



EMPLOYMENT TRIBUNALS

Claimant: Mrs H Emmett-Newman

Respondent: Royal Mail Group Ltd

Heard at: Manchester (by CVP)

On: 30 March 2023

Before: Judge Callan (sitting alone)

REPRESENTATION:

Claimant: Mr. B. Allen, Trade Union representative

Respondent: Ms. A. Niaz-Dickinson (counsel)

JUDGMENT

The judgment of the Tribunal is that the complaint of unfair dismissal is not well-founded. This means the respondent fairly dismissed the claimant.

REASONS

Introduction

1. The claimant was a postal worker employed latterly at Oldham Road, Manchester. She commenced her employment on 27/01/1997 and was dismissed for gross misconduct on 21/09/2022. The alleged misconduct was that she had brought the respondent into disrepute by posting on Facebook a derogatory comment.

2. By a claim form presented on 17/11/2022, the claimant complained that she had been unfairly dismissed.

3. The respondent resisted the claim in its response form and maintained the claimant was fairly dismissed by reason of her misconduct.

Issues

4. The issues to be determined, this being a dismissal for alleged gross misconduct, were:

- 4.1 Whether or not the respondent can prove the sole or principal reason for the dismissal;
- 4.2 Whether or not that reason was one which related to the claimant's conduct;
- 4.3 Whether the respondent acted reasonably or unreasonably in all the circumstances of the case in treating that reason as a sufficient reason to dismiss the claimant;
- 4.4 Did the respondent have a genuine belief that the claimant had committed the misconduct?
- 4.5 Were there reasonable grounds for that belief;
- 4.6 At the time the belief was formed, had the respondent carried out a reasonable investigation;
- 4.7 Did the respondent otherwise act in a procedurally fair manner;
- 4.8 Was dismissal within the range of reasonable responses?
- 4.9 If the dismissal was found to be unfair, the respondent would argue that the claimant's compensation should be reduced on the ground that, had the respondent acted fairly, the claimant would or might have been dismissed in any event. The respondent would also seek a reduction in compensation to reflect what the respondent said was alleged culpable and blameworthy conduct.

Evidence

5. On behalf of the respondent, I heard evidence from Ms. Helen Marley (HM), Parcel Lead Manager at Manchester Mail Centre, who conducted the disciplinary hearing, and from Mr. Simon Walker (SW), Independent Case Manager, based at Bradford North Delivery Office who heard the claimant's appeal against dismissal. The claimant gave evidence on her own behalf and evidence was given in support of her claim by her husband, Mr. F.P. Emmett-Newman. I was also provided with a bundle of 153 pages, and I read those documents referred to by the witnesses in addition to the pleadings..

Relevant Legal Framework

6. Section 98(1) and (2) of the Employment Rights Act 1996 (ERA) provides as follows: the4re

- “(1) In determining for the purposes of this Part whether the dismissal 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.
- (2) A reason falls within this subsection if it –
 - (a) ...
 - (b) relates to the conduct of the employee”

7. Section 98(4) of ERA provides as follows:

“Where the employer has fulfilled the requirement 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.”

8. It is for the employer to show the reason for dismissal and that it is a potentially fair one, such as conduct: this is not a high threshold – it is designed to deter employers from dismissing for trivial or unworthy reasons. If the reason *could* justify the dismissal, the enquiry moves on to the question of reasonableness (**Kent County Council v Gilham** [1985] ICR 233).

9. In conduct dismissals it is well-established that there are three aspects which have to be considered: did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case? did the employer hold a genuine belief that the employee was guilty of the misconduct alleged? and did the employer have reasonable grounds for that belief. The band of reasonable responses test applies to each stage of the dismissal process, that is, the investigation, dismissal and appeal.

10. Where the dismissal is for alleged gross misconduct, the tribunal must nevertheless determine whether it was within the range of reasonable responses to treat the conduct as a sufficient reason for dismissing the employee summarily (**Burdett v Aviva Employment Services Ltd.** [2014] 11 WLUK 420).

