EMPLOYMENT TRIBUNALS

Claimant: Mr D Turley

Respondent: Royal Mail Group Plc

HELD AT: Carlisle **ON:** 11 & 12 July 2017

BEFORE: Employment Judge Holmes

REPRESENTATION:

Claimant: Mr Kingston, Lay Representative
Respondent: Mr McArdle, Legal Executive

JUDGMENT having been sent to the parties on 1 August 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. In this case Mr David Turley complains of unfair dismissal arising out of the termination of his employment with the respondents on 23rd May 2016. The dismissal arose in relation to two charges, the details of which are set out on page 181 of the bundle which were, firstly, in relation to an incident on 27th January 2016 and, secondly, in relation to one on 4th February 2016. The respondent concedes dismissal, but contends that the dismissal was fair. The respondent has called two witnesses Paul Doran, the dismissing Officer, and Erica Wilkinson who is the Appeals Officer. The claimant has given evidence himself and has called in support as witnesses a Tony Williams, the Divisional Union Representative, Paul Kirkup his local Union Representative, and his partner Helen Sprott. There has been an agreed bundle and the Tribunal has heard submissions from both parties. The claimant being represented, very ably it must be said, for a lay representative, by Mr Kingston and the respondents, equally ably, by Mr McArdle, a Legal Executive.

2. Having heard the witnesses and considered the documents the Tribunal finds the following relevant facts.

2.1 The claimant was employed as an OPG (known to everyone else as a Postman) since the 4th April 2005, and worked at the relevant time at the Carlisle Delivery Office. His duties included, as one would expect, to prepare

the mail for delivery and then to take it out on delivery in the Carlisle area. In early 2016 his duties frequently involved him on walks in areas affected by the severe flooding which affected the city, and which had the affect of altering the deliveries he had to do in two ways, the number of delivery points was reduced because some of the premises were then inaccessible or uninhabited, but equally consequentially there were other aspects of alteration to the duties, in that this gave rise to re-direction, to call and collects and other consequences arising out of the flooding.

2.2 It was against that background that the events that bring the claim to the Tribunal occurred, and in particular the events of 27th January of 2016. The claimant that morning started work at 5.30, and went about the "prepping" duties, before going out on his delivery. He and his colleague Stephen Quays were due to do duties known as D36 and D38. The claimant had come in early at that time to assist with the work because of the flooding, and consequently his entire shift was as it were one hour earlier, with him starting at 5.30. There was some issue as to the degree of assistance that was given in the prepping work, but the effect was that around about 9.00 or 9.15 the deliveries were ready to go, and the claimant and Mr Quays were about to leave . At that time there was a container, known as a "York" container full of mail which the claimant considered could not be delivered. The claimant had considerable experience of the duties in question, and indeed had been commended for his work during the flooding and the aftermath of it in terms of how he had sought to assist customers, and had shown great humanity in doing so which had been recognised by a senior employee. It was against this background of his familiarity with the walks, and indeed the difficulties, that gave rise to his view that the amount of mail to be delivered would not be achievable in the time that then remained for it to be done.

2.3 The manager on the day in question was not the claimant's usual line manager, Mark Stuart, but one Nathan Murphy whom the claimant considered was rather less experienced, and did not have the same level of understanding as to the difficulties posed in the wake of the flooding. His relationship with Mr Stuart however seemed rather better, and he made reference, in the course of the various interviews that he gave in these proceedings, to the way in which he and Mark Stuart had worked in relation to these problems. He seemed to find Mark Stuart's approach very helpful, not least at all because, in the course of the preparation before the mail was to go out on these walks, Mr Stuart was in the habit of walking around and seeing how things were going. So there would be a dialogue and discussion as to the likely level of achievable deliveries in relation to those walks, but on this particular day Mr Stuart was, it seems, on a day off or for some reason was not present and Mr Murphy was therefore acting as the relevant line manager. He did not follow that practice although the claimant did subsequently say that he had earlier in the morning brought to Mr Murphy's attention that there would be some difficulties in getting all of the mail out. Be that as it may, in the course of the morning and shortly before he and Mr Quays were about to go out, it is common ground that there was a discussion between Mr Murphy, the claimant and indeed Mr Skinner who was in fact the Delivery Office Manager , or the "main man" as the claimant in fact calls him that morning in which the claimant, (again it is common ground) raised the issue of whether it

would be possible to deal with all of the mail that was due to go out, and in particular the contents of the York container, which was brought in to the vicinity of the office where the managers were at that time.

2.4 Thereafter there is a dispute as to what occurred. There seems to be common ground that there was a discussion about whether this mail could be delivered or not, but the respondents case is that the claimant was then given instructions by Mr Skinner, in fact quite definitely, that the mail should be taken out, and that this instruction was given on at least three occasions. The claimant, however , disputes that, but whatever the position the mail did not go out, and that York container of mail was left behind. Again there is something of a dispute as to precisely where it was left behind, but it was left behind and it seems common ground that it was not left outside the manager's office, wherever it ultimately ended up.

