



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Opoku

**Respondent:** Royal Mail Group Ltd

## RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

**HELD AT London Central (By CVP)**

**On: 16&17 May 2023**

**Employment Judge:** Employment Judge Henderson (sitting alone)

### Appearances

For the claimant: Mr K McNerney (Counsel)

For the respondent: Ms K Faulkner (Solicitor)

## JUDGMENT

**1.The Claim for unfair dismissal does not succeed. The dismissal was fair.**

**2.The date provisionally agreed for a Remedy Hearing (on 29 June 2023) is not required and should be removed from the Tribunal lists**

## REASONS

### Background

1. This is an unfair dismissal claim brought by the claimant in an ET1 lodged on 13 January 2023 (following early conciliation with ACAS from 21 October to 8 November 2022). The ET1 made reference to claims for notice pay, but Mr McNerney confirmed (after taking instructions) that there was no claim for unlawful deduction of wages nor for breach of contract or wrongful dismissal.

2. The claimant had been employed by the respondent from 23 May 1988 to 29 September 2022 as a Night Shift Postman based at Mount Pleasant Mail Centre in London. He had been summarily dismissed for gross misconduct for intimidating and inappropriate behaviour towards a colleague, Paulette Fenton (**PF**). The claimant denied such conduct.
3. The claimant said he had been employed for 34 years and had a clean disciplinary record. It emerged from his oral evidence (though not contained in his witness statement or any of the documentary evidence) that he had been dismissed some years ago; had brought Employment Tribunal proceedings and had been reinstated. The claimant appeared to say that Mr Kohealtee had been involved in the earlier dismissal, but there was no documentary evidence produced to support his oral statements.

#### 4. List of Issues

5. I asked the parties' representatives to agree a List of Issues on the first morning of the hearing. These were:

##### Unfair dismissal

The claimant was summarily dismissed on 29 September 2022.

Did the respondent have a potentially fair reason for dismissing the claimant? The respondent says the reason for the claimant's dismissal was misconduct s.98 (2)(b) Employment Rights Act 1996 (ERA)

- If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will decide, in particular, whether:
  - there were reasonable grounds for that belief;
  - at the time the belief was formed the respondent had carried out a reasonable investigation;
  - the respondent otherwise acted in a procedurally fair manner;
  - dismissal was within the range of reasonable responses open to a reasonable employer in the circumstances. (**BHS v Burchell**)
- If the dismissal is found to be procedurally unfair, would the claimant have been fairly dismissed in any event had a fair procedure been followed? (**Polkey**)
- If the claimant was unfairly dismissed, did he cause or contribute to his dismissal by blameworthy conduct and should any basic or compensatory award be reduced (section 123 ERA)
- Did the respondent act in breach of the ACAS Code of Practice on Disciplinary Procedure) so as to attract an uplift (of not more than 25%) to any compensatory award made by the Tribunal?

### Clarification of the claimant's case

6. Mr McNerney confirmed that the claimant was not relying on any mental health condition or issues as part of his case: either with regard to the alleged misconduct or with regard to whether a lesser sanction should have been applied.
7. Mr McNerney also confirmed that the claimant's case as presented did not rely on any reference to "dishonesty" or "corruption" or collusion of the claimant's witnesses in conducting the investigation, disciplinary or appeal process. This was despite the persistent allegations made to this effect by the claimant in his oral evidence and in some of the documentary evidence. Based on Mr McNerney's submissions, I did not consider this element of the claimant's evidence.
8. I explained on numerous occasions to the claimant that the tribunal would not (and should not) decide whether or not he actually committed the alleged misconduct. It needed to decide the Issues as set out above relating to reasonable belief following a reasonable investigation and whether the dismissal was within a range of reasonable responses.

### **Conduct of the Hearing**

9. The hearing was conducted over two days remotely using the Cloud Video Platform. Apart from an initial issue with regard to the claimant's connection to the hearing, there were no technical problems.
10. The tribunal was presented with an electronic bundle of documents (315 pages in total) – page references are to that bundle unless otherwise specified.
11. I heard evidence from the claimant and on behalf of the respondent from Salim Kohealtee (**SK**), Shift Manager at Mount Pleasant and Steven Potter (**SP**) Independent Case Manager, based in Colchester. The witnesses adopted their written statements as their evidence in chief.
12. On Day 1 after clarifying the Issues and reading the documents, the tribunal heard evidence from the respondent's witnesses. On Day 2 the tribunal heard evidence from the claimant and oral submissions from both representatives. I reserved my Judgment, which I now give, with Written Reasons.
13. The tribunal agreed with the parties, a Provisional Date for a Remedy Hearing (if needed) for one day on 29 June 2023.

