EMPLOYMENT TRIBUNALS

Claimant: **Mr C Roche**

Respondent: **Royal Mail Group Ltd**

Heard at: London Central (by CVP) **On:** 1 & 2 August 2024

Before: Employment Judge Emery

REPRESENTATION:

Claimant: Mr C Feeny (counsel)
Respondent: Mr R Chaudhry (solicitor)

JUDGMENT

The judgment of the Tribunal is as follows:

1. The complaint of unfair dismissal is well-founded. The claimant was unfairly dismissed.

REASONS

The Issues

1. The claimant claims unfair dismissal. The respondent argues that the claimant was dismissed for gross misconduct, namely a violent act towards a coworker, meriting immediate dismissal without notice. The claimant says that the respondent unreasonably failed to take into account his length of service, the significant stress he was suffering related to his caring responsibilities; he says the incident was not an act of violence as characterised by the respondent; he says that the industrial action which was then occurring led to management taking a harsher approach than it has done in similar cases.

2. The Issues are set out in the Case Management order dated 25 April 2024:

    a. Were their reasonable grounds for the belief that the claimant had committed gross misconduct
    b. At the time the belief was formed had the respondent carried out a reasonable investigation
    c. The respondent otherwise acted in a procedurally fair manner
    d. Dismissal was within the range of reasonable responses.

Witnesses

3. For the respondent I heard evidence from

    a. Mr Tipler, at the time the Operations Performance Leader SW London, who was the dismissing manager
    b. Ms Melanie Birch, Operations Development Director based at Farringdon, who heard the claimant's appeal against dismissal.

4. I then heard evidence from the claimant and from his Union rep at the investigation hearing, Mr Richard Blackwell.

5. Before hearing evidence from witnesses, I spent two hours reading the witness statements and the documents referred to in the statements.

6. The judgment does not recite all the evidence I heard, instead it is confined to findings to the evidence relevant to the issues in this case. It incorporates quotes from my notes of evidence; these are not verbatim quotes but are instead a detailed summary of the answers given to questions. Where there is a page number reference after a quote, this is a quote from a document.

The facts

7. At the date of his dismissal the claimant had worked continuously for the respondent for 44 years, starting at age 16. He had, which is uncontested, an "unblemished disciplinary record extending over 44 years" until the incident which led to his dismissal. Throughout his employment he received commendations from managers because of his good service and received awards for his good driving.

8. The claimant has had caring responsibilities for his brother, who suffers from dementia, for a number of years. His brother lives alone, and the claimant visits him every day and cleans, cooks, takes him to appointments, and generally looks after him. He has lasting power of attorney over his brother's affairs.

9. On 8 February 2023 at 9.30 am the claimant called his brother, who sounded confused and upset. The claimant recognised these symptoms as serious – as he put it in his statement for the disciplinary process, the last time his brother was this

poorly he had needed to call 999 and his brother had "ended up in hospital" (134). The claimant was worried, and he "rushed" to finish his round so he could leave work and check on his brother.

10. On returning to the depot, the claimant informed his manager Mr Haughton he would have to leave work explaining the reasons. This was agreed. Mr Haughton and other managers were aware of his caring responsibilities for his brother.

11. The Earls Court office where the claimant worked has limited parking for private vehicles. It was the norm for cars to park in front of each other, meaning many cars will always be blocked in. The depot had an informal system by which employees left their car keys in the vehicle or in the depot, meaning cars could be moved to allow blocked cars to exit.

12. At 11.45am the claimant went to leave the depot and found his car had been blocked. The car blocking him, belonging to Mr A, was locked, he checked the depot there were no keys. He asked a colleague and then Mr Haughton to call Mr A, neither were able to contact him. In a handwritten note written two days later, Mr Haughton says he told the claimant Mr A would be back at around 12.30.

13. Mr Haughton's note records that he watched the claimant through a window trying to push and move two cars "but got no joy with that." The claimant's evidence is that he was 'increasingly frantic' at this point.

14. At around 12.30 Mr A returned to the deport in a post office van. Cctv shows the van stopping next to the claimant, who is gesticulating. The driver's window was down, and the cctv shows the claimant leaning inside and grabbing the top of Mr A's fleece jacket for a few seconds. A member of staff standing behind the claimant intervenes, and the claimant steps away, still clearly angry and speaking and pointing at Mr A. The claimant then attempts to walk back to Mr A's van, but his colleague again intervenes, and the claimant walked to his car and gets in. Mr A then moved his car and the claimant drove out. The incident lasts about 20 seconds.

15. Mr Haughton was told about this incident, being told that the claimant "had just had a go" at Mr A. Mr Haughton spoke to Mr A and was told that the claimant "had a go at him and grabbed him…". Mr Haughton then looked at the cctv, his note records that the cctv showed the claimant "waving his hands … he then lunged and grabbed [Mr A] quite aggressively." (Mr Haughton's note dated 10 February 2023, page 125).

16. Mr Whelan, the colleague who intervened, provided a statement – he says that the claimant "grabbed [Mr A's] jacket saying I had hospital you can't block people in and take your keys. I pulled [the claimant] away and he turned and said you can't block people in" before getting in his car (118).