2.5 Consequently at some point during that morning the remaining York was discovered, and the evidence is a bit unclear as to whether anything occurred that day in relation to this mail being left behind, but certainly the following day, when Mr Stuart in fact was back in the office, he was aware of this position and indeed from the evidence he has given in the course of the enquiries in this case it seems that the claimant actually came to him and brought it to his attention. For one reason or another the following day it was Mr Stuart that took this matter up, and consequently he who initially spoke to the claimant about it. That was not any formal interview and there seem to be no records of it, but the upshot of it was that there was a fact finding interview with the claimant. That was on the 3rd February and is recorded at pages 87 to 92 of the bundle with the claimant's additional comments at page 93. So it was Mr Stuart who initially carried out this fact finding interview, and went through the events of the 27th January.

2.6 In summary the claimant's position in that meeting was that there was no instruction given by Mr Skinner, he did indeed bring to Mr Murphy and Mr Skinner's attention that the delivery could not be carried out, but that he thought that they understood that, and knew that he was leaving it behind . There would therefore be no issue in relation to it, the managers were aware he was leaving it, and he was not aware of any instruction, and certainly did not disobey any instruction.

2.7 Mr Stuart thereafter carried out further fact finding interviews with the relevant parties, Nathan Murphy (which is recorded at pages 98 to 100 of the bundle) and Andrew Skinner (at page 101 to 103 of the bundle). Their accounts were different, in that they maintained that there had been instructions given to Mr Turley and indeed Mr Quays to take out the mail and they disagreed that they had not done so. They effectively maintained the position that this instruction had been given but the claimant had then left the mail behind where it was subsequently found. Mr Stuart also interviewed Stephen Quays at around about this time although this was not of course directly a part of the claimant's disciplinary process but he also did make enquiries with him.

2.8 Matters were left at that point in Mr Stuart's hands, but shortly afterwards on 4th February the next incident giving rise to these proceedings occurred.

This occurred when the claimant was working that day, went out on delivery and subsequently returned to the delivery office. Upon doing so he signed a time sheet which is to be found at page 84 of the bundle in which the last two entries he recorded were for his last letter in that column at 13.25 and his finish time he put down as 14.25. There appears at some point to have been a complaint made to Mark Stuart that the claimant had gone home early and therefore had gone home before 14.25. This is documented, and again in some of the enquiries and the accounts given, although there is no direct evidence of any direct complaint, but this is the way in which the matter came to light, because of other OPG's apparently somehow disgruntled that the claimant had left and were raising this with Mr Stuart which then gave rise to him looking into the matter . Ultimately it was Paul Hill who carried out a fact finding in relation to this matter on 30th March and the notes of that are at page 109 onwards to 116 of the bundle. The reason for this probably was (although it has not been referred to in the evidence before me) that there is some suggestion that there was an issue in relation to Mr Stuart and consequently Mr Hill was asked to take over the fact find which he did.

2.9 On 30th March this incident was discussed with the claimant by Mr Hill, Mr Kirkup the claimant's Trade Union representative was present in that meeting as well and in relation to these events basically the claimant said that he had made a mistake, he had put on an extra 40 minutes when he should not have done and that this was entirely innocent but nothing worse than that. Mr Kirkham in that meeting did suggest having sent the sheet which was produced to the meeting that there were other areas by other persons on that sheet and he suggested that this was at most a training issue and not any disciplinary matter. Sometime between the 30th March and the 14th April both Mr Stuart and Mr Hill escalated their respective potential disciplinary issues to Mr Durham, they taking the view that their respective issues may involve sanctions that were beyond their grade in terms of their authority and they both referred their matters to Mr Doran who is a Delivery Office Manager at Whitehaven. The first of the allegations that was referred and indeed Mr Doran originally wrote to the claimant only in relation to that but subsequently in one of the respondents several undated letters but at some point before 21st April it must be he wrote to the claimant in relation to both of the allegations and that letter is at page 133 to 134 of the bundle and both of the allegations are set out, the first one being failure to follow a reasonable instruction which refers to the incident on 27th January 2016 where the instruction is summarised as being to take out all due mail for the delivery and given to the claimant and in relation to the second allegation defrauding the business by falsifying an official document recording incorrect times i.e. the time sheet at page 84 then there is a paragraph setting out the details of that allegation and in particular the allegation that Mr Stuart was aware employees were returning from duty at 13.15 and went to see who was coming back in from delivery, there were a number of first class mis-sorts in the office that needed to be delivered to prevent any failures, the line manager Mr Stuart spoke to a number of OPG's at the priority locker who stated that they would take the mis-sorted duty. This letter apparently has a missing line or so because it doesn't make sense to go to the top of page 134 but whatever is missing we then come to the allegation that on inspecting the sign off compliance sheet around 13.30 Mr Stuart noticed that Mr Turley had signed

from his duty a last letter time of 13.25 pm and had signed off his duty at 14.25 so in terms of the allegations they were summarised and set out in that letter and the claimant was invited to a formal conduct meeting with Mr Doran, he was invited to bring any representation that he wished to and given the warning necessary in relation to the consequences of such a meeting in terms of disciplinary outcome, the letter also noted as indeed is the case that his disciplinary conduct record was indeed clear.

