EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000166/2024

Final hearing
held in Edinburgh
on 8 and 9 July 2024

Employment Judge A Jones

Mr C Smart	**Claimant** **In person**
Royal Mail Group Limited	**Represented by** **Mr Gibson, solicitor**

JUDGMENT

The claimant was not unfairly dismissed and his claim fails.

Background

1. The claimant lodged a claim of unfair dismissal on 19 February 2024. The respondent's position was that the claimant had been dismissed for a potentially fair reason being conduct and that it had followed a fair procedure. Parties lodged a joint bundle of documents. The respondent called three witnesses, Mr Christie who was the claimant's line manager at the time of the issues leading to his dismissal, Mr McLuckie who took the

decision to dismiss the claimant and Mr Walker who dealt with the claimant's appeal against dismissal. The claimant gave evidence on his own behalf. The respondent provided submissions in writing and the claimant made brief oral submissions.

Issues to determine

2. The issues to determine at this hearing were:

   i. Did the respondent establish a potentially fair reason for the claimant's dismissal.
   ii. If so, was the claimant's dismissal fair within the terms of section 98(4) Employment Rights Act 1996 ('ERA')
   iii. If the claimant was unfairly dismissed what if any compensation should be awarded to him.

Relevant law

3. ERA provides that conduct is a potentially fair reason for dismissal. If a respondent establishes a potentially fair reason for dismissal then in order to determine whether a claimant has been fairly or unfairly dismissed, a Tribunal should have regard to section 98(4) ERA which provides that, where an employer can show a potentially fair reason for dismissal:

> "... 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."

Findings in fact

4. There was very little dispute on the facts, the main issue was whether the claimant had been entitled to withdraw his labour and whether dismissal was the appropriate sanction. Having listened to the evidence of the witnesses, all of whom gave their evidence in a straightforward manner, and considered the documents to which reference was made by the parties, the Tribunal found the following facts to have been established.
5. The claimant was employed as a postal worker by the respondent from 6 February 1995 until his summary dismissal on 31 January 2024.
6. The claimant's contract of employment provided that collective agreements reached through collective bargaining between his employer and the recognised trade union, which was the Communications Workers Union ('CWU'), would be incorporated into his contract of employment.
7. During the course of his employment, various collective agreements were reached between the respondent and the CWU all of which altered the claimant's terms and conditions of employment.
8. The CWU and the respondent reached a collective agreement called the Business Recovery, Transformation and Growth Agreement in around July 2023. This agreement included payment of a one off bonus, a pay rise, changes to attendance procedures and some operational changes. The agreement followed a ballot which took place on 11 July 2023 in which members of the union voted in favour of acceptance of that agreement.
9. The claimant wrote to a manager on 17 July asking for clarification on the impact of the changes on his position. Mr Morrison, to whom the claimant had written, responded on 31 July indicating that the respondent would continue to publish communications to employees on agreements reached with the union to allow them to understand the individual impact of changes.
10. Although staff were advised by the respondent that the attendance standard changes which were to be implemented as a result of the agreement, were to take effect from 1 August, these changes were subsequently delayed pending further discussion between the respondent and the CWU.

11. The claimant wrote to his line manager on 2 August indicating that he was now working under protest pending clarification of the changes to his terms and conditions.
12. There was a change in line management at the claimant's branch and the claimant contacted his new line manager Mr Christie on 25 November 2023 to inform him that he intended to withdraw his labour and would not be attending for work. Mr Christie urged the claimant to attend work as required.
13. The claimant was due to return from annual leave on 28 November 2023 and did not attend work on that day or make any further contact with the respondent.
14. Mr Christie had arranged a meeting to take place between the claimant and Mr Weeks who was Mr Christie's line manger to discuss the claimant's concerns on 28 November the claimant did not attend that meeting and informed Mr Christie that he had slept in.
15. Mr Christie wrote to the claimant on 30 November indicating that he was very concerned that there had been no further contact form the claimant and that he had not attended work. The claimant was informed that his absence was unauthorised. He was asked to contact Mr Christie immediately to discuss the matter.
16. Having received no further contact from the claimant, Mr Christie wrote to him again on 4 December and said that there had been an unsuccessful attempt to contact the claimant by phone on 29 November. He was told that if there was no explanation for his absence within three working days, or he provided an unsatisfactory explanation, this would lead to action being taken against him under the conduct policy which could result in his dismissal. The claimant was also advised that his pay had been stopped.
17. The claimant then wrote to Mr Christie by email on 4 December. He concluded the email by stating "At this point, I believe the whole working relationship between myself and Royal Mail has eroded over time and is now irretrievably broken. I'm not sure how we move beyond that, but as ever, I remain open to discussion in an attempt to resolve the situation."

