



EMPLOYMENT TRIBUNALS

Claimant: Mr S Sivananthan

Respondent: Royal Mail Group Ltd

Heard at: Watford

On: 29-31 August 2023

Before: Employment Judge Bansal (sitting alone)

Appearances:

For the Claimant: Mr T Deal (Counsel)

For the Respondent: Mr R Chaudhry (Solicitor Advocate)

JUDGMENT having been given orally at the hearing and sent to the parties on 3 October 2023 these written reasons are provided at the request made by the claimant in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

Introduction

1. The claimant was employed by the respondent as a Postal Worker from 25 March 2002 to 1 July 2021, when he was summarily dismissed for gross misconduct.
2. The claimant contacted ACAS on 28 July 2021, and an early conciliation certificate was issued on 6 September 2021.
3. The claimant presented a Claim Form (ET1) on 4 October 2021, making complaints for unfair dismissal, sex discrimination, age discrimination, and notice pay/wrongful dismissal. The respondent submitted a response (ET3) on 23 November 2021 contesting the complaints and contending the claimant was fairly dismissed for sending unsolicited mail to colleagues..
4. The complaints of age and sex discrimination were withdrawn by the claimant by email dated 7 March 2022. A Judgment confirming this withdrawal was issued on 4 April 2022.
5. At a Preliminary Case Management Hearing held on 14 September 2022, Employment Judge Maxwell determined the legal issues to be determined; made case management orders and listed the hearing date.

The Hearing

6. At this hearing the claimant was represented by Mr Deal of Counsel and the respondent by Mr R Chaudhry Solicitor Advocate.
7. The Tribunal was presented with an agreed bundle of 164 pages.
8. I heard evidence from the claimant who provided a witness statement and was cross examined. On the first day of the hearing the claimant was provided with the assistance of a Tamil speaking interpreter. Unfortunately, on the second day, the Tribunal was unable to provide an interpreter. In discussion the claimant confirmed he wanted to proceed with the hearing and was content to continue without an Interpreter. He confirmed he was able to understand but may require questions to be repeated. I noted from the notes of the disciplinary process the claimant did not request an interpreter and chose not to be accompanied. In Tribunal, I observed the claimant had a good command of the English language. The claimant explained he had a hearing impairment. To assist the claimant, the parties representatives swapped their seating during questioning of the claimant, and also spoke loudly so that the claimant was able to hear clearly what was being said, and follow the hearing. claimant was properly. During the hearing the claimant did not complain about any hearing issues or not being able to follow the proceedings.
9. The Respondent called Mr Haffenden (Dismissing Officer) and Mr Joe Miranda (Appeal Officer). Both witnesses provided written statements upon which they were cross examined. I also asked questions of the witnesses by way of clarification.
10. At the conclusion of the parties' evidence, both representatives made their submissions, following which I delivered my judgment orally.

List of issues

11. The issues to be determined by the Tribunal are as set out below. These were agreed by both representatives, although Mr Deal clarified that the point being taken about the investigation process related to the lack of investigation into the use of the respondent's envelope which was viewed as theft of their stationary. Further, he confirmed that if the claimant is successful he would be seeking reinstatement as opposed to compensation.

Unfair dismissal

- 11.1 What was the reason or principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1)&(2) of the Employment Rights Act 1996 ("ERA")

The respondent asserts the reason was conduct, which is a potentially fair reason. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

- 11.2 If the reason was conduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

- 11.2.1 there were reasonable grounds for that belief;
- 11.2.2 at the time the belief was formed the respondent had carried out a reasonable investigation;
- 11.2.3 the respondent otherwise acted in a procedurally fair manner;
- 11.2.4 dismissal was within the range of reasonable responses.

12. The points taken by the claimant on fairness are that the respondent;

- 12.1 took no action on his prior complaints of bullying;
- 12.2 should have made further enquiry into where the envelopes came from;
- 12.3 should have looked at his employment record, seen his complaints about bullying and then asked him whether his conduct was related to that;
- 12.4 should have asked him about his mental health and whether he was suffering with depression or another mental health issue;
- 12.5 attached insufficient weight to his;
 - a. good service;
 - b. long service;
 - c. apology.
- 12.6 imposed an excessive sanction.