### **Findings of Fact**

#### The claimant's grievance

14. In June 2021 the claimant submitted a formal written grievance about bullying and harassment at work (page 67) referring to "Ahmed" and "Ikram". In October 2021 the claimant raised a formal complaint under the bullying and harassment process (Form H1) against Ahmed, Ikram and his own Line Manager, Feisal. (pages 69-70). This was given the Complaint Reference 8003404879. The

claimant said he had also raised verbal complaints over 2020/2021 about PF but there were no written complaints produced about her and she was not mentioned in the claimant's H1 Form.

15. There was an investigation into the claimant's complaint by A Teta in November/December 2021. As part of the respondent's investigation into the claimant's grievance PF was due to be interviewed as a witness.

PF's complaint against the claimant

16. On 12 November 2021 PF submitted her own complaint under the Bullying & Harassment process (page 73-74 and 77-78) about the claimant. She referred to complaints the claimant had made about her in 2020, which does corroborate the claimant's own evidence to this effect. PF also alleged that the claimant would come and stand opposite her bus stop for her journey home from work and stare at her, in order to intimidate her. PF made reference to the recent cases of Sarah Everard and Sabina Nessa and her concern at being a victim.
17. PF was interviewed by Mr Teta on 16 November 2021. There is a lack of clarity as to the nature of this interview. At pages 91-95, this is referred to as part of complaint 8003404879 (i.e. the claimant's complaint), but there is also a suggestion (page 76) that the 16 November interview was part of PF's complaint against the claimant for intimidation and that following that interview, Mr Teta decided to uphold her complaint and proceed with a conduct investigation against the claimant. As a result, the claimant was not formally interviewed as part of the investigation of PF's bullying and harassment complaint.
18. Unfortunately, this lack of clarity and lack of proper record keeping by the respondent was a feature of this particular case.
19. Mr Teta's investigation into the claimant's complaint against Ahmed, Feisal and Ikram concluded on 31 December 2021. The complaint was not upheld, and Mr Teta believed that the claimant had acted in bad faith.

The claimant's suspension and conduct investigation

20. The claimant was suspended on 24 November 2021 pending the investigation into the conduct complaint against him. This was carried out by Altaf Patel and was described as "*alleged inappropriate and intimidation (sic) behaviour towards a member of staff, Ms Fenton in that you followed her several times after work on the way to the bus stop and allegedly you was very passive aggressive in starrng (sic) at Ms Fenton*".
21. After several abortive attempts to arrange an interview (the claimant's evidence as to his reasons for being unable to attend were vague and confused) there was a fact-finding interview between the claimant and Mr Patel on 6 May 2022. At this interview the claimant continued to make allegations of bullying and corruption against various colleagues and managers. The claimant denied the alleged misconduct and said that PF was part of a group who were bullying him. He referred to two colleagues Rudy and Grace who accompanied him when he

left work each day and who could give evidence supporting him. These witnesses were not interviewed by Mr Patel.

22. In late May/early June 2022 Mr Patel passed the conduct complaint to SK as he was more senior than Mr Patel and could deal with more appropriate penalties.

SK's conduct investigation and disciplinary process

23. SK reviewed the papers received from Mr Patel and was satisfied there was a potential case to answer by the claimant. On 10 June 2022 he invited the claimant to a formal conduct meeting on 16 June 2022 (page 166-67).
24. The claimant responded on 11 June (page 168) refusing to attend a meeting with SK, objecting to his conducting the conduct hearing due to "previous abusive issues by [SK] well on the late shift) the claimant requested that another manager be sought to conduct the meeting.
25. The claimant accepted in his oral evidence that he had not specifically referred to SK being involved in his earlier dismissal. He said that he had set out various dates when SK had been involved in earlier proceedings although he had not specified the nature of such involvement. In his oral evidence SK said that he had checked the dates referred to by the claimant but that they revealed nothing which would prevent him from carrying out the conduct investigation/disciplinary hearing. SK, however, accepted that he had not communicated this fact to the claimant.
26. I asked SK why he had not simply referred the matter to another manager. He said he had taken advice from HR and that the claimant had not given any substantiated reason as to why he (SK) had any conflict of interest. His advice was that in such circumstances there was no need to appoint another manager to carry out the disciplinary process. I did not find this response to be plausible given the size of the respondent organisation and its resources.
27. However, I also find that the claimant had not been clear as to his objections for SK hearing the conduct/disciplinary proceedings. His response was simply that SK was "dishonest" and there were references to "issues of corruption" (page 171). The claimant also made allegations of corruption and conspiracy between Mr Patel and other managers and that further correspondence would be from "my brief" by which he presumably meant his legal adviser (page 175).
28. Given the claimant's refusal to participate in the disciplinary process, SK continued in his absence. He interviewed PF on 27 June and also Rose Blackett (cited incorrectly as Blanchard). SK did not interview Rudy or Grace.

