EMPLOYMENT TRIBUNALS

Claimant: **Mr E Preira**
Respondent: **Royal Mail Plc**

Record of at a Full Hearing heard by CVP at the Employment Tribunal

Heard at: **Nottingham** **On:** **18 and 19 October 2021**
Reserved to: 2 November 2021

Before: **Employment Judge Blackwell**
Members: **Mr Blomefield**
Mr Purkis

Representation
Claimant: **Mr Ali Moosa, Solicitor**
Respondent: **Mr Chaudhry, Counsel**

RESERVED JUDGMENT

The unanimous decision of the Tribunal is: -

1. That the Claimant's claim of Unfair Dismissal pursuant to section 152 of the Trade Union and Labour Relations (Consolidation) Act 1992 fails and is dismissed.

2. That the claim of Unfair Dismissal pursuant to sections 94 and 98 of the Employment Rights Act 1996 also fails and is dismissed.

RESERVED REASONS

1. Mr Ali Moosa represented the Claimant and he called the Claimant himself, Mr F Bulger, Trade Union Officer, Mr B O'Sullivan, also a Trade Union Officer, Mr S Halliwell, who sat on the Independent Appeals Tribunal which heard Mr Preira's appeal against dismissal. We were to hear evidence from Mr Beggs but he did not appear and given that his statement was neither signed nor dated we have not considered his evidence at all. Mr Chaudhry acted for the Respondents and he called Mr D Claydon who dismissed Mr Preira and Mr Thompson who chaired

the Independent Appeals Panel. There was an agreed bundle of documents and references are to page numbers in that bundle.

The issues

2. Mr Preira's first claim is that he was dismissed because he took part in trade union activities. He relies on section 152(1)(b) of the Trade Union Labour Relations Consolidation Act 1992.

> *1) For purposes of Part X of the Employment Rights Act 1996 (unfair dismissal) the dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee—*
>
> *(a)…….*
>
> *(b) had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time, . . ."*

3. If Mr Preira succeeds in establishing that the reason for dismissal or if more than one the principle reason was his involvement in trade union activities, then the dismissal will be automatically unfair, and he will succeed at that point.

4. If, however, Royal Mail are able to establish a potentially fair reason dismissal within the meaning of section 98(1) and (2) Employment Rights Act 1996 then the Tribunal will have to consider the fairness of the dismissal in accordance with subsection 4 of section 98.

Section 98 Employment Rights Act 1996

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c)is that the employee was redundant, or

(d)is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

……./

(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."

5. It is common ground that the Tribunal must apply the test of the band of reasonable responses as set out in the oft cited case of ***Iceland Frozen Foods v Jones [1983] ICR*** beginning at page 17.

   The law for this band of reasonable responses was laid out in the judgment and is as follows:

   1. The starting point should always be the words of section 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 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 was 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 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.

Findings of Fact

6. Mr Preira began employment with RMG on 1 June 2004. At the time of his dismissal he was an LGV driver, he was summarily dismissed on 24 June 2020 on the grounds of gross misconduct.

7. RMG need no introduction employing some 130,000 people throughout the United Kingdom.

8. On 25 October 2019 Mr Preira drove to a friends house to attend a party intending to stay the night. He consumed a lot of alcohol. He received a call saying that the carer who Mr Preira employed to look after his disabled ex-partner had to leave therefore leaving the disabled person on their own. Mr Preira decided to drive home. En route he collided with a parked car. The Police were called, and he was breathalysed and found to be nearly 3 times over the drink driving limit. He was arrested and charged. His car was sufficiently badly damaged in the collision so as to be written off.

9. On the advice of Solicitors, he pleaded not guilty in his words to buy time.

10. Mr Preira notified his Line Manager of the arrest charge on 28 October.

11. After 2 weeks sickness absence Mr Preira returned to his driving job and he carried on driving until the day of the hearing of his case in the Magistrates Court on 10 March 2020. He changed his plea to guilty on the day of the trial acting on the advice of new Solicitors. His licence was revoked for 23 months which could be reduced to 15 months if Mr Preira attended an alcohol awareness course.

