



EMPLOYMENT TRIBUNALS

Claimant: Mrs A Smith

Respondent: Royal Mail Group Ltd

Heard at: Leeds Employment Tribunal (via CVP)

On: 1 and 2 February 2022

Before: Employment Judge K Armstrong

Representation

Claimant: In person

Respondent: Mr R Chaudry (solicitor-advocate)

JUDGMENT having been sent to the parties on 11 February 2022 and a request having been made in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the Tribunal provides the following

REASONS

Claims

1. The claimant claims compensation for unfair dismissal, following her dismissal by the respondent on 25 May 2021 for gross misconduct.

Conduct of the hearing

2. The hearing took place, via CVP, on 1 and 2 February 2022. All parties in attendance confirmed that they were able to see and hear throughout the proceedings.
3. The claimant represented herself. She informed the tribunal that she is undergoing assessment for Autism Spectrum Condition and also suffers with back pain. It was agreed that regular breaks would be taken for at least 10 minutes every hour, plus additional breaks as requested by Mrs Smith. This was observed throughout the hearing.
4. The Respondent was represented by Mr Chaudhry, a solicitor-advocate.

Issues for the tribunal to decide

5. At the outset of the hearing, it was agreed that I would hear evidence and give judgment on the issue of liability first, followed by evidence and judgment in respect of compensation if required. The claimant confirmed that she does not seek re-instatement or re-engagement with the respondent, having now secured alternative employment.
6. The issues in respect of liability were identified in a discussion at the outset of the hearing and revised after hearing evidence. It is agreed that the claimant was dismissed, and that the reason for the dismissal was a reason related to the claimant's conduct, which is a potentially fair reason. It was agreed that the respondent genuinely believed that the claimant was guilty of the conduct, and had reasonable grounds for that belief. She admits it happened.
7. It is not agreed that the respondent acted reasonably in all the circumstances in treating the claimant's conduct as a sufficient reason to dismiss her. The issues are as follows:
 - 7.1. The claimant says that at the time the belief was formed the respondent had not carried out a reasonable investigation. She says they should have referred back to her line manager Mr Shaw for information regarding her medical position, an Occupational Health referral, and her previous conduct;
 - 7.2. Did the respondent act in a procedurally fair manner? The claimant says not because one of the charges was not found proven on appeal, but the dismissal was still upheld;
 - 7.3. Was dismissal within a range of reasonable responses? The claimant says not for five reasons:
 - 7.3.1. The respondent did not take into account her 'exceptional circumstances', namely that she was in pain following an accident at work, under stress due to the covid-19 pandemic, her judgment was impaired due to painkillers and pain; and she was facing stress as a result of matters in her personal life;
 - 7.3.2. She was treated inconsistently when compared with two other employees, tending to show that dismissal was a disproportionate sanction;
 - 7.3.3. The respondent failed in their duty of care by not noticing the claimant was in pain and taking action earlier - including not logging the injury at the time it occurred;
 - 7.3.4. The respondent placed unreasonable weight on damage its reputation;
 - 7.3.5. The respondent failed to take into account the claimant's previous good record;
 - 7.4. If the dismissal was procedurally unfair, should I reduce compensation on the basis that it is likely that the claimant would have been dismissed in any event if a fair procedure had been followed;
 - 7.5. If the dismissal is found to be unfair, should the claimant's basic and compensatory award be reduced for contributory conduct i.e.

because the claimant's actions to some extent caused or contributed to her dismissal.

Evidence

8. I was provided with a hearing bundle comprising 247 pages. Page references in **bold** refer to this bundle. I was also provided with a schedule of loss dated 21 September 2021, and an updated schedule of loss. The Respondent produced an additional document on 2 February 2022 (the second day of the hearing), headed '*about your appeal*'. The Respondent said that this document was sent with the notification of the claimant's appeal hearing. The claimant accepted receiving this document and did not object to its inclusion in the bundle.
9. I heard evidence from the following witnesses, all of whom provided witness statements in advance of the hearing: Geoff Balls, delivery office manager and Chloe Thomas, independent case manager, on behalf of the respondent; and the claimant.
10. The claimant said at the outset of the hearing that she was not aware that she could call supporting witnesses. She said that she might have called her union representative as a supporting witness. He was present with her at the investigatory, disciplinary and appeal meetings. I have the minutes of those meetings within the bundle. The claimant had the opportunity to make comments on the minutes of those meetings in the course of the disciplinary procedure, and has had the opportunity to cross-examine the respondent's witnesses regarding alleged inaccuracies in the minutes. Therefore I was not satisfied that it would be proportionate or in the interests of justice to adjourn the hearing today to allow the claimant to obtain witness evidence from her union representative.

