EMPLOYMENT TRIBUNALS

Claimant: Mr M Young

Respondent: Royal Mail Group Limited

Heard at: Reading **On:** 10-11 April 2024

Before: Employment Judge Anstis (sitting alone)

Representation
Claimant: Mr D Percival (trade union representative)
Respondent: Mr R Chaudhry (solicitor)

JUDGMENT

The claimant's claims are dismissed.

REASONS

INTRODUCTION

1. These written reasons are produced at the request of the claimant. That request was made at the end of the final hearing.

BACKGROUND

2. The claimant was employed by the respondent at its Aldershot Parcelforce depot as a delivery driver.

3. It was accepted by the respondent that he was one of the best drivers at that depot, and at the time of his dismissal he had more than ten years' service and a clean disciplinary record.

4. The claimant, along with many of his colleagues, was a member of the CWU. In summer 2022 the CWU was in dispute with the respondent, and its members had voted in favour of industrial action including strikes. Those strikes were scheduled to take place in late August and early September 2022.

5. The underlying rights and wrongs of that dispute are not relevant to my decision and I express no view on them.

6. Everyone agrees that feelings were running high in the run up to the strikes. It was a time of considerable stress. Members of the union on strike would lose pay, in support of what they considered to be their long-term future. People may have their own reasons for not striking. Pickets were expected to be in place, and there would be considerable peer pressure, for better or for worse, to support the strike.

7. The respondent had prepared what seems to be a number of briefing notes for managers ahead of the strike. No doubt the union had done the same in respect of its officials and representatives, although I have not seen such material from the union side.

8. It is accepted by both parties that the respondent's standard policies on conduct and use of social media applied throughout the period of industrial action. While Mr Donaghy (a trade union official who gave evidence on behalf of the claimant) seemed to suggest in his witness statement that the notes given to managers by the respondent should have been agreed with the union, there was nothing he could point to in the relevant notes that went beyond the respondent's usual policies.

THE WHATSAPP POSTS

9. In anticipation of the strike, a WhatsApp group under the name "CWU" was established by local union representatives for union members at the Aldershot depot.

10. It has never been in dispute that the claimant posted two messages in that group. The first, timed at 14:42, said "*Fuck Royal Mail*", followed by a "crying with laughter" emoji. The second, timed at 15:19 said "*Maybe they need to choose sides* [two named individuals] *are you for the people or against the people the wrong answer will result in your car being blown up although looking at* [named individual's] *not sure he would be bothered lol.*"

11. The claimant accepts that these two posts were the reason for his dismissal, and that the latter (but not the former) was misconduct. However, he says that (i) both amounted to trade union activities so if the posts were the reason or principal reason for his dismissal his dismissal was automatically unfair and (ii) the latter comment was misconduct, but not gross misconduct and did not justify his dismissal. He said that it was only elevated to gross misconduct and dismissal by virtue of the respondent's policy of adopting a heavy handed and harsh approach to any misconduct linked to the industrial action.

12. Following amendment of the claimant's second claim, his claims are both of unfair dismissal. In legal terms, the questions for me to decide are whether the posts were trade union activities, what the reason for dismissal was and

whether dismissal was within the range of reasonable responses open to an employer in these circumstances.

TRADE UNION ACTIVITY?

13. I will address at the start of this decision the question of whether these posts were "*trade union activity*". S152(1)(b) of the Trade Union and Labour Relations (Consolidation) Act 1992 protects a person who "*had taken part … in the activities of an independent trade union at an appropriate time*". The CWU is an independent trade union. It was the claimant's undisputed evidence that these posts had been made outside working hours, so they would have been "*at an appropriate time*". In making those posts, was he "*participating in the activities of an independent trade union*"?

14. In Brennan v Ellward [1976] IRLR 378 it was said that *"It is necessary in every case to summarise carefully all the acts and facts relied upon as constituting "activities", including as an element (but not the only element) whether he is a representative, and then to decide as a matter of common sense whether such acts taken together constitute the activities of an independent trade union."*

15. The claimant was not a trade union representative and held no position within the union (other than being a member) at the time of the posts.