12. At page 151 is a fact finding document filled in by Mr Preira which sets out the circumstances arising from his arrest for drink driving and the subsequent conviction.

13. It is common ground that Mr Preira was subject to and bound by the following: -

    1. The Group Conduct Policy beginning at page 41 and at page 45 appears the following paragraph: -

    "*Criminal actions outside employment should not be treated at automatic reasons for formal notification under this policy or contemplation of dismissal. Employees should not be dismissed solely because a criminal charge against them is pending or because they are absent through having been remanded in custody.*

    Some types of behaviour are so serious and so unacceptable if proved as to warrant dismissal without notice (summary dismissal) or pay in lieu of notice. It is not possible to construct a definitive list of what constitutes gross misconduct and in any event all cases will be dealt with on their merits."

    2. The Business Standards Guide beginning at page 61 and in particular at page 92: -

    "You must not take part in criminal activity"

    3. The National Agreement for the Implementation of the Road Transport Directive (known as the drivers bible) beginning at page 109 and in particular clause 9.11 at page 114 which reads: -

    "*Drivers losing their licence for nonmedical reasons e.g. drink driving, speeding conviction will be managed under the conduct code. Each individual will be treated according to the individual merits of their case".*

14. As a consequence of the fact finding exercise Mr Preira was by an undated letter at page 174 and 175 invited to a formal conduct meeting the conduct was listed as follows: -

    1. *"Breach of business standards*
    2. *Drink driving conviction.*
    3. *Failure to adhere to the professional drivers agreement attached. ie clause 9.11 referred to above."*

15. Mr Preira was interviewed on 22 May by Mr Claydon the Conduct Manager. Mr Preira was present and represented, in our view very competently, by Mr Brooks of the CWU. The notes begin at page 176. At 179 Mr Preira added some amendments to those notes and in particular at page 180 he adds the notation *"I believe there is comparators at NDC".*

16. In so far as is relevant a great deal of time was spent in a scoping exercise to determine whether if Mr Preira's employment was to continue there was an alternative none driving position available for him. In that regard we accept Mr Bolger's evidence which was supplied to RMG at pages 171 to 173 that there were vacancies. RMG's position throughout appears to have been that there could only be vacancies if RMG agreed with the Unions position which throughout they declined to do so. The reality is, however, that there were vacancies if RMG had chosen to accept that position. They chose not to as far as we understand their position because of the existence of a national dispute which turned on the existence of vacancies or otherwise.

17. By an undated letter beginning at page 189 Mr Claydon informed Mr Preira of his decision which was "immediate dismissal" attached to that letter was a decision report beginning at page 191 Mr Claydon concluded: -

    "*A scoping exercise was carried out, but no job opportunities are presently available but again even if there had been this would not have changed my decision to dismiss. He has been charged in a Court of Law for being 3 times over the limit and this is a clear breach of business standards."*

18. The report is simple and concise and sets out mitigation put forward on Mr Preira's behalf namely that he had 15 years of unblemished service and that Mr Preira was very contrite. Mr Brook summarised the position as follows. He asked if Royal Mail could show leniency with Mr Preira as he accepted that he had completely messed up but as a consequence of his actions not only was his employment in jeopardy, but his personal life was also suffering and us dismissing him would only punish him again.

19. On 26 June 2020 Mr Preira appealed against the dismissal as he was entitled to do. He was invited to attend the National Appeal Panel on 21 September. As part of that appeal process Mr Weatherall and another CWU representative set out at pages 203 to 205 a cogently written and persuasive appeal submission. The panel hearing began on 21 September and the notes of its various discussions begin at page 210. The panel was chaired by Mr Thompson an independent person together with Mr Trunks, RMG's representative and Mr Halliwell the CWU representative. Mr Weatherall was the advocate for Mr Preira. The process was

in our view comprehensive and throughout Mr Weatherall provided good representation for Mr Preira. As we have said above in paragraph 16 much time was taken up with the consideration of whether or not alternative none driving posts were available for Mr Preira.