Findings of Fact

11. The claimant commenced employment with the respondent on 23 October 2017. She worked as an operational postal grade delivery worker. She was summarily dismissed for gross misconduct on 25 May 2021.
12. In March 2020 the respondent implemented a change to operational delivery procedures due to coronavirus. A '*working time listening and learning brief*' setting out these procedures appears in the bundle at **88**. It amends the procedure for signed for and special delivery parcels to remove the need for customers to sign to confirm receipt, and allowing for the delivery person to sign in their place. It makes clear that the person delivering the item should not sign or record it as delivered until the customer has opened the door and has the item in their hands.
13. The claimant signed an attendance sheet to show that she had attended training in relation to this brief. The claimant accepts that she signed this but disputes that she was given a copy of the handout or that she read it at the time or shortly thereafter, or that she could clearly understand or hear any verbal training that was delivered. In any event, she accepted in oral evidence that she was aware of the procedures and abided by them on all deliveries up until 27 February 2021. In those circumstances, I do not need to make any findings about whether or not she attended training or was

- handed a copy or read a copy of that document. She accepts they were the procedures she had to follow and that she knew that was what she had to do.
14. On 6 and 9 January 2021 the claimant suffered falls at work which resulted in injury to her back. She did not take any time off work immediately afterwards
 15. The claimant says she reported these accidents to her line manager Paul Shaw on 18 January 2021 and asked him to record them in the accident book. She also says that on a number of occasions she approached Mr Shaw to further discuss the accidents and her current medical situation, but that he avoided engaging in any such conversation.
 16. Mr Shaw has not given evidence to the Tribunal. Mr Balls gave evidence that he had experience in the same role as Mr Shaw and that he is likely to have been very busy. His evidence was that if a delivery officer was struggling and was not getting an acceptable response from their line manager he would expect them to raise it with another manager or with their union representative.
 17. I have seen a message from the Claimant to Mr Shaw dated 27 February 2021 at 13.23 which states: *'The twinge in my back just reminded me that I haven't got copies of the accident book for my two on Wednesday 7th Saturday 9th. Can you email them to [email address]? I can give you the details again if need be. Thanks, have a good week ☺ A'*. Mr Shaw responds *'OK will try to find them on my computer'*.
 18. The accident reports have not been produced to the Tribunal, and the Respondent does not provide any evidence to suggest that they were in fact completed. I am therefore satisfied on balance that the accidents were not recorded in the accident book.
 19. The claimant's evidence is that until 8 March 2021, she herself did not realise how serious the effect of her injuries was on her. She was continuing to work, managing her pain as best she could with painkillers. Although she attempted to discuss the accidents with Mr Shaw on a number of occasions, she did not ask to be put on amended duties (which had been on previously and was aware were an option) and did not take any sick leave.
 20. She says that with hindsight the combination of the pain and painkillers was affecting her judgment and she was not fit to work by 27 February 2021, but she herself was unable to recognize this. She says that the Respondent, specifically Mr Shaw, should have noticed a change in her demeanour and taken steps to intervene and stop her working, without her needing to request this. I return to this below in my conclusions.
 21. At 13.29 on 27 February 2021 the claimant delivered a special delivery item to the incorrect address (the address next door to the delivery address) by putting it through the window, and signed for it herself. The claimant now says she has no recollection of this happening but she has accepted throughout the investigation and to the date of the Tribunal that this must be what happened.

