EMPLOYMENT TRIBUNALS

Claimant
H Bradley

Respondent
Royal Mail Group Limited

v

Heard at: Watford
On: 3 and 4 May 2023
Before: Employment Judge Anderson

Appearances
For the Claimant: D Robson (solicitor)
For the Respondent: R Chaudhry (solicitor)

JUDGMENT

1. The claimant's claim of unfair dismissal is upheld.

REASONS

Background

1. The claimant was employed by the respondent, a mail delivery company, as a postal worker, from 22 January 1988 until his dismissal for gross misconduct on 11 March 2022. The claimant brings a claim of unfair dismissal. The respondent's position is that the claimant was fairly dismissed for conduct reasons after a disciplinary process had taken place.

The Hearing

2. Both parties were represented at the hearing. I received a bundle of 154 pages along with a witness statement from the claimant and one from Steven Potter, the disciplinary appeal manager. Both witnesses attended the hearing and gave evidence. The respondent filed an 11 page addition to the bundle on the first morning. The claimant did not object. I requested a copy of a document named the National Conduct Procedure Agreement from the respondent which was supplied part way through the first day. Both representatives agreed that this was a standard unfair dismissal case to be decided on the usual grounds including the application of the Burchell principles. Therefore, a list of issues was not necessary.

Findings of Fact

3. The claimant, Harry Bradley, was employed by the Respondent, Royal Mail Group, from 22 January 1988. His job, at the time of dismissal, was to deliver and collect mail.

4. Part of the claimant's daily role was to collect mail from customers and deliver the mail to the Greenford Depot. His job was to do this twice each day. He had a schedule for the collection of mail and the drop off at Greenford. The uncontested evidence of Mr Malhotra, the claimant's line manager, during the disciplinary process was that the claimant was usually late in dropping off his first load to Greenford but back on track by the time the second drop was made.

5. On 27 October 2021 it was agreed that the claimant could start work later than the scheduled time (11.45 rather than 11.08) due to problems in his personal life. This agreement was brokered by a CWU representative.

6. On 1 November 2021 the claimant telephoned Mr Malhotra to say he would be later than 11.45 due to domestic issues.

7. On 2 November 2021 the claimant was observed by Mr Malhotra parked up for a period of approximately thirty minutes in the car park of Stockley Park business park. This was during his working hours.

8. Mr Malhotra said in a meeting with the claimant on 23 December 2021 that he was observing the claimant on this day as:

   'it is part of my job to do outdoor observations to make sure everyone is safe and well.'

9. In an interview with Fasal Sheikh, the disciplinary hearing manager, on 11 February 2022, Mr Malhotra said he was '*doing a routine check and notices Harry sitting standstill'.*

10. In an interview with Steve Potter, the appeal hearing manager, on 22 April 2022 Mr Malhotra said:

11. *'I was working with the CWU in trying to implement the shorter working week. This was a reduction of an hour a week or 12 minutes a day. In doing this I looked at the PDA actuals. I looked at the data. I have 9 fulltime outdoor collection duties and saw the pattern of when people were returning to the office. I explained that there is enough time in the duties for 12 minutes to be taken off at the end without having to remove workload. I noticed HB had a big yellow blob on his data that meant he was not moving. I looked at different days and there was a similar pattern.'*

12. PDA actuals are data and statistics on actual collections and deliveries. There is an agreement between the respondent and the CWU that they should not be used for the purpose of trawling for misconduct issues. The agreement states as follows:

> *This new technology is not being introduced to track individuals or to be used for individual performance management and therefore it is confirmed that the data generated will not be used for this.*
> *…*
> *It is recognised that the use of technology may increase levels of individual visibility and it is agreed that this new technology is not being deployed for or will be used as a disciplinary tool. As such it will not enhance the ability of managers, or the evidence available, to take disciplinary action.*

13. There are two issues in this case about the use of PDA actuals. Firstly, there is the fact that Mr Malhotra became aware of the incident on 2 November 2021 because of PDA actuals information and then observed the claimant that day because of that knowledge. The second is about the use of PDA actuals by the claimant to evidence his claim that this was a one off incident. Mr Potter's evidence was that PDA actuals has been used in misconduct cases with CWU approval where it supported the employee's case, and sometimes at the behest of an employee, to prove a defence they were raising.