20. It is also apparent that the appeal constituted a re-hearing rather than a review.

21. By letter of 7 December the appeals decision was sent to Mr Preira and it was a majority decision with Mr Halliwell dissenting that the appeal be dismissed. It concluded at paragraph 33 on page 295 as follows: -

"*The majority decided that instant dismissal had been the appropriate sanction, taking into account all of the specific circumstances of this case. We have reminded ourselves that our role is not to assess the decision of DC, as would be the approach taken by an Employment Tribunal. That in our view would have been a relatively simple decision: agreeing that dismissal in the circumstances is an option open to a Manager acting reasonably. Our decision is a more difficult one placing ourselves into the role of Dismissing Officer. However, in doing so the majority has no hesitation whatsoever in deciding that dismissal was the appropriate outcome."*

22. Mr Halliwell's dissenting view is set out at page 295 to 296 at paragraphs 34 to 41.

23. At this point we should record that in his evidence to this Tribunal Mr Halliwell said at paragraph 4: -

"*The ET will be aware that a decision was made by majority which I disagreed with for a number of reasons. This was detailed in the Minority Report, however, what the current evidence does not show is the exchange of correspondence that took place within the panel which unfairly curtailed the Minority Report, the external influences the panel endured of which I will elaborate upon in my evidence."*

Appended to Mr Halliwell's statement was an email from Mr Halliwell to Mr Thompson and others which began: -

"You should not have changed my Minority Report that is for me to write or for the other person dissenting. My Minority Report should be written in the report as provided."

Mr Halliwell confirmed that the remainder of that email was the Minority Report which he felt should have been included. In fact, it seems to us that there is in substance no difference between what is included in the official document and what is included in Mr Halliwell's email of 6 November. Mr Halliwell went on to accuse Mr Thompson of censoring his views. We reject that allegation it is not borne out by the documentation referred to.

Conclusions

The Section 152 Dismissal

24. It is for RMG to prove the reason for dismissal and they rely upon conduct which is a potentially fair reason for dismissal. We find as facts that Mr Preira was a trade union official. Further, that during the disciplinary process there was a

national dispute between the trade union and RMG. We further accept that Mr Preira was actively campaigning on the trade union's behalf to encourage members to vote in favour of strike action. Both Mr Claydon and the appeals committee would have been well aware that Mr Preira was a trade union official if for no other reason than that the disciplinary process adopted was one specific to trade union officials. We further note that the allegation that the dismissal came about because of Mr Preira's trade union activities was not raised at the time of his dismissal nor did it form a ground for appeal. Even Mr Halliwell accepted that it was not a ground of appeal and was not discussed.

25. The allegation first appeared in the claim form served by Mr Preira to this Tribunal. When asked why it had not been raised earlier Mr Preira's response was vague and unconvincing. It was clearly an afterthought. Both Mr Claydon and Mr Thompson in clear terms denied that they had been influenced by Mr Preira's trade union activities. Mr Claydon whom we found to be a straightforward witness said that he was on good terms with his local trade union officials and he had not in anyway been influenced by the fact of Mr Preira's trade union activities. Mr Thompson gave evidence in similar terms saying that the thought had not crossed his mind and confirming that it had never been raised during the appeal process. On balance we accept that the only reason for dismissal was conduct i.e. Mr Preira's conviction for drink driving. Thus, RMG have proved a potentially fair reason for dismissal.

