



# EMPLOYMENT TRIBUNALS

Claimant: Andrew Stothard

Respondent: Royal Mail Group Ltd

Heard at: Leeds through CVP

On: 23 October 2020

Before: Employment Judge C O'Neill

## Representation

Claimant: In Person

Respondent: Mr Gregson (Solicitor Weightmans)

# RESERVED JUDGMENT

The complaint of unfair dismissal fails and is dismissed.

# REASONS

## 1. Claims

Unfair dismissal was the only claim before the tribunal.

Early conciliation has taken place and began on 9 April 2020 and ended on 4 May 2020 and the ET1 was lodged on 26 May 2020. The claimant having been dismissed on 7 February 2020.

## Law

2. The law in this case is to be found in the Employment Rights Act 1996 sections 94 and 98.

3. The most important case is that of *British Home Stores Ltd v Burchell* [1978] IRLR 379 the principles of which are well established and enshrined in the issues I set out in the Issues section below.

***Iceland Frozen Foods v Jones [1982] IRLR 439*** is also a long-standing and well-established case which sets out the guidance to employment tribunals on how to approach the decision-making, including a warning against substitution.

- (1) the starting point should always be the words of [s 98(4)] themselves;*
- (2) in applying the section an Industrial Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Industrial Tribunal) consider the dismissal to be fair;*
- (3) in judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what the right course to adopt for that of the employer;*
- (4) 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, another quite reasonably take another;*
- (5) the function of the Industrial 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 falls outside the band it is unfair.'*

#### **4. Background**

4.1 In brief, the claimant was dismissed by reason of conduct on 7 February 2020 following an investigation on the 10<sup>th</sup> and 14<sup>th</sup> of December 2019 a disciplinary hearing on 27 January 2020, followed by an appeal hearing.

4.2 . The claimant is the postman. The respondent relies on dishonesty and an authorised absence. The claimant having entered into an agreement with the respondent to take holiday from 11<sup>th</sup> of November 2019, returning to work on 2 December 2019, failed to return on the agreed date and only returned on 9 December 2019.

The respondent contends that in the investigation into the unauthorised absence that followed, the claimant was dishonest in that he was unable to evidence that it was ever his intention to return on 2 December 2020 by producing booking forms, et cetera and the dismissing officer formed the belief that he was not telling the truth about his holiday plans. As a general rule postman are not permitted to take holiday in December. Honesty and integrity are of paramount importance to the respondents who accept that had the misconduct simply been an unauthorised absence from work, it might not have been regarded as gross misconduct and it was the dishonesty factor that justified the dismissal.

## 5. Evidence

5.1 There was an agreed Bundle of Documents of about 200 pages.

5.2 Witnesses. The witnesses for the claimant were Mr David Bruyee , who drove the claimant to the airport and Ms Joanne Yates, the claimant's sister, who spoke to Mr Lee Fortune (the claimant's manager) on 5 November 2019.

5.3 The respondent witnesses were Mr Gary Trunks the appeal officer and Mr Adam Knight who was the dismissing officer.

5.4 The witnesses produced witness statements which were taken as read and cross-examined.

## 6. Issues

The issues for the Tribunal to decide are as follows:

6.1 Was the claimant dismissed? The parties agree that he was expressly dismissed without notice 7 February 2020 for alleged gross misconduct.

6.2 What was the reason or principal reason for dismissal. The Respondent says the reason was conduct, a potentially fair reason under S98(2)(b).

6.3 The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

6.4 If the reason was misconduct, then the Tribunal must decide if the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

6.4.1 there were reasonable grounds for that belief;

6.4.2 at the time the belief was formed the respondent had carried out a reasonable investigation;

6.4.3 the respondent otherwise acted in a procedurally fair manner;

6.4.4 dismissal was within the range of reasonable responses.

6.5 Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

## 7. Findings of Fact

7.1 Having considered all of the evidence both oral and documentary I make the following findings of fact on the balance of probabilities which are relevant to

the issues to be determined. Where I heard or read evidence on matters on which I make no finding or do not make a finding to the same level of detail as the evidence presented to me that reflects the extent to which I consider that the particular matter assists me in determining the issues. Some of my findings are also set out in my conclusions below in an attempt to avoid unnecessary repetition and some of my conclusions are set out in the findings of fact adjacent to those findings.