Wrongful dismissal/Notice pay

- 13. What was the claimant's notice period?
- 14. Was the claimant paid for that notice period?
- 15. If not, was the claimant guilty of gross misconduct (doing something so serious that the respondent was entitled to dismiss without notice)?

Remedy for unfair dismissal

16 To what remedy or remedies is the claimant entitled.

Findings of fact

- 17. Having considered all of the evidence, on the balance of probabilities I have made the following findings of fact. Any reference to a page number is to the relevant page number in the bundle.
- 18. The respondent is an international business, essentially providing a postal service. It employs in excess of 130,000 employees.
- 19. The claimant commenced his employment with the respondent on 25th March 2002 as Postal Worker, based at Home Counties North Mail Centre. On his appointment on 25th March 2002 the claimant was provided with a statement of his main terms and conditions of employment which he duly signed.(p39-43)
- 20. In particular, Para 17 provides "*the Company has a conduct code to which you will be subject. If necessary this document may be inspected on request to your Personnel section via your line manager.*"(p42)
It also states – "If you have a grievance relating to your employment you may invoke the grievance procedure by application initially to your line manager".

21. At all material times, the claimant's employment was subject to the respondents code of business standards and conduct code. This code sets out the standards of behaviour expected of all employees in the course of their employment. (58-68)
22. In particular, the Code provides;
 - a. All employees are required to follow the business standards and any employee breaking any of these business standards may be dealt with under the Conduct Policy and any finding of misconduct could result in action up to and including dismissal. (p59)
 - b. All employees are required to be open honest and polite towards each other, not to abuse or offend others; or take part in, encourage or condone bullying, intimidation harassment, unlawful discrimination or abuse of any kind to anyone whether a colleague customer supplier or member of the public. (p67)

The Respondent's Conduct Policy

23. The policy outlines the approach that will be taken even if an employee does not meet the expected standards of conduct and behaviour. (83-88) In essence, this Policy sets out the respondent's Disciplinary policy and procedures.

In particular, the Policy provides,

- No conduct action will be taken against an employee until the case has been fully investigated.
 - No employee will be dismissed for a first breach of conduct, except in the case of gross misconduct, when the penalty will normally be dismissal without notice or payment in lieu of notice.
 - Notification of action in line with the conduct policy will only be made when sufficient facts of the case have been determined.
 - Each case will be treated on its merits with conduct action being taken as appropriate to the seriousness of the issue.
 - 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.
24. The code does not provide a definitive list of what constitutes gross misconduct but states that all cases will be dealt with on their merits. (p86)
 25. In addition, the Respondent has a National Conduct Procedure Agreement with Unions CWU & Unite-CMA which is designed to help and encourage all employees to achieve and maintain standards of conduct including behaviour. (p69-81)