17. The claimant was spoken to when he came into work on 9 February by Mr Haughton. Mr Haughton's note records that the claimant said "nothing had happened". He also says that the claimant refused to leave work when told he was being suspended, to which the claimant replied all staff would walk out; he says that the claimant repeatedly refused to leave work until being told the police would be called (125-6) (the 9 February allegations).

18. In his evidence, the claimant denies saying 'nothing happened' or that he refused to leave work. He says that he said "I am saying nothing until I have union rep." The respondent's case is that the claimant did not mention a union rep.

19. The claimant was given a letter saying that he was being suspended from work for alleged violent behaviour and invited to a fact-finding meeting, he was told he could be accompanied by a colleague or a union rep (122-3). Subsequent letters confirming and extending his suspension all referred to "alleged violent behaviour".

20. Mr A provided a statement on 10 February 2023. This stated that the claimant came towards him "aggressively, he grabbed my collar and [shook] me, shouted at me, saying 'why did you block me' … a few times. I said 'sorry'. He shouted repeatedly don't do it again". He said that he the claimant removed his hand then grabbed his collar again, repeatedly saying why you block me, don't do it again "…I was shocked…" (127).

21. The claimant's union rep, Mr Blackwell was shown the cctv of the incident by Mr Haughton on 10 February. The claimant was never shown this footage at any stage of the disciplinary process, disciplinary hearing or appeal.

22. The claimant wrote a statement in advance of a 'fact finding discussion'. This states: "Firstly I would like to apologise for my actions…".

23. The statement says the claimant has never put his hand on anyone at work before, and he asked for the issue with his brother to be taken into consideration. He referred to the call with his brother, his caring responsibilities, the lasting power of attorney. He says the call with his brother "was not great and very worrying…". He says that by the time he spoke to Mr Haughton, "my anxiety was multiplying … and it was affecting my mental state." He described trying to push the cars, as Mr Haughton had observed. He said when this failed "all options" of getting to his brother had gone, "and my mind was all over the place." He says that by the time Mr A returned "my emotions, anxiety, stress, frustrations and my mental state … took over". He says he "reached in and grabbed his collar and started shouting at him." He says that after his colleague said "leave it" he left the window but was still shouting at Mr A. He says that he was "angry but not violent." (134-136).

24. The fact-finding discussion took place on 20 February 2023. The claimant described again what had happened, including trying to push the vehicle, his

interactions with Mr Haughton; the notes record him saying “my anxiety was getting worse and so was my stress levels…” (138-9).

25. Mr Haughton’s view was that a potential sanction was dismissal, outside of his authority, the case was passed to Mr Tipler who on 23 March 2023 invited the claimant to a formal conduct meeting to address an allegation of “alleged aggressive behaviour”. He was told his clear record would be taken into consideration, but that one outcome could be dismissal without notice (145-6).

26. The claimant was sent the following documents in advance of the conduct meeting: the fact-finding meeting notes, statement of Mr A, statement from a passenger in Mr A’s van and a statement of the colleague who had intervened. The claimant’s own statement was not included, nor was Mr Haughton’s statement.

27. The meeting commenced with Mr Tipler recording the incident as grabbing another member of staff “in a violent manner”. The claimant reiterated his prior statements, he accepts he grabbed Mr A’s collar and shouted at him. The claimant was asked whether he had thought about getting a lift, or a taxi instead of waiting for Mr A to return. The claimant accepted he had not thought of this.

28. The claimant was asked if he wanted to say anything in mitigation, and referred again to his brother’s condition, “I look after him daily and at weekends, he needs prompting to do everything in life, I feed him…”. He referred to documents he had provided on his brother’s medical condition and power of attorney.

29. The claimant said “I have stated counselling … first class support over my mental health issues regarding my brother. I have been a postman for 45 years never been accused of violence I have never put my hand on anyone…”.

30. His rep referred to the claimant’s frustration and anxiety, the fact that this was “totally out of character” and referred to a supportive petition of colleagues also provided by the claimant at this meeting. He referred to the claimant’s apology, that he had taken responsibility.

31. The claimant was dismissed without notice for gross misconduct on 29 March 2023; the report (167-70) states:

    a. The claimant’s brother had dementia and “was distressed”
    b. The claimant “felt he needed to go and see his brother”
    c. He knew his car was blocked in at 9.30am, he had “ample” time to find alternative means of travel “but chose not to”
    d. The claimant shouted at Mr A and grabbed him by the collar, a colleague intervened
    e. The next day the claimant said ‘nothing had happened’

f. The claimant refused to go home when asked to do so 3 times, saying other staff would walk out – "demonstrating a lack of respect for his colleagues, his manager or the business."
g. The claimant only left when threatened with the police being called
h. If his colleague had not intervened "the outcome would have been far worse due to the nature of [the claimant's] attack"
i. It was only when the claimant became aware of cctv footage and witness statements that he changed his story as "… he was as he was unable to deny his attack, demonstrates [the claimant's] dishonest nature."

32. At this stage I note the following: of the findings by Mr Tipler above at (e), (f), (g), (h) and (i) - the 9 February allegations - no questions were asked of the claimant on these points at the investigation interview or disciplinary hearing. The claimant had not seen Mr Haughton's statement and so was unaware these allegations had been made.