16. Mr Percival adopted the bold submission that because these posts were in a trade union WhatsApp group they were bound to be participating in the activities of the trade union. His argument was that any post in a trade union WhatsApp group was, by definition, a trade union activity. I do not accept that. It cannot be the case that anything posted in a trade union WhatsApp group is, by definition, a trade union activity. Apart from anything else, this submission went beyond what the claimant or even Mr Donaghy had said in evidence.

17. In response to a question from Mr Chaudhry the claimant was clear that he did not consider what he had done in these posts to be participating in a trade union activity. In argument that followed this, it was recognised by everyone that what the claimant said about this was not the last word on the matter. It might be that he was participating in trade union activity even if he had not realised that. However, it is clearly not a good start to his argument that the claimant himself did not think that he was engaging in trade union activity in making these posts.

18. Mr Donaghy is a trade union official and probably better placed than the claimant to identify what is and is not participating in trade union activity. Mr Donaghy readily accepted that just because it was in the WhatsApp group it did not mean it was trade union activity. His position, which I accept, is that encouraging full participation in a strike or other industrial action is a trade union activity, but making threats or jokes is not.

19. The first half of the claimant's second post is an invitation to take sides, not as such a encouragement for full participation in industrial action. Mr Donaghy suggested that this was a trade union activity as it was essential the same question that had been asked in the ballot on industrial action – but the ballot had taken place and this was not the claimant urging people to participate in a ballot, nor was it urging people to participate in the strike. The second half of the second post was (on the respondent's case) a threat, and (on the claimant's case) a joke. Neither of those are union activities.

20. I accept that participating in trade union activities ought to be given a wide interpretation in order to give proper protection to individuals and their union activities. It is, for instance, not necessary for the union activity to be done on the basis of any official position within the union, nor formally under the banner of official activities. However, a post being in a trade union WhatsApp group does not give it any inherent protection, and I do not see that an encouragement to take sides followed by either a threat or a joke can be considered to be participating in trade union activities.

21. As for the first comment, "*fuck Royal Mail*", I do not see how directing abuse at the employer can be regarded as being participating in the activities of an independent trade union. The position may be different if this had been accompanied by a reasoned critique of the employer's latest proposals (which could fall within trade union activities) but I do not see that simply insulting the employer can be considered as a trade union activity.

22. Neither of the posts that the claimant got into trouble for were participating in the activities of an independent trade union.

TRADE UNION MEMBERSHIP?

23. There was a secondary point under s152(1)(a) about whether this concerned union membership rather than activities. The claimant was a union member, as were many others. Protection of union membership encompasses things that may go with union membership, such as access to union support, but I did not hear any basis on which the claimant's activities could be considered as a part of his union membership. He did not get into trouble because of his union membership.

24. The posts which led to the claimant's dismissal were not participating in the activities of an independent trade union nor was he dismissed for being a member of the union, so the claim of automatic unfair dismissal must be dismissed.

25. There remains the claim of ordinary unfair dismissal, as to which the essential point is whether dismissal was within the range of reasonable responses open to the respondent.

UNFAIR DISMISSAL?

Generally

26. Unfair dismissal is addressed in section 98 of the Employment Rights Act 1996:

> *"(1) In determining … whether the dismissal of an employee is fair or unfair, it is for the employer to show …*
>
> *(a) the reason … for the dismissal …*
>
> *(4) Where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair …*
>
> *(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."*

27. While there was an issue over whether the WhatsApp posts amounted to trade union activity, it has never been in dispute that those posts were the reason for the claimant's dismissal. The dismissal is clearly for a reason related to the claimant's conduct, which is a potentially fair reason.

28. It is well established that in an unfair dismissal case I am not to substitute my own view of matters for the respondent's, nor am I to decide whether I would have dismissed the claimant in these circumstances. There is a "range of reasonable responses" that can be adopted by an employer, and it is only if it is outside that range of reasonable responses that a decision to dismiss will be unfair.

The investigation

29. It is not clear on what date or dates the WhatsApp messages were posted, though it is agreed that it must have been between 17 August and 23 August 2022.

30. The second post was in response to another individual posting about the position of trainee managers. Trainee managers remained as CWU members during their period of training, but presumably were either at or aspiring to managerial grades. The claimant himself recognised that they were in a "*sticky situation*", possibly with loyalties torn between the managerial and union sides of the dispute. The two named individuals were both trainee managers.