- 7.2 The claimant was employed by the respondent as the post man and was so employed from 8 September 2017 until his dismissal on 7 February 2020.
- 7.3 The claimant had agreed with his manager to take three weeks holiday for weeks commencing 11 November, 18 November and 25 November, returning to work on 2 December. It was agreed that two weeks would be taken as paid leave and the third week as unpaid leave the claimant having insufficient entitlement to take for three weeks.
- 7.4 The claimant was off on sick leave with a bad back from 24 October 2019 and did not return to work before taking his holiday. He has produced fit notes, certifying that he was unfit to work until 19 November 2019. There are no fit notes for any period after that.
- 7.5 During the claimant period of sick leave his relationship with his line manager Lee Fortune deteriorated, with each blaming the other for poor communication and resulted in Mr Fortune withholding sick pay and classing the claimant's absence as an authorised from 4 November 2019 on account of the claimant's alleged failure to keep in touch with management in the appropriate way. This aspect had no bearing on the decision to dismiss and the matter was resolved before Mr Knight convened the dismissal hearing. The outcome was that the claimant's sick pay was restored.
- 7.6 The parties accept that as a general rule postmen are not permitted to take holiday during December, because that is the peak period in the build up to Christmas and that this was well-known within the organisation and was known to the claimant. In 2019 there was also a general election which increased the postal traffic.
- 7.7 The claimant says he originally intended to fly to his holiday destination on or about 12 November 2019. However, he did not fly out until the following week (16 November 2019) and extended his holiday, returning home on 7 December 2019 and intending to return to work on 9 December 2019.
- 7.8 The claimant says that on 6 November he sent an email to his line manager Mr Fortune asking for his annual leave to be moved to encompass the return date of 8 December 2019. The same email indicates his sick note had been extended for two weeks. The claimant says this email was ignored. However, that is not quite true, as there was a reply from Mr Fortune on the same day which did not grant permission to move the holiday period and in answer to a further email from the claimant there is an email reply from Mr Fortune dated

16 November 2019 expressly stating that the holiday extension to 8 December 2019 is not agreed.

- 7.9 At the time that the claimant submitted the email of 16 November to Mr Fortune he was already in Thailand yet his email is silent about that. This is an example of where the claimant is disingenuous. He certainly did not lie expressly about his whereabouts but that in his own words 'I just didn't mention it'.
- 7.10 The claimant also says he had a telephone conversation with his line manager Gary Roberts on 19 November 2019 in which he repeated his request to move his holiday dates, but Mr Roberts allegedly told him 'I was already on an authorised absence and not receiving any pay, so there wasn't any point'. The email from the claimant to Mr Trunks, dated 2 April 2020 describes this conversation in some detail. By this time the claimant was already in Thailand with the return flight booked for 8 December. I find that Mr Roberts did not authorise any extension of the leave and that no reasonable person would have taken his remarks as granting such permission. Mr Trunks, who interviewed Mr Roberts, preferred Mr Roberts evidence and concluded it was more likely to have been the claimant who said that. In addition the claimant accepts that he told Mr Roberts that he had just landed whereas he had arrived in Thailand on 16 November. The claimant says that he did not wish to deceive Mr Roberts but accepts that the discrepancy between this statement and his arrival date might well give the impression that he was being less than frank.
- 7.11 During his cross-examination of Mr Knight the claimant asserted that as he was led to believe by both Mr Roberts and Mr Fortune that he was on unauthorised leave he was entitled to remain absent from work until they called him back. Mr Knight does not accept that proposition and I find the claimant was disingenuous in making it.
- 7.12 It appears to me that the claimant took it upon himself to defer his holiday by a week to start on 19 November and so as not to return to work until 9 December 2019, without the permission of either of his managers, Mr Fortune or Mr Roberts and was absent without leave. I accept the claimant's evidence that Mr Roberts did not warn him that if he failed to return on 2 December 2019 he would be jeopardising his job, but the email from Mr Fortune makes it absolutely plain that unauthorised absence could lead to disciplinary action.
- 7.13 The claimant says that he was unsure of his status at that time because he had agreed annual leave from 11 November, he had a sick note which certified that he was unfit for that week commencing 11 November and he had an email from Mr Fortune asserting that his absence was unauthorised. I find that no reasonable employee should have misunderstood the Claimant's position, which was that he had no authorised leave after 2 December when he knew he was expected back at work and I do not accept that the claimant did not understand that expectation.
- 7.14 In the circumstances it was not unreasonable for the respondents to call the claimant to an investigation and thereafter a disciplinary hearing when the

claimant failed to return to work or submit a sick note to explain his absence on 2 December. Both the investigation meeting and the disciplinary hearing were fairly conducted in accordance with the conduct policy, the claimant was made aware of the charges against him, was represented by his union, given every opportunity to answer the charges, was provided with the notes and given an opportunity to correct them and given the right of appeal which he exercised.