22. From 1-8 March 2021 the claimant was on annual leave. She emailed her line manager the day before her return saying she was suffering with back pain and might not be in on 9 March. She then sent him a text on that date saying that she was not well enough to attend work. She remained on sick leave from that date.
23. On 8 March 2021 the claimant's line manager returned from annual leave. He picked up a complaint from the customer who was expecting to receive the package to say she had been notified it had been delivered but it had not (this complaint was made on 27 February). On 8 March 2021 the customer who had received the package contacted the respondent to complain that she had received a package through her window which was not for her address and it had caused damage to her property, namely the blind, a mobile phone and charger.
24. On 7 April 2021 the claimant attended a telephone occupational health appointment. I have not been provided with a report from this meeting. The claimant says she has not received it either. The claimant says, and I accept, that the conclusion was that she was fit to return to work with adjustments and restrictions for four weeks.
25. On 8 April 2021 the claimant was suspended pending an investigation into the mis-delivery incidents on 27 February 2021 (**109**).
26. The claimant was invited to and attended a fact find meeting on 13 Apr 2021. She was represented by her CWU representative Paul Ellerton. The meeting was conducted by Paul Shaw (the claimant's line manager). Minutes are in the bundle at **127**, including the claimant's amendments. The claimant gave an account of what happened, and also set out mitigation including that she was in considerable pain and her daughter was suicidal at the time.
27. The matter was referred to another manager, Geoff Balls, for further consideration.
28. The claimant was invited to a conduct interview with Mr Balls on 29 April 2021. She was informed that this was to consider 3 charges:
1. *'Mis-delivery of a special delivery item*
 2. *Fraud – that you did not follow coronavirus- change to operational delivery procedures*
 3. *Failure to follow royal mail's standards and procedures resulting in damage to customer property, damage to customers trust and confidence in RM, damage to RM's good name and brand.'*
29. That interview took place on 29 April 2021. Again the claimant was represented by the same union representative. The minutes are at **136 – 145**, including the statement of case provided by the claimant and her amendments. She has signed the notes to say that inclusive of those amendments the minutes are accurate. I am not going to attempt to summarise the content of those minutes as they are lengthy and detailed, save to say that in her submission, the claimant again gives an account of the events on 27 February 2021, and sets out in detail her 'exceptional circumstances'. In her amendments to the notes, she adds that '*I explained*

this was based on my recollection of events, working out what I must have done' (144).

30. In the course of the hearing, the claimant's union representative raised the issue of a comparator who had also mis-delivered items but was not dismissed. Following the hearing, Mr Balls undertook some further investigation in relation to this.
31. On 18 May 2021 the alleged comparator emailed Mr Balls in response to his enquiries setting out some further details (151). He said that he had signed for a special delivery item which he had posted incorrectly. The address was difficult to read. He had six months experience at the time and was under the impression that a first-time delivery was key. He got the address wrong and posted to a neighbour. About two hours after his shift ended, once he had been made aware of the error, he returned to the property and re-delivered the item. He was suspended for about two weeks pending investigation and no further action was taken. The officer who made the decision has since left the respondent's employment. In Mr Balls' evidence he said that he differentiated this case on the basis that delivery had not been undertaken through a window, there was no damage to property, there had not been two complaints, and the postal worker at the time was relatively inexperienced compared to the claimant.
32. During his deliberations Mr Balls also considered a similar case he himself dealt with about 12 months earlier which is set out at 172-175. On that occasion, the employee admitted that he signed for a special delivery item and left it outside at the wrong address. He received a two year '*suspended dismissal*'. Mr Balls' evidence was that he differentiated that from the claimant's case because in her case there were two customer complaints, and damage caused to a customer's property. Also, the comparator had 25 years' service compared to the claimant's three. He also felt that the comparator admitted his error immediately rather than attempting to make excuses or place blame on others.
33. On 25 May 2021 the claimant attended a meeting during which she was notified of Mr Balls' decision, which was that he found all three charges proven, and that the appropriate sanction was dismissal. He set out his decision in a report dated 25 May 2021 at 156-162. Within that decision Mr Balls sets out the reasons for his findings on each charge, and deals with the comparator evidence.
34. The claimant immediately indicated her intention to appeal, on the basis that she disagreed with the decision (163).
35. The appeal took the form of a re-hearing, and was heard by Chole Thomas on 11 June 2021. The claimant was again represented by her union at this hearing. The minutes are set out at 178 onwards. Following the hearing, the claimant submitted some amendments to the minutes. Ms Thomas accepted some of those amendments but not others. During the appeal meeting, the claimant said that the accounts she had put forward previously were based on her '*piecing together what must have happened*' after the event rather than from her own recollection of the events of 27 February 2021. She again put forward the mitigating circumstances she previously referred to.

36. Following the appeal, the claimant submitted some further evidence in the form of text messages between her and Mr Shaw and her and another work colleague, regarding her accidents at work.
37. On 2 July 2021 the claimant was sent the outcome of her appeal. Ms Thomas upheld the findings on charges 1 and 3 but dismissed the findings in relation to charge 2 as she was not satisfied that this amounted to fraud. She found that the charges 1 and 3 were sufficient to justify dismissal and therefore upheld the dismissal.