31. One of the trainee managers (the one whose car had not been specifically mentioned) immediately complained about this post to his manager. His manager sent him to her manager, Jennifer Burkin. She referred him back to his manager, but before this happened another manager who was with her took photographs of the post or posts that were being complained about.

32. On 23 August 2022 the trainee manager submitted a written complaint in the following terms:

> *"I would like to make a formal complaint over a post that was put on the CWU WhatsApp page from* [the claimant] *where he stated that Myself and* [the other trainee manager] *need to decide if we are for the people or against the people and stating that the wrong answer will result in your car being blown up, I feel disgusted that a remark and threat like this can be made on a Union WhatsApp page to a fellow CWU member and the Rep failing to respond that the message was unacceptable, I feel that this is a threatening and intimidating message and I am very angry and disgusted that it has been put on the group, I have got my own reasons for deciding not to strike on the strike days and feel that my reasons should be respected, I will say that LOL is on the end of the message however I did not find the post funny."*

33. The claimant was suspended from work the next day and remained suspended until his dismissal. A consequence of this was that he never in fact participated in the strikes, as he was suspended from work at the time.

34. The respondent's conduct process began, starting with a "*Informal seek of an explanation*" on 24 August and an invitation to a fact-finding meeting, which was sent on 30 August 2022.

35. In response to this invitation, the claimant wrote a letter saying:

> *"Firstly, I just want to say how terribly sorry I am for the post that I placed on the WhatsApp group.*
>
> *I have had time to reflect on this and I wholly regret my decision to make this post. Under no circumstance did I ever post this with the intention to cause any offence. This was never my intention nor was it meant to cause any harm or intimidation to anyone.*
>
> *I have worked with Parcel Force coming up to 10 years and I have a completely unblemished record and have never been accused of threatening or intimidating anyone during this time so it does come as a huge shock to me that I would be seen as behaving in this manner.*
>
> *I have removed the post now as I have re-read it and can completely understand why this was seen and interpreted as inappropriate. I have*

> *learnt my lesson here and understand that a comment that was posted in jest is not acceptable.*
>
> *Please accept this letter as my sincere and utmost apology*
>
> *I am happy to meet* [the complainant] *face to face to apologise to him directly and explain what happened. I would like to offer him my humblest apologies and resolve this matter. If* [he] *does not wish to meet face to face, then I completely respect and understand this decision. I have however, written a letter of apology to him to explain my actions which I would appreciate you passing on for me."*

The conduct meeting

36. The fact-finding meeting on 2 September progressed to a formal conduct meeting before Ms Burkin on 20 September 2022. The essential facts of the matter – that the claimant made the posts – have never been in dispute and little of significance arises from the disciplinary process itself. The claimant points out that prior to the formal conduct meeting he never received a formal warning that his actions may result in dismissal without notice. This is true, but they were always described as being potentially gross misconduct, which the claimant (or at least the union rep who accompanied him throughout the process) understood could result in dismissal.

37. The claimant has also criticised the early identification of his posts as being threatening and intimidation. It is true that those words were used right from the start, without the addition of "alleged", but I do not consider this to suggest that the respondent had already formed a conclusion on the matter. This was simply a description of the offence that the claimant was to address.

38. It was said by the claimant that too much time had been spent by Ms Burkin in his hearing talking with his union rep about matters that were not relevant to his case. However, he also accepted that there were no additional questions that Ms Burkin should have asked him and nothing more that he wanted to say but had been prevented from saying, so it seems that if this happened it was not to the detriment of his opportunity to participate in the hearing.

Dismissal

39. On 27 October 2022 Ms Burkin wrote to the claimant saying that she had decided that he should be dismissed for "*the use of threatening and intimidating behaviour towards two … colleagues*".

40. Her decision was accompanied by a lengthy report which recited some of the agreed facts and history of the case. In this she says, amongst other things:

> *"I felt that* [the claimant] *displayed an immature approach to the seriousness of the issues, the sincerity of the explanation were of a*

superficial manner the responses to questions were given as though they were the responses I wanted without sincerity...