11. I was also referred to the cases of **Graham v Secretary of State for Work and Pensions (Jobcentre Plus)** [2012] IRLR 759 EWCA 903 which examined the application of **Burchell** in a case of alleged misconduct and gave guidance at paragraphs 35 and 36. Paragraph 36 reiterated that the ET must consider by the objective standards of the hypothetical reasonable employer, rather than by reference to the ET's own subjective views, whether the employer has acted within the "band or range of reasonable responses". The Court of Appeal held that this is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse. The ET must not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what is the right course to adopt for that of the employer. Ms. Niaz-Dickinson also referred to **Tayeh v Barchester Healthcare Ltd** [2012] EWCA 29 which reiterated the point that it is not for the ET to substitute its own findings about the seriousness of the allegation for that of the employer.

The Facts

12. The respondent provides mail (letters and parcels) collection and delivery services across the UK. The claimant had been employed for some 25 years and on 19/04/2022 had commenced sick leave with a heart condition. At the time of her dismissal, the claimant was based at Manchester Mail Centre and her duties in the main were sorting large letters. There was at the time a well-publicised national industrial dispute between the Communication Workers Union (CWU) and the respondent.

13. On 05/07/2022, a comment was posted using the claimant's Facebook account on the CWU's Facebook page which stated "what will happen when RM work out we don't need all the management bullying and harassment to do our jobs? Maybe sack a few more?". This was reported to Helen Marley by Gary Broadfoot, the shift manager, at around 19.30. He considered it to be a breach of the respondent's social media policy which provides that "Employees must ensure they – avoid saying anything that might seriously damage Royal Mail's reputation and brand". And when using social media in both a work and personal capacity they "must not use social media to make defamatory or discriminatory comments" or "display behaviour online which may cause offence to other employees, customers or clients of Royal Mail Group, that could subsequently cause serious damage to the company." The policy also provides that "Breaches could lead to disciplinary action and in cases where the behaviour is serious enough to be considered gross misconduct this could lead to dismissal."

14. At 19.45 the same evening, HM telephoned the claimant and after asking about her well-being, said she wished to discuss a Facebook post comment made by the claimant. The matter was discussed briefly and HM read out the comment to the claimant. The claimant was then invited to attend the next day for "a chat" face to face if possible and she agreed to attend the next day at 3 pm. A note of the telephone conversation was provided at page 56. The claimant attended a "seeking an explanation" meeting the next day, accompanied by her CWU representative. A note of the meeting was provided at pages 57-59 of the bundle. The claimant stated that she had not made the comment, her husband had made it using her Facebook account. She said when HM telephoned her the previous evening, she had been

asleep and had been groggy due to the tablets she was taking for her condition. HM then raised with the claimant that when she answered the telephone she said she needed to turn down the television which she had been watching as it was loud. HM put to her that she had confirmed she had posted the comment. The claimant denied that she had done so, or that she had been bullied and harassed by her managers.

15. On 19/07/2022, the claimant's husband provided a signed and dated statement saying that he had posted the comment using his wife's Facebook account.

Disciplinary investigation

16. A fact-finding interview took place on 22/07/2022 conducted by James Cunliffe, Work Area Manager (JC) (pages 61-64). The claimant attended with her CWU representative. JC outlined that he was conducting the meeting in line with the respondent's conduct Code to discuss the comment made on Facebook. He established that the claimant had been provided with the notes of the Seeking an Explanation meeting held on 06/07/2022. When asked why she had posted the comment, the claimant said that she had not done so, her husband had posted it. The claimant explained that one of the ways she connects with social media is via a computer at home which connected to the television. She had left her Facebook account open and her husband had commented on the post using her account. She said that when HM telephoned, she was not aware of which post she was referring to as she had just woken up and was groggy due to the medication she took for her condition. She handed the signed statement from her husband to JC. The CWU representative asked JC to accept the statement given by the claimant's husband. JC said that he would take it as part of the fact-finding but stressed that every Royal Mail employee is responsible for their own social media accounts. The claimant signed the notes of the meeting as a true and accurate record on 26/07/2022.