7.15 The disciplinary hearing was conducted by Mr Adam Knight on 27 January 2020. He reached the conclusion on reasonable grounds that the claimant was absent without leave from the 2 to 9 December 2019. In addition, having given the claimant several opportunities to produce evidence of his original booking and its subsequent amendment, Mr Knight concluded that it has always been the claimant's intention to extend his holiday to 9 December 2019.

7.16 Mr Knight then focused on the question as to whether the claimant had acted dishonestly the charge being that he had never intended to take holiday in the period 11 November to 2 December but had always intended to stay away until 9 December 2019 and manipulated the situation to achieve that end, knowing that he would have been refused holiday in December had he requested those dates from the outset.

7.17 In the records of the fact-finding interviews and disciplinary hearing, as corrected by the claimant, on a number of times the claimant gives the impression of being less than frank or cooperative a number of times. For example, his response to Mr Fortune's request to provide copies of his passport to evidence his travel dates was 'I shouldn't have to'. The claimant failed to produce evidence of the fact that his hotel booking had to be changed from 11 November to 19 November and despite having been asked to produce it on previous occasions he told Mr Knight that he hadn't done so because he didn't think it was important which gives the impression of his reluctance to do so. The claimant produced a receipt purported to be from the hotel in Thailand as evidence of the hotel booking but accepts that he edited the email trail that preceded it, but at today's hearing dismissed the respondents doubts about that on the disingenuous basis that he had only been asked to produce details of the hotel booking and not the email trail that accompanied it. The claimant accepts Mr Knight's account of his attempts to assist the claimant in producing details of the booking amendment from booking.com (by providing first the contact details, then a mobile telephone and then a private area to make the call) and I find the claimant's behaviour gives the impression of reluctance to provide this because he had something to hide, and that was the conclusion that Mr Knight drew.

7.18 During the investigation meetings, the disciplinary hearings and at the tribunal hearing the claimant accepted that his flight was first booked on 12 November 2019 for 15/16 November 2019, and that this was the only flight booking he had made.

7.19 The claimant told Mr Knight that his hotel accommodation had been arranged some month earlier through booking.com, and that the original

booking had been made to commence on 11 November 2019. The claimant was asked to produce documentary evidence of the hotel booking and its amendment but he failed to produce any documentation to show that the hotel was booked for that date. At first the claimant said he did not have the telephone number or contact details. When Mr Knight provided them the claimant said he did not have a telephone and Mr Knight provided one. Then, the claimant refused to use the telephone in front of Mr Knight and his union representative and so they each agreed to leave the room. The claimant then said that he was unable to make the call without the booking reference and Mr Knight suggested that he goes home to find it. No evidence was ever produced to Mr Knight by the claimant that he had a booking at the hotel for the week commencing 11 November. The claimant accepted this description of events relating to the production of the booking documents. This reinforced Mr Knight's view that the claimant had no such earlier booking and had never had any intention of returning on 2 December in line with his authorised time off and, more importantly, was lying directly to Mr Knight about that.

7.20 Mr Knight concluded *'it is my reasonable belief that there was no original booking for the hotel from 11 November 2019. Mr Stothard been given plenty of chances and reasons to provide the evidence of the original booking. However, he has failed to do this on multiple occasions.'*

7.21 Mr Knight also concluded that *'Andrew Stothard had remained absent from work for an extra week when he did not have authority to do so. He was well aware that the month of December is the busiest time of year for Royal Mail employees and its customers. Andrew Stothard would have been well aware that he would not have been allowed to take further time off in December if he had asked management. I believed therefore that he invented the story about having to change his holiday when he had no intention of returning to work on 2 December 2019 as indicated'*.

7.22 Save that the claimant wished to have a three-week holiday in Thailand, he has provided no explanation to the tribunal or to the dismissing and appeal. Officers as to why he was compelled to remain on holiday until 8 December. Even if he had to defer the start of his holiday because of his back condition and began it on 19 November that would still have given him a two-week holiday, before returning within the agreed holiday dates on 2 December.

7.23 As a consequence of these conclusions Mr Knight formed the view that he had lost trust and confidence in the claimant and his misconduct warranted summary dismissal.

7.24 In reaching this conclusion, Mr Knight, relied on those matters set out in the conduct policy and a behaviour standards document. The behaviour standards document sets out in part 2, under the heading personal behaviour and appearance *'we should all demonstrate efficiency and reliability, honesty, punctuality, good attendance and a smart and clean appearance'*. The

document does not spell out the consequences of failing to meet the standards which objectively a wide degree of culpable behaviours not all of which would warrant dismissal.