The complaint received … outlines how [the complainant] *felt after seeing the message and it is the impact on the victim of the reported behaviour which must be considered. Whilst the comment regarding the car being blown up may be possibly comic, though not by* [the complainant]*, it does not rule out that damage may not be inflicted on the vehicle through some other method. For a seemingly intelligent man his aggression towards two of his fellow colleagues that had stated they would not strike due to not being able to afford the loss in earnings is completely unacceptable.*

Whilst I acknowledge the superficial apology, I do not believe [the claimant] *understands the enormity of the damage he has caused with the intimidation, at no point has he given me reason to think that there is any remorse or any reason as to why he would not make similar comments again in the future. I have formed a reasonable belief that the Social Media post amounted to intimidation and a threat to two employees for the simple reason that they had chosen to attend work as they are entitled to do and that the purpose of the message was to influence them in order to make them change their minds."*

She references both the conduct and social media policies and says:

"I appreciate it is easy to make comments on social media but there are risks. It is everyone's responsibility to be fair, kind, respectful and a need to take a responsible approach to fellow employees. Some behaviour is so serious and unacceptable such as the behaviour displayed by [the claimant] *on the CWU WhatsApp group page, of Intimidating and Threatening behaviour towards* [his two colleagues] *has proved. It is about respecting other people's choices, no one knows other people's personal circumstances.*

Our Code of Business standards in regards to personal behaviours is very clear in that all employees:

- *must not intimidate, threaten, or act in a derogatory or discriminatory way*
- *must not behave violently or be abusive to others*
- *must not do or say anything that may harm the business, colleagues or others*

[The claimant's] *action has clearly displayed behaviours against what we expect and also a further comment made 'Fuck Royal Mail' shows that* [he] *has no respect for our Code Of Business standards and I have*

no confidence that his behaviour will change. I appreciate that during industrial action emotions may run high, however there are certain behaviours that the business cannot tolerate and risk a repeat of behaviours.

…

After careful consideration of all the available evidence: Once the strike days are over, we need to return to working together and doing the right thing for our customers, with intimidation and fear between colleagues this will not work and will affect colleagues long term health which I am not prepared as a manager for Parcelforce Worldwide to have this happen in the Aldershot workplace."

41. There was no shortage of material that Mr Chaudhry could refer to to suggest that posts such as the claimant's were in breach of the respondent's policies. Indeed, the claimant's admission of misconduct suggests that he accepts this. The question is whether the decision to dismiss was within the range of reasonable responses open to the employer.

42. On the whole most of the policy references simply say that something should not be done or may lead to conduct proceedings. The conduct policy itself describes "*abusive behaviour to customers or colleagues*" as being gross misconduct. On the face of it, a threat to blow up someone's car would clearly fall within the concept of "*abusive behaviour to … colleagues*".

43. The claimant's consistent position has been that the second post was clearly a joke that could not and should not have been taken by anyone to amount to a threat. The difficulty with that is that it was taken seriously by the complainant, and even if not to be taken directly as a threat to blow up their car, clearly created or conveyed to that individual a sense of menace. The complaint describes it as a threatening and intimidating message and the claimant has never suggested that the complaint was made in bad faith or was not an accurate expression of how the individual felt.

44. Perhaps the most that can be said of this on the claimant's behalf is that the message was so obviously a joke and inoffensive that the complaint against it was a clear overreaction and not a way of reasonably interpreting the message. I do not, however, consider that to be the case. The point of the message was the people including the complainant needed to "pick sides" and there may be violent consequences for them if they pick the wrong side. I do not see that that can be excused away as being a joke. There is clearly a reference to one of the cars being such a wreck that blowing it up would make no difference, but it is not unreasonable to treat the message as a threat. The claimant has explained that he would have no intention of threatening a friend and work colleague of ten years, but that was not the way it was seen, and it was not unreasonable for the complainant or Ms Burkin to take this as a threat and gross misconduct under the conduct policy.

Other arguments about fairness

45. There are a number of other points to consider.

46. First, there is the question of remorse. I had been concerned about this point since it seemed to me that the early letter from the claimant did show remorse, but Ms Burkin and the appeal officer both explained how they did not see things that way, and in his cross-examination of the claimant Mr Chaudhry established that the apology offered in that was in fact quite limited. The claimant still considered that he had done nothing wrong in posting what he saw as a joke.

47. Second, there is the question of whether this was an exaggerated sanction pursuant to a policy of making an example of people who conducted misconduct in the context of industrial action.

