EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr G Kingstone	v	Royal Mail Group

Heard at: Watford (in part by video) **On**: 15 December 2022
Before: Employment Judge R Lewis sitting alone

Appearances
For the Claimant: In person
For the Respondent: Mr R Chaudhry, solicitor

JUDGMENT

1. The claimant was not unfairly dismissed by the respondent and his claim of unfair dismissal fails.

REASONS

1. This was the hearing of a claim presented to the tribunal on 24 September 2021. Day A for early conciliation was 11 August and Day B was 10 September. The claim was for unfair dismissal only. The response was presented on 29 November.

Procedure points

2. By letter of 27 February 2022 the tribunal directed the present hearing (listed for two days) and set a case management timetable. No preliminary hearing took place.

3. In October 2022 the claimant wrote to tell the tribunal that he did not have the facilities for a video hearing. By letter of 6 November, the hearing was converted to be heard fully in person.

4. The respondent later wrote to ask that it be able to participate remotely, due to difficulties around train travel to Watford.

5. The application came before me. After obtaining more information from the respondent's solicitors, it seemed to me fair to direct that the dismissing manager, Mr Bedi, based close to Watford, should attend in person; I gave leave for Mr Potter, the appeal hearer, to give evidence remotely from a distance, and Mr Chaudhry took part remotely due to personal circumstances. These arrangements all worked successfully.

6. There was an agreed bundle of 99 pages which I had the opportunity to read the day before the hearing. The claimant was the only witness on his own behalf and had submitted a very short, handwritten statement. There were statements on behalf of the respondent from Mr Bedi and Mr Potter. At the time in question Mr Bedi was employed as Performance Leader and was based at the Home Counties North Centre where the claimant had worked. Mr Potter was based at Colchester Delivery Office as an Independent Case Manager. Long service was a striking feature of this case: the claimant had 35 years service, Mr Bedi 27, and Mr Potter 44. Mr Bedi and Mr Potter were very experienced in dealing with disciplinary cases.

7. On the morning of the hearing, Mr Chaudhry sent written submissions to the tribunal. I repeat my comment: in a case where only one side is professionally represented, it is neither realistic nor fair nor in accordance with the overriding objective to expect a litigant in person to read, understand and be able to reply to written submissions which he has received on the day of hearing. In practice nothing turned on the point in this case.

8. At the start of the hearing, I told the parties that the second day of hearing would be reserved to remedy (which in the event was not needed); but on the first day I would hear the evidence of the witnesses on liability and on contribution. I reserved any Polkey question to the remedy hearing.

9. The evidence was concluded by the time of a slightly delayed lunchbreak on the first day. Both sides made brief closing submissions that afternoon, and I gave judgment the same day.

Legal framework

10. The legal framework can be shortly stated. The only claim was for unfair dismissal. The first task of the tribunal is to decide what was the reason for dismissal, namely the factual events in the mind of the manager making the decision to dismiss.

11. The tribunal must then, in light of that finding, decide whether a fair procedure has been followed. A fair procedure does not require all possible steps to have been taken, but should include compliance with the respondent's own procedure and with the Acas Code.

12. Where the tribunal finds that misconduct is the reason, it should have regard to the guidance, well known to lawyers, in British Homes Stores v Burchell [1978] IRLR 379. It should ask whether the respondent genuinely believed that the claimant had committed the misconduct; and whether it did so on reasonable evidence, after a reasonable enquiry has taken place.

13. At the final stage, the tribunal must consider whether dismissal was within the range of reasonable responses. A tribunal may find that a dismissal was harsh, but nevertheless within the range of responses.

14. At all stages, the tribunal must take care not to substitute its own view for that of the employer, ie it should not perform its own analysis of what the tribunal would have done if placed in the shoes of the decision maker.

15. Applying the "range of reasonable responses" approach, requires the tribunal to understand that where judgment is to be exercised, there is often more than one right answer.

16. Finally, if the tribunal finds the dismissal to be unfair, it may consider whether the claimant has in any respect brought dismissal on himself, or whether his conduct before dismissal was such that a reduction in an award is fair. If it does so, it must set a percentage, and reduce any award by that percentage. It may apply different percentages to the basic award and the compensatory award, which are governed by different principles, but if it applies different percentages, it should explain its reasoning for doing so.

