Case No. 2301828/2022

EMPLOYMENT TRIBUNALS

Claimant: Miss S Gopalan

Respondent: Royal Mail Group Limited

Heard at: London South (By CVP) **On:** 22 December 2022

Before: Employment Judge Self

Appearances

For the Claimant: In Person

For Respondent: Mr R Chaudhry - Solicitor

JUDGMENT

1. The claim of Unfair Dismissal is not well-founded and is dismissed.

WRITTEN REASONS

(As requested by the Respondent on 28 December 2022)

1. By a Claim Form dated 26 May 2022 the Claimant seeks compensation for what she contends was her unfair dismissal by the Respondent Royal Mail Group Limited. No other claims were pursued.

2. I have heard oral evidence from Mr Chelvan (Optimised Production Lead) who heard the disciplinary, Ms Walsh (Independent Case Manager) who heard the appeal and the Claimant herself. All of those witnesses produced written witness statements. In addition, there was a bundle of documents and I considered any documents to which my attention was directed. The Respondent made closing submissions and the Claimant chose to utilise her

closing to plead for her job back indicating that she would accept any alternative penalty that might be applied instead.

3. The Claimant was a long-serving employee of the Respondent having 21 years' service at the time of her dismissal. The Claimant came across as being a woman who was passionate about her former job and it seemed that to her it was more than a job and was really an intrinsic part of her life. The dismissal has clearly hit the Claimant very hard indeed.

4. On 2 March 2021 the Claimant was summarily dismissed for gross misconduct. Conduct is a potentially fair reason for dismissal pursuant to the Employment Rights Act 1996 (ERA) and the Claimant has not put forward an alternative reason for her dismissal. The Claimant did call into question the evidence of those who provided evidence against her and suggested that the reason why individuals may have provided evidence as they did was on race grounds or the fact that they were jealous of the Claimant for acting up as a supervisor but at no point did she suggest that the Respondent dismissed her for anything other than her alleged misconduct.

5. The Respondent have a number of Policies and Procedures including a Conduct Policy and a document entitled "Our Business Standards". The Claimant accepted that she was aware of these standards on a generalised basis and indeed the relevant sections stating that aggressive, abusive and violent behaviour would not be tolerated and could lead to dismissal probably does not need a specific policy for an employee to understand and know.

6. On 25 November 2021 an incident took place between the Claimant and Mrs Ekoli. Words were exchanged about a piece of equipment that the Claimant asserted Mrs Ekoli was taking away from her without her permission. The Claimant explained in her statement that the Claimant and Ms Ekoli got into a dispute over a Mini-York and there was a tussle over possession. The Claimant states that she put on the brake to stop it being taken away and that Ms Ekoli became aggressive with her and effectively struck her with the Mini York and subsequently slapped her. The Claimant accepts that her right hand "slightly pushed her left shoulder". Other staff intervened and broke up the altercation.

7. The Claimant accepted in her statement that she was unwise to have put the brake on as a means of preventing Ms Ekoli taking the equipment and matters escalated into a physical confrontation after she had done that and had she not done so matters may have panned out differently.

8. On 26 November 2021 the Claimant was the subject of a precautionary suspension (as was Mrs Ekoli) as it was believed that the presence at work may hamper the investigation. That was a perfectly reasonable stance to take in a tight knit work community where there might be the possibility of witness interference and/or sides being taken.

9. The Claimant states and the Respondent does not dispute that she made a request that CCTV footage be secured and viewed at the outset.

10. On 1 December 2021 the claimant was invited to a further fact find meeting. All the normal safeguards for such a meeting were in place and again in the course of that meeting the Claimant asked for the CCTV to be taken into account. That CCTV footage was never obtained. The Claimant asserts that it would have shown the incident, but Mr Chelvan's view was that it would not have assisted as it was not focussed upon the spot where the incident took place. I have no evidence to support either party's assertion.

11. Within that meeting the Claimant said (75):

    "when I held the auto level we started to push and pull it. She then twisted my hand off the auto level and then Edith started lifting the auto level because I had put the brake on it. She lifted it and then dropped it. It hit me on my tummy. When it hit my tummy I was in so much pain I pushed her left shoulder then she slapped me and started shouting in anger and started pushing me again and again backwards".

12. Perhaps unsurprisingly the account of Mrs Ekoli differs to that of the Claimant and she stated that after a struggle over the equipment the Claimant slapped her on her back. She also asked for CCTV to be viewed.