17. On 02/08/2022, JC wrote to HM recommending that the matter proceed to a formal conduct meeting (page 65).

Disciplinary hearing

18. On 15/08/2022, the claimant was informed that the matter was going forward to a formal conduct meeting which would hear allegations that, first, she had breached the respondent's Business Standards in that on 05/07/2022 she had posted a comment on social media that may have caused reputational damage to the respondent and its employees, and secondly, she had breached the respondent's social media policy in that on 05/07/2022 she had posted a comment on a social media platform alleging managers bully and harass employees. She was informed that she had the right to be accompanied by a trade union representative and the matter was being considered as gross misconduct. She was further informed that if the matter was upheld, one outcome could be her dismissal without notice.

19. The claimant attended a disciplinary hearing on 22/08/2022, accompanied by her CWU representative, which was conducted by HM. Notes of the meeting were

provided at pages 71-80 and were signed by the claimant as a true and accurate record on 27/08/2022. HM put to the claimant what she had said to HM during the telephone call on 05/07/2022. The claimant said that she could not recall “95%” of the conversation as she was confused having just woken up. Her TU representative informed HM that the claimant’s husband had been unfairly dismissed following allegedly being bullied and harassed by his managers. He also pointed out that the comment does not state there was bullying and harassment by managers, it was a question. HM responded that it was her view that the question was implying that managers bully and harass employees.

20. The respondent’s disciplinary policy defined gross misconduct as “Some types of behaviour are so serious and so unacceptable, if proved, as to warrant dismissal without notice (summary dismissal) or pay in lieu of notice. It is not possible to construct a definitive list of what constitutes gross misconduct.” Examples of what could be judged to be gross misconduct are given, one of which is “Abusive behaviour to customers or colleagues”.

21. On 21/09/2022, HM wrote to the claimant setting out her decision to dismiss her without notice for gross misconduct, together with a Decision Report giving her reasons for her decision (pages 85-95). As to the first allegation, HM rejected the claimant’s explanations such as it was her husband who had posted the comments using her Facebook account. She believed them to be a deliberate attempt to deflect responsibility for posting the comment. Further, she disbelieved the claimant’s assertion that she was unaware of the post during the course of the telephone call on the evening of 05/07/2022 as HM considered if that was the case, the claimant would have asked for details before offering to delete it.

22. In respect of the second allegation, HM held that the claimant was responsible for placing a post on the CWU’s Facebook page which has 59,000 followers. The original post received 322 comments and was shared 122 times. The post from the claimant’s Facebook was placed at around 12.30 pm and was taken down at around 08.30 pm. HM found that during that time it was available for anyone visiting the CWU’s Facebook page to read and share, and she believed it placed both the respondent’s business reputation and customer confidence at risk.

23. HM found that the allegations constituted gross misconduct. In respect of the appropriate sanction, having considered the claimant’s length of service and mitigation, she decided the misconduct was so serious that it warranted summary dismissal. This was because the claimant failed to accept responsibility for her actions and showed she was unable to adhere to the respondent’s business standards.

Appeal

24. The claimant appealed against her dismissal. Her grounds of appeal were that the decision to summarily dismiss her was harsh, unfair and not in line with the respondent’s conduct code.

25. The appeal hearing took place on 22 October 2022 in person. The claimant was accompanied by her trade union representative. The manager hearing the

appeal was Simon Walker (SW), an Independent Case Manager based at Bradford North Delivery Office. Notes of the hearing were provided in the bundle of documents at pages 106-111. It was explained at the outset that the appeal was by way of a rehearing of the case.

26. At the hearing, the claimant raised issues with regard to the telephone conversation on 05/07/2022. Her representative said the conduct policy did not provide for such a stage in the procedure, and as such, it should not be relied upon. The claimant was groggy at the time of the call and could not recall the discussion. It was therefore unfair for it to be used against her.

27. The claimant's representative raised a concern that not only did HM conduct the telephone call, but then held a Seeking an Explanation meeting with the claimant the following day. Having taken part in two discussions with the claimant, HM was not the correct person to conduct the hearing at the formal stage. The representative relied upon two statements by HM which indicated that she had made her mind up against the claimant and should not have had conduct of the formal hearing. He also pointed out that JC who conducted the investigation was subordinate to HM which was outside of the procedure and would have potentially been influenced by her. It was also unacceptable that HM repeatedly used her transcript of the telephone call in her disciplinary meeting with the claimant and in the decision making document. In short, HM placed overreliance on a disputed document which was unfair in the circumstances.