Relevant law

38. S.98(4) Employment Rights Act 1998, in so far as relevant, provides as follows:

*'Where the employer has [shown that dismissal was for a potentially fair reason]
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.'*

39. I have considered the principles set out in *BHS v Burchell* [1978] IRLR 379 which provides guidance on the matters to consider when dealing with a dismissal for conduct. The principles are set out in the issues identified above.
40. I am mindful that I must take care not to substitute my decision for that of the employer, but to consider whether or not the employer's actions fall within the range of actions which are open to a reasonable employer.
41. I have been referred to the case of *Governing Body of Hastingsbury School v Clarke* UKEAT/0373/07 and 0374/07 in which the Employment Appeal Tribunal was satisfied that the Employment Tribunal at first instance were entitled to find that the disciplinary procedure should have been suspended while investigations into the employee's ill health (which was said to have contributed to his conduct) were investigated.
42. I have considered the case law regarding inconsistent treatment. Evidence of other employees being treated inconsistently might justify a finding of unfair dismissal in three potential circumstances (*Hadjjouannou v Coral Casinos* [1981] IRLR 352 EAT):
- (i) where employees have been led by an employer to believe that certain conduct will not lead to dismissal;
 - (ii) where evidence of other cases being dealt with more leniently supports a complaint that the reason stated for dismissal by the employer was not the real reason:

(iii) where decisions made by an employer in truly parallel circumstances indicate that it was not reasonable for the employer to dismiss.

43. In this case, the claimant invites me to find that the comparators are truly parallel and that the decisions made in their cases indicate it was not reasonable for the respondent to dismiss her.

Conclusions

44. I return to the issues identified above

(1) *The claimant says that at the time the belief was formed the respondent had not carried out a reasonable investigation. She says they should have referred back to her line manager Mr Shaw for information regarding her medical position, an Occupational Health referral, and her previous conduct.*

45. I have considered whether the information about the claimant's injury, her sick notes as provided to Mr Shaw and the occupational health report should have been passed forward to Mr Balls as part of the investigation report, or conversely whether what the claimant raised in the disciplinary and appeal hearing should have triggered Mr Balls or Ms Thomas to make further enquiries in that respect. Whilst ideally and for completeness perhaps this would be the case, I remind myself that I have to consider what is reasonable and whether the investigation carried out was within the range of what a reasonable employer would have done.

46. Mr Balls and Ms Thomas both accepted that the claimant had had a fall at work and that she had been off work sick since 9 March 2021. Therefore any record of her accident (which did not in any event exist in a formal capacity) would not have added anything to the investigation. The only missing information in reality was that she had been referred to occupational health. This was within the respondent's knowledge and the dismissing officer should ideally have been made aware of this. However, did the fact he didn't know about it render the dismissal unfair? I am satisfied in this case that it did not. Although the claimant makes some reference to 'piecing together' what happened during the disciplinary meeting, it was not made clear that she had no recollection of events. In fact she gave a clear account of her actions and an explanation for them. It was also open to the claimant to refer to the occupational health referral in particular if that was specifically something she wanted to be taken into account, as opposed to generally that she was in pain following an accident. Given that the occupational health referral outcome was that the claimant was fit to return to work on reduced duties, I do not consider that it was unreasonable that Mr Shaw did not pass it forward as part of the investigation report.

47. At the appeal hearing, the claimant did make it clearer that she felt she could not recall the incidents of 27 February 2021. However I am satisfied that it was reasonable for Ms Thomas to rely on the information that she had and to consider the representations made by the claimant as part of the overall picture at that stage, without needing to make any further investigation into her health position. She was in possession of the information above and in light of all the evidence she had, it was reasonable not to undertake any further investigation.