33. I also note that although the decision contains a chronology of events, including when statements were provided, the claimant's statement does not appear in this chronology and the body of the report does not refer to this statement or its contents.

34. The decision records that Mr Tipler considered the claimant's mitigation, but this did not provide a "justifiable explanation as to why he would attack another member of staff, lie to his manager, refuse a reasonable request and incite other members of staff. As an employer … [the respondent] cannot continue to employ someone who shows behaviour traits that are in breach of the business standards when they are unable and/or unwilling to understand the seriousness of those actions."

35. Mr Tipler states that a penalty lower than dismissal is not appropriate as the claimant's actions against Mr A, his failure to initially admit to them, his failure to follow a reasonable request from his manager to leave the premises, and comments regarding encouraging other members of staff to walk out "lead me to believe that [the claimant's] behaviours are beyond correcting."

36. The report concludes that the claimant's "violent actions, threats, dishonesty, failure to respect his manager's request and his encouragement to other members of staff to walk out is deemed such a serious offence ... clear gross misconduct, that I feel any penalty less than dismissal simply would not send out the right message to our own staff and managers."

37. Mr Tipler states that the claimant's 45 years' service and clear conduct record were taken into consideration, but the "seriousness" of this conduct means that a lesser penalty is not appropriate. "Therefore, proven gross misconduct of this type has only one result and that is summary dismissal, this is because the trust has unequivocally been lost … concerning his total lack of ability to make the right

decisions, violent conduct and dishonesty. This leaves me little option but to summarily dismiss…".

38. In his evidence Mr Tipler accepts that the claimant may not have been sent Mr Haughton's handwritten statement, he accepts it is not listed as an attachment to the disciplinary invitation at 146; he accepts that he used it as part of his deliberations. Mr Tipler now argues, notwithstanding that he relied on it, that "most of the statement is not relevant", and not relying on it would not have changed his decision.

39. Mr Tipler accepts that the claimant was caring for his brother with serious medical issues, that he had evidence of this at the disciplinary hearing, and that this was a source of "considerable stress" to the claimant. He does not accept that this could cause a single lapse of judgment "As when we discussed the other options, what he could have done differently, and he did not take any of those opportunities, including borrowing a van. So, I accept there was an issue, but the way he handled this was what crossed the line …". He accepted that the claimant was "not rational" at the time he tried to move cars, but "he should have handled it differently and not attack and show violence towards another employee".

40. Mr Tipler accepts that he mentioned 4 separate offences in his decision: violent behaviour; a denial which demonstrates dishonest conduct; refusing to go home and the threat of unofficial strike action. He argues that the three non-violent offences "… all play into the background … but the key charge is violence supplemented by anger." By choosing to say nothing happened "this adds dishonesty". He said that if he had apologised at this stage "it could have" changed his decision "It would have been a consideration to apply." He accepts that the claimant later admitted grabbing and shouting, but that he did not admit his acts were violent "… the failure to admit to violence, how can trust him…".

41. Mr Tipler accepts he did not refer to an allegation of dishonesty during the hearing, he said that this is "background" and the decision was based on "violent acts, and he did not show honesty…". He said the claimant's act was violent and aggressive – there are mitigations which I can apply – for example an admission, an element of honesty is important …".

42. Mr Tipler also says that the claimant exaggerated his brother's health "to explain why he acted in the way he did"; in his statement he describes his reasoning: whether this was "the real reason" why the claimant had to leave so urgently, he says he is "not sure" his brother was the reason he needed to leave, and he refers to the "tension" with Mr A related to the industrial dispute, the claimant was "playing up" his brother's situation.

43. The claimant appealed the decision to dismiss, in summary arguing:

a. the stress over his brother, his clear conduct record and length of service were “not reasonably taken into account”;
b. a reasonable conclusion would be that this was a one-off incident which occurred because of his brother’s issues and high levels of stress;
c. the report “makes a number of inaccurate claims and unfair assumptions which were aimed towards justify the most severe penalty rather than establishing facts.”;
d. he had demonstrated regret and remorse;
e. the conduct agreement 2015 aims for informal resolution or a corrective approach, “… each case must be judged on its own merits and in light of all the circumstances including the employee’s record and service and any mitigation with the aim of being corrective”, but no corrective approach was considered;
f. the decision does not accurately reflect the claimant’s “vast” caring responsibilities “in supporting his brother’s daily needs” and the stress and anxiety which can result
g. the finding that the outcome could have been far worse had the colleague not intervened is “baseless and unreasonable”.
h. it disputes that the use of “attack” is fair, saying no witness used these words but that Mr Tipler’s report “uses ‘attack/attacked/violent’ multiple times which does not fairly reflect the nature of the incident.”
i. Attack implies an intent to harm Mr A, which is inaccurate
j. The claimant’s “actual words” to Mr Haughton when asked about what happened was “Nothing, I want my rep with me.”, that this is a “bad choice of language” but “… is not a rejection of being open about what happened.”
k. The statement about choosing not to find alternative means of travel demonstrates that Mr Tipler “has not been able to recognise the growing stress and deteriorating mental state” of the claimant that day.
l. He was never asked about “taking staff with him”; had he been asked “he would strongly deny these allegations as untrue”
m. There was no consideration of the claimant’s stress as a mitigating factor, instead Mr Tipler refers to his sympathy, but they were not taken “into the context of how they influenced his behaviour that day”
n. The statement that the claimant’s behaviour is “beyond correcting” and truest has been “unequivocally lost” is in “direct contrast” to the claimant’s service, the fact he has expressed remorse
o. The claimant’s statement of apology is not referenced in the investigation or Mr Tipler’s report and this statement is not included in the file for the disciplinary hearing or in the decision report “this statement is another crucial piece of evidence in determining … whether this was a one of incident or whether there is an ongoing issue with … behaviour…”
p. The apology shows genuine acceptance of his behaviour, he apologises, and explains the stress-related issues which led to his actions;