14. Mr Malhotra spoke to the claimant about the incident on 3 November 2021. The claimant commenced a period of sick leave from 4 November 2021.

15. Mr Malhotra invited the claimant to a fact finding meeting on 23 December 2021.

16. The claimant attended with his trade union representative Danny Wood. The claimant said that he had been standstill in Stockley Park as he was upset due to serious domestic problems. He said he only dropped his mail once that day because he was late to work, he forgot his PDA and had to go back for it, his mental state was slowing him down and he worried about getting stuck in traffic. He said that a previous manager, Narinder, had given him permission to stay out (i.e. only offload mail once) when he was late. He refuted the idea that he had stayed out on more than one occasion during Mr Malhotra's management, an allegation made by Narinder Randhawa. The claimant said that he was not aware of the impact of his staying out or the importance of the Universal Service Obligation to the business. He asked Mr Malhotra if this action was being taken as a result of '*a personal thing between you and me?'* and noted that he had received comments from colleagues to the effect that he was too old to be doing the job. The claimant refused to allow Mr Malhotra to use PDA actuals evidence to confirm the claimant's argument that this was a one off event.

17. Mr Malhotra spoke to Narinder Randhawa on 18 January 2022. Mr Randhawa denied that there was any agreement for the claimant to stay out.

18. Mr Malhotra decided that there was a case to answer, and the matter was allocated to Fasal Sheikh, Mr Malhotra's manager, who acted as disciplinary hearing manager. Mr Malhotra notified the claimant on 18 January 2021 that

the case had been allocated to Mr Sheikh and the charge was '*unexcused delay on 2/11/21.'* Mr Sheikh wrote to the claimant on 20 January 2022 inviting him to a formal conduct meeting on 27 January 2022. The letter explained that the charge was considered to be gross misconduct and an outcome could be dismissal without notice.

19. The respondent's conduct policy sets out the following regarding Gross Misconduct:

> *Some types of behaviour are so serious and so unacceptable, if proved, as to warrant dismissal without notice (summary dismissal) or pay in lieu of notice. It is not possible to construct a definitive list of what constitutes gross misconduct and in any event all cases will be dealt with on their merits. However, the following examples show some types of behaviour which in certain circumstances could be judged to be gross misconduct:*
> - *Theft*
> - *Violence*
> - *Abusive behaviour to customers or colleagues*
> - *Criminal acts against Royal Mail Group or its employees*
> - *Intentional delay of mail*
> - *Deliberate disregard of health, safety and security procedures or instructions*
> - *Unauthorised entry to computer records*
> - *A serious or persistent breach of the Continuous Disclosure and Communications Policy or the Share Dealing Policy*

20. The National Conduct Procedure Agreement, which is an agreement between the respondent and CWU, so far as is relevant, states as follows:

> ***Delay to Mail***
>
> ***Delay to mail can be treated as***
> - *unintentional delay*
> - *unexcused delay*
> - *intentional delay*
>
> ***Unintentional delay***
> *Royal Mail group recognises that genuine mistakes and misunderstandings do occur and it is not our intention that such cases should be dealt with under the conduct policy beyond informal discussions for the isolated instance*
>
> ***Unexcused delay***
> *Various actions can cause mail to be delayed, for example carelessness or negligence leading to loss or delay of customers mail, breach or disregard of a standard or guideline. Such instances are to be distinguished from intentional delay (see below) although they may also be treated as misconduct and dealt with under the conduct policy. Outcomes may range from an informal discussion to dismissal.*

Intentional delay
Intentional delay of mail is classed as gross misconduct which, if proven, could lead to dismissal. The test to determine whether actions may be considered as intentional delay is whether the action taken by the employee knowingly was deliberate with an intention to delay mail.