48. I have also considered whether further investigation should have taken place in the form of discussions with Mr Shaw regarding the claimant's previous good character and whether this incident was out of character. Both Mr Balls and Ms Thomas accepted that the claimant was of previous good character so there was no need to return to Mr Shaw for more information on this point and more investigation. The investigation was reasonable.
- (2) *Did the respondent act in a procedurally fair manner? The claimant says not because one of the charges was not found proven on appeal, but the dismissal was still upheld.*
49. I am satisfied that removing the second charge did not render the dismissal procedurally unfair. Ms Thomas's amendment was a fair one, in removing the charge of fraud. I am satisfied that dismissal for the remaining two charges was potentially fair on the face of the charges. This is because the charges concern the same conduct, although framed differently. I have considered below whether it was substantively fair to dismiss the claimant for this conduct.
- (3.1) *The respondent did not take into account her 'exceptional circumstances', namely that she was in pain following an accident at work, under stress due to the covid-19 pandemic, her judgment was impaired due to painkillers and pain; and she was facing stress as a result of matters in her personal life;*
50. I am satisfied that Mr Balls and Ms Thomas did both take into account the claimant's circumstances. Both say in their decisions that they did, and set out at length what those circumstances were and why in the overall picture in their view the balance fell in favour of dismissal. Mr Balls repeated this in his oral evidence – he stated that he considered her circumstances carefully as part of the overall picture.
51. The information that the claimant herself gave about her health situation and mental state at the time was inconsistent. At each stage of the proceedings, she gave an apparently clear account of why she acted as she did. Although at the disciplinary stage she made some reference to putting together the information retrospectively, in my view it was not clear that this was her position until the appeal stage. It was reasonable for Mr Balls and Ms Thomas to weigh these inconsistencies together with the claimant's circumstances.
52. With all the information the dismissing and appeal officer had, it was in my view within band of reasonable responses to dismiss the claimant, even taking into account the claimant's mitigating circumstances.
- (3.2) *She was treated inconsistently when compared with two other employees, tending to show that dismissal was a disproportionate sanction;*
53. I am satisfied that Mr Balls and Ms Thomas considered these comparators and that it was reasonable for them to conclude that they were different for the reasons given. I am satisfied that they are not sufficiently similar to establish that dismissal was a disproportionate sanction in itself.

(3.3) *The respondent failed in their duty of care by not noticing the claimant was in pain and taking action earlier - including not logging the injury at the time it occurred*

54. I have considered this argument carefully. There were some failings on the part of the respondent, particularly in not recording the accidents as it should have done immediately once reported.

55. I have considered the case of *Clarke* referred to above, in which the Tribunal were satisfied that the employer should have paused the disciplinary procedure to further investigate the claimant's ill-health, in a situation where this appeared to have contributed to his conduct. However, I am satisfied the claimant's case is different for two reasons: (i) it was not suggested in *Clarke* that employer should have intervened *before* the conduct occurred; and (ii) in that case the claimant's behaviour was markedly bizarre throughout the disciplinary proceedings.

56. In this case, Mrs Smith invites me to find that the respondent should have stepped in before the conduct occurred, in which case the incidents of 27 February 2021 would never have happened. However, she said herself she was managing her pain so that she could continue to work, which she wanted to do. She didn't request any time off before 27 February 2021, or any adjustments to her workload. She herself didn't realise how much the pain and the painkillers were affecting her judgment until 8 March 2021, when she was told about the mis-delivery on 27 February.

57. It is correct that the claimant's line manager owed her a duty of care and should have been alert to problems which were apparent to a reasonable observer. I accept that the claimant attempted to speak to him on a number of occasions. I also accept that he would have been extremely busy and this is more likely to be the reason that he did not follow up on comments made by the claimant, rather than any deliberate attempt to prevent the claimant from pursuing her concerns any further. The claimant herself says that she chose to continue with her work and minimised her condition to herself and others. I accept that this was for the admirable reasons of not wanting to create difficulties for colleagues in a time of crisis, but it was not reasonable in those circumstances to expect the respondent to have realised that she was unfit for work. The failure to seek help from a union representative, to request time off or light duties, or to have pursued the matter with another manager may well have been to her own detriment ultimately, but I accept the respondent's submission that it was her action and I should not hold the respondent accountable for it now

(3.4) *The respondent placed unreasonable weight on damage its reputation;*

58. This point was not really explored in evidence with the respondent's witnesses, but I deal with it as a submission. I am satisfied that it was reasonable to take this factor into account. It is in my view self-evident that mis-delivery of items and signing for items that haven't been delivered would damage the reputation of Respondent. The claimant submits that the public were generally supportive of the work of postal workers during the pandemic, and that she had a good relationship with the residents on her postal round. However, this does not negate the potential impact that a mis-delivery would have on these customers' overall view of royal mail.

59. Having read the decisions of Mr Balls and Ms Thomas I do not consider that this factor was given disproportionate weight but that it was one of the factors which they both took into account in weighing the overall picture and coming to their decisions.

(3.5) *The respondent failed to take into account the claimant's previous good record;*

60. Mr Balls and Ms Thomas both refer to this factor in their decisions and evidence. I am satisfied that they did give it due consideration. It was within the band of reasonable responses to weigh it in the balance and come to the decision they did.

Conclusion

61. I then step back and consider all of the points raised in the round. I am satisfied that overall dismissal was within the band of reasonable responses and therefore the claimant was not unfairly dismissed.

62. Therefore, there is no need for me to consider *Polkey*, contributory conduct or remedy.

Employment Judge **Kate Armstrong**

____4 February 2022_____