The Claimant and his conduct -20 May 2021

26. It is not disputed that until the claimant's summary dismissal on 1 July 2021, he had an unblemished disciplinary record and was considered as a good worker.
27. On or about 20 May 2021, Mr Len Haffenden (Late Shift Manager) was approached by three employees, all being work colleagues of the claimant and informed him of unsolicited mail received. They suspected it was the claimant who had sent the unsolicited mail to them by post. The mail sent included items - a pair of scissors, a Hi Vis jacket, chocolate wrappers and old newspaper. (p125) The employees handed over the envelopes with the items contained in them, to Mr Haffenden for investigation. A photoshot was taken of the items including the two envelopes that were given.
28. The three employees who received this mail were the claimant's work colleagues. In evidence the claimant confirmed the three employees were from the Sri Lankan community, being the same as the claimant.
29. That day, Mr Haffenden instructed Mr James Moran (Late Lead Parcel Manager) to ascertain if it was the claimant who had sent the unsolicited mail. Although the Tribunal did not hear from Mr Moran and neither was there a statement from him, Mr Haffenden confirmed that Mr Moran, reviewed the claimant's personnel file and compared the handwriting on the envelope and ascertained the handwriting matched that of the claimant.
30. It is understood that Mr Moran met with the claimant that day. The claimant explained that Mr Moran had a brief discussion with him at his work station and merely asked him if he had sent any mail to anyone. No details about the mail and to whom these were sent too was given to the claimant. The claimant denied sending any mail.
31. The claimant in evidence said at that time he did not know he had sent any mail to anyone at that time, and just focused on his work. This is surprising in light of the admission made a few days later on 26 May.
32. It does not appear that Mr Moran took a note of this discussion. There was none in the bundle. Mr Haffenden in evidence said it was an informal discussion. Mr Moran informed Mr Haffenden of this discussion, following which Mr Haffenden in accordance with its disciplinary procedure immediately placed the claimant on precautionary suspension on full pay for alleged misconduct. He was informed the reason for this suspension – *“for sending unsolicited mail to work place colleagues”*. This was also confirmed in writing by letter of the same date (i.e 24/05/21). (p89)
33. The claimant said he received the suspension letter on 26 May 2021, and on the same day he wrote to Mr Haffenden acknowledging receipt of the suspension letter, and stating, *“I would like to let you know that I accept the complain that you have mentioned on the letter. So I do apologise for the incident. In addition I do promise you that I will make sure it will never happen again. In this occasion may I please ask you excuse me.*

Your help is greatly appreciated.” (p90)

34. By a letter dated 28 May 2021, Mr Moran invited the claimant to a fact finding meeting scheduled for Wednesday 2nd June 2021. In that letter the Claimant was informed that the meeting is to establish the facts and to determine if any formal action under the conduct policy is required. Further he was advised of his right to be accompanied by a trade union representative or a work colleague. (p91)
35. By letter dated 1 June 2021 to Mr Moran, the claimant confirmed his attendance at the scheduled meeting, and also stated, *“I would like to let you know that I accept the complain and I do apologise for the trouble. In addition I do promise you that it never happened again. In this occasion may I please ask you excuse me. Your help is greatly appreciated.”* (p92)

Fact Finding Meeting – 2/06/2021

36. On 2 June 2021, Mr Moran held the fact finding meeting. Notes of this meeting were taken. A typed version was sent out to the claimant, which he signed on 7 June 2021 to confirm they were a true reflection of the meeting held. (p93-94) In evidence, the claimant did not challenge the accuracy of these signed notes.
37. The agreed notes confirm that the claimant initially denied to Mr Moran sending the unsolicited mail to his work colleagues. The explanation given by the claimant for this denial is that he did not think it was serious and that an investigation would be held. He had decided to own up, as he realised he should not lie to his Managers. Hence, he sent the letters of 26 May & 1 June admitting to the alleged misconduct of sending the unsolicited mail.
38. The claimant did not recall the names of the colleagues he sent the mail too, but confirmed they were several. He recalled one of them was a female but he did not know her address. He explained he obtained their personal addresses by walking in the Watford area to find where they lived. I found this surprising in light of the efforts made by the claimant to ascertain the addresses of the employees. To do this he would have known their names in the first instance.
39. In relation to the envelopes, the claimant admitted one envelope was the respondent’s pre-paid envelope he used, which he had received with his annual leave record, and the others he purchased himself.
40. The claimant explained he informed his brother about this, and confirmed that even to him he could not explain the reason why he had sent the unsolicited mail.
41. In reply to a question asked by Mr Moran, “if he was aware of the stress and anxiety this had caused to the individuals”, the claimant replied, *“I understand it and I am aware of it. After I realise, I done wrong I asked my brother who said apologise first and make sure it does not happen again.”* In reply to the question, if he was aware that using Royal Mail envelopes without consent or for non-work purposes is an offence, he replied

"I realise now that it is wrong."