13. A number of individuals were interviewed about their observations of the incident. Some saw nothing but the following eye witness accounts would appear to be material:

    a) GM – Saw the struggle over the equipment with both trying to take each others' hands off the equipment. She saw the Claimant slap Mrs Ekoli's back with her right hand. She also saw Mrs Ekoli push the Claimant after she had been struck and push the equipment onto the Claimant.
    b) RAB – Describes the struggle over the equipment and that he saw the Claimant slap Mrs Ekoli on the left shoulder.
    c) MM – She observed the Claimant hit Mrs Ekoli.

    There were other witnesses who had varying views of the incident although there was substantial support for the fact that there was a struggle which was quite intense over the equipment and both parties had participated in that. A number of witnesses stated that they saw the claimant with her glasses hanging off her face at the end of the incident.

14. On 10 December 2021 the Claimant was sent a copy of the investigation meeting notes for consideration and if necessary amendment. After 14 December 2021 there does not appear to be any additional enquiry but there was a delay until 14 January 2021. On that date the Claimant was invited to a "fact-finding decision meeting" on 19 January 2021.

15. The Claimant was accompanied at that meeting by a Trade Union representative. At that meeting the delay was explained as being on account of a combination of the busy Christmas period and Mr Patel's annual leave and an accident he had at work. Whilst I do not consider that the delay had any

effect on the outcome of the disciplinary process, disciplinary matters are very stressful for individuals and best practice would have been to inform the Claimant if time scales were going to be extended and such information should be clearly communicated.

16. Mr Patel told the Claimant that having considered all the information that he had been given he believed that there was a case to answer and as he considered that the outcome may be beyond his level of authority the case was to be passed onto Mr Chelvan for further consideration.

17. The Trade Union representative wanted it recorded that the Claimant's actions were in self-defence and the Claimant stated that it was in self-defence due to:

> ***"Edith vigorously yanking the Mini York from me. It was hitting my stomach along with the wheels also hitting my foot. This caused me to push her on the shoulder and not hit her as stated in the previous statements."***

18. On 27 January 2022 the Claimant was sent a letter which referred to the incident with Mrs Ekoli and allegations of physical assault which were said to be in clear breach of Royal Mail policy. On 11 February 2022 the Claimant was invited to a formal conduct meeting to discuss the physical assault and a Breach of Business Standards through unacceptable behaviour in that on 25 January 2021 the Claimant physically assaulted Mrs Ekoli. The invitation is standard in its terms making clear the right of accompaniment, that the act was potentially one of gross misconduct and that the Claimant's clean conduct record would be taken into account.

19. Having considered the evidence gathered during the investigatory stage from a wide range of individuals present or on shift that day including those indicated by the Claimant, progression to the next stage of the process was, not only within a band of reasonable responses but, inevitable. The Claimant was assisting in managing / supervising that area on that day as a Team Leader.

20. The Claimant attended the meeting on 17 February and was given the opportunity to raise any points that she wished to in terms of the evidence gathered. The Claimant had, of course, provided a full explanation of the incident previously and even on her own case had pushed Mrs Ekoli on the shoulder although others said she had struck her. Push or strike both amount to an assault and there is simply a difference in severity of the action.

21. Mr Chelvan noted that CCTV had not been obtained despite a previous request. He stated that the agreement with the Trade Union indicated that CCTV footage would not normally be utilised save for a criminal investigation or in exceptional circumstances. That was not challenged by the Claimant. Having said that Mr Chelvan made the necessary request for the footage, but due to the lapse of time the footage had been deleted.

22. Mr Chelvan considered the extent to which this affected his ability to make a decision on the issue and considered that in light of the fact that he had a

number of first-hand accounts from eye witnesses and the admissions that had been tendered he could still make a finding of fact on the matter. There was no guarantee of course that the footage would have caught the incident in any event.

23. Mr Chelvan reasoned as follows:

a) 6 witnesses had seen / heard an argument which involved shouting and grappling over a piece of equipment.
b) Some witnesses had observed the Claimant's glasses being awry and three attested to the Claimant hitting or slapping Mrs Ekoli on the shoulder and the Claimant had accepted there was contact.
c) Two witnesses had explained that there had been previous issues between the two participants and that Mrs Ekoli lacked respect for the Claimant.

24. On 25 February 2022 the Claimant was notified that the allegation against her was made out and that she was to be summarily dismissed. Mr Chelvan concluded that the Claimant's behaviour on the day of the incident fell well below acceptable standards. He was mindful of the Claimant's long service and previous clean record but considered that matters were sufficiently serious that dismissal was reasonable and appropriate. He took into account that the Claimant took on managerial responsibilities and was assisting with management on the day in question and as the Claimant did not seem willing to take any responsibility for her part in the altercation was concerned that he could not repose the necessary trust in her in the future. Accordingly, the Claimant was summarily dismissed. I understand that Mrs Ekoli was also dismissed for her part in the altercation and so there was parity of outcome.