q. Mr Tipler has not interviewed key witnesses and "instead draws conclusions which are based on assumptions. This meant the investigation was nowhere near thorough enough…"
r. "Only five specific questions" were asked at the conduct interview, meaning there was not a fair hearing.
s. There were previous employees changed with aggression in the same office which were handled differently, referring to what he describes as a more serious event involving a postal worker called Chris Blair, who was involved in a fight but was not disciplined, instead transferred to Fulham Delivery Office.
t. His multiple awards and certifications from Royal Mail since 1998 significant messages of thanks from management, and excellent sick record;

44. The appeal was heard by Ms Birch (193-200). Ms Birch had been employed for just over a year at this point, she had online training at the outset of her employment, and on her involvement with a HR investigation she spent 2-3 hours going through the applicable policies.

45. By the appeal hearing Ms Birch had the claimant's written statement, it was provided by his rep who refers to the statement saying that it is clear he "recognises his fault" (167).

46. At the outset, Ms Birch said that the hearing would be a "rehearing". The claimant's union rep was invited to speak, and he reiterated and repeated the grounds of appeal. He reiterated the claimant's apology "… his statement started with an apology to [Mr A]", he referred to the claimant attending counselling, he is "adamant" it would not happen again, he referred to the stress of dealing with dementia "can be overwhelming". He said that the words used in the allegations – attack, violent – do not reflect the nature of the incident.

47. Ms Birch asked one substantive question – was the claimant aware how Mr A felt? The claimant answered that he was, he had seen other incidents, and he had been the recipient of unwanted conduct himself.

48. Ms Birch accepted during the appeal that the claimant was not charged in respect of the 9 February incidents, the allegation of incitement of unofficial industrial action, the alleged "nothing happened" remark, allegedly refusing to leave work, alleged dishonest, and she did not take these allegations into account when deciding the appeal. For her "the crux" was whether the claimant threatened an employee.

49. Ms Birch did not watch the cctv footage because she was "… clear about the severity of the incident, so I did not feel I needed to watch it." She did not interview other employees; she says she contacted HR to find out more information about Mr Blair but was told there was no record of him as an

employee. Her evidence was that as everyone was "aligned" on the severity of the situation, she needed to "understand what was driving this behaviour."

50. She argues that the principal reason why she upheld the dismissal is because when she asked how Mr A felt "… I felt he did not understand or consider how his actions made [Mr A] feel, he did not give me enough. If this was a one-off event so out of the ordinary, then normally you would understand [how Mr A. felt]. This did not come across in his answer."

51. Ms Birch says she gained this viewpoint from the claimant's denying the incident amounted to violent conduct, she considers he was saying that the incident was "not as serious as has been made out", that he was "trivialising" the incident.

52. The decision to dismiss was upheld; the reasons include:

    a. Notwithstanding the stress the claimant was under that day, "the severity of the incident itself was significant. … Whilst I believe that [the claimant] understands that this reaction and his actions were not correct, I do not believe that he fully appreciates the impact of his actions on others"
    b. His long length of service: "I do not believe that a long length of service mitigates an individual's behaviour that clearly contravenes" the respondent's standards
    c. His stress does not excuse unacceptable behaviour
    d. Ms Birch "notes" the claimant's view that he has demonstrated remorse and has previous clear conduct and so can be trusted
    e. The 2015 agreement – and the corrective approach: Ms Birch accepts that this is "… a view but … [the claimant's] behaviour contravenes" the respondent's expected standards.

53. On point (a) above, Ms Birch argues that she "can't imagine" what it would be like to be a carer for someone who has a debilitating condition "… but there are lots of people who have significant issues who do not behave this way. I could not confidently say the risk of him returning was low risk … we are adults and need to take accountability". She says that she was aware that the evidence shows the claimant was acting irrationally – trying to move the car – but she argues his answer "did not give me confidence … he did not articulate that he appreciated the impact, he was saying 'these things happen' and so he did not appreciate the impact of his actions."

54. Ms Birch says that she considered a lesser sanction "however the incident that occurred and the lack of self-control" means she did not have the trust or confidence to reinstate him. She says she considered his length of service, "it is important, a huge thing, I did not take this decision lightly."