General approach

17. Before turning to my findings of fact I mention one or two general points.

18. In this case, as in many others, evidence touched on points about which I make no decision. That is not an oversight or an omission on my part; it reflects the reality, that not everything that was brought up in this case, including points on which the claimant had very strong feelings, was helpful or relevant to my decision making.

19. In hearing and deciding this case, I should pay proper regard to my obligation to place the parties, so far as I can, on equal footing. That is always difficult in a case where only one side has legal representation, particularly if the unrepresented party struggles to understand the legal framework, and the structure of the tribunal process. Like many litigants in person, the claimant would have benefitted from expert legal advice.

Findings of fact: setting the scene

20. The claimant, who was born in 1970, joined the respondent shortly after his 16th birthday. By the time of his dismissal, he had completed 35 years service. He was employed as OPG (Postman Grade). Since 2011 he had been based at the Home Counties North Mail Centre in Hemel Hempstead. He had been a CWU member in the past, but had given up membership some years before these events. He was deemed to have a clean disciplinary record; the word "deemed" in context means that any previous disciplinary infringement had been spent by passage of time. At the relevant time his line manager was Mr F Ali.

21. The respondent has statements of policy and practice, to which Mr Chaudhry in cross examination referred the claimant. He in particular referred to the handbook entitled "Our Business Standards," and to the following extracts (35-37):

> "Our business standards are the standards of behaviour we expect to see in all of our people at Royal Mail Group. It's about doing the right thing, following the law, acting honourably and treating others with respect.";
>
> "We expect our people to follow our business standards…Please be aware that breaking any of our business standards may be dealt with under the conduct policy;"

> "Health and safety - Everyone has responsibility for their own safety and that of their colleagues. You must… always follow the appropriate safety rules, standards and procedures, asking for an explanation if you're not sure."

22. The respondent has a detailed conduct policy, and Mr Chaudhry referred the claimant to the examples of gross misconduct (50) which includes "Deliberate disregard of health, safety and security procedures or instructions."

23. I heard evidence about two geographical areas at the Centre, which I refer to separately as the Yard area and Gatehouse area. I mean by this that the Yard area is a working part of the exterior of the Centre, where smaller vehicles may be worked on. Wearing a High Vis is compulsory for anyone working in the Yard area.

24. That is different from the Gatehouse area, of which pages 98 and 99 were photographs in the bundle. The Gatehouse sits between the vehicle entrance and exit into the Centre. Both entrance and exit have a vehicle barrier. The photograph at 99 shows clearly that there was no pedestrian exit adjacent to the incoming traffic lane. It was common ground that the Gatehouse roadway and immediate area were out of bounds, in the sense that employee access to them is prohibited. Signage inside the mail centre makes this clear (96 to 97).

25. Anyone whose duty requires them to work at the Gatehouse, eg security cover, must wear a High Vis while doing so. The claimant himself had done this in the past.

26. I accept the evidence which was that this was not some arbitrary rule, but reflected the fact that heavy vehicles used the Gatehouse roadway, and it was not regarded as a safe area for pedestrians.

27. Mr Bedi explained that non-customer facing staff are no longer required to wear full uniform at work, but when working within Hemel Hempstead Centre, all staff are required as an identifier to wear a High Vis jacket, if not in full uniform. In addition, there are areas of work, or particular jobs, for which wearing a High Vis is compulsory. I accept the broad proposition that High Vis jackets are generally available, which is not to say that one may be produced on demand every moment for every person in every circumstance. That is no more than everyday experience and common sense.

28. I was told finally that CCTV of the Gatehouse area can be seen in real time within the distribution centre; CCTV of other areas of the workplace can only be seen by security staff. The CCTV had a 30 day override. Mr Potter explained that access to stored footage was restricted and subject to what sounded like a complex bilateral procedure for access.

29. I was referred by the claimant to what he considered to be historic but unresolved complaints. There was no documentary evidence of any of these. He said that he had put in a formal grievance many years previously, but had been dissatisfied with the resolution and had therefore not made use of the grievance procedure on a second occasion.