25. On 2 March the Claimant appealed "against the severity of the decision" and raised the issue about the failure to secure the CCTV. The Respondent runs a system where appeals are dealt with by individuals known as Independent Case Managers. These individuals are part of a specific team engaged to consider appeals and are independent of the line management and location. In this case Ms Walsh was appointed. She was an individual who was experienced in her role having dealt with approximately 300 appeals. Her evidence was that she had in the past advised that reinstatement was appropriate and she was not challenged on that.

26. On 31 March 2022 the Claimant wrote to Ms Walsh setting out the points she wished to consider:

a) Certain witness statements were deemed to be "deliberately false".
b) One witness had seen the whole thing but was afraid to tell the truth.
c) The Claimant had pushed Mrs Ekoli on the shoulder in self-defence after the equipment had been dropped onto her leg and that it was just a "tap". The Claimant was then slapped by Mrs Ekoli.
d) The CCTV footage had not been obtained.
e) Previous decisions in Croydon mail centre had been more lenient.

27. The appeal interview was held on 6 April 2022 and the Claimant was again accompanied by a Trade Union member. The appeal was a rehearing of the issue. From the notes the Claimant was given every opportunity to set out her case in detail and at the end the Claimant asked that the penalty be reduced and that both individuals be taken back. There was criticism of Mr Chelvan's handling of the case and it was suggested that he had made his mind up before the hearing and that he failed to deal with matters in any depth at all.

28. The Claimant was given the chance to correct the notes of the meeting and having done so signed off a slightly amended copy. Ms Walsh then conducted interviews with 7 members of staff who had witnessed all or some of the incident. I have carefully read those interviews and I am satisfied that the interviews were pertinent, thorough and balanced. There was clear evidence in support of the fact that the Claimant had struck Mrs Ekoli and the nature of the altercation.

29. On 11 May the Claimant was sent a copy of all the interview notes and the Claimant was given the opportunity to comment before Ms Walsh made her decision and was given a week to do so. The Claimant responded in that time frame. Ms Walsh was also conducting the appeal into Mrs Ekoli's behaviour.

30. On 18 May 2022 the Claimant was informed that Ms Walsh had finished the re-hearing and that she had concluded that the claimant had been treated fairly and reasonably and that the original decision was upheld and the appeal dismissed.

31. Ms Walsh found that the Claimant's explanation that Mrs Ekoli walked into her hand was not supported by the evidence of others who described the Claimant hitting Ms Ekoli on purpose (three witnesses). It was reasonable for Ms Walsh to conclude on the balance of probabilities that the Claimant had struck Ms Ekoli, as it was for her to conclude that it was totally unnecessary for there to be a physical struggle over the equipment.

32. Ms Walsh described the initial conduct interview notes of the Claimant by Mr Chelvan to be **"not as good as I would want them to be"** but reflected that she had carried out a complete reinvestigation and that at the appeal all requirements for a fair hearing were in place. I have reviewed that statement and concur with it. Ms Walsh did not accept the suggestion that the Claimant was not made aware that she could potentially be dismissed and pointed out this was made explicit in the letter of invitation which it was.

33. Ms Walsh concluded by being satisfied that there was a fight over the equipment and then the Claimant struck Mrs Ekoli. That constituted gross misconduct and the two options for sanction were a final warning (suspended dismissal) or summary dismissal. Ms Walsh considered the fact that the Claimant did not consider that she had done anything wrong and had thereby not learned from her behaviour. When asked what she would do differently the Claimant did not suggest anything. The Claimant's long service and clean previous service were considered, but even that did not mitigate what was described as "totally unacceptable behaviour".

34. The whole incident was immature and escalated into a situation where others were distracted from their work to separate the pair and both contributed to the unfortunate incident. The Claimant told me that Mrs Ekoli should have been dismissed for slapping her. Despite the fact that there was evidence that she had struck Mrs Ekoli the Claimant's suggestion was that she should not have been dismissed. That is not an easy path to tread. In fact, I was told that both participants were dismissed.

35. Once an employer has shown a potentially fair reason for dismissal, and as stated earlier that has not been in dispute in this case, the Tribunal must go on to decide whether the dismissal for that reason was fair or unfair. This involves deciding whether the employer acted reasonably or unreasonably in dismissing for the reason given in accordance with S.98(4) of the Employment Rights Act 1996 (ERA) which states that:

'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'.***

36. As S.98(4) makes clear, it is not enough that the employer has a reason that is capable of justifying dismissal. The tribunal must be satisfied that, in all the circumstances, the employer was actually justified in dismissing for that reason. In this regard, there is no burden of proof on either party and the issue of whether the dismissal was reasonable is a neutral one for the tribunal to decide.

