



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant and **Respondent**

Mrs M Tregale

Royal Mail Group Ltd

Held at: Exeter by CVP

On: 23 and 24 November 2020

Before: Employment Judge Smail

Appearances

Claimant: In Person
Respondent: Ms S. Percival, Solicitor

JUDGMENT

The dismissal was not unfair.

REASONS

1. By a claim form presented on 31 March 2020 the Claimant claims unfair dismissal. She was employed as a postwoman between 28 April 1997 and 10 March 2020 just short of 23 years. She was dismissed on 17 December 2019 for breaching health and safety standards by throwing a perstop tray at the letter frame where other staff were working in the Exeter mail centre. The incident occurred on 29 October 2019. A perstop tray is an oblong plastic tray in which letters are carried. It's a sizeable bucket. The dismissing manager was Mr Jason Moore. Because the Claimant had not been suspended during the investigation process, Mr Moore dismissed

with 12 weeks' notice, which the Claimant worked until going on sick leave.

2. Within the notice period the decision to dismiss was confirmed on appeal by Jo Rysdale on 13 February 2020. The same misconduct was found. The nature of the appeal was a rehearing.
3. Both Mr Moore and Ms Rysdale treated the matter as gross misconduct. It was noted also, however, that the Claimant had been given what is called a 2-year serious warning on 10 December 2018. Less than 1 year of the 2-year warning had lapsed before the alleged throwing incident. I have not seen the warning and have no detailed knowledge of its circumstances, only an understanding that it related to bullying and harassment, but it does mean that if misconduct short of gross misconduct had been found, the Claimant was at risk of dismissal.
4. That said, the Respondent has sought to defend this dismissal on the basis of gross misconduct.

LAW AND ISSUES

5. The tribunal has had regard to section 98 of the Employment Rights Act 1996. By section 98(1) it is for the employer to show the reason, or if more than one, the principal reason for the dismissal. A reason relating to the conduct of an employee is a potentially fair reason. By section 98(4) where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) 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.
6. This has been interpreted by the seminal case of British Home Stores v Burchell [1978] IRLR 379 (EAT) as involving the following questions:
 - (a) Was there a genuine belief in misconduct?
 - (b) Were there reasonable grounds for that belief?
 - (c) Was there a fair investigation and procedure?
 - (d) Was dismissal a reasonable sanction open to a reasonable employer?

I have reminded myself of the guidance in Sainsbury's Supermarkets v Hitt [2003] IRLR 23 (CA) that at all stages of the enquiry the Tribunal is not to substitute its own view for what should have happened but judge the employer as against the standards of a reasonable employer, bearing in mind there may be a band of reasonable responses. This develops the guidance given in Iceland Frozen Foods v Jones [1982] IRLR 439 (EAT) to the effect that the starting point should always be the words of s. 98(4)

themselves; that in applying this section an employment tribunal must consider the reasonableness of the employer's conduct, not simply whether they, the employment tribunal, consider the dismissal to be fair. In judging the reasonableness of the employer's conduct an employment tribunal must not substitute its decision as to what was the right course for that of the employer. In many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, whilst another quite reasonably take another. The function of the employment tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair: if the dismissal is outside the band, it is unfair.

7. The issues narrowed in the course of the case. The case was well-argued by both sides who stated their positions clearly. It was agreed that the essential issues were whether there was a reasonable investigation and whether the Respondent had reasonable grounds after a reasonable investigation for believing that the Claimant had thrown the tray in a manner risking health and safety, in preference to her account that she had tidied up a tray from the floor and placed it on the table in front of the frame. It was accepted by the Claimant that if she threw the tray as the Respondent found, then dismissal would be a fair result. There would have been a reckless disregard for health and safety contrary to a number of policy documents, amounting to gross misconduct. The focus, then, is on the reasonableness of the Respondent's findings and how they got there.

The Witnesses' Accounts

8. Three workers were at the letter frames near to where the tray rested, to try to use a neutral word. The incident happened towards the end of their shift, at 21.55. The claimant was coming on her shift around that time. The matter was reported during the following shift by the workers. The three workers discussed with one another the following day, whether to report the matter. They chose to report it, believing it sufficiently serious. Each wrote a separate statement.

9. Chris Long wrote:-

'...We were sorting Devon letters. I was stood by my frame at the end, Anna was on the third frame and Sandy was on the fourth. Sam had gone to packets. Suddenly there was a loud crash and both Anna and I looked up startled. An empty tray had been thrown at the sorting frame between us and had hit it and fallen on the bench near us. It had been thrown at some force. If either Anna or I had moved at the time, it would have hit us. We were both really shocked by this. I looked behind and Maria was the only one there.'