42. At the end of the meeting the claimant was told that as he had admitted to sending the unsolicited mail to other staff and using Royal Mail envelopes he would be interviewed again. He was also informed that he would be sent a copy of these meeting notes which he could amend and return. He was also told about receiving support and to contact Mr Moran if required.
43. Mr Moran passed it to Mr Haffenden to consider further as Mr Moran did not have the level of authority to proceed with this matter. The claimant was informed of this by letter dated 15th June 2021. (p96)
44. On receipt of the papers Mr Haffenden considered the information and was satisfied there was a case to answer. He invited the claimant to a formal conduct meeting scheduled for 25th June 2021 at 4:00 pm at his office. (p96-97). The invite letter set out the offences namely sending unsolicited mail to other employees and using Royal Mail property to send the mail to the employees causing them distress.
45. The claimant was provided with a copy of the fact finding meeting with Mr Moran. There was no other enclosures including no evidence of the envelopes and the items that had been sent, even though these were in the possession of the respondent.
46. The letter also advised the claimant of his right to be accompanied by a Trade Union representative or a work colleague; that he would be given every opportunity to fully explain his actions and present any evidence or points in mitigation; and that his alleged conduct was considered as misconduct which could lead to his dismissal with notice. In evidence Mr Haffenden explained that the reference to "with notice" was an error on his part.

Disciplinary Meeting – 25 June 2021

47. The claimant attended the meeting on 25th June 2021, with Mr Haffenden. The claimant attended on his own, although also in attendance was Mr Quao (Union Representative). The claimant did not ask for his attendance and neither did he object to his presence. In evidence, Mr Haffenden explained he had asked Mr Quao, to attend as an independent witness for both parties. From the notes of this meeting there is evidence that Mr Quao, played no part in the discussion, except as an observer. Notwithstanding the claimant raised no issue with his presence during the process except in his witness statement, nevertheless the Tribunal found Mr Quao attendance unusual in the circumstances, particularly as the claimant was not forewarned.
48. It is noted from the signed notes of the meeting, that it was a relatively short meeting.(p99-100). The notes record that the claimant admitted sending two letters on 26 May & 1 June 2021 admitting to sending the unsolicited mail to his colleagues. Mr Haffenden had accepted the claimant's admission, and did not probe him any further as to why he did this or into any background issues which may have explained his conduct and been of relevance.
49. However, the claimant was given the opportunity to put forward any mitigating circumstances that he wanted to be taken into account before a decision was

made. In reply the claimant confirmed;

- a. he accepted what he had done was serious and that is why he had decided to admit to the offences;
- b. he understood the staff were upset because of his action;
- c. he had spoken to his brother and GP and was advised to apologise;
- d. that he had received hospital treatment but could not find anything wrong with him;
- e. he wanted to apologise for his actions and said he was happy to apologise to the staff involved and to Royal Mail;
- f. he had 19 years' service and that he would like this to be taken into account.

Decision

50. Mr Haffenden adjourned the meeting, and following his consideration he decided to summarily dismiss the claimant for gross misconduct, effective from 1 July 2021. This was confirmed to the claimant by letter dated 30 June 2020. (p101-104)
51. In the bundle, Mr Haffenden disclosed his note marked Deliberations & Conclusions. This sets out his reasoning for his decision. In summary, he was of the view that this was a serious offence and warranted dismissal. He considered the following points;
 - a. the claimant had lied to Mr Moran when first asked about sending the mail;
 - b. the time he took to admit to the offence;
 - c. he did not provide an explanation for sending the unsolicited mail;
 - d. his inability to confirm the names and addresses of the individuals he sent the unsolicited mail despite having their names and addresses to send the mail;
 - e. his lack of empathy for his colleagues who he did not find were caused any distress or upset;
 - f. use of the RM envelope which was theft;
52. In his witness statement, Mr Haffenden, set out his reasoning why he considered the claimant's conduct amounted gross misconduct; He considered the Code of Business Standards & Conduct Policy, which states;
 - a. *In Royal Mail Group, we work together to create a positive and tolerant working environment for everyone. We do this by treating each other politely and with respect by making sure we don't take part in inappropriate behaviour and by keeping to our values at all time.* (p65)
 - b. *You must not act in an intimidating, threatening, derogatory or discriminatory way* (p65)
53. He also considered the Conduct Policy (p86) which provides an example of gross misconduct – “*abusive behaviour to customers or colleagues*” He said he took the view that the claimant's behaviour of sending unsolicited mail to his colleagues was designed to intimidate them and cause distress. This was gross misconduct. In terms of the possible penalties, Mr Haffenden said he considered penalties less than dismissal, even though the claimant did not give any explanation as to why he had singled out the three individuals. In