2.10 Mr Doran set up the disciplinary hearing on that basis. He received in the meantime the information that both Mr Stuart and Mr Hill had compiled in their respective fact finding interviews with the various people that they had carried out interviews with, this material was assembled and was provided to the claimant before he attended the disciplinary meeting on 21st April, and no issue has been taken in relation to that. So Mr Doran at that point had got this information, had provided to the claimant, and this set the scene for the disciplinary hearing. Mr Doran himself did not carry out any further enquiries or interviews with any of the people that had already been seen, and proceeded to hold the disciplinary meeting on the 21st April.

2.11 In that meeting, the notes of which start at page 145 of the bundle, the claimant was again represented by Mr Kirkup . The record was amended subsequently, because the claimant did make annotations to the notes, but the record was then completed setting out what was said in that meeting. Following that meeting, in which the claimant effectively said much the same as he had said in the fact find in relation to both of the allegations, Mr Doran did receive some further information. Also in that meeting the claimant himself provided a document to Mr Doran. It is headed "defraud" , and is part of a dictionary definition of that word, following which the claimant set out on some two pages some observations that he wanted to make in writing. He provided those to Mr Doran on the day of the hearing, and they are at pages 153 to 154 of the bundle.

2.12 In terms of what he said in relation to the latter allegation he said this:

"I still think from memory we posted the last letter at 13.25, I can remember as it was a mis-sort from an earlier part of our job which we posted on the way back to the factory, I also remember dropping my van share partner on the way back to the factory at approximately 13.30, this is after the times that Mr Andrew Skinner says he has seen me I cannot explain that ."

2.13 In that document the claimant was clearly asserting that he was indeed still out on his round at 13.25. The rest of this document relates more to the incident on 27th January, and indeed going back to the meeting, and what was said in the meeting, Mr Kirkup on behalf of the claimant made a number of points in relation to practices in relation to returns of mail and working hours, and in particular what is known as the “30 minute flex practice”. In relation to these matters he was effectively saying, in the alternative (the claimant's case of course being that there was no instruction given to him) that the instruction, if given, was not a reasonable one. This argument has been developed in this hearing as well, because it would be either to require the claimant to work overtime, which he could not be forced to do, if he was

required to take out too much mail the effect of such an instruction would be to make him work overtime, which could not be reasonable. Alternatively this was an improper attempt to apply the 30 minute flexi arrangement, and was a further instance (because this appears to have been a recurrent theme) of management seeking to misuse, misunderstanding or misapplying this practice.

2.14 In terms of that allegation that was one of the themes, and in relation to the second , basically the position taken in the hearing was that, whilst Mr Turley had made a mistake in filling in the sheet, this was not “defrauding” anybody. He did not do so for financial gain, there would be no point in him doing so, and he should not be treated harshly, this was a genuine mistake, the claimant being under a fair amount of stress at the time.

2.15 So that in summary is the line that was taken in that meeting. Following the meeting Mr Doran did receive some further information and that was in the form of a statement that Caroline Park, an OPG, had apparently made to Mark Stuart also (who is also Ian Stuart, somewhat confusingly but there is only one) dated 6th May 2016 which is at page 165 of the bundle. This is a brief handwritten statement in which he says on 4th February:

"I am returning to base I have seen D Turley back at base at 13.19, he was exiting the Mail Centre and making his way to the Mail Centre car park, his van was already back in delivery car park when I parked my van there at 13.20"

This had apparently been provided to Mark Stuart . Along with that statement was an email or at least part of an email at page 166 of the bundle dated 4th February at 13.37, and furthermore, there was a photograph which is actually at page 74 of the bundle, which apparently shows the claimant's van, but not the claimant, and somebody else stood next to it. This was put forward as showing the claimant's van back in the delivery office at or around 13.19. The photograph itself bears no date or time, and what was provided to Mr Doran at this time was that statement, that email which other than its date and time, does not have any further details upon it.