55. In questions, Ms Birch accepts that she rejected the appeal because she considered that the decision to dismiss was reasonable. Her statement says that

she did not feel need to undertake any further investigations because the disciplinary investigation was comprehensive. She accepts that the claimant alleged there were "inaccurate claims and assumptions", she felt that she had "read all of the points which we went through … I was satisfied I had enough to make the decision … there are certain things we will not accept, and the way he behaved fits into this."

56. The respondent argues the claimant's apology is "self-serving" and designed to save his role, that he "does not apologise properly" as he is not apologising for "violent behaviour", which he denies occurred. The claimant disagrees, arguing he was apologising for "what it says here, what happened."

57. Another factor the claimant says is relevant is a grievance the claimant submitted against managers including Mr Tipler for what he contends is an unlawful deduction from his wages during industrial action. Mr Tipler says he was unaware of this at the time, that there was a lot of issues with staff and pay which were handled centrally. I accept that Mr Tipler did not have in his mind this grievance when making the decision. As his statement makes clear however, Mr Tipler believes that the fallout from the industrial action may be the underlying cause of the claimant's act against Mr A.

58. Mr Blackwell argues that in his 30 years' experience, and having seen the cctv, it was surprising that this issue was not dealt with informally; "I have come across many occasions of similar incidents in the workplace where the individuals can talk through mediation or informally…". He says that because the claimant provided a written statement accepting responsibility for his actions, and based on previous similar incidents, he believed at the time that the disciplinary hearing would be primarily to address mitigation.

59. The claimant's position and that of Mr Blackwell is that Cliff Blair does exist. They both say that when the fight involving Mr Blair occurred, Mr Haughton "kept it inhouse and Mr Blair was moved to another office… there was no formal process." Mr Blackwell reiterated that Mr Blair continues to work at the Fulham delivery office "So I am surprised by [the respondent's] statement" that there is no record of him.

60. Mr Blackwell argues that the respondent would "definitely" consider length of service and disciplinary record, and from this evidence would consider whether there was a likelihood of reoffending, along with a consideration of the seriousness of the offence. He says that these conversations would usually take place during the investigation interview "but we were not enabled to have this conversation", he believes because of "tensions" between the union and management "so informal conversations were not happening." He says that even so he expected the process to take into account the claimant's clear conduct and length of service and he did not expect an incident like this, with this mitigation, to lead to dismissal.

The law

61. S.98 Employment Rights Act 996

(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—
   a. …
   b. relates to the conduct of the employee,

(3) …

(4) 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.

62. Unfair dismissal – relevant case law

a. The ‘Burchell test’ - *British Home Stores Ltd v Burchell [1980] ICR 303 (EAT).* The test of ‘fairness’: a dismissal will only be fair if at the time of dismissal:

   i. the employer genuinely believed the employee has committed misconduct;
   ii. the employer has reasonable grounds for this belief; and
   iii. it had carried out as much investigation as was reasonable in the circumstances.

b. The "range of reasonable responses" test - *Iceland Frozen Foods Ltd v Jones [1982] IRLR 439:* The s.98(4) test of ‘reasonableness’ is an objective one. Once it has determined that the employer’s belief in misconduct was genuine, the tribunal has to decide whether the employer's decision to dismiss the employee fell within the range of reasonable responses that a reasonable employer, in those circumstances and in that business, might

have adopted**.** The tribunal must not substitute its own view on whether or not the dismissal was reasonable for that of the employer.

c. *Sheffield Health & Social Care NHS Foundation Trust v Crabtree UKEAT/0331/09:* while the employer must prove that it had a genuine belief that the employee had committed misconduct; on whether the employer acted reasonably in doing so, the burden of proof is neutral.

d. *Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23*: The 'range of reasonable responses test' applies to both the conduct of the investigation and the decision to dismiss; the tribunal is not to decide whether it would have investigated differently, but whether the investigation was within the range of investigations that a reasonable employer would have carried out.

e. *Chubb Fire Security Ltd v Harper [1983] IRLR 311*): The tribunal cannot consider the 'unjustness' to the employee, the question is solely whether the employer acted within the rage of reasonable responses.

f. *Newbound v Thames Water Utilities Ltd [2015] EWCA Civ 677*: the assessment of reasonableness is not conducting a "tick box" exercise, and the band of reasonable responses is not infinitely wide.

g. *Governing Body of Hastingsbury School v Clarke UKEAT/0373/07:* Where an employee is suffering from ill-health which may be contributing to behaviour which may constitute gross misconduct, a failure to investigate the ill-health before dismissing may make the dismissal unfair (this is the case even if the employee's explanation of that link may seem implausible - see City of Edinburgh Council v Dickson UKEAT/0038/09 – an employer must investigate any allegations of ill health rather than relying on its own option that there is unlikely to be a link).

h. *Dytkowski v Brand FB Ltd ET/2402856/19*: where an employee alleges there is a link between a condition and aggressive behaviour, an employer should investigate that link. The investigation was important both to assess the culpability of the employee and to consider the likelihood of a similar incident occurring.

i. *Neary v Dean of Westminster [1999] IRLR 288* – the definition of gross misconduct: conduct that so undermines the relationship of trust and confidence ... that the employer should no longer be required to continue to employ them.

j. *St Mungo's Community Housing Association v Finnerty [2022] EAT 117:* where a tribunal considers that the decision to dismiss is beyond the range or reasonable responses, it must consider the employer's reasoning and explain why it is defective.