SK's decision to dismiss

29. On 28 September 2022 SK gave his decision to dismiss the claimant with effect from 29 September 2022 for gross misconduct (page 218-223). The charge was intimidating, passive-aggressive and inappropriate behaviour towards PF in that the claimant followed PF several times after work on the way to the bus stop

and stared at her. The claimant was given the right to appeal, which he duly did on 29 September (page 223)

30. I asked SK about his decision to dismiss for gross misconduct and whether this had been influenced by the fact that the claimant refused to engage with his conduct investigation/disciplinary process. SK said that he was not influenced by that, however, I note that in many of his responses he came back to the fact that the claimant had refused to engage with the process. I find that the claimant's conduct in refusing to engage with the disciplinary process did influence SKs decision.

31. I also asked SK about why he had not considered the lesser sanction of a final written warning rather than dismissal. He said that he did not believe that the claimant would change his behaviour.

32. I find that the investigation conducted by Mr Patel and SK did have some omissions. I also find that given the claimant's objections to SK conducting the disciplinary process and given the behaviour of both the claimant and SK there must be questions raised with regard to the fairness of SKs decision to summarily dismiss the claimant.

#### The appeal process conducted by SP

33. I note that the appeal conducted by SP was carried out by way of a rehearing. SP said that appeals were often carried out by way of rehearing, but he felt in this particular case there was additional work that needed to be done and further clarity was required.

34. The claimant accepted in his oral evidence that he had not raised any objection to SP hearing the appeal. The claimant said that he had only questioned SP's independence when he saw the outcome, namely that SP had not upheld his appeal. I find that SP was an independent manager.

35. SP held the appeal hearing on 6 December 2022, the claimant was accompanied by Ian Murphy his union representative. The notes of this meeting are at pages 231-238.

36. Following this meeting, SP interviewed PF on 20 December 2022; Grace (the claimant's witness) on 4 January 2023 and R Blackett on 11 January 2023. He said that Rudy (the claimant's other witness) had already left the respondent organisation.

37. Following the meeting with the claimant and the various interviews SP gave his appeal decision on 2 February 2023 (pages 271-281). SP did not uphold the claimant's appeal. He overturned the finding that the claimant had specifically followed Ms Fenton after work but did uphold the decision to dismiss for gross misconduct for inappropriate behaviour in intimidating/staring at her at the bus stop after work, which conduct had been witnessed by Ms Blackett. SP said that Grace's evidence was neutral and did not change his reasonable belief that the alleged conduct had taken place as alleged by PF.

38. SP confirmed that he believed such conduct was gross misconduct within the respondent's Conduct code. He said that whilst it was not specifically defined, the list of gross misconduct offences was not definitive and the claimant's conduct generally fell within the spirit of prohibiting "abusive" behaviour towards colleagues. He accepted that the claimant's conduct was not necessarily the same as violent or overtly discriminatory behaviour, but he felt it was nevertheless serious misconduct, which merited dismissal.
39. I asked SP his view on the delay of over 10 months between the claimant's suspension and his dismissal and subsequent appeal. SP accepted that the delay was considerable and not acceptable. However, he noted that the claimant's lack of cooperation in particular with SKs investigation and meetings had significantly contributed to the delay.
40. I also asked SP about why he had not considered other sanctions such as a final written warning which would have given the claimant a chance to change his behaviour. SP accepted this was an option he had considered, and he had taken into account the claimant's considerable length of service. However, he noted that in reaching his decision, one factor was the earlier finding that the claimant had raised his own complaints against colleagues and managers in bad faith. He said that this showed a pattern of behaviour from the claimant. He also noted the claimant's conduct during fact-finding investigations and the appeal process where the claimant consistently made allegations of dishonesty and corruption against colleagues.
41. The claimant's conduct in this regard had led SP to the belief that the claimant was unlikely to change his behaviour if he were given a final written warning.