2.16 Additionally, because this had been mentioned by the claimant and his representative, referring to a discussion in September 2015 about working hours and flexible working and allied matters, Mr Doran obtained, and also sent to the claimant, a note of a joint discussion, which is at pages 167 to 168 of the bundle. This records a meeting in September 2015 between Mr Turley, Mr Quays, his delivery partner, Mr Kirkup as the union representative and Mr Hill and Mr Stuart from the management team. The note records a discussion about the hours that the claimant wanted to work or not work, and how he wanted to deal with his working hours going forward. That was relied upon by the respondent, and the managers in the course of this case, as showing that the claimant did not want to work the 30 minute flexi arrangement that his colleagues largely worked, but wanted work to time, as it were. He wanted an arrangement that he was not included in that arrangement, but basically worked the set hours which are set out on the first page of that document. There is discussion in that document, however , as to what the claimant

should do when he returned from his duties early, and it was documented there that he was requested to let a manager know that he was back early, if that happened, and then to take out any other duties if requested to do so. Whilst that is recorded there is a dispute as to whether it was ever agreed, although it is conceded that it was something that was put to the claimant as something that was wanted, but it was suggested by Mr Kirkup that that could not actually be achieved unless it applied to everybody and one could not have a situation where every time somebody came back early they had to seek out their manager in case there was any extra work for them. Be that as it may, that was a further document Mr Doran obtained and provided to the claimant.

2.17 The claimant was invited to comment upon these further documents which he did on the 10th May, page 169 of the bundle. He did not specifically comment upon the contents, but he did raise a query as to why this new evidence had been added to his conduct hearing after it had been completed and made a point that it should have been given to him before not after it. Nonetheless Mr Doran had asked for his comments, and those what he sent.

2.18 Thereafter Mr Doran considered the information that he had got, and convened an outcome hearing for the 23rd May. Consequently he did deliver to the claimant his decision, and in accordance with that, and at the same time or shortly after, he produced a document called a Decision Report which starts at page 175 of the bundle, and which sets out his decision and the reasoning for it. This goes on to page 181 and consequently will not be rehearsed fully in this judgment, but, in essence, he sets out the history of the investigation, the information and evidence that he had received, and the various responses that the claimant had made in the course of the interviews.

2.19 At one point on page 178 he says this in the seventh bullet point from the bottom: *"Mr Stuart decided at this point to take a photograph of the shared vehicle you had been using that day with the time line of when photograph was sent to him" . S*o he was under the impression at that point that the photograph that he had been provided with had in fact been taken by Mr Stuart.

2.20 In terms of the issues as to the 27th January, Mr Doran's conclusion was that the instruction had been given, he accepted the accounts that Mr Skinner and Mr Murphy had said in their fact finding interview, Mr Doran having not in fact interviewed them himself, but accepting their accounts. He considered that it was more likely than not that the instructions that they said had been given to Mr Turley had in fact been given. He also found that the instruction was a reasonable one, and he rejected the arguments advanced on behalf of the claimant that the instructions were unreasonable. He consequently held that the claimant had indeed failed to follow a reasonable instruction in relation to the first charge.

2.21 In relation to the second charge, he concluded that the claimant had indeed deliberately falsified the entry on the time sheet, that he had done so deliberately to deceive, by recording an incorrect finishing time. He records, at page 180 of the bundle the following : *"This I believe was a deliberate act*

on his part to defraud the business of time" .He went on to say that he acknowledged the comment that other people may have failed to make an entry on the signing in sheets, but he believed this to be a genuine error on their part, he did not however believe that was the case in the claimant's case and went on to say in the third bullet point from the end of that page *"I do understand your comments on this and recognise there may have been no financial gain however it is more than reasonable for me to believe that this was done in a way so as to mask his finishing time as Mr Turley continuously said his last letter was around 13.25 and did not return to the office until 13.40/45"*. On the concluding page, page 181 he set out his decision, which was that in relation to the charges he had taken into account all the penalties available up to and including dismissal, and had decided that dismissal without notice was appropriate. He went on to say *"the fact that there are two charges this all bore weight when I was making my deliberations and subsequent decision"*, . So, in summary, that was the decision he made and his reasons for it.

2.22 The claimant appealed against that decision, doing so, it would seem by the established practice of effectively returning the reply slip with an indication that he did wish to appeal. No grounds were put in that document which is at page 182, and there does not seem to be a "grounds" document as such, but in due course the appeal was referred to Erica Wilkinson, who is an independent Case Work Manager and an experienced Appeals Officer with the respondent. She became seized of the matter in due course, and consequently wrote to the claimant on the 26th May 2016, (a welcomingly dated letter) indicating that she would hold an appeal hearing with him, the claimant planning to be represented again by his trade union representative, in this instance it being Mr Williams the Divisional Officer who accompanied him to this appeal.