30. The claimant also said that he had a number of long running concerns about the provision of a uniform and about safety footwear in particular. Mr Bedi replied that the respondent provides safety footwear, and that there are areas of the workplace where it is compulsory; he conceded that it is not particularly comfortable and that some employees prefer to provide their own footwear.

31. The claimant referred repeatedly to having been subjected over a period of years to harassment by Mr Moat, Local Distribution Manager. The clearest evidence of this would have been a statement of the complaints in a formal grievance, and a grievance investigation and outcome. These did not exist. The claimant said on a number of occasions that the experience of some years of harassment had affected his mind, and gave a number of examples. There was no medical evidence of this, as might have been obtained for example from a sick record, a return to work interview, or records of an attendance with the GP.

The events of 3 June 2021

32. Within that setting, the events in this case began on 3 June 2021. Mr Moat wrote the following day as follows:

> "On Thursday 3rd June it had been raised to me that there was some instances of health and safety issues at the bottom of the Yard area, I was studying the Key Locker CCTV camera looking at various areas of the operational Yard and at 11.58 I saw [the claimant] walk out from the small dock area towards the gatehouse, he was wearing what looked like a blue shirt and No Hi Viz jacket, the Barrier is currently broken so in the upright position, he then stepped into the road next to the gatehouse to get past the pathway barrier which is clearly marked up as "Strictly No Pedestrian Access" and continued up the pathway." (54)

33. Mr Ali, the claimant's line manager, spoke to the claimant later the same day and his note records that after the claimant declined CWU accompaniment:

> "I asked Graham if he went outside through the yard barrier without wearing a Hi Viz jacket today 3/6/2021 between 11.56 and 12.01? Graham stated no." (53)

34. Mr Ali as line manager was tasked with conducting a formal fact finding meeting. He wrote to invite the claimant to attend a meeting (55) and it took place on 16 June.

35. At the meeting, the claimant gave only one answer:

> "He stated on the original question (informal meeting) I did not ask him if he was wearing Hi Viz jacket. According to Graham I just asked him if he went outside through the yard barrier. Graham is not giving any answer to the [Mr Moat] statement. He is not agreeing or disagreeing." (57)

36. After that, the claimant refused to answer any questions.

37. Mr Ali interviewed Mr Moat the following day and he confirmed what he had already written. It does not appear that anyone viewed the CCTV after Mr Moat's original sighting of the claimant on 3 June.

38. On a date after 16 June, Mr Ali passed the case to Mr Bedi to deal with and informed the claimant that that had happened (59).

39. On 25 June Mr Bedi wrote to the claimant (60) to invite him to a formal conduct meeting. The invitation letter alerted the claimant to the risk of dismissal and advised him of his right of accompaniment. He enclosed details of the investigation and copies of witness statements. The disciplinary action was based on an allegation of "Serious health and safety breach".

40. The claimant was sent an acknowledgement slip in accordance with normal practice He returned it, having signed it and dated it 28 June (62) stating that he was unable to attend for the following reason:

> "My solicitor advises on the basis of the case I should not wilfully or willingly attend any meeting whatsoever."

41. On 1 July Mr Bedi spoke to the claimant and reminded him of the meeting.

42. The meeting took place later that day. The claimant did not attend. In the absence of the claimant, Mr Bedi proceeded to determine the matter, and dismissed the claimant (63 to 66).

43. Mr Bedi's report noted that the claimant had a clear conduct record; he summarised the steps taken to interview, and then in deliberations accepted Mr Moat's description of what he had seen, and recorded that the claimant had failed to engage with the process.

44. His conclusions were:

> "It is my belief that the claimant did exit the building via the Yard (with No PPE) and Gatehouse. This is a highly dangerous act that could have had the potential to cause serious injury including death to Mr Kingstone or a Driver of a vehicle that may have had to swerve to try and avoid him. He has continually either denied any wrongdoing or then refused to participate in the process meaning that there is no way of being able to correct this unsafe behaviour or to try and understand if there were any other potential mitigation to him doing this. Given this I have no confidence of this incident would not reoccur which is something that I cannot leave to chance."