evidence he said he did consider transferring him to another site, but felt it was inappropriate due to the fear of him repeating his behaviour. He did not consider any other penalty of written warning of any kind, because he viewed his actions serious which had caused stress and anxiety to his colleagues, and that he was not sure that the claimant would not do this again. In his mind the only appropriate penalty that was summary dismissal. The claimant was given the right of appeal.

Appeal

54. By letter dated 2 July 2021, the claimant appealed his dismissal. In his appeal letter he gave no grounds of his appeal. (p106) However, for the appeal hearing he provided a statement and some medical evidence confirming his state of health and the medication he was now taking. (p111-112)
55. In his appeal statement the claimant said it was an error of judgement caused by his state of health both physical and mental. For the first time, he mentioned he had suffered from bullying and harassment from various members of the team and that the explanation for his behaviour was a build-up of anger and frustration combined with his health condition. He felt a thorough investigation would have covered the bullying he had been subject to. He also mentioned for the first time, that an interpreter would have assisted him to explain his actions better than he did. He pointed out that he had a clean workout record for the past 18 years. He believed dismissal was an extreme punishment. He was looking for his job back and was willing to undergo regular supervision. If he could not be re-instated would be willing to consider a change of reason for termination as he did not accept it was gross misconduct.

Appeal Hearing

56. The Appeal was held on 18 August 2021 at a face to face meeting. The appeal was heard by Mr Joe Miranda. He is employed as an Independent Case Manager, having held this role for 11 years.
57. Mr Miranda confirmed that this appeal hearing was re-hearing. this is in accordance with the Respondent's Conduct Code. As Appeals Manager, he had the authority to uphold the original decision, allow the appeal or impose a lesser (but not greater) penalty. Notes of this meeting were taken by hand and a typed copy was provided after the meeting to the claimant for his review. (p129-138).
58. The claimant did not take any representation with him, and on the issue of the interpreter, he was happy to proceed without one, despite Mr Miranda offering to adjourn the meeting. In the meeting, the claimant confirmed as follows;
- a. admitted that the persons he sent the unsolicited mail to were not the individuals who had bullied or harassed him in the past.
 - b. his explanation for sending this unsolicited mail was that he was angry.
 - c. admitted sending the mail to three persons, and recalled the name of one colleague – Mrs Ranjthamalar.
 - d. admitted his error on not paying for the postage on the pre-paid envelope and the envelope to Mrs Rajeswary;

- e. he sent the mail to the three colleagues because he was unhappy with them; one of them had annoyed him and another called him a fucking idiot;
- f. got the addresses of the colleagues from a friend;
- g. accepted he did not report their behaviour to his Manager;
- h. admitted that he lied to Mr Moran because he knew then that it was wrong to send the unsolicited mail;
- i. admitted it was wrong to do what he did;
- j. his brother had told him to accept that he had done wrong and accept the complaint.

Mr Miranda dismissed the appeal and confirmed this by letter dated 24 September 2021. (p145).