2.23 The appeal was held on the 13th June 2016. Mrs Wilkinson opened it by explaining the process she would follow, and the notes of the appeal start at page 188 of the bundle. In the course of her opening remarks she expressed that this appeal would be a re-hearing of the case, and that indeed was the basis upon which she proceeded. She summarised the synopsis of the case initially, and then, after that appeal submissions were made by Mr Williams on behalf of the claimant in relation to his grounds of appeal. Those start on page 190 and were divided into sections. In section 2.1, in relation to the first of the charges, he made the first point that it was disputed that the instruction was in fact given, and that was of course the primary basis for the claimant disputing that charge. He went on to say that, given that another manager witnessed the instruction, he accepted that Mrs Wilkinson might form the view that the instruction was given, so he then went on to set out the claimant's alternative argument, which was that if, it was given, it was not a reasonable instruction. He went through this in some detail (as indeed has been advanced in this hearing) the various procedures in relation to overtime, the thirty minute flex agreement, and similar matters in relation to the procedures agreed between the respondent and the union. He also referred to other provisions of the codes in relation to mail delivery and overtime. Summarising all those matters they all went to the issue as to whether or not the instruction if given could be regarded as a reasonable instruction, Mr

Williams on behalf of the claimant contending that for all the reasons he advanced, any such instruction could not be a reasonable one.

2.24 He also made reference (in a way that has not actually featured in this hearing, save perhaps at its conclusion in submissions) to another factor, namely the potential involvement of another OPG Robin Morrison and another one called Paul Nugent, in relation to whether or not they had been earmarked to help the claimant with his duties on this day, thereby possibly suggesting that it was anticipated that there would be difficulties in him carrying out the whole of the delivery. This additional point was made, which has not featured greatly in this hearing, but was also relied upon by Mr Williams in the appeal.

2.25 Moving onto the next charge , Mr Williams went on to deal with that at Section 2.9 of the appeal notes, (page 193 of the bundle) , and said basically that he could not understand how the claimant could be charged with defrauding the business, as there was no advantage to the claimant by what it was alleged that he had done that day. He went on to set out the procedures for people coming back from their deliveries early, saying that this was something that sometimes happened, that ultimately this was again not a deliberate act on the part of the claimant, there had been a mistake but there was no fraud element to it. Basically, he argued, this was not something deserving of conduct, it was a training point or a counselling issue. He also suggested that Mr Turley and Mr Quays were being treated differently because of their desire not to work past their time, a reference back to the matters discusses in September 2015, where whatever else occurred, it seems clear that Mr Turvey and Mr Quays did not want to participate in the same arrangements as their colleagues, and indeed that was agreed with the respondent.

2.26 Those submissions were made, and received by Mrs Wilkinson, who ended the meeting at that time without making a decision, but instead sent out the notes as one would expect, and then carried out some further enquiries of her own. Those enquiries were to interview Andrew Skinner, Paul Hill , Mark Stuart and Nathan Murphy , and all the notes that she took are set out in the bundle at various pages as set out in paragraph 14 of her witness statement. This was something that she did, but Mr Doran when he had done disciplinary did not, the fact finding having been carried out by Mr Stuart initially, with Mr Doran relying upon that information when he took his decision. Mrs Wilkinson, however, conducting the rehearing decided that she would interview these persons , and look into the details.

2.27 She did not however interview Caroline Park, or anybody else in relation to the incident on the 4th February. Furthermore, in relation to her interview with Mark Stuart which is at pages 235 to 241 of the bundle, whilst she did ask him in relation to the incident on 27th January, mainly about his views as to whether or not the delivery could be completed (because of course he was not actually there on 27th January) but whilst she went into that incident in some detail with him, she asked him no questions in relation to the 4th February incident.

2.28 In terms of that aspect of the charges she did not touch upon this in her interviews, save that in relation to Andrew Skinner she did, whilst discussing largely the events of 27th January with him, also touch upon the 4th February incident in her interview with him, which is at pages 220 to 231. She does so towards the end of the interview at page 227, where she moves from the 27th January incident to then refer to what is called the second "notification", and asks "what was the act of fraud in this case", and Mr Skinner answers her questions. There is no discussion, however, in that part of the interview about timings, and Mr Skinner himself seeing the claimant, which he had claimed he had done, in a statement that he had provided dated 16th July . In this interview that issue was not touched upon in any detail, and there was no discussion about the times or anything of that nature in this interview with Mr Skinner.

2.29 Subsequently having carried out these interviews Mrs Wilkinson provided the claimant with details of them, and also other information that she had received in the meantime, this included photographs that Mr Skinner had apparently taken, they are at pages 71, 72 and 73 of the bundle, and are photographs of a York container, or the interior of a York container with some mail in it, and also of a frame with mail in it and also there were copies of some mail with redacted addresses, but those appear to be photographs that Mr Skinner provided to Mrs Wilkinson after his interview.

2.30 Also there was a floor plan produced which is at pages 251 to 252 of the bundle, in which there is a representation of the York container which was said to be showing the position in which it was ultimately found on the 27th January.