37. The Tribunal must be careful to assess the question of reasonableness under S.98(4) in the context of the particular reason for dismissal it found established by the employer.

38. It is important to appreciate that whether an employer has acted reasonably is not a question of law. The wording of S.98(4) has the effect of giving tribunals a wide discretion to base their decisions on the facts of the case before them and in the light of good industrial relations practice. As Lord Justice Donaldson put it in **Union of Construction, Allied Trades and Technicians v Brain 1981 ICR 542, CA**:

'Whether someone acted reasonably is always a pure question of fact. Where Parliament has directed a tribunal to have regard to equity…and to the substantial merits of the case, the tribunal's duty is really very plain. It has to look at the question in the round and without regard to a lawyer's technicalities. It has to look at it in an employment and industrial relations context and not in the context of the Temple and Chancery Lane.'

39. The appellate courts have, nevertheless, developed certain general principles, some of which have crystallised into principles of law. Thus, the broad, non-

technical approach has led to the development of the 'band (or range) of reasonable responses' test as a tool for assessing the reasonableness of an employer's actions.

40. Employers often have at their disposal a range of reasonable responses to matters such as the misconduct or incapability of an employee, which may span summary dismissal down to an informal warning. It is inevitable that different employers will choose different options. In recognition of this fact, and in order to provide a 'standard' of reasonableness that tribunals can apply, the 'band of reasonable responses' approach was formulated. This requires tribunals to ask: did the employer's action fall within the band (or range) of reasonable responses open to an employer?

41. The test was applied in **Iceland Frozen Foods Ltd v Jones 1983 ICR 17, EAT**:

    "We consider that the authorities establish that in law the correct approach for the… tribunal to adopt in answering the question posed by [S.98(4)] is as follows:

    (1)the starting point should always be the words of [S.98(4)] themselves;

    (2)in applying the section [a] tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the… tribunal) consider the dismissal to be fair;

    (3)in judging the reasonableness of the employer's conduct [a] tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;

    (4)in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;

    (5)the function of the… Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case 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."

42. The test of whether or not the employer acted reasonably is usually expressed as an objective one — i.e., tribunals must use their own collective wisdom as industrial juries to ***determine 'the way in which a reasonable employer in those circumstances, in that line of business, would have behaved'*** (**NC Watling and Co Ltd v Richardson 1978 ICR 1049, EAT**). Nonetheless, there is also a subjective element involved, in that tribunals must also take account of the genuinely held beliefs of the employer at the time of the dismissal. However, what a tribunal must not do is put itself in the position of the employer and consider how it would have responded to the established reason for dismissal. As the Court of Appeal explained in **Foley v Post Office; HSBC Bank plc (formerly Midland Bank plc) v Madden 2000 ICR 1283, CA**, although members of the tribunal can substitute their decision for that of the employer, that decision must not be reached by a process of

substituting themselves for the employer and forming an opinion of what they would have done had they been the employer.

43. The 'range of reasonable responses' test applies not only to the decision to dismiss but also to the procedure by which that decision is reached — **J Sainsbury plc v Hitt 2003 ICR 111, CA**.

44. It is the employer who must show that misconduct was the reason for dismissal in a conduct case such as this one. According to the EAT in **British Home Stores Ltd v Burchell 1980 ICR 303**, EAT, a three-fold test applies. The employer:

    a) Must show that it believed the employee guilty of misconduct, and that

    b) it had in mind reasonable grounds upon which to sustain that belief, and

    c) at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

45. This means that the employer need not have conclusive direct proof of the employee's misconduct — only a genuine and reasonable belief, reasonably tested. The burden is on the employer to demonstrate (a) above and the there is a neutral burden on (b) and (c) (**Singh v DHL Services Ltd EAT 0462/12)**.

46. The extent of the investigation and the form that it takes will vary according to the particular circumstances. In some cases, as the Code explains, the investigation stage will only involve the employer collating evidence; in others, an investigatory meeting with the employee will be required (see para 5). If the employer decides to hold an investigatory meeting, it is important that it should not result in disciplinary action (see para 7). If it becomes clear during the course of such a meeting that disciplinary action is needed, the meeting should be adjourned and the employee given notice of a separate disciplinary hearing and told of his or her right to be accompanied.