28. As to the sanction, the claimant accepted that she was responsible for her social media account so that there may be an element of accountability but dismissal was nevertheless a harsh penalty.

29. SW rejected the appeal by letter dated 25/11/2022 (page 137). His deliberations and conclusions were provided at pages 138-146.

30. SW disagreed with the representative's contention that HM should not have made contact with the claimant by telephone on 05/07/2022. The respondent's conduct policy states that there should be prompt investigation and the manager would meet the employee on the day of the incident or when the behaviour was becoming a cause for concern. It was also his view that it is good practice to make a contemporaneous note. As to HM's involvement having spoken to the claimant on the telephone and conducted a seeking an explanation meeting the next day, SW noted the investigation had been handed to JC to conduct a further fact-finding meeting. In any event, SW considered the matter in the round, on the facts as he believed them and on the available evidence. He had had no prior involvement in the matter. There had been no challenge to HM being the decision maker at the formal meeting either beforehand or at the meeting itself, despite the trade union's involvement.

31. SW considered it to be very serious that an employee of the claimant's length of service could make such offensive comments. In the absence of medical evidence, SW took the view that the claimant believed it was her right to post the message irrespective of the impact on her colleagues, customers and potential harm to the respondent. Having read the contemporaneous note made by HM of the

telephone discussion, SW was not satisfied with the suggestion by the claimant that her medication had caused her to respond to HM regarding the Facebook comment in the way she had and then changed her evidence the next day. Accordingly, SW formed the belief that the claimant did make the post and that she believed she had the right to make the unsubstantiated allegations as she was unwilling to show any remorse or directly accept that the post was inappropriate.

32. SW took the view that the claimant's post advanced the opinion that any employee of the respondent in a management role was to be considered a bully and therefore more of them should lose their jobs. The respondent's social media guide for employees stated that employees must not display behaviour online which may cause offence or cause harm to the business. Employees should not use social media to make defamatory or discriminatory comments and nor should they use them to harass or bully. SW took the view that by posting the comments about all the respondent's managers, the claimant failed to protect the business or herself against claims of harassment. He formed the view that the allegations had been proven.

33. With regard to the appropriate penalty, SW took into account the claimant's long service and clean disciplinary record. However, the claimant's actions amounted to gross misconduct. Due to the claimant not showing any remorse and being unable to say that she did not believe the post to be true, he found that her actions were so serious that any penalty less than dismissal would be condoning those actions. For those reasons, he upheld the penalty of summary dismissal.

Discussion and Conclusions

34. I now consider the issues in the case as set out above and apply the facts to the law in reaching my decision. Ms. Niaz-Dickinson, for the respondent, addressed me in submissions at the end of the hearing as did Mr. Allen for the claimant. I have considered all the points raised (whether or not I have expressly referred to them).

Reason for the dismissal and genuine belief in that reason

35. The first matter I had to decide was whether the claimant's dismissal was for misconduct. I am satisfied that matters raised by the respondent fell within the it's disciplinary policy as potential gross misconduct and the reason for the claimant's dismissal was for such acts.

36. For these reasons, I find that the respondent's belief in the claimant's misconduct was genuine.

Reasonableness of investigation

37. The claimant criticised the involvement of HM in the telephone conversation and Seeking an Explanation discussion. Mr. Allen submitted that the involvement of HM was a breach of the respondent's policy at page 38a which stipulates that where the outcome may result in a major penalty, the fact-finding must be carried out by a different manager to the decision maker. This was an aspect of the case which initially I found to be particularly troubling. However, the matter was handed to JC by

HM to conduct a fact-finding interview. JC asked a number of open questions seeking information from the claimant. In referring the matter back to HM for a formal conduct meeting, JC stated that he did not accept the claimant's explanation for how the post was placed on social media, that it may have breached the respondent's code of business standards and social media policies, and may have caused reputational damage. It was not alleged that JC was not of a managerial grade, and in dealing with the formal stage, that HM was not of the requisite level of authority. No criticism of the involvement of HM was made by the claimant or her representative at the time of the formal hearing.