7.25 The Conduct Policy '*outlines the approach that will be taken if an employee does not meet the expected standards of conduct and behaviour. Resolving issues informally with support and guidance will be used where appropriate to encourage improvement. Only where the issue is potentially more serious will formal conduct action be considered as outlined below*'.

7.26 The policy contains the usual clause that 'No employee will be dismissed for a first breach of conduct, except in the case of gross misconduct, when the penalty will normally be dismissal without notice or payment in lieu of notice'.

7.27 Gross misconduct is described in the conduct policy and a list set out, which is expressly said not to be exhaustive. The policy states '*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*'. The list of examples of gross misconduct does not contain an example of dishonesty of the sort relied on by Mr Knight.

7.28 Thereafter, the policy sets out a table of penalties. That table expressly refers to dishonesty and provides that it is within the contemplation of the policy that dishonesty may attract a lesser penalty than dismissal. The first level of penalty is a warning. The second level of penalty comprises a serious warning of up to 36 months for dishonesty. The third level of penalty combines such a warning with a transfer. The fourth level of penalty in vote, suspended dismissal for up to 36 months in the case of dishonesty. The fifth level of penalty comprises such suspended dismissal plus transfer for up to 36 months in the case of dishonesty. The next level is dismissal with notice and the final level summary dismissal.

7.29 Before these charges the claimant had a clear disciplinary record.

7.30 Mr Knight told me, and I accept, that he was familiar with the policies outlined above. He told me in terms that he considered a lesser penalty but decided that the claimant's conduct warranted summary dismissal and he distinguished that conduct from other examples of dishonesty which might warrant a lesser penalty. Mr Knight distinguished the claimant's circumstances on the basis that he did not believe that the claimant had acted on impulse, but had acted in a premeditated way ever since the holiday was first arranged and that it had always been the claimant's intention to remain on holiday until 8 December with or without authority. Mr Knight also distinguished the claimant's conduct as warranting summary dismissal as he showed no remorse, failed to acknowledge or take ownership of his conduct. For Mr Knight this was a breach



of the fundamental term of trust and confidence as between an employer and employee and all the parties accepted trust was a key factor within Royal Mail.

- 7.31 Mr Stothart in cross examination suggested to Mr Knight that there were procedural failings in the conduct of the disciplinary hearing, in that he had failed to properly investigate the matter. Mr Stott put two things to the witness. Firstly, that the bundle of documents contained a document relating to another person's case and Mr Stothart put it to Mr Knight that had he properly prepared the case and read the documents this would have come to light. The fact that Mr Knight had not noticed the document evidenced that his investigation was superficial. Mr Stott also pointed out that the investigation was superficial because Mr Knight only had the documents on Friday at the hearing took place on Monday. Mr Knight frankly admitted the oversight in relation to the document belonging to another member of staff, but otherwise confirmed and I accept, that he properly prepared for the hearing and did not adopt a superficial approach.
- 7.32 The claimant exercised his right to appeal which was heard by Mr Gary Trunks on 2 March 2020, at which the claimant was represented by his union. There were no procedural defects at the appeal stage. The claimant having provided documents and having been provided with all the relevant documentation, was represented, was given every opportunity to raise the points on appeal, was provided with notes and given the opportunity to correct them. The appeal was conducted as a rehearing.
- 7.33 Mr Trunks undertook some further investigation and in particular interviewed Mr Gary Roberts but preferred his account as to what was said between Mr Roberts and the claimant on the 18<sup>th</sup> and 19<sup>th</sup> of November. Mr Trunks explained that it was illogical for a Royal Mail manager to suggest that a postman's absence during December, (whether or not on unauthorised leave) would make no difference. Mr Trunks was of the view that such a manager would be very keen to have the postman return as soon as possible because of the peak period. Having heard from the claimant Mr Trunks concluded that it would be more likely to have been the claimant to have said what the claimant attributed to Mr Roberts and which Mr Roberts denied.
- 7.34 At the appeal hearing the claimant's representative drew Mr Trunks attention to the fact that the claimant had now produced evidence of his original booking from 12 November 2019 which Mr Knight had requested but the claimant had been unable to supply at that time. This comprised a document said to be from the hotel in Thailand and was described as a receipt and purported to show payments in respect of a particular room from 12 November until 30 November 2019. This document was not a pre-existing document but was generated by the hotel at the request of the claimant who emailed the hotel on 27 February 2020. This document was not before Mr Knight. Mr Trunks considered the document.
- 7.35 I accept the evidence of Mr Trunks that he '*examined this evidence closely*' and reached the following conclusion '*I remain unconvinced that this verifies*

*when the hotel had been originally booked. The reason this does not convince me is because it is clear from the printed copy provided that some of the text has been hidden indeed. It even says (quoted text hidden) within the document.'*

Mr Trunks noted that the email document provided by Sutus Court said only *'this is proof you stay with us'* and concluded that it did not confirm that the original booking was for the days commensurate with the claimant agreed leave or that it was subsequently amended.