2.31 The material referred to was sent to the claimant under cover of a letter of probably 5th, possibly 3rd July 2016, at page 247 of the bundle. As part of her investigation Mrs Wilkinson also interviewed Stephen Quays who was the claimant's delivery partner, and who was himself undergoing his own disciplinary process in relation to these matters. As part of her investigation Mrs Wilkinson also received an email from Mark Stuart which is at page 261 of the bundle, and which is dated 13th July , in which he explains how it was the photograph which had been previously provided to the claimant which is page 74 of the bundle came to be taken. It is clear from this email that it was not in fact Mr Stuart who took the photograph, but Ms Park and it says *"please find enclosed the image which was sent from C Park mobile phone on the day in question, if you click into the file you will see the time on C Park mobile which was 13.37 and the message. I have tried to use the works camera but it had no battery and my own mobile phone was flat so I spent five or ten minutes looking for a camera before I asked C Parks to take the photo. If you require any more help please let me know I have enclosed C Parks statement in case you may require it at a later date".*

2.32 That statement is presumed to be that which I have already referred to i.e. her handwritten statement of the 19th May, but it is not clear from the email as to whether it is or is not that one, but the assumption is that it was. The one that he provided to Mrs Wilkinson was in due course produced to the claimant.

2.33 Thereafter there was email traffic between Mr Williams and Mrs Wilkinson in the course of the appeal, largely Mr Williams setting out various arguments in relation to the claimant's appeal, and the evidence that had been provided and he makes various comments upon the allegations and indeed the evidence that had been provided. That went on in the course of the appeal and was received by her. An interview was also carried out with Paul Nugent, and Mrs Wilkinson saw him on the 19th July 2016 because he had been referred to as someone by Mr Williams that was a potential witness in relation to being tasked with assisting the claimant , so she saw him and interviewed him, the notes are at pages 272 and 273 of the bundle. Having carried out these further enquiries and sent the results of them to the claimant she concluded her deliberations, and reached her decision.

2.34 That decision is set out in a document that runs from pages 287 to 309 of the bundle, and is consequently substantial, in terms of volume and indeed in content , which sets out in considerable detail the allegations, the enquiries made at various stages, her own enquiries and ultimately her conclusions on the appeal. There is no prospect of the Tribunal being able to summarise that document given its considerable length and depth, but from it perhaps the most salient features are these.

2.35 Reference is made in Section 3.3 of this document , page 293 of the bundle to Andrew Skinner, and something that he told Mrs Wilkinson. It appears that he told Mrs Wilkinson what is there recorded, not in the course of his interview, (and indeed it is not in his interview record) but from what she has written there, that he has made this observation in response to the comments on the additional evidence, presumably by Mr Turley. This seems to be a separate conversation, but she has recorded it in this section of her decision document . She records that Andrew Skinner says this: *"I have just checked the office diary, it confirms the discussion and the instruction given to Mr Turley and Mr Quays, it also confirms the actual traffic v model" . S*he then carries on " *Andrew Skinner further told me "The model day traffic for Wednesday 27th January was planned at 110k, the actual traffic received on 27th January was 88k, a various of 22,000 items under planned model."*

2.36 That is a reference to an office diary, which had not previously featured in the enquiries, or the previous investigations into the case, and appears to have arisen solely at this point, during Mrs Wilkinson's appeal. Following a request for disclosure in these proceedings, enquiries have been made as to whether that diary is available, and the respondents have not been able to provide it. The Tribunal has not seen it, and nor has anybody else conducting he disciplinary or the appeal, but Mr Skinner was referring to it in corroboration , in effect of the giving of instruction that he claims that he gave to Mr Turley and Mr Quays. No enquiries were made in relation to that diary at the time, or indeed , until this hearing, since and so it has never emerged.

2.37 At the conclusion of this document Mrs Wilkinson sets out her decision and the reasons for it. In summary, effectively on page 308 of the bundle onwards and at the bottom of that page, she sets out the core facts of the case, recording initially the incident on 27th January when she records that

the claimant was instructed by Andrew Skinner to take out all the mail, and the claimant did not do that and how that was witnessed by Nathan Murphy. She then goes on to refer to the 4th February incident where she records *"inspection of compliance sheets showed David Turley had signed from his duty with a last letter time of 13.25 and signed off from his duty at 14.25, Caroline Park also raised concerns about David Turley having gone home before his due finish time"* and she then goes on to record the agreement in September 2015, and also the claimant's eleven years service and his clear conduct record.

2.38 Having recited thereafter the requirement of honesty and integrity on the part of all employees of Royal Mail she says this: *"this is not a case of a single naïve act by David Turley but two separate and very deliberate decisions, David Turley showed absolutely no consideration for the customers he served to behave in the way he did in each incident is extremely serious and strikes to the very core of the business values and this case can only be considered to be serious misconduct"*. She goes on to say how she has considered whether a lesser penalty was appropriate including a suspended dismissal, but that as the claimant had at no time accepted any responsibility or acknowledged his behaviour was wrong or shown any sign of remorse she rejected that and consequently upheld Mr Doran's decision to dismiss him.