10. Sandra Trebble wrote:-

'I was standing at frame four sorting Devon letters and there was a loud crash and I looked to my left and saw a grey box had landed on the frame to the left of Anna. I then glanced around and saw Maria walking away. I don't know why she did it. She did not say anything to any of us.'

11. Anna Mearns wrote:-

'... It was quiet when all of a sudden there was a tremendous crash. I immediately looked around and saw Maria standing at least 6 feet away. As I looked I saw her arm swing back as if she had thrown something. The empty box hit the sorting frame with tremendous force, the noise made me jump. It was quite frightening. Had someone been stood in the frame, it would have caused an injury. I am at a loss to know why she threw the box. She didn't speak, but just walked away after the incident.'

12. Karen Halls conducted an investigation. The claimant was interviewed on 5 November 2019 and she put forward her innocent explanation that she had picked the box off the floor because it posed a tripping hazard and put it on the frame. She said there was no York to put it on. A York is a wheeled trolley which contains the plastic trays for the letters. She suggested that she had always had a frosty reception with the three witnesses who wrote the statements and that might explain why they were saying what they were.

13. Karen Halls asked some follow-up questions. The manager, Reggie Chacko said there were Yorks available for empty boxes at the time of the incident. Chris Long said there could not have been an empty box lying on the floor and that there was a York for empty boxes. Anna Mearns said there was a York for empty boxes and that there was not an empty box on the floor. Sandra Trebble said she could not remember whether there was a York for empty boxes. She did not see an empty box on the floor near the relevant frames.

Disciplinary

14. Karen Halls found that there was a case to answer and forwarded the case to Jason Moore for a disciplinary hearing. The hearing took place on 9 December 2019. The claimant was represented by a union representative. The claimant again put forward her innocent explanation, namely that she saw a tray on the floor and picked it up with her left hand and lifted it to the frame with an underhand action. She picked it off the floor, checked the frame first, and as nobody was sorting there, she placed the tray on the table in front of the frame. She suggested that the witnesses had just assumed she had thrown the tray. It did slide across the frame and make a noise. She said you could tip the tray on the frame and it would make the same noise when tipping letters onto the table in front of the frame to sort them. The claimant also suggested it was impossible for her to throw the tray because of her arthritis.

15. Mr Moore found on the balance of probabilities, that the witnesses would not have said what they did, unless it had been true. What they described was inconsistent with the claimant's account. He preferred their evidence and rejected theirs. That was a decision for him to take. Throwing the tray over a distance of some feet before the frame was a clear breach of health and safety policy, he found.

Appeal

16. The matter went to appeal. Ms Rysdale, an independent casework manager, conducted the appeal interview which took place on 14 January 2020. Following that, Ms Rysdale decided to make some further enquiries. Ms Rysdale re-enacted throwing the tray at the frame from various angles. She interviewed Chris Long on 29 January 2020. She put to him whether it was possible that the noise had been created by the claimant simply dropping an empty tray onto the frame from a foot or so while walking away. Mr Long said that was not possible, not only from what he saw, but from the force and the noise. This meant it could not just have been put on the frame. He was asked why he had not challenged her there and then; he replied that that was a good question. He thought it was to do with the climate in which they operated. They were so used to poor behaviour from the claimant, he said, that it did not come as that much of a surprise. Also, he said, she can be quite intimidating. On the night, it was almost time to leave so he chose to do nothing; but later at home he felt he needed to do something. He did discuss the matter with Sandra and Anna that night before leaving and they commented to the effect: Can you believe that? The following shift they decided to report the matter. The three of them did take a joint decision to report the matter. They felt that they wanted to be sure it was a serious enough event to warrant reporting it.

17. Anna Mearns was also re-interviewed. She was asked how did she know that the box hit the frames, as she claimed? She replied it was the sound: they turned around immediately and the claimant was the only person around. Anna Mearns was convinced she saw a movement in the claimant's arm. She is sure that that is what happened. It must have been thrown. She was specifically asked, could it not be the noise of the claimant dropping an empty box onto the frame from a foot or so while walking away. Anna Mearns replied the box appeared with force. It must have been thrown against the frame. It was thrown not put; 'I don't tell tales', she said. It was a possible danger. Ms Rysdale put it again: trays make a noise when dropped onto the bench or are tipped: what was different about that noise? Anna Mearns replied it hit the frame and fell onto the flat. It was in the air. It was not the noise of a box being put down. Anna Mearns also insisted that there could not have been a box to be picked up at the location claimed by the claimant. They would have picked it up earlier. Anna Mearns was asked why she did not challenge the claimant at the time? She replied, because we don't speak to her. 'She's caused trouble and we just don't get involved'.