Where proven, such breaches of conduct can lead to dismissal, even for a first offence; indeed intentional delay is a criminal offence and can result in prosecution.

21. Mr Robson said that only the charge of intentional delay could lead to dismissal where there was a one off incident. I find that this is not what is stated in the document. The final paragraph states that unexcused and intentional delay can lead to dismissal for a first offence, and intentional delay can in addition lead to a criminal prosecution.

22. At the disciplinary meeting on 27 January 2022 the claimant told Mr Sheikh that he did not tell anyone about his distress on 2 November 2021 as he had previously told Mr Malhotra about a stomach problem and Mr Malhotra had been unhelpful, also that he did not take the mail to Uxbridge, instead of Greenford, to drop it off as he had received comments from colleagues at Uxbridge that made him feel uncomfortable. In response to a question on whether he understood the importance of offloading his collected mail between rounds he said '*Yes I do. I also feel that it comes back to Uxbridge it sits here for two hours waiting for com run. I would have brought that mail back at 16:00'.* The claimant's union representative said that he had advised the claimant not to give permission to use PDA actuals because that information is not used for a conduct case.

23. The claimant made amendments to the notes after the hearing. Mr Sheik did not accept the amendments as he said they did not reflect what was said during the meeting but noted he had considered what the claimant said.

24. Mr Sheikh interviewed Mr Malhotra on 16 February 2022 and the claimant was given an opportunity to comment on the interview notes.

25. On 10 March 2022 Mr Sheikh advised the claimant in a letter that he had decided that the charge of gross misconduct was upheld, and the claimant was summarily dismissed. His reasons, in summary were:

    a. He had failed to return to Greenford to drop his first collection before starting his second collection.
    b. He failed to advise his line manager about this.
    c. Narender Randhawa said that the claimant had failed to offload his first collection on more than one occasion. Mr Sheik believed this as the claimant had refused access to the PDA actuals which might have proven otherwise.
    d. The claimant denied knowing about the Universal Service Obligation despite his length of service and regular training emails.
    e. He did not believe that there were or had been agreements in place for the claimant to stay out between collection rounds.

f. Research showed that the claimant was not running any later in his duty on 2 November 2021 than he had been in the preceding week.
g. A lower penalty was not warranted given the seriousness of the conduct and the fact that the claimant had shown no remorse.

26. I find that Mr Sheikh's decision that the conduct of the claimant was gross misconduct deserving of summary dismissal was in part based on his belief that this was not a one off incident.

27. I find that when he asked the claimant about allowing the use of PDA actuals this was not in knowledge that Mr Malhotra had been alerted to a possible transgression on 2 November 2021 by PDA actual information but because the claimant said the incident was not a one-of and this would corroborate that claim, or otherwise.

28. The claimant appealed and Steven Potter was designated appeal manager. Mr Potter is from a different part of the business, and the claimant and Mr Potter were unknown to each other. Mr Potter is an independent case manager and has conducted hundreds of appeal hearings. It is the respondent's practice that an appeal is a rehearing. Mr Potter said in oral evidence that he often did not read the report from a decision manager as he was effectively starting from scratch.

29. The appeal was heard on 31 March 2022 via Teams due to the pandemic. The claimant had a union representative in attendance. During the hearing the claimant gave the names of two colleagues, who he said had a deal to stay out between collections. After the hearing the claimant made amendments to the notes, and both he and his representative made various further points. Mr Potter interviewed Mr Malhotra on 22 April 2022 and the claimant had the opportunity to comment on the interview notes.