k. *Brito-Babapulle v Ealing Hospital NHS Trust [2014] EWCA Civ 1626:* although dismissal where gross misconduct has been found may be "almost inevitable", mitigating factors must be considered and that to assume that gross misconduct means that there cannot be mitigation is an error in law.

l. *Vincent (t/a Shield Security Service) v Hinder UKEAT/0174/13*: A failure to consider any alternative sanction where an employee has a clean record and long service fell outside the band of reasonable responses.

m. *Strouthos v London Underground Ltd [2004] IRLR 636* CA: Having 20 years' service and no previous warnings was a relevant factor in determining whether a dismissal is fair

" … it all depends on the circumstances. The statements in McLay and Cunningham do not, in my judgment, exclude a consideration of the length of service as a factor in considering whether the reaction of an employer to conduct by his employee is an appropriate one. Certainly there will be conduct so serious that, however long an employee has served, dismissal is an appropriate response. However, considering whether, upon a certain course of conduct, dismissal is an appropriate response, is a matter of judgment and, in my judgment, length of service is a factor which can properly be taken into account, as it was by the employment tribunal when they decided that the response of the employers in this case was not an appropriate one."

n. *Post Office v Fennell [1981] IRLR 221 (CA)*): "Equity" demands that similar conduct should be dealt with in a similar way.

o. *Hadjioannou v Coral Casinos Ltd [1981] IRLR 352 (EAT)*: Employer's previous decisions will only be relevant to the fairness of the dismissal if:

It has previously treated similar behaviour less seriously; so that employees have been led to believe that certain categories of conduct will not lead to dismissal; or

Where employees in "truly parallel circumstances" arising from the same incident are treated differently.

p. *Taylor v Parsons Peebles NEI Bruce Peebles Ltd [1981] EAT IRLR 119*: on mitigation, a reasonable employer would have taken account of the

employee's long service and employment history, even in a situation where an employee had deliberately hit another.

q. *Arnold Clark Automobiles Ltd v Spoor [2017] IRLR 500, EAT:* The dismissal of an employee with 42 years' exemplary service because of one isolated incident of physical violence was unfair, in part because the employer failed to take into account the circumstances of the offence and the employee's service record.

r. ACAS Guidance: An employer should consider before deciding on a disciplinary penalty the employee's disciplinary record, (including current warnings), general work record, work experience, position and length of service.

s. *Tesco Stores Ltd v S UKEATS/0040/19*: a failure to properly consider mitigation took the investigation outside of the range of reasonable responses. Tribunals must consider the degree of relevance of that failure to the issue of sanction, whether or not the employee advanced any evidential basis which merited further inquiry, and the extent to which resultant further investigation could have revealed information favourable to the employee.

Closing arguments

63. At the outset of day 2 I referred the parties to several dictionary definitions of 'violent behaviour', an allegation used interchangeably with 'aggressive behaviour' during the disciplinary process. The claimant's case is that he believed he was being charged with aggressive conduct, which he says is a different charge to violent conduct, with potentially different consequences.

64. Dictionary definitions of violence include:
"behaviour involving physical force intended to hurt, damage, or kill someone or something"
"extremely forceful actions that are intended to hurt people or are likely to cause damage"
"behaviour which is intended to hurt, injure, or kill people.

65. I raised this issue because I considered at this stage an issue in the claim *may* be whether it was within the range of reasonable responses to allege the claimant's conduct, viewed within the range of a reasonable disciplinary process, amounted to violent conduct.

66. The claimant's case is:

a. He accepts he committed misconduct
b. There was a failure to properly consider the context of the claimant's actions, his brother, his stress and anxiety
c. Evidence was withheld or not discussed with him including the allegations in Mr Haughton's statement, but these led to adverse findings making the decision "irrational" and "manifestly unfair"
d. There was a failure to properly consider mitigation
e. A "large part" of Mr Tipler's thinking related to the industrial unrest being the reason the claimant acted this way, "natural justice" required this to be put to the claimant
f. On appeal, there was no further investigation, the cctv was not watched, the appeal was "procedural box ticking". The allegation of a lack of contrition is not sustainable given the claimant's apology.

Which led to conclusions outside of the range of reasonable responses that he had committed gross misconduct which cannot be mitigated, also leading to the finding there was no trust that he would not act in the same way in the future.

67. Mr Chaudhry accepts there were "issues" with the decision, these were rectified on appeal. Ms Birch "refocused on the aggressive behaviour." Mitigation was taken into account. While the claimant argues he was suffering stress and anxiety which affected his mental health, "there is no Dr's letter or OH report, the stress is not of that nature". The stress within the claimant's statement shows "the ordinary stresses of a person with caring responsibilities." Mr Haughton's statement makes it clear the claimant is stressed and frustrated, this was taken into account. He argues that the "critical point" is how the claimant reflected on his actions, his apology was limited.

68. On the issue of aggressive v violent behaviour, he argues that the focus was on aggressive behaviour, he says there was no tick box exercise, that consideration was given to length of service and his record; "their critical rational was based on how the claimant reflected on his actions." And that trust was broken - violent actions, threats, dishonesty, failure to respect managers, resisting leaving, encouraging a walk out.

