle, and that he knew that this was in breach of the company policy.

38. I have seen no evidence that would lead the Tribunal to conclude that the Respondent's evidence or method for gathering that evidence was in any way untoward or suspicious. In any event, the Claimant admitted the misconduct at the first hearing.

39. It is not for this Tribunal to comment on the Trade Union that operates within the Respondent, nor to make findings about the practices of that Trade Union nor any of its members.

40. Given the Claimant's frank admissions, I find that the investigation was reasonable, given the nature of the allegations, the position of the Claimant and the size and resources of the employer.

Was the Respondent's belief that the Claimant had committed misconduct based on reasonable grounds?

41. There were reasonable grounds for the Respondent's belief that the Claimant had committed the conduct set out in the conduct notifications. He admitted the conduct. He admitted having awareness of the no smoking rules which were breached and having received briefs on these rules.

42. The Respondent's rules around smoking in company vehicles are clear, and it is clear that this can be viewed as gross misconduct. It is also against the law under the Health Act 2006. I find that it is reasonable for the Respondent to view employees who break both the Respondent's own rules and the law as having committed gross misconduct.

Was the decision to dismiss within the band of reasonable responses?

43. What must be determined is whether dismissal lay within the range of reasonable responses open to an employer of the Respondent's scale and

nature. It is not relevant whether this Tribunal would have imposed a lesser sanction in the circumstances.

44. The Claimant has argued that no reasonable employer would impose dismissal in the circumstances. The Claimant has cited the fact that he was given 'counselling', which amounts to an informal penalty, when he committed the same misconduct in December 2018. He argues that this shows that the Respondent viewed smoking in a company vehicle as a minor infraction, for which dismissal would be unreasonable.
45. I reject this argument. The Claimant was fully aware of the rules around smoking in company vehicles and had promised in writing that he would not do it again after December 2018. The fact that the Claimant was given a warning about the same misconduct only four months before the events which led to his dismissal make the misconduct more serious, not less.
46. The Claimant has argued that he should not have been viewed by the Respondent as having broken the law. He openly stated his view in evidence that "I didn't break the law". He put forward his view that smoking in a company vehicle is common practice and therefore the law is unenforceable. He questioned Mr. Masterman and Mr. Miranda as to whether they were police officers or members of the Health and Safety Executive, as in his argument, only those persons could say the Claimant had broken the law.
47. I find this argument wholly without merit. A person abides by or breaks the law by their conduct. Breaking the law is not contingent on being caught doing so by a police officer or member of the Health and Safety Executive. Smoking in a company vehicle is against the law and the Respondent was entitled to take this into consideration.
48. The Claimant has also raised the issue that the statements of Mr. Masterman and Mr. Miranda use the word "prohibited" while the actual policy says "not permitted" in relation to smoking in company vehicles. I accept the explanation given by both of them that they consider these terms to have the same meaning. I see no difference in the Claimant doing something that was "prohibited" and doing something that was "not permitted".
49. The Claimant also contends that he did not deliberately breach the Respondent's smoking policy. I find this argument without merit. The Claimant understood that he was not allowed to smoke in company vehicles and yet chose to do so. This is, in my view, a deliberate act.
50. As discussed above, the Claimant's conduct was sufficient to amount to gross misconduct. The Respondent's Conduct Policy [43] gives examples of what may be viewed as gross misconduct. Included on this list is "Deliberate disregard of health, safety and security procedures or

instructions". The Claimant was also aware that such a penalty could be imposed following his counselling in January 2019. As such, I find that the Respondent was entitled to impose a range of sanctions, up to and including summary dismissal. The decision to dismiss the Claimant for his misconduct was not outside the band of reasonable responses.

Was dismissal of the Claimant by the Respondent procedurally fair?

51. The ACAS Code says this about an employer's notification of the disciplinary case to be answered.

- a. This notification should contain sufficient information about the alleged misconduct ... to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.

52. The procedure followed by the Respondent was both fair and compliant with the ACAS Code of Conduct on Disciplinary and Grievance Procedures. Any flaws, such as the missing telephone number or initial failure to provide the notes with the letter of 16 May [118] were minor in nature and did not undermine the key principles of fairness as set out in the Code.

Conclusion

53. The Respondent dismissed the Claimant for a potentially fair reason relating to his conduct. Applying section 98(4), in all the circumstances of the case, the Respondent acted reasonably in treating that conduct as a sufficient reason to dismiss the Claimant. The Claimant was not unfairly dismissed.

Employment Judge King
Date: 09/03/2022

REASONS SENT TO THE PARTIES ON
11 March 2022 By Mr J McCormick

FOR THE TRIBUNAL OFFICE