59. In the bundle contained a Report of the Appeal prepared by Mr Miranda. (p146-151) it is a comprehensive document setting out the background and investigation; consideration to the claimant's points of appeal; and the reasons for his decision. In his deliberations Mr Miranda referred to the Code, which states, "*employees have the right to have their previous work record, conduct record and any extenuating circumstances fully taken into account.*" He also took account of the Code of Business Standards applicable to all employees, and the fact the code states that 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.
60. Mr Miranda, found the claimant had throughout this case been inconsistent having initially stated that he had not sent anything at all, but then admitting to it; and then later gave various accounts of how he obtained the home addresses including the use of a friend; and why he did this. He believed the claimant's actions were premeditated and malicious. He found his behaviour disturbing and appreciated how this had worried and concerned his colleagues. He did consider an alternative sanction to dismissal given the claimant's length of service and that he was only a few years from retirement. However he considered the seriousness of this conduct which was a serious breach of the Code of Standards and Behaviour, and the impact on the colleagues welfare. He decided not to uphold his appeal.

Relevant Law

61. **Section 98(1) and (2) of Employment Rights Act 1996 ("ERA")** provides that:
- "(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show;
- (a) the reason (or, if more than one, the principal reason) for the dismissal;
 - and (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
- (2) A reason falls within this subsection if it -(b) relates to the conduct of the employee."
62. **Section 98(4) of ERA** provides that:
- "(4) Where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair (having

regard to the reason shown by the employer)

- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) 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."

63. In conduct cases the tribunal must have regard to the test set out in the case of **British Home Stores Ltd -v- Burchell [1978] IRLR 379** EAT, namely:
- (i) did the employer believe that the employee was guilty of misconduct;
 - (ii) did the employer have reasonable grounds for that belief;
 - (iii) had the employer carried out as much investigation into the matter as was reasonable in all the circumstances.
64. The first question goes to the reason for the dismissal. The burden of showing a potentially fair reason is on the employer. The second and third questions go to the question of reasonableness under Section 98(4) ERA and the burden of proof is neutral.
65. It was held in the case of **Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 CA** that the range of reasonable responses test applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason.
66. **In Shrestha v Genesis Housing Association Ltd [2015] EWCA 94** it was made clear that the investigation should be looked at as a whole when assessing the question of reasonableness. I remind myself that it is not for the tribunal to substitute its own view of what was the right course for the employer to adopt. The function of the tribunal 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 (**Iceland Frozen Foods Ltd v Jones 1982 IRLR 439 EAT**).
67. In the case of **Taylor v OCS Group Ltd [2006] EWCA Civ 702** tribunals were reminded they should consider the fairness of the whole of the process. They will determine whether, due to the fairness or unfairness of the procedures adopted the thoroughness or lack of it of the process and the open-mindedness or not of the decision –maker the overall process was fair, notwithstanding any deficiencies at an early stage. Tribunals should consider the procedural issues together with the reason for dismissal. The two impact on each other and the tribunal's task is to decide whether in all the circumstances of the case the employer acted reasonably in treating the reason they have found as a sufficient reason to dismiss.
68. The ACAS Code of Practice :Disciplinary and Grievance Procedures (2015) ('the Code') which tribunals are required to take into account when considering relevant cases states, at Paragraph 5 that 'It is important to carry out necessary investigations of potential disciplinary matters without

unreasonable delay to establish the facts of the case. In some cases this will require the holding of a investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing. 'It also says that in misconduct cases ,where practicable ,different people should carry out the investigation and disciplinary hearings. Paragraph 24 says that 'Disciplinary rules should give examples of acts which the employer regards as acts of gross misconduct .These may vary according to the nature of the organisation and what it does, but might include things such as theft or fraud, physical violence, gross negligence or serious insubordination.' It also states at Paragraph 27 that in relation to appeals that any appeal 'should be dealt with impartially and wherever possible, by a manager who has not previously been involved in the case.'

Wrongful dismissal

69. **Section 3(2) ERA and Article 3 of Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 SI 1994/1623** gives the Tribunal jurisdiction to hear claims for damages for breach of contract of this kind provided the claim arose on termination of the contract of employment and has been brought in time.
70. Subject to any defining terms in the contract of employment, summary dismissal is only permissible if the claimant's conduct amounted to a repudiatory or fundamental breach of contract. The employer must show that the employee behaved in such a way as to fundamentally undermines the employment contract (i.e. it must be repudiatory conduct by the employee going to the root of the contract). The conduct must be a deliberate and wilful contradiction of the contractual terms or amount to gross negligence (a serious dereliction of duty) which undermined trust and confidence.