69. The respondent now accepts that the 9 February allegations should not have been taken into account in the decision. Ms Birch instead focused on the incident and lack of self-control and the seriousness of this – a physical altercation with actual force. "This is at the very low end… there was no punching or an assault. But it crosses the threshold of violence as you have placed hands on someone…"

70. Mr Chaudhry made it clear that the respondent does not accept the claimant was suffering from significant anxiety although "he was clearly frustrated and anxious."

This was not irrational conduct, as the claimant did not collapse or have a panic attack. The respondent argues that the claimant's statement is a "self- serving document" it was entitled to discount.

71. Mr Chaudhry argued that a corrective penalty was not appropriate as there has to be a degree of admission, and he has denied behaving aggressively.

Conclusions on the evidence and the law

Dismissal

72. There were significant failures at the disciplinary stage which means the original decision to dismiss was outside of the range of reasonable responses, rendering this decision unfair.

73. It is not always the case that omitting to provide a statement to an employee in a disciplinary process will result in unfairness. However, Mr Haughton's statement contained contentious allegations which, had the claimant had sight of, he would have denied.

74. Instead of Mr Tipler addressing Mr Haughton's allegations with the claimant, the claimant was unaware of them. But they were relied on as direct justification for concluding that the claimant should be dismissed – because he had shown a lack of honesty, he refused to leave when asked by Mr Haughton, he had threatened a staff walk-out.

75. In addition, Mr Tipler believed at the time he made his decision that the claimant's conduct did not relate to his brother, that this was an excuse, the underlying issue related to the strike action.

76. But none of these points were explored in the disciplinary hearing, the claimant was unaware of them, that they may be factors in the decision to dismiss.

77. Mr Haughton's statement and Mr Tipler's own view of the claimant's rationale clearly materially influenced Mr Tipler's conclusion that all trust had gone, the claimant's mitigation was insufficient, he must be dismissed, this is explicit in the dismissal letter.

78. I accept that as a matter of basic fairness, all allegations which are being considered as elements of a finding of gross misconduct, or as issues potentially affecting assessment of mitigation, must be put to the employee during the disciplinary process. A failure to do so makes this dismissal outside of the range of reasonable responses and therefore unfair.

79. Could the dismissal otherwise be fair, stripping out the 9 February allegations not known to the claimant? Mr Tipler's decision is infused with words - attack, violent act, which are not part of the disciplinary charge which was aggressive conduct. There is a significant difference between the meaning of violent and aggressive, the ordinary meaning of the former requires an intent to harm. The claimant believed he was being asked to meet a charge of aggressive conduct, the decision was he had engaged in a violent attack. It is outside of the range of reasonable responses to define an act of misconduct so significantly differently in the allegation and in the decision letter.

80. In addition, the decision to dismiss combines all of the elements of the disciplinary findings – violence, refuse to leave 'incite' members of staff in combination – these are the ""behaviour traits" which cause Mr Tipler to conclude that the claimant is "unable or unwilling" to understand the seriousness of his actions. This conclusion shows that the different elements of the findings have been linked to justify the claimant's dismissal. I do not accept Mr Tipler's evidence that stripping out the 9 February allegations contained in Mr Haughton's statement would not have changed his conclusion, that his dismissal was otherwise fair.

81. Given Mr Tipler's rationale, much of which appears for the first time in his witness statement, I do not accept that Mr Tipler gave reasonable consideration to length of service, clear prior record or the fact the claimant was receiving counselling.

82. Instead, Mr Tipler relied on issues not put to the claimant, and/or not in the decision letter. I conclude that his thought process meant he had an overwhelming belief of the claimant's guilt which precluded him at any stage properly considering any of the claimant's mitigation evidence.

83. Mr Tipler did not have the claimant's statement or disregarded it. If Mr Tipler was concluding that the apology was self-serving, as he now says, he should have said so in his decision. By ignoring it and the claimant's mitigation contained therein, he has acted outside of the range of reasonable responses.

Appeal

84. Was this unfairness rectified on appeal? This was not a rehearing as promised, it was a review of some of the evidence. I do not consider that this mislabeling was a material factor making the decision on appeal unfair, what counts is not the labeling but whether the appeal decision was within the range of reasonable responses of a similarly sized and resourced employer.

85. The appeal rectified the following significant issue as the 9 February gross-misconduct findings were dismissed on the procedural grounds identified by the claimant.

86. The claimant admits misconduct, and he accepts that 'aggressive behaviour' falls within the ambit of potential gross misconduct meriting dismissal. At this point therefore, the fairness of the appeal – whether the decision to uphold the dismissal was within the range of reasonable responses – goes to the issues raised by the claimant in mitigation; his length of service, his clean record, his admission, his apology, his brother's condition and the stress he was under that day.

87. Part of Mr Tipler's reasoning for not accepting the claimant's mitigation was because he did not believe the claimant's brother's health was the real reason for the incident, that he could have made alternative arrangements to travel. This reasoning does not appear to have been upheld by Ms Birch; she does not refer to it at all.

88. During the course of the disciplinary process including at the disciplinary and appeal hearings, the claimant had repeatedly referred to significant stress over his brother, and had stated he was now attending counselling to help him manage this.