45. In brief sentences, Mr Bedi also addressed the possibility of transfer to another site or suspended dismissal, and in both referenced the claimant's lack of engagement as giving no grounds for adopting either of those courses.

46. On 6 July and for the first time, the claimant engaged with the disciplinary process by writing a letter of appeal (67).

47. He stated that "I genuinely cannot recall" if he committed the offence. He then raised an issue about harassment and being victimised. However, he raised two important points in substance One was that "The dock is used frequently by members of staff and I can't recall anyone being admonished for doing so." The other referenced his 35 years of service.

48. Though not well expressed, the claimant there identified the two major points in his favour: he raised an allegation of inconsistency of treatment, and referred to the credit to be given for lengthy, unblemished service.

49. On 13 July Mr Potter wrote to the claimant (69) to arrange to hear the appeal on 21 July. The claimant was offered the option of the appeal taking place by either Microsoft Teams or conference call and he adopted the conference call option. The bundle contained Mr Potter's detailed notes of the call (73 to 77) along with the claimant's amendments and clarifications (80 to 81). Mr Potter explained in evidence that he conducted appeals at that time remotely due to covid related precautions and his own health.

50. When presenting the appeal, and paraphrasing very much in his favour, the claimant's points were:

    50.1 That the case constituted a continuation of years of harassment by Mr Moat;

    50.2 That what he had done had been done by many others over a long period of time;

    50.3 That he had denied the allegation to Mr Ali on 3 June because "I thought if I said no … then I may not hear anything else";

    50.4 That he accepted with hindsight that he should have attended the meeting with Mr Bedi;

    50.5 That the risk caused by his actions was not that substantial anyway because drivers slowed down as they approached the gate;

    50.6 That the claimant took PPE and safety issues seriously.

51. In further discussion, the claimant noted that there was no evidence other than that of Mr Moat (I comment that the CCTV, which would have removed the reliance on Mr Moat's word for it, was no longer available because the appeal was heard after the 30 day over ride, and the relevant footage had not been preserved).

52. There was one particularly significant exchange (75 to 76). Mr Potter asked "Why did you walk through an area that is signed "Strictly no pedestrian access."

53. The claimant's reply was:

> "I did the gate duty at Christmas and saw who went in and out. I cant be sure I did that on that date. I have gone through the gate on other occasions to get to my car."

54. Mr Potter said in evidence that that was significant for two reasons: first he found it an admission that this was not the only occasion when the claimant had broken the rules; and, secondly, it was an admission that the claimant had himself been responsible in the past for enforcing the very procedure of which he had been found to be in breach: he must therefore have been entirely familiar with it.

55. At this hearing, and seemingly for the first time in this whole sequence of events, the claimant explained why he had gone through the prohibited area and barrier on 3 June 2021: it was a short cut to the staff car park, and he wanted to get sandwiches from his car.

56. On 24 August Mr Potter wrote to inform the claimant that his appeal had failed (and attached his decision report, 90 to 95).

57. While the report should be read in full, Mr Potter noted that the claimant had given no details of anyone else who had committed the same wrongdoing. Addressing the issue of the claimant's length of service he wrote:

> "In this case given Graham's attitude to his actions and the subsequent proceedings I do not think his behaviour can be corrected by awarding a lesser penalty than the one given. Furthermore, I have no confidence that he would act differently if I were to re-instate him. I therefore decided the penalty of dismissal is the appropriate penalty in this case."

Discussion

58. The first question for the tribunal to decide in a case of unfair dismissal is what was the reason for dismissal, namely the factual consideration in the mind of the person making the decision to dismiss. In this case that is Mr Bedi, not the appeal hearer, Mr Potter. I find that the reason for dismissal was that set out in the dismissal letter, namely that the claimant was found to have committed a serious health and safety infringement, and by failing to engage with the disciplinary process had been unable to assure his employer that there was no risk of recurrence by showing an understanding of wrongdoing and its implications. I find that that is a reason related to conduct and therefore a potentially fair reason for dismissal within the framework of s.98(2) Employment Rights Act 1996.