2.39 That was the conclusion of the appeal and the claimant obviously was unsuccessful. The other relevant and pertinent facts to record are that in relation to Mr Quays, the claimant's delivery partner, he too was disciplined in relation to the 27th January incident. In fact his disciplinary was dealt with also by Mr Doran, in relation to his outcome that is recorded at page 380 of the bundle, a letter to Mr Quays from Mr Doran dated 23rd May and the decision in his case was a two year serious warning. In the decision report that accompanies that letter Mr Doran sets out his rationale for the decision he took in relation to Mr Quays, and the mitigation advanced in his case. To some extent, again with Mr Kirkup being involved in representing him, some of the same points were made in relation to his case as were made in relation to Mr Turley, but ultimately Mr Doran came to the view that Mr Quays had failed to follow a reasonable instruction i.e. the same charge as was the first charge against Mr Turley , and decided to impose that sanction.

2.40 Mr Quays appealed, his appeal was dealt with by Carol Wallbanks and the notes of that are also in the bundle , but she rejected his appeal as well. To the extent that Mr Quays sought to differentiate himself and distance himself from Mr Turley's actions, she deals with this in the last page of her decision document (which is at page 393) where she says this *"when I questioned Mr Quays on this point and this is about what had been said by whom he stated that Mr Turley had lied and that Mr Turley was already in the office talking to Nathan Murphy when he went to drop his call and collects off, I have taken this into consideration and it is irrelevant whether Mr Turley agreed with Mr Quays how much mail would be left or not and it is also irrelevant if Mr Turley and Mr Quays went to the office or not, the fact is when Mr Skinner issued the instruction to deliver all the mail both Mr Quays and Mr Turley were at the office at that point, therefore Mr Quays chose to ignore the instruction that had been given"* . In terms of any differentiation relied upon by

Mr Quays in his appeal, disassociating himself from the conduct of the claimant, she rejected that, and the appeal was dismissed in his case.

3. Those then are the relevant facts found by the Tribunal and to them must be applied the law, and in terms of the relevant law it is enshrined in Section 98 of the Employment Rights Act 1996, which contains the law in relation to unfair dismissal. It is well established that in relation to a dismissal of this nature the dismissal is only fair if it is for one of the potentially fair reasons set out in that section, amongst which is the reason of conduct, (often forgotten but it does not say "misconduct" it actually reads "conduct") , and that is the potentially fair reason that is advanced in this case. In terms of the burden of proof, the burden establishing the reason lies upon the respondent, thereafter in relation to whether the reason was in fact fair in all the circumstances, there is a neutral burden but the initial burden of proving the reason lies on the respondent.

4. Secondly, in assessing whether there has or has not been an unfair dismissal the Tribunal is not to substitute its own view as to what it would have done in the circumstances, if taking the decision for itself, it has to look at the decision of the employer and decide whether it fell within the band of reasonable responses, both in relation to the procedure adopted, and in terms of the actual merits of the decision. In relation to the test to be applied in conduct dismissals Mr McArdle has already referred to the leading case is ***Burchell v British Home Stores*** which sets out the test to be applied, which is that in order for such a dismissal for conduct to be fair the Tribunal has to be satisfied that the employer had, firstly, a genuine belief in the conduct relied upon, that that belief was founded upon reasonable grounds, and after a reasonable investigation, and finally, after that, that the decision to dismiss itself then fell within the band of reasonable responses. That is the test that the Tribunal will apply. (For completeness, and whilst not expressly referred to in the oral judgment, the Tribunal had in mind the authority of ***Foley v. Post Office; HSBC Bank v Madden 2000 ICR 1283.***)

i)The reason for dismissal.

5. In terms of the reason for the dismissal, as Mr McArdle submitted there is not really much dispute in this case but that the reason was the claimant's conduct. Mr Kingston for the claimant has suggested that this was some form of fabrication on the part of managers who were trying to cover up their deficiencies in relation to the 30 minute flex rule, and its application or misapplication. In terms of fabrication of such a reason, that cannot be entirely right, because in terms of the basic facts giving rise to the claimant's dismissal, they were not matters that could be or were fabricated, they were matters that actually occurred. Put simply, in relation to the first charge there was clearly some conduct, in that the claimant did not take out all the mail on 27th January. In relation to the second charge the claimant did not correctly fill in the time sheet for that day, so in terms of the basic facts those cannot be the result of fabrication as such, and so in terms of potential reason then there clearly seems to be a basis for a conduct reason.