89. Ms Birch's decision says that the claimant's situation that day was "clearly a very stressful situation" but that the severity of the incident, plus the fact he did not appreciate the impact of his actions on others, meant she could not have trust that he would not do so again.

90. This finding ignores the following: the claimant did apologise in writing – not referred to by Ms Birch. It was not suggested at the appeal that the apology was self-serving; if Ms Birch felt this was the case questions should have been asked and the claimant was entitled to say why it was not self-serving.

91. The decision ignores the fact the claimant stated he had mental health issues over his brother's health and caring responsibilities, and he started counselling. No questions were asked on this at disciplinary or appeal, but his evidence at this time is clearly suggestive of insight, that the claimant had concerns about what he accepted was his irrational conduct that day, that his apology was not therefore self-serving. Such factors were relevant to mitigation, they were ignored.

92. The decision also ignores the fact that when asked, the claimant said he did understand the impact on Mr A, and that he had experienced similar. It is difficult to square this clear answer with Ms Birch's conclusion that this answer does not show insight. While Ms Birch says this answer is not sufficient, she does not say why.

93. These factors – the claimant's apology and written statement, the counselling, the claimant's statement at appeal were, I find, not considered at all by Ms Birch at appeal. I do not accept it is within the range of reasonable responses to ignore answers and evidence which on their face clearly demonstrate insight and instead find against the claimant on these issues. If Ms Birch does not believe the claimant, the appeal hearing was the chance to ask questions about her issues of concern. She did not ask any questions on these issues.

94. Ms Birch relies consistently on the seriousness of the incident; her answers during the hearing suggest that she believed that the claimant's actions were an act of violence. The claimant disputed the use of 'violent' or 'attack'. Ms Birch used the claimant's denials as evidence he was minimising his actions, further justifying his dismissal as fair.

95. But the claimant always accepted he had engaged in aggressive behaviour; he disputed the characterisation of the event as violent. At no time did Ms Birch consider the cctv evidence or invite the claimant to look at it and give his comments. She accepted the characterisation that the claimant had engaged in an act of violence, notwithstanding his denials, without considering whether his point of view was accurate; his denials were instead used to justify his dismissal.

96. I conclude it is outside of the range of reasonable responses to find against the claimant because of his view that he had not acted violently, without checking the cctv footage and allowing the claimant to look at and comment on it. Violence was disputed, the claimant had not seen the cctv footage, neither had Ms Birch. Such a critical finding needed to be based on available evidence rather than a supposition of what this evidence showed.

97. Ms Birch says she asked HR to check on Mr Blair. The claimant and his union rep are bemused by this answer. No documents have been produced showing the attempts to seek his HR records. I accept Mr Blackwell's forceful evidence that Mr Blair was employed at the Fulham office at the time of appeal, and that his characterisation of the incident with Mr Blair is broadly accurate. Insufficient effort was put into locating him. At the very least the claimant's rep should have been asked for further clarity on his identity. Given that the claimant stated that Mr Haughton was involved in this decision, Mr Haughton could have been interviewed.

98. Given that the claimant was raising a similar fact incident, arguing more generally that the respondent acted towards incidents such as this with a more flexible approach, and give that Ms Birch agreed to look into it, it was not within the range of reasonable responses to either ignore or make only desultory enquiry into this issue.

99. Ms Birch accepts that mitigation is potentially relevant to her decision. The reason why nearly 45 years of exemplary service was discounted was the seriousness of the situation as well as his lack of insight “he did not understand or consider… he did not understand” how Mr A felt, meaning the wellbeing of employees could not be protected if he was reinstated.

100. I do not consider that it was within the range of reasonable responses to effectively discount the claimant’s mitigation on length of service by saying he had not shown insight. In so concluding, Ms Birch has ignored or discounted the apology, the counselling, his mental health issues, his statement to her. This is evidence of insight. It was not reasonable to say that it is not insight without giving reasons why. It was not reasonable to discount length of service by saying he has not shown insight, without explaining why the apology, the counselling and his answer is not evidence of insight.

101. Mr Tipler did not have any regard to the claimant’s apology. While paying lip-service to the concept of mitigation, Ms Birch appears to have ignored the issues the claimant raised; apart from criticising his answer to her question, she does not consider mental health issues, the apology, the counselling – she certainly does not address them. If Ms Birch, as with Mr Tipler, did not believe the claimant, it was for her to say why; if she discounted his evidence of mental health issues she should have said why.

102. If Ms Birch was discounting his apology and other statements on mitigation, it was outside of the range of reasonable responses not to say why his mitigation evidence was either not believed or was not sufficient evidence of insight.

103. I conclude that the respondent failed at appeal to engage with the claimant’s principal arguments on mitigation and this was outside of the range of reasonable responses.

104. It may be that the respondent could argue that even if it had engaged on these issues he would still have been dismissed. This is an issue of Polkey, to be determined at remedy.

105. On Polkey and contributory fault, I heard brief submissions from the claimant and none from the respondent, these are issues to be addressed at remedy.

Employment Judge Emery
18 October 2024

Judgment sent to the parties on:

28 October 2024
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For the Tribunal:

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