30. On receipt of the interview notes with Mr Malhotra, the claimant's union representative said, '*Mr Malhotra pointed out that 'he was working with the CWU to implement the SWW'. Mr Malhotra has limited or no local discussions with the local CWU, nor any mandatory resource meeting to discuss PDA actual data in which would have identified any OPG's performance or arrival patterns (or nipped the matter in the bud).*'

31. I find that although this is a criticism of the process which led to the disciplinary charge, there is not a clear statement that any action founded on such information is unfair. Rather it implies that it should have been discussed with the CWU first and this may have led to a different course of action. Considering this view and the statement of Mr Potter about his experience of PDA actuals being used in conduct hearings with the approval of the CWU, I find that the position on the use of PDA actuals information as set out in the agreement is not in practice as unequivocal as it appears. Because of that I find that it was open to the respondent to draw conclusions from the refusal to allow access to that information.

32. On 25 May 2022 Mr Potter wrote to the claimant rejecting his appeal. His reasons were, in summary:

    a. He did not accept that the alleged bullying by colleagues at Uxbridge had any bearing on the claimant's actions on 2 November 2021. The claimant did not contact his manager on 2 November 2021. He had done so on 1 November 2021. His first round was completed in his usual timeframe.
    b. Based on the events of 2 November 2022 alone, there had been unexcused delay to mail, and any previous similar action was irrelevant. The request for PDA actuals was in relation to the claimant's assertion that this was a one off event not to prove the contrary.
    c. He accepted the Claimant had personal issues, but he did not make his manager aware of the problem and if he had been that close to breakdown, he would not have been able to continue with his second collection as normal. He did not accept that because of the claimant's interaction with Mr Malhotra about his stomach problems this could put the claimant in a position where he thought there was no point in raising or did not want to raise with Mr Malhotra his difficulties on the 2 November 2021.
    d. Despite the claimant's length of service and clear conduct records the claimant had failed to follow instructions and was not remorseful. It was not clear to Mr Potter that the action would not be repeated.

33. I find that in Mr Potter's decision, the relevance of whether the incident on 2 November 2021 was a one off was not relevant to his decision that this was an incident deserving of a gross misconduct charge and summary dismissal. It was relevant to his consideration of mitigation.

34. The claimant did not raise a grievance against Rohan Malhotra either in response to his alleged refusal of assistance when he had a stomach problem or his actions in relation to this disciplinary process. He did not raise a grievance about the alleged bullying at Uxbridge. Th claimant said in evidence that he did not like to do so, he is not a grass. He had only ever raised one grievance and that was against his own judgement at the instigation of the trade union.

35. The claimant states that the incident on 2 November 2021 in his staying out after completing his first collection round was a one-off event during the time he was managed by Mr Malhotra. I find that on the evidence, which includes Mr Malhotra's accounts of what he saw in the PDA actuals data, Mr Randhawa's evidence to Mr Malhotra in the fact finding exercise and the claimant's refusal to allow the respondent access to the PDA information in connection with the disciplinary process, the incident on 2 November 2021 was not a one-off incident and the claimant had stayed out on other occasions.

36. The claimant stated that he was running late because of domestic issues, further hampered by leaving his PDA in the depot, and then became very

distressed while out on his first collection round leading to his decision to park up to gather himself together before continuing with his work. He says this is why he did not return to Greenford with his first collection. He then did not go to Uxbridge as an alternative, because of colleagues there that had been bullying him about his age. I find on the evidence that the claimant was distressed due to his domestic circumstances and did feel because of this that he did not wish to go and face unpleasant colleagues at Uxbridge, but I do not accept that this was the reason he was parked up at Stockley Park, which on the evidence referred to in the paragraph above, had happened on more than one occasion. Furthermore, there is evidence the finishing time of the claimant that day was in line with other days.

37. I find that the claimant, as an employee of the respondent for 34 years, would have been very clear of the respondent's view on delay to mail deliveries and collections and cannot have been unaware that it would view delay as a serious conduct matter. That information is clearly set out in the respondent's conduct documents and business standards.