18. Mr Christie spoke to the claimant by phone on 5 December when he informed him that the correct procedure was for him to return to work and raise a grievance regarding his concerns.
19. The claimant was subsequently invited to a fact finding meeting with Mr Christie. The meeting took place on 12 December and was also attended by a CWU unit representative. At that meeting Mr Christie reiterated that the correct procedure was for the claimant to return to work and raise a grievance. The claimant responded saying that "I think we are past this point." At the end of the meeting the claimant handed Mr Christie his ID badge and locker key and advised him that he probably wouldn't need these anymore. He stated that he would like the company to agree a mutual termination of employment with him.
20. The notes of this meeting were subsequently sent to the claimant, who proposed amendments which were accepted by Mr Christie.
21. The claimant did not return to work after this meeting and Mr Christie wrote to him on 15 January stating that the case had now been referred to a higher authority manager for consideration as the potential penalty was outwith his level of authority at that time.
22. Mr McLuckie was appointed to deal with the issue and wrote to the claimant on 15 January inviting him to a formal conduct meeting on 22 January 2024. The letter informed the claimant that his failure to attend work was being considered as gross misconduct.
23. The claimant replied indicating that he would not attend the meeting as there was a "previous working history" with Mr McLuckie and he didn't consider him to be neutral. The claimant had worked with Mr McLuckie briefly around 7 years previously.
24. Mr McLuckie took advice from HR who indicated that he should proceed to deal with this issue.
25. The claimant did not attend the meeting on 22 January and Mr McLuckie wrote to the claimant inviting him to a further meeting on 26 January.
26. The claimant responded on 23 January indicating he had not failed to attend the previous meeting and insisted that another hearing manager be

appointed. He said once that had been confirmed, he'd be happy to attend any such meeting.

27. Mr McLuckie then wrote to the claimant on 26 January indicating that he had gone ahead with an investigation meeting and wished to invite him to a further meeting to discuss the decision he had reached following his investigations. The meeting was to take place on 31 January.

28. The claimant did not attend that meeting and Mr McLuckie wrote to the claimant by letter of 31 January indicating that he had decided to summarily dismiss the claimant because of his unauthorised absence from work since 28 November 2023. Mr McLuckie included a report setting out the basis for his decision.

29. The claimant appealed against the decision on 1 February.

30. Mr Walker, who is an independent case manager employed by the respondent was appointed to deal with the appeal. He wrote to the claimant inviting him to attend a meeting on 8 March, which would be held remotely on Teams.

31. The claimant attended that meeting and Mr Walker advised the claimant that the hearing would be a rehearing of his case. Notes of the meeting were taken which were provided to the claimant and the claimant's suggested amendments to those notes were accepted by Mr Walker. During the course of the appeal hearing, the claimant indicated that he did not wish to be reinstated to his previous role and was seeking compensation from the respondent.

32. Mr Walker then conducted investigations into the matter, considered the issue afresh and issued a decision to the claimant on 12 April indicating that the claimant's appeal against dismissal had not been upheld.

Discussion and decision

33. There was little dispute on the facts of the case. The claimant's position was that he had withdrawn his labour as he felt there was no option left open to him. The respondent's position was that if the claimant had returned to work

then he could have submitted a grievance and his concerns could have been addressed.

34. There was no dispute that the claimant had made clear he did not wish to return to work for the respondent after he withdrew his labour. He said he did not resign at that time because he did not have a copy of the collective agreement and therefore could not resign. While the claimant indicted that he had received advice to that effect, the Tribunal found the position adopted by him to be very surprising.

35. There was no dispute that the claimant had been a model employee until the events leading to his dismissal. He had sought voluntary redundancy previously and not been accepted for that. It appeared that he remained aggrieved that he had not been able to benefit from a voluntary redundancy package. The claimant had long service with the respondent and it appeared that he did not feel he could continue working for them because he perceived that the ways of working expected of him were very different from when he started in the role. While the Tribunal had sympathy with the claimant's point of view, in that he was not clear what changes were going to take effect and when, nonetheless that did not entitle him to simply stop attending work. He was informed on a number of occasions that he should return and pursue a grievance, but for reasons which were unclear, he chose not to do so. That is regrettable and it is clear that the respondent dismissed the claimant as a last resort and was put in a position where it had no option but to dismiss him. The claimant would not return to work, had handed in his ID card and made clear that he felt that the relationship had irretrievably broken down. He appeared to expect the respondent to offer him some compensation and engage in a discussion on how to terminate the claimant's employment on a mutual basis. However, the respondent was under no obligation to adopt such an approach.

36. The claimant was dismissed by reason of his conduct. The Tribunal accepted without hesitation, that where an employee simply does not attend work and does not pursue a grievance or other internal procedures, then his absence from work is almost certainly going to amount to gross misconduct.

37. The respondent followed a fair procedure in relation to the termination of the claimant's employment. It sought to encourage him to return to work and deal with matters from there, but he refused to do so. It gave him an opportunity to explain his position. While the claimant indicated that Mr McLuckie was not impartial, the Tribunal did not accept that this was the case. The issue which concerned the claimant had occurred many years previously and there had been no grievance or disciplinary action involved. In any event, the claimant made clear at the appeal stage that even if another manager had been appointed instead of Mr McLuckie, then he would still likely be int eh same position.

38. Moreover, the claimant's appeal against dismissal was a rehearing. It was clear that Mr Walker dealt with the issue both thoroughly and impartially and even if it could be said that Mr McLuckie should not have dealt with the issue (and the Tribunal did not accept that to be the case) any procedural irregularity was remedied by the rehearing which was dealt with by Mr Walker.

39. In all of these circumstances, the claimant was dismissed for a potentially fair reason being conduct as a result of his continued unauthorised absence from work and the respondent's actions both in terms of the procedure followed and the decision to dismiss fell within the band of reasonable responses. As such the claimant's claim is bound to fail.

Employment Judge:	**A Jones**
Date of Judgment:	**11 July 2024**
Entered in register:	**11 July 2024**
and copied to parties	11/07/2024