The Fairness of the Dismissal

26. The first matter we need to consider is the assertion made of inconsistency of treatment. Mr Chaudhry cited the well-known Court of Appeal decision in ***Post Office v Fennell [1981] IRLR22*1** and we also reminded ourselves of the relatively recent Court of Appeal decision in the case of ***Newbound v Thames Water Utilities [2015] IRLR734*** in which the Court of Appeal considered unjustified disparity in the treatment of Employees and cited the cases of ***Habjioannou v Coral Casinos Ltd [1981] IRLR352*** and ***Paul v East Surrey District Health Authority 1995 IRLR305***. Bearing those authorities in mind and the stricture "Industrial Tribunals would be wise to scrutinise arguments based on disparity with particular care" the relevant evidence is as follows: -

    1. Mr Claydon through the offices of HR conducted a search for any comparable case of the dismissal of an HGV driver for drink driving over the previous 12 months and that search found nothing.

    2. The statement of Mr O'Sullivan which we accept that one of his members a Ms Bennett in October 2018 was convicted of drink driving and her licence was suspended for 15 months. However, she continued to be employed by Royal Mail in a none driving capacity.

    3. As noted above we were to hear evidence from Mr Beggs as to his conviction, but he did not give evidence and we place no weight on his unsigned statement.

4. There is also reference in the appeal hearing to a Mr C Toplins who was kept in employment after a drink driving conviction, but it is common ground that Mr Toplins was not an LGV driver.

5. As we have noted above Mr Preira himself during the disciplinary process put before the appeal noted that there was a comparator, but he provided no evidence of that to the appeal hearing nor to us.

6. We come now the extraordinary evidence of Mr Halliwell which was given only in re-examination. Mr Halliwell asserted that there were 2 cases of which he was aware, that he had raised them with Mr Thompson, but that evidence had been supressed. We note that that assertion was not put to Mr Thompson nor is it referred to either in Mr Halliwell's Minority Report or in his evidence to this Tribunal. We cannot accept that if there was comparable evidence showing disparity of treatment then Mr Halliwell would surely have raised it at the earliest in his Minority Report and at the latest in his witness evidence. We therefore place no weight at all on Mr Halliwell's evidence in that regard.

26. Taking that evidence in the round in our view there is insufficient evidence to support an allegation of disparity of treatment.

The Band of Reasonable Responses

27. Mr Moosa referred us to the unreported case of ***Wincanton Group Plc v Gregory [2012] UKEAT/0011/2/1110.*** In that case the EAT found Mr Gregory's dismissal to be unfair because Wincanton had promised it was looking for alternative roles for him when it was not doing so.

28. In our view that case is clearly distinguishable from the circumstances applying to Mr Preira. As we have said above a great deal of time was spent on the scoping exercise seeking to find alternative employment for Mr Preira. However, both Mr Claydon and the majority decision on appeal clearly held that their decision to dismiss would have been the same had they found there to be alternative work available. It is also clear that Mr Bolger in particular did carry out a thorough search and provided evidence of it both to Mr Claydon and to the appeal panel. It was simply that RMG were not prepared to accept that there were vacancies having regard to the national dispute which occurred at that time thus we do not accept that the Wincanton case assists Mr Preira.

29. However, Mr Weatherall in his appeal submission in our view, with the exception of the emphasis on the availability of alternative roles could not have put Mr Preira's case anymore clearly. He relied upon the fact that Mr Claydon found Mr Preira to be contrite. He recognised the seriousness of the conviction, relied upon Mr Preira's length of service and good conduct and pleaded for leniency and continuing employment in the role of a Postman. It is clear that both Mr Claydon and the majority of the appeal panel also considered those factors and nonetheless came to the conclusion to dismiss. It is also clear that both Mr Claydon and the appeal majority considered lesser penalties, but both came to

the clear view that a lesser penalty was not appropriate.

30. Does the decision to dismiss fall within the band of reasonable responses having in particular regard to subsection 4 of section 98? In our view it does, this is a case where one employer might reasonably have taken the view that a final written warning would be appropriate whereas another employer might quite reasonably take another view namely that dismissal was appropriate. We therefore conclude that the complaint of unfair dismissal must fail.

_____
Employment Judge Blackwell

Date: 1 December 2021

JUDGMENT SENT TO THE PARTIES ON

3 December 2021

.....

.....
FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.