38. Mr Robson said that the incident of 2 November 2021 could not, under the respondent's policies, be classed as gross misconduct. His argument is that it amounts to unintentional delay at most, and even if unexcused delay, it is at the less serious end of such actions and does not warrant a finding of gross misconduct or summary dismissal. The respondent's conduct policy states clearly under the heading of gross misconduct that the list of examples of gross misconduct is not exhaustive and it is very common in conduct dismissal cases to find that the act complained of is not on a policy list of gross misconduct examples. The conduct procedure agreement leaves the question of sanction for unexcused delay open. It is clear from the respondent's evidence that the respondent takes the matter of delayed mail extremely seriously. I find that the actions of the claimant on 2 November 2021 in failing to deliver his first collection mail to Greenford at the relevant time and failing to notify his manager or anyone else that this had happened could, potentially, constitute gross misconduct under the respondent's policies.

Submissions

39. For the claimant, Mr Robson said in summary that this was a straightforward unfair dismissal case with conduct at its heart. He said that conduct was not a reason that could be relied upon for dismissal here. He said the real reason for dismissal was operational efficiency. He said that PDA actuals data was inappropriately accessed and relied upon, and he noted that there were issues of ageism in the workplace. Mr Robson said that the gravity of the claimant's actions was not in line with the gravity of the misdemeanours set out as examples of gross misconduct in the respondent's conduct policy. He noted that witnesses raised by the claimant had not been interviewed which was an issue where the witness evidence relied upon came from Mr Malhotra who the claimant believed had an axe to grind.

40. Mr Chaudhury for the respondent, in his written submissions, set out that the respondent had relied on a fair reason for dismissal and had carried out

a fair process. He said that the claimant's behaviour had undermined the respondent's trust and confidence in him and that he had shown no remorse during the disciplinary proceedings.

Law, Decision and Reasons

41. The question I need to answer is whether the dismissal was fair or unfair. This is a two-stage process. The first stage is for the respondent to show a potentially fair reason for dismissal, and secondly if that is achieved, the question then arises whether dismissal is fair or unfair.

42. Section 98 of the Employment Rights Act 1996 identifies a number of potentially fair reasons for dismissal which include at s98(2)(b) the conduct of the employee. I am satisfied on the evidence that the claimant was dismissed for conduct.

43. The claimant and Mr Robson put forward the alternative view that he was dismissed either because Mr Malhotra had a personal issue with him or for operational efficiency reasons. Whether or not Mr Malhotra had a personal issue was something raised throughout the disciplinary process and the claimant referred to a conversation they had before Mr Malhotra was appointed manager about his lateness, and a union representative's view that Mr Malhotra was unhappy with an adjustment to his start time. Even if I did accept this argument, and I do not, the matter was then passed to Mr Sheikh to deal with and later to Mr Potter. Beyond the assertion that Mr Malhotra may have had a word with Mr Sheikh, the claimant could point to no reason why the two hearing managers should make decisions other than on the facts before them. As to Mr Malhotra's motives, I do not accept that the claimant's evidence on their relationship, as stated above, is proof that Mr Malhotra would mount an underhand plan to have him dismissed, and I note that the claimant admits that he did not follow procedure on 2 November 2021. As to whether the real reason was operational efficiency, I have seen no evidence to support that view. I find therefore that these alternative views are unproven and there was no reason for the claimant's dismissal other than the respondent's belief in his misconduct.

44. The second stage as set out at s98(4) of the Employment Rights Act 1996 is to consider whether the dismissal was fair or unfair, having regard to the reason shown by the employer and 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.

45. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions *in Burchell 1978 IRLR 379* and *Post Office v Foley 2000 IRLR 827*. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the

employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (*Iceland Frozen Foods Limited v Jones 1982 IRLR 439, Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23,* and *London Ambulance Service NHS Trust v Small 2009 IRLR 563).*

46. In relation to the first part of the Burchell test I am satisfied that the respondent had a genuine belief in the claimant's misconduct. The claimant on his own admission and as evidenced by the respondent, failed to offload his first collection mail at Greenford Depot on 2 November 2021. It was his job to do so.