### Submissions

42. I heard oral submissions from both representatives. Neither representative presented any legal authority to me. Ms Faulkner referred to one case (**BBC v Smart EAT/227/79**) but was unable to give any more detailed reference and she did not provide (or offer to provide) a copy of that authority. I have been unable to locate it from the reference provided. It is the legal representative's obligation to provide authorities upon which they intend to rely.
43. Mr McNerney made detailed submissions with regard to the delay and quality of the investigations. Whilst I accept that the investigations were by no means ideal, I note that a respondent employer is not required to carry out a detailed forensic investigation equivalent to an investigation into a criminal offence and is not required to reach a conclusion beyond reasonable doubt, but merely to form a reasonable belief based on a reasonable investigation. Accordingly, I do not accept Mr McNerney submissions with regard to nature of the investigations generally.

### Conclusions

44. Based on the findings of fact set out above, I find that there were issues with the investigation carried out by SK and his genuine belief in the claimant's

misconduct when reaching his decision to summarily dismiss the claimant. However, I find that any flaws in that investigation or decision were remedied by the rehearing, further investigation and appeal process conducted by SP.

45. I find that the respondent (acting through SP on the appeal) did have reasonable grounds for the belief in the claimant's misconduct having carried out a reasonable investigation. The key question then comes down to whether the dismissal was within the reasonable range of responses open to a reasonable employer in all the circumstances.

46. The **BHS v Burchell** guidelines continue to be the key case on fairness in misconduct cases and were upheld by the Court of Appeal in **Graham v Secretary of State for Work and Pensions (Jobcentre Plus) [2012] EWCA Civ 903**, where Aikens LJ said (paragraphs 35-36):

*"...once it is established that employer's reason for dismissing the employee was a "valid" reason within the statute, the ET has to consider three aspects of the employer's conduct. First, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; secondly, did the employer believe that the employee was guilty of the misconduct complained of and, thirdly, did the employer have reasonable grounds for that belief.*

*If the answer to each of those questions is "yes", the ET must then decide on the reasonableness of the response by the employer. In performing the latter exercise, the ET must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to the ET's own subjective views, whether the employer has acted within a "band or range of reasonable responses" to the particular misconduct found of the particular employee. If the employer has so acted, then the employer's decision to dismiss will be reasonable. However, this is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse. The ET must not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The ET must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which "a reasonable employer might have adopted". An ET must focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any internal appeal process) and not on whether in fact the employee has suffered an injustice."*

47. As I reminded the parties at the hearing, it is not for the tribunal to substitute its own view of the appropriate penalty for that of the employer (**City of Edinburgh District Council v Stephen [1977] IRLR 135**, **Trust Houses Forte Leisure Ltd v Aquilar [1976] IRLR 251**, and **Meridian Ltd v Gomersall [1977] IRLR 425**).

48. Consequently, it is open to the employer to decide on a range of penalties, all of which might be considered reasonable. The tribunal should not ask whether a lesser sanction would have been reasonable, but whether or not dismissal was



reasonable ( ***British Leyland v Swift [1981] IRLR 91***). There is a range of potential factors which might make a dismissal unfair: in misconduct cases they may include the employee's length of service and his past conduct. (***Trusthouse Forte (Catering) Ltd v Adonis [1984] IRLR 382***).

49. In applying the reasonable range of responses test, it is not for the tribunal to consider whether the employer *should have* imposed a lesser penalty but whether a reasonable employer could still have dismissed *in spite of* that lesser possibility.
50. In this case, there was a history of the claimant's conduct in relation to his dealings with his colleagues. His complaint against several colleagues had been found to be made in bad faith. The claimant had raised and continued to raise during the disciplinary and appeal process and at the tribunal hearing, allegations of dishonesty and corruption against several of his colleagues and managers. However, Mr McNerney said that the claimant did not rely on the substance of such allegations as part of his case for unfair dismissal in the tribunal. I have, therefore, not made any findings of fact with regard to those allegations.
51. SP said that the claimant's behaviour towards his colleagues was unlikely to change and this was a factor in why he decided to dismiss rather than to give a final written warning. I accepted SP's evidence on this matter.
52. Accordingly, I find that dismissal was within the range of reasonable responses open to this employer, given all the circumstances in this case. The dismissal was fair.

**Employment Judge Henderson**

**JUDGMENT SIGNED ON: 26 May 2023**

**JUDGMENT SENT TO THE PARTIES ON  
26/05/2023**

**FOR THE SECRETARY OF THE TRIBUNALS**