38. At the appeal stage, the claimant raised that HM should not have been the manager to deal with the formal conduct meeting. SW referred matters back to both HM and JC and copied the questions and answers to the claimant for her response. HM stated that she felt it appropriate for her to deal with the formal conduct meeting as she was the second line manager at the time. In evidence before me, HM stated that she considered it was appropriate for her to deal with the matter as there was a shortage of managers, there being two vacancies out of a total of 15 managers covering various shifts. When it was suggested that the matter could have been passed to another area, HM said that there were already two cases which had been considered for sending out of the area but had been declined because of workload issues.

39. SW also asked a number of additional questions of JC and provided both the questions and answers to the claimant for her comments. She had nothing further to add. JC stated that he handed the case to HM to deal with at the second line level as she was his next line manager.

40. Having considered the above, I find that the conduct and extent of the investigation was within the band of reasonable responses.

Dismissal and reasonableness of the sanction

41. The claimant contended that HM was judge and jury in, effectively, bringing the allegations and then deciding the sanction having conducted the disciplinary hearing. As stated above, I gave anxious consideration to this matter and find that it did not fall outside the range of reasonable responses as the claimant had an adequate opportunity to answer the allegations. In any event, the appeal was before an independent manager who conducted a fair hearing and it is at the end of the disciplinary process, including any appeal, that reasonableness of the dismissal is to be assessed since a thorough and reasonably conducted appeal process can rectify earlier defects (**Taylor v OCS Group Ltd** [2006] ICR 1602). I find that the appeal by SW did rectify any irregularities at the dismissal stage.

42. I cannot substitute my view for that of the respondent, and in my judgement the summary dismissal of the claimant is within the range of reasonable responses open to an employer in these circumstances which is the test I must apply. SW demonstrated that he took the relevant factors into account in confirming summary dismissal was the correct penalty in the circumstances.

Was the appeal fair and reasonable

43. At the appeal stage, the claimant said that she could only recollect about 5% of the telephone discussion. She did not produce medical evidence to support her contention that her medication caused her to be “groggy” or adversely affected her cognitive abilities. (Following the appeal hearing, she provided a list of possible side effects of her medication – see below). In her response to the questions to and answers by HM, she denied saying that she had made the comment or admitted to making the post during the telephone call. It was therefore in my view reasonable for SW to conclude that it was plausible for the majority of the note to be accurate and that on the balance of probabilities the claimant had made the post on her Facebook page.

44. SW conducted an in person hearing at which the claimant was represented by her CWU representative. The claimant was asked a large number of questions covering the relevant issues during the course of the appeal hearing. Her representative raised issues on her behalf and the claimant was given the opportunity to add additional points had she wanted to do so. She had the opportunity to review and amend the notes of the hearing if she wished. As noted above, she was provided with the additional questions SW asked of HM and JC and had the opportunity to provide additional information as appropriate. She provided SW with a list of her daily medication and their possible side effects on 25/10/2022. Accordingly, I find that the appeal was a hearing in front of an independent manager who examined the evidence, heard the appellant’s arguments against the finding of misconduct and the sanction of dismissal. For the reasons given above, I am satisfied that the claimant had a fair hearing and that the appeal was conducted reasonably. Having done so, Mr. Walker acted reasonably in dismissing the claimant’s appeal.

Conclusion

45. In essence, the claimant’s attack on the fairness of the dismissal fell short of showing the respondent acted outside the band of reasonable responses.

46. This decision is reached on the balance of probabilities and applying the range of reasonable responses test having considered the documentary and oral evidence over the course of a day.

47. For these reasons I dismiss the claimant’s claim of unfair dismissal.

Judge Callan
Date: 15 August 2023

JUDGMENT AND REASONS SENT TO THE PARTIES ON
25 August 2023

FOR THE TRIBUNAL OFFICE

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