47. I must then consider whether the respondent's genuine belief in the claimant's misconduct was based on reasonable grounds and after carrying out a reasonable investigation.

48. A fact finding interview was carried out. A disciplinary hearing was held, an appeal hearing was held. At all meetings the claimant had a trade union representative. In all cases he was given the opportunity to comment on notes. Further interviews were carried out with some of the people named by the claimant in his interviews. He had the opportunity to comment on those interview notes. The claimant was allowed to make further comments after his appeal hearing which were taken into account by Mr Potter.

49. Mr Robson says that the investigation was not reasonable because the respondent did not interview two people named by the claimant as having had an agreement that allowed them to stay out between collection rounds. He says this was particularly important as the claimant had said that Mr Malhotra had an axe to grind. The claimant gave two names in his interview with Mr Potter. Mr Potter's decision conclusion records that Mr Malhotra denied there were agreements, and I note that Narinder Randhawa had also denied this, and he said that the people named were not valid comparators as they were not in the same position of having to offload first collection mail to Greenford. Despite this, in oral evidence, Mr Potter admitted that if there had been evidence of other arrangements (to stay out) then this could, potentially have helped the claimant's cause. If that was the case, and in a situation where an employee of 34 years' service was facing summary dismissal in relation to a one-off incident, then I conclude that contacting those two named persons is a step that should have been taken by the respondent, and in failing to do so, the investigation was not reasonable. The respondent is a large organisation with substantial resources and contacting two people to put a single question to them would have been a relatively simple matter.

50. Where a belief is based on an unreasonable investigation then it is not based on reasonable grounds. For this reason, I uphold the claimant's claim that he was unfairly dismissed.

Remedy

Procedural fairness

51. I have considered whether there should be any deduction to a damages award on the basis that any procedural failing would not have made any difference to the decision to dismiss the claimant, under the principles in *Polkey v AE Dayton Services Ltd [1987] IRLR 503 (HL)*. I make no deduction as I have found that the failure to interview two witnesses suggested by the claimant led to the investigation being unreasonable. Where Mr Potter has admitted that interviewing those witnesses could potentially have aided the claimant's cause, I cannot conclude that rectifying the error would have not made any difference to the decision to dismiss.

Contributory Fault

52. While in assessing the fairness of a dismissal the tribunal must not substitute its own view for that of the employer, when considering the extent to which any actions of the claimant contributed to his dismissal, this is a decision for the tribunal based on its findings of fact.

53. Under s122(2) Employment Rights Act 1996

'Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.'

54. Under S123(6) Employment Rights Act 1996

'Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.'

55. The claimant has admitted that he stayed out in breach of his duties on 2 November 2021. I have concluded above that this has happened on more than one occasion. I have also concluded that the claimant would have been aware that the respondent would view any delay to mail as a serious conduct matter. I have also taken into account, not only in relevance to 2 November 2021, but in general, that the claimant was going through an extremely difficult time which may have impaired his judgment. Furthermore, whether well founded or not, he believed that his manager disliked him and he wanted to minimise raising matters with him about the impact of this on his work. I have noted that he did raise maters with Mr Malhotra on 1 November 2021 and through his union to get a start time adjustment, but I still accept that he did not see Mr Malhotra as someone who would support him with his problems.

56. Having considered all of these factors I make a reduction to the basic and compensatory elements of any damages award of 60%. I have concluded that despite the claimant's problems at that time, he had a longstanding

employment with the respondent and a knowledge of its procedures and concerns. His actions in ignoring those procedures significantly contributed to his dismissal.

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Employment Judge Anderson

Date: 5 May 2023

Sent to the parties on: 11.5.2023

GDJ
For the Tribunal Office