59. I must then consider whether the requirements of fairness have been met. They are set out at s.98(4) which provides that:

> "The determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) 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 shall be determined in accordance with equity and the substantial merits of the case."

60. In the case of Burchell, referenced above, guidance was given to tribunals as to how to approach this question, and while that remains binding, it should be borne in mind that the burden of proof is not now the same as it was when the Burchell case was decided.

61. I ask first was the respondent's belief that the claimant had committed misconduct a genuine belief. I find that it was. Mr Bedi had no reason to doubt Mr Moat's description of what he saw on CCTV.

62. I then ask was it based on evidence. I find that it was. The evidence before Mr Bedi consisted of Mr Moat's description of the CCTV, and the claimant's responses. The responses were inconsistent and off the point, prefiguring something of the claimant's conduct of his own case in the tribunal. Like Mr

Ali and Mr Moat before, and Mr Potter after him, Mr Bedi noted that the claimant's immediate response, asked the same day whether he had committed the infringement, was to deny it, which Mr Bedi believed was untrue.

63. The claimant's second response was to disengage from the process. It is difficult to believe the claimant's assertion that he did so on the advice of a solicitor. A solicitor would be expected to understand that nothing is achieved by silence and absence. Even if that were a solicitor's advice, the claimant had, after 35 years service, a great deal more knowledge of the workplace and its systems than any outsider, and he bore the consequences of his own disengagement. His disengagement began on 16 June after he had answered one question from Mr Ali. Thirdly and most consistently, and continuing at this hearing, a major part of the claimant's response to the allegations against him was to deflect blame to others for what he felt were managerial failings.

64. The tribunal must then ask whether the respondent had conducted a reasonable investigation. As Mr Chaudhry rightly pointed out, this is also a step in which the tribunal must not substitute its own view, and in which there may be a range of reasonable responses. My only concern is that the CCTV, which was the conclusive evidence against the claimant, was seen by one person only, and by the date of the disciplinary could no longer be seen by anyone as it had been overridden. I heard no details of the bilateral agreement which covers CCTV, but I add the comment that whatever its origins, it does not appear in harmony with a modern idea of fairness.

65. Was dismissal within the range of reasonable responses? The range of responses test requires the tribunal to allow an employer a wide range of discretion. That is right in principle. I was concerned by two points which appeared strongly to favour the claimant when I first read the papers. The first was that the claimant raised the issue of inconsistency. I was concerned that Mr Moat referred to safety issues in the yard, and Mr Potter commented that he would expect disciplinary action to have been taken if there had been any other infringement. I accept the clarification given by Mr Bedi which was that the yard area was a working area in which High Vis was compulsory; but where employees had a legitimate reason to be present, and where the work was not inherently dangerous. That was to be distinguished from the Gatehouse area, which was not a working area, was out of bounds to pedestrians, and where High Vis was essential because of the much higher risk caused by heavy goods traffic. The second matter was whether appropriate credit had been given to the claimant for a lifetime of unblemished service. Having heard Mr Bedi and Mr Potter, I accept that that was a factor of which both were well aware, and that they weighed it in the balance in their decision making.

66. I therefore find that dismissal was within the range of reasonable responses and the claimant's dismissal was fair.

67. I do not need to make any finding on contribution, but I add that if I had found procedural unfairness, I would have set a very high level of contribution for the purposes of the compensatory award, but, recognising

that the basic award is compensation for many years unblemished service, I would have made a more modest reduction to that award.

68. In closing, Mr Chaudhry commented that the claimant had done himself no favours in reply to the disciplinary allegation against him. I wholly agree. From his initial denial on 3 June up to his failure to attend with Mr Bedi, the claimant made a series of tactical decisions which damaged his own position significantly. It seems to me clear that neither Mr Bedi nor Mr Potter was set on dismissing the claimant, and that a professionally mature response from the claimant, acknowledging and apologising for wrongdoing, and offering assurances as to future conduct, might well have been enough to lead to a final written warning and saving his employment.

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Employment Judge R Lewis

Date: 20th January 2023

Sent to the parties on: 05.02.2023

GDJ
For the Tribunal Office