Mr Trunks goes on to say *'the text that it is clearly from Mr Stoppard to the hotel above the hidden section demonstrates that it is Mr Stott, is telling the person at the hotel about the moving the booking rather than them acknowledging that they had a record of the original booking and confirming the change'*. In summary, Mr Trunks reached the conclusion that Mr Stothard had not made an original booking for the hotel on the dates claimed and then changed it.

7.36 Mr Trunks went on to consider the penalty imposed. Mr Trunks had reached the conclusion that Mr Stothard had set out to do what he wanted and take three weeks holiday ending on 8 December and fabricated the story about moving the booking to deceive his managers. Mr Stothard had made only one airline booking on 12 November to fly out on 15/16 November and return on 8 December and Mr Trunks concluded similarly there was only one hotel booking and that was for the later period ending on 7 December.

7.37 Mr Trunks also confirmed that honesty and integrity were of critical importance within Royal Mail and that the claimant's actions amounted to a deliberate contrivance and it concerned Mr Trunks that the claimant had not come clean but had persisted in telling untruths to his managers, such that he felt unable to trust the claimant in the future, and that trust was of fundamental importance to the employment of a postman. In the circumstances Mr Trunks reached his own conclusion that summary dismissal was the appropriate penalty.

## **Conclusions**

8. The bare facts of this case are not much in dispute. The claimant having agreed holiday dates with the return to work date of 2 December 2019, took it upon himself to defer his return until 9 December 2019. He did this without permission. Had he asked for holiday in December he knew that it was likely to be refused. On his return he was invited to an investigation meeting followed by disciplinary meeting at which he was summarily dismissed for unauthorised absence and dishonesty.
9. I am in no doubt that the claimant's managers and in particular Mr Knight and Mr Trunks genuinely believed that the claimant had taken unauthorised absence from 2 December 2019 to 9 December 2019 and had on return and during the investigation and disciplinary process persisted in lying to the managers about the circumstances in which the extended holiday was taken.

10. I find that the disciplinary hearing and the appeal were fairly conducted and the factual issues in dispute thoroughly investigated. The claimant was represented, fully informed of the charges, given every opportunity to present his case and to produce evidence of his original booking arrangements.
11. I find that both Mr Knight and Mr Trunks considered the evidence before them carefully and had reasonable grounds to believe that the claimant had contrived to take extended unauthorised holiday and had fabricated a story to make it appear that he had not planned such a return date all along. The fabrication being the story that the claimant had not decided to stay away until 8 December all along but had changed his holiday plans and in particular his hotel booking to that later date. Their conclusions are very carefully explained in the documentation provided to the claimant and I find are based on reasonable grounds.
12. There were potential mitigation factors which Mr Knight acknowledged, namely that on the 18 and 19 November 2019 the claimant attempted to clear the return date with one of his line managers Mr Gary Roberts but by that time the claimant was already in Thailand with the return flight scheduled for 8 December 2019 and was in effect presenting his manager with a fait accompli.
13. I accept the Claimant's evidence that Mr Roberts did not warn the claimant of the consequences of not returning when they spoke on the 18<sup>th</sup> or 19<sup>th</sup> of November, but the email from Mr Fortune makes it absolutely clear that the extension of the holiday to 8 December was not authorised and the claimant risked disciplinary action if he persisted in taking unauthorised leave. Further, no reasonable person could have interpreted Mr Roberts remarks as condoning the late return. Mr Trunks carefully weighed up the evidence and had reasonable grounds to prefer Mr Roberts account of what was said.
14. It is accepted that the claimant had a clear disciplinary record.
15. The final question is whether dismissal falls within the range of reasonable responses given the respondent's own conduct policy highlighted above.
16. As set out above in the legal section I am not at liberty to substitute my view for that of the respondent managers. The test is whether the respondent managers reached a conclusion to dismiss that no reasonable employer would have come to. There are clearly within the contemplation of the respondent's policies acts of dishonesty which attract only a warning and thereafter various levels of increasing severity. Mr Knight gave careful and considered evidence as to why he classed the claimant's conduct as being of the most serious kind and which he regarded as a fundamental breach of trust. Mr Trunks reached a similar conclusion. I find that the respondent's decision to dismiss fell within the band of reasonable responses.
17. In the circumstances I find the dismissal to be fair and I dismiss the complaint of unfair dismissal.

Employment Judge O'Neill

Date 24 October 2020