Analysis and Conclusions

71. I have applied the relevant law to the findings of fact to determine the issues, and have reached the following conclusions.

What was the principal reason for dismissal

72. The respondent has admitted dismissing the claimant on the grounds of conduct. The conduct being;
- (i) sending unsolicited mail to work colleagues;
 - (ii) using the respondent property in the form of the pre-paid envelope(s) to send the items to work colleagues;
73. I conclude the respondent has shown the principal reason for the claimant's dismissal, namely conduct which is a potentially fair reason falling within s98(2)(b) ERA. I am satisfied that the respondent's Business Standards and Personal Behaviour Code with the Conduct Policy provides a code of conduct applicable to all employees and the
74. The claimant admitted the conduct of sending unsolicited mail to three colleagues and by using a pre-paid envelope for sending to one employee. In particular, the claimant confirmed sending the unsolicited mail

by his letter of 26 May & 1 June.

75. Conduct does not have to be blameworthy, culpable, or reprehensible. Misconduct can be deliberate and intentional.
76. It is not necessary for a Tribunal to decide whether misconduct amounts to gross misconduct before it can come to a decision as to whether dismissal for that misconduct was unfair, as unfair dismissal is a statutory concept which considers the reasonableness of the employer's belief.

Did the Respondent have reasonable grounds for its belief.

77. I conclude that both Mr Haffenden and Mr Joe Miranda genuinely believed the claimant was responsible for sending the unsolicited mail. This belief was held on the grounds the writing on the envelopes matched that of the claimant, which the claimant admitted and sending the items.
78. In respect of the use of respondent property (i.e the pre-paid envelope); that belief was reasonably held by Mr Miranda at the appeal hearing, when the claimant admitted it was an error on his part not to have paid for the postage. Given this response, it was reasonable for Mr Miranda to hold the belief that the claimant was aware that he had to pay for his own postage on personal items. However, I accept Mr Miranda's admission that the offence of using the pre-paid envelope for personal use on its own does not constitute gross misconduct.

Reasonable investigation and procedure

79. In assessing the fairness of the dismissal, I had regard to requirements in the Burchell test. I therefore considered the investigation process. The onus is on the respondent to carry out as much investigation as is reasonable before deciding whether dismissal is a reasonable response in the circumstances. The investigation need not be to the standard of a police forensic investigation but must be a reasonable one.
80. On the facts, I am satisfied a reasonable investigation was carried out for the purposes of interviewing the claimant for the fact finding meeting with Mr Moran on 2 June 2021. Mr Moran had checked the claimant's handwriting to the envelopes. This was not disputed. He had taken a photograph of the two envelopes and the items sent. Again the items sent were not disputed by the claimant during the disciplinary process. In this respect what further investigation should have been undertaken given the Claimant's admission, and given the admission what purpose would any further investigation have served.? Mr Deal made the point that there was no statements taken from the employees who received the unsolicited mail, in particular to verify how they had been affected by the unsolicited mail. Whilst I accept it would have been prudent to have done so, the failure to do so does not make this investigation unfair on the facts. It is reasonable for an employer to assume that some upset and distress will be caused to any employee receiving unsolicited mail, in particular which enclosed a scissors.
81. I note that in the disciplinary meeting on 20 June 2021, the claimant acknowledged that the employees were caused upset for which he offered

his apology. In fact in evidence, the claimant was of a different view namely that he did not think the employees were distressed or upset at all.

82. I considered if Mr Haffenden could have made further enquiries in support of his reasons for dismissing the claimant. I agree with Mr Deal, that he should have been more diligent in checking how many pre-paid envelopes were used by the Claimant. Had he done so, he would have noted it was only one; further he should have enquired how he had received the envelope and whether it was common practice within the workplace for employees to use these pre-paid envelopes for their personal use.
83. I conclude looking at the investigation as a whole it was within the range of reasonable responses.