47. There is no hard-and-fast rule as to the level of inquiry the employer should conduct into the employee's (suspected) misconduct in order to satisfy the test in British Home Stores Ltd v Burchell (above). This will very much depend on the particular circumstances, including the nature and gravity of the case, the state of the evidence and the potential consequences of an adverse finding to the employee. In **ILEA v Gravett 1988 IRLR 497**, EAT, Mr Justice Wood (then President of the EAT) offered the following advice: ***"at one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation which may be required, including questioning of the employee, is likely to increase."***

48. In conducting the investigation, an employer should interview witnesses, although there is no need to interview every available witness once a fact has been clearly established. However, the investigation may be flawed if an obvious witness is overlooked. Similarly, failing to reinterview a vital witness as more information comes to light may be fatal. What amounts to a fair investigation will depend on the particular facts of the case.

49. In considering whether or not the fairness of a dismissal the Tribunal will also have to consider whether the process adopted was a fair one in the circumstances of the case. Employers are expected to have regard to the principles for handling disciplinary and grievance procedures in the workplace set out in the Acas Code of Practice on Disciplinary and Grievance Procedures ('the Acas Code'). The Code is relevant to the question of liability and will be taken into account by a tribunal when determining the reasonableness of a dismissal in accordance with S.98(4) as per **S.207 Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A)**. Furthermore, if the dismissal is found to be unfair, the tribunal can increase (or indeed decrease) an award of compensation by up to 25 per cent for an unreasonable failure of either party to follow the Code if it considers it just and equitable to do so — S.207A TULR(C)A.

Conclusions

50. It was established beyond any doubt that there was an unpleasant altercation between the Claimant and Mrs Ekoli and several co-workers had to intervene in order to bring matters to an end. It is clear that the conduct of the Claimant (and it would appear Mrs Ekoli) fell below what is reasonable in the work place and that it infringed the Respondent's well publicised Business Standards.

51. It was inevitable that the matter would be investigated further and upon gathering the evidence inevitable that the Claimant would be subject to a disciplinary hearing. I find that both those decisions fell well within a band of reasonable responses taking into account what was known by the Respondent at each stage.

52. There were a number of eye witnesses and although there were some differences in account there was a body of evidence that pointed to the fact that the escalation of the issue was caused by the Claimant applying the brake on the equipment and that the Claimant had struck Mrs Ekoli. There was evidence from which the Respondent could conclude that the Claimant had done these things and indeed the Claimant accepted them, all be it that she sought to minimise the strike to being a small push.

53. Save for one point (CCTV) which requires further enquiry I am satisfied that the Respondent conducted a reasonable and thorough investigation not just once but twice. It is unfortunate that the CCTV footage was not obtained timeously with the result that it was lost. There is an issue as to what it would have shown which I cannot resolve. I work on the basis that it ***could*** have provided evidence of the incident.

54. However, whilst I am satisfied that the failure to obtain the CCTV is a failing within the investigation and that it may have shown the incident I do not accept that the failing rendered the dismissal unfair. There was ample evidence from eye witnesses upon which a finding could and was made and in the circumstances I accept that the investigation was sufficient even taking into account the lack of CCTV.

55. The product of those investigations provided a range of evidence for Mr Chelvan and Ms Walsh to consider and to make their findings. Whilst I consider that Ms Walsh did a more thorough job than Mr Chelvan during the hearing processes I am satisfied that both did sufficient and discharged their

duties reasonably and fairly. To the extent that Mr Chelvan could be criticised (and I do not do so) I am confident that the investigation and appeal held by Ms Walsh would have “cured” any deficiency.

56. I have looked at the process adopted and the whole process was conducted in accordance with the ACAS Code. The Claimant was accompanied and supported and was able to put across her view and position as she wished to do. I am satisfied that upon there being a reasonable investigation the Respondent held a genuine belief on reasonable grounds that the Claimant was guilty of misconduct. I understand that Mrs Ekoli was also dismissed for her role in the incident

57. I am also satisfied that upon finding the misconduct proven there was a consideration at both stages of the Claimant’s mitigation which was relatively strong in terms of length of service and blameless conduct record. It may well be that had the Claimant adopted a more conciliatory approach by fully recognising that her conduct had not been acceptable that a different outcome may have accrued such as a final warning. I also acknowledge that there would have been some employers who may have given the Claimant the benefit of the doubt in any event and placed her on a final warning.

58. Having said that I do consider that the decision to dismiss was a decision that fell within the reasonable band of responses and that it was reasonable to characterise the conduct as misconduct for which dismissal and in this case summary dismissal was the reasonable sanction. Whilst I acknowledge that the dismissal itself and this decision has been a grievous blow for the Claimant and that it has affected her adversely I do not consider that the dismissal was unfair and accordingly this claim is dismissed.

Employment Judge Self
24 February 2023