18. Sandra Trebble was also re-interviewed on 29 January 2020 by Ms Rysdale. Mrs Trebble said that that she turned to her left. Where the sound came from, the frames were shaking. It was a metallic crash. She saw the box and wondered where it had come from; they all turned it was a sudden, unusual noise. They did not see anyone other than the claimant. She thought the box must have been thrown towards the frame. The frames were shaking. The box must have hit the frames and then the bench. The claimant was the only person there. There was no other way the tray could have got there. It was the noise that made her turn her head. She was asked why the noise could not have been what the claimant was asserting, namely dropping an empty box onto the frame from a foot or so and walking away. Mrs Trebble replied that it was the loudness of the noise and the fact the frame was shaking and where the claimant was located.
19. Ms Rysdale preferred the accounts of the witnesses to that of the claimant, she noted that there were differences in account from the claimant: when first asked about the matter by Karen Halls, the claimant stated she just put the tray down; at the fact-finding the claimant stated she put it on the frame it did make a noise, but it was not deliberate; at the formal conduct interview the claimant stated it slid across the frame and made a noise. So there were material differences in account which lacked credibility.
20. She rejected the suggestion that there had been dishonest collusion between the three witnesses. The witnesses gave an explanation as to why they had waited until the following day, before making a report, namely the incident happened last thing on their shift and they wanted to be sure it was worth reporting. Ms Rysdale also rejected the suggestion that the claimant could not throw a tray underarm, as alleged. No one was suggesting she had thrown it overarm. Ms Rysdale had undertaken a credibility test from a distance of approximately 4 to 6 feet using an underarm motion. She released a tray towards the same letter frame where the claimant claimed to place the tray. She did this more than 12 times with the tray hitting the letter frame at different points. On all but two occasions the tray dropped down and landed on the bench of the letter frame. The noise of the tray hitting the metal frame could not be distinguished from the noise of it then landing on the bench, given the proximity in time. In her opinion, the event involved one noise. She was satisfied that it is possible to 'launch/toss' (as she put it) a tray towards the frame from a relatively short distance in what would be a dangerous manner and for there to be just one noise and for the tray to land on the frame.
21. The overall decision was hers to take and she preferred the cogency of the witnesses' evidence to that of the claimant's

Some points on the investigation

22. After some weeks, the claimant raised the issue of CCTV. CCTV does run at some points in the mail centre. It was not interrogated in this case. Mr Moore told me that the CCTV will wipe itself after two days unless recovered. No one thought to recover the CCTV in time. I agree with the claimant that it would have been interesting to have the CCTV. I regard the matter as neutral, however; the CCTV may well have shown the claimant act as the witnesses describe. I do not assume, as invited to do so by the claimant, that it would exonerate her. In short, I regard the absence of CCTV as neutral between the parties.
23. The claimant criticised Ms Drysdale's throwing-of-the-trays experiment. This was not conducted, she points out, in the presence of the witnesses. The claimant suggests, this makes it unreliable. I disagree. Ms Drysdale was entirely clear what the witnesses were saying about the throwing of the tray. She undertook a re-enactment to see if it could corroborate what they were saying; she concluded it could. She did it for her own purposes. It did not need to be done in front of the witnesses.

CONCLUSIONS

24. This tribunal takes no pleasure from seeing an employee with nearly 23 years' service losing her job in these circumstances. However, the respondent managers had to make a decision as to whether or not they believed the complaints made to them. On considering the evidence and on the balance of probability, they preferred the evidence of the witnesses. There was cogency to their evidence. The respondent managers had to make a decision as to whether they accepted or not the complainants' evidence. They decided they believed it.
25. That involved a finding, therefore, of the claimant behaving in a most troubling fashion. An intemperate and reckless throwing of a tray at the letter frames. If it had hit a worker it could have caused injury. The account from the witnesses was cogent and compelling. There was a reasonable basis for the respondent managers conclusions. They had followed a fair and reasonable investigation and procedure. It is common ground, that having made that finding dismissal was a reasonable response.
26. The decision to dismiss was not unfair. The cogency and consistency of the witnessed evidence, tested at least twice by Mrs Halls and Ms Rysdale, was sufficient to provide a reasonable basis for the decision. Mr Moore's insight is fair. The witnesses would not have said what they did unless true, on the balance of probability.

27. There was no credibility to the suggestion that they had colluded to fabricate. Checking with each other as to what they had seen and whether it was worth reporting is not colluding to fabricate.

Employment Judge Smail
24 November 2020

South West Region