48. This relies on the following: (i) a large number of people were disciplined for misconduct arising in the context of industrial action – many were dismissed, (ii) at a collective level it was agreed between the respondent and the CWU that such cases would be referred to a review chaired by Lord Falconer. Sample cases were submitted and in many cases Lord Falconer reduced the sanction previously applied by the respondent. As a result of this the respondent agreed that rather than put the remaining cases to Lord Falconer sanctions would be reduced in all cases that were subject to this procedure, and financial compensation would be paid.

49. Although in theory the claimant's dismissal could have been subject to this process for a number of reasons (including that it arose relatively early, prior to the industrial action) it was not.

50. Mr Percival suggested that there were two points that arose from that. Lord Falconer overturning most of the cases submitted to him suggested that the respondent had been heavy handed, and their decision to reduce the sanction in all other cases could be seen as an admission that this heavy handedness had been exposed by Lord Falconer.

51. Mr Chaudhry did not dispute that this was, broadly, the outcome of the agreed process before Lord Falconer, but it was his position that this did not show any underlying heavy-handedness or have any particular reference to the claimant's dismissal, which was an individual matter.

52. It is clearly the case that Lord Falconer found that the sanction that had been imposed in most cases was too harsh. I do not think it is said by the claimant that Lord Falconer found that there had been a deliberate policy of harsh penalties. There is always going to be a limit as to how far decisions on dismissals of others can be related to any other particular case, but so far as this is concerned I find: (i) it is not clear by reference to what standard Lord Falconer was addressing the fairness of the sanction. I am to address it by

reference to the range of reasonable responses. It is not clear whether Lord Falconer did this or applied some other standard of fairness. (ii) Although Mr Percival pointed out that statements by Mr Donaghy about general policies adopted by the respondent had not been challenged in cross-examination, there was no first-hand evidence of any policies or instructions given to managers to be particularly harsh.

53. While acknowledging Lord Falconer's findings, I do not find that they lead to the conclusion contended for by the claimant – that there was a deliberate policy to impose harsher than usual sanctions for acts of misconduct in the context of industrial action. In particular, they do not lead to the conclusion that the decision to dismiss the claimant was outside the range of reasonable responses that an employer could adopt.

54. This is clearly a matter of long-standing contention between the parties. For the avoidance of doubt, my findings on this point do not bind any future tribunal addressing a different case.

The appeal

55. There was an appeal. A relevant point that arose on appeal was the claimant providing to the appeal officer, via his union representative, copies of offensive posts on another work-related WhatsApp group. These were said to have been made by managers, including the complainant.

56. The point made by Mr Percival on this was a matter of consistency. The claimant's breach of the social media policy and other policies was treated more seriously than other breaches of such policies.

57. As I expressed during this hearing, arguments that others have not been disciplined for similar offences can be somewhat difficult. It has not been suggested that anyone in authority in the respondent was aware of this group before the claimant mentioned it. No-one had complained, whereas there had been a complaint in the claimant's case.

58. The appeal officer fairly said that now that the point had arisen there was little more that she could do than refer it back to local management for consideration. The claimant's understanding was that one person had been dismissed but it seemed to be his position that more than one person should be dismissed.

59. Referring to the misconduct of others that the respondent was unaware of at the time of a claimant's dismissal is rarely decisive on questions of fairness. It would be odd if the appeal officer had decided that in the light of others having been in equal breach of the policy the right approach was that the claimant's sanction should be reduced (it is not said that it should be removed altogether). Far more likely is that, depending on the circumstances, others should be put through disciplinary proceedings. It appears that at least one

person was and was dismissed. I am not aware of the full circumstances of that case, but it does not suggest to me that the claimant's dismissal was unfair.

CONCLUSION

60. The claimant made WhatsApp posts that he should not have done. They were in breach of the respondent's policies. He made a threat of violence against colleagues. This was not unreasonably seen as a threat of violence by a colleague and is not excused by being presented in a jokey manner. Making threats of this nature is described as being potentially gross misconduct. The procedure used to investigate this matter was not unfair. Some employers may have chosen to give a warning for this, but dismissal was within the range of reasonable responses open to the respondent and the claimant's dismissal was not unfair.

Employment Judge Anstis
Date: 12 April 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON

14/05/2024

FOR THE TRIBUNAL OFFICE