Procedure

84. In terms of the procedure followed, I am satisfied the claimant;
- a. was made aware of the basis of the complaint;
 - b. understood the reason for the investigation and disciplinary action;
 - c. was given full and fair opportunity to make his representations;
 - d. understood the seriousness of the matter;
 - e. was warned that he may face dismissal;
 - f. was given the right to be accompanied;
 - g. was given the right of appeal following his dismissal, which he exercised;
 - h. the appeal was a rehearing which afforded the claimant further opportunity to make his representations;
85. I do, however, find that it would have been advisable for the Respondent to have done the following;
- a. disclosed a copy of the photograph of the items (p125) at the investigation or disciplinary process; or even shown the original items to the claimant;
 - b. not to call in attendance the Union rep at the disciplinary hearing without the agreement of the claimant;
 - c. taken statements from the three employees;
 - d. Mr Miranda should have considered to speak with the three employees to ascertain if there was any issues between the claimant which may have offered any light to the reason why he sent the unsolicited mail to them
86. However, I do not consider these issues to be a material defect in the procedure as they did not cause any unfairness to the claimant or deny him a fair hearing.
87. I therefore conclude that the overall procedure adopted by the respondent was fair.

Dismissal within the range of reasonable responses

88. In accordance with the respondent's Conduct Code & Standards of Behaviour the offence of sending unsolicited mail is a serious offence as it is a form of intimidation and harassment of colleagues. I note the Code does not explicitly list the sending of unsolicited mail or use of respondent's pre-paid envelope as individual offences of gross misconduct.

89. In my Judgment given the seriousness of the claimant's conduct the respondent was entitled to hold the admitted conduct as gross misconduct and to warrant summary dismissal.
90. In the disciplinary process the claimant accepted what he did was wrong. He accepted the seriousness of his actions and apologised. Although in evidence the claimant's evidence was inconsistent – in that;
- he still did not believe he did anything wrong
 - that he had caused any distress or upset to his colleagues;
 - his motivation in doing what he did was to make him feel happy
91. I am satisfied that both Mr Haffenden and in particular Mr Miranda acted reasonably in treating the allegation of sending the unsolicited mail as a sufficient reason for dismissing the claimant.
92. I noted the claimant was a long standing employee with some 19 years of service, and without any previous disciplinary issues, However, it is inconceivable that he was not fully aware of the gravity and consequences of the offence and the upset and he caused by his conduct.
93. There is case law which provide an employee's length of service is a relevant factor when considering summary dismissal. Pause (***Strouthos v London Underground Ltd 20024 IRLR CA***) However, an employees long service can also count against him or her **In Summers v Metropolitan Police Authority ET Case No. 2318747/10** where the employee who worked for the police gave false details when arrested the tribunal stated that the difficulty with the claimants length of service was on the one hand he was rightly argued that she had a long untarnished career on the other hand it was concluded that with her long years of service she really ought to know and indeed did know what was her duty.
94. The claimant, to this Tribunal and in his appeal considered that a written final warning was warranted for his conduct. If a final written warning was merited for the conduct in question it is difficult to see how dismissal could be said to fall outside the range of reasonable responses available to a reasonable employer.
95. On the facts, I find that dismissal fell within the range of options available to a reasonable employer, and that the dismissal fell within the band of reasonable responses in the circumstances.

Wrongful dismissal

96. With regard to the wrongful dismissal claim, I have to determine whether or not, and to what extent, the claimant was in breach of contract by his conduct.
97. I am satisfied the claimant was in breach of contract by doing what he did. The claimant admitted to this conduct as well as there is clear evidence adduced by the respondent to show the breach by the claimant. This proven conduct fundamentally undermined the employment contract. Accordingly, this claim fails.

98. In conclusion, the claimant's complaints fail and are therefore dismissed.

Employment Judge Bansal

Date: 6 March 2024

Judgment sent to the parties on

7 March 2024

For the Tribunal office