6. In terms of whether the dismissal was fair, that of course may be a different matter, and there may be issues in relation to the evidence subsequently given by managers (fabrication of evidence is not the same thing as fabrication of a reason for dismissal) , but in terms of what was the reason in the minds of the persons carrying

out the dismissal who were in fact, of course, in this case Mr Doran, firstly, and secondly, Mrs Wilkinson, the Tribunal is quite satisfied that the reason in the minds of both of those senior employees was the claimant's conduct, and their belief was that on the two occasions in question he had committed acts of serious misconduct which warranted disciplinary action. So in terms of the reason, the Tribunal has little hesitation in accepting that the reason was indeed the claimant's conduct.

ii)Fairness of the dismissal.

7. We come to the real battle ground in the case, which is whether or not it was fair to dismiss the claimant in all the circumstances. In terms of the test, the first question is whether the belief in the misconduct of the claimant on those two occasions was a genuine one, on the part of firstly Mr Doran and secondly Mrs Wilkinson. Well in relation to that, again, the Tribunal has no hesitation in accepting that they both genuinely believed the claimant had been guilty of misconduct on both of those occasions on the evidence put before them. They had evidence on which to come to that view, not least of all because as I have indicated the basic facts were admitted, and what really ultimately mattered was the interpretation to be put upon those facts, and whether or not one party's construction of the claimant's conduct was to be preferred to the other, but ultimately the Tribunal is quite satisfied they both held that genuine belief.

ii(a)The first allegation.

8. The Tribunal now comes to the reasonableness of the grounds in relation to both of the charges, and it has to look at them both separately. Now in terms of the first charge, the not taking the mail out on 27th January , that, of course, depends upon two matters, one whether an instruction was given and two, whether, if it was, it was a reasonable instruction. Clearly if the first is established, then the second becomes a crucial question, but if the first is not established then there is no reasonable belief that the instruction was given, then the second issue does not arise at all. The question for the Tribunal is whether , first of all, Mr Doran but secondly, and more importantly, Mrs Wilkinson believed on reasonable grounds that the instruction had been given. Now in relation to that the evidence that was before Mrs Wilkinson and indeed Mr Doran previously was from Mr Skinner and Mr Murphy to the effect that it was, and they had said that from the beginning, they said it to Mr Stuart and they said it to Mrs Wilkinson, and Mrs Wilkinson did not just rely upon what they had said previously, she actually re- interviewed them and tested them upon that issue. They maintained that that was the position, and that may be in itself sufficient to say that was a reasonable basis for a belief. But one must also take into account the claimant's account, because the two have to be balanced and Mrs Wilkinson had to balance the two. What she noted is that what the claimant said was that he had not heard any such instruction, and that, at the least, when he had this discussion in the office, in which he accepts he said he did not want to take out all of the mail , he then , as it were, assumed that the managers were aware what he was going to do. They knew, he alleged that he was going to leave a certain amount behind, so the highest that he put it was not any positive agreement on the part of his managers to him taking that course, but a silent assent, if I can put it that way to his doing so. The highest he put it was in effect "well, I told them that was what I was going to do and they basically said nothing and I assumed that that was alright".

9. That was his account, to be contrasted with that of the two managers. Mrs Wilkinson heard them all, weighed them up and decided she preferred the account of the two managers, and that was anticipated by Mr Williams, perhaps on the slightly cynical basis that she would believe the managers, but, of course, there is a more rational explanation for it which is that there are two managers saying the same thing, and only one person saying another,

10. Mr Quays' account, which ,of course, was not directly in Mr Turley's original disciplinary , was really no more than he was not in the office, and did not hear it so in terms of positive account, he does not give one, but ultimately it was a matter for Mrs Wilkinson to weigh up that evidence and come to the conclusion that one was more likely than the other and that is what she did. It is right, however, that there was a piece of evidence it subsequently turned out which might have corroborated what Mr Skinner said, for the first time in the course of the appeal Mr Skinner made reference to an office diary, in which he says that this discussion and the instruction were referred to, and that did not emerge until well in to the appeal, and is first recorded in Mrs Wilkinson's decision document. It is indeed unfortunate that no such document has been produced, and this may give rise to some concern as to whether that is right or wrong, but Mrs Wilkinson took the view at that stage that she had the evidence of Mr Skinner and Mr Murphy, and the claimant's account and although, perhaps as a counsel somewhat of perfection, it would have been better to have had that information, at the end of the day the Tribunal does not consider that the absence of that piece of evidence is such as to seriously flaw the conclusion that she came to on the question of the giving of the instruction. As it was, it was always open to the claimant to allege that any such entry was an after the event fabrication, so to ignore it may have been fairer to him.

11. In terms of whether Mrs Wilkinson was entitled to come to that view, the Tribunal accepts that she was, and that she had reasonable grounds for believing that that instruction had been given.

12. That then brings us to the next question which is that of the reasonableness of the instruction, and we then come to something that becomes slightly labyrinthine, in that the question is being asked as to whether it would be reasonable for the Tribunal to conclude that it was reasonable of Mrs Wilkinson to conclude that the instruction given by the managers was itself reasonable. So we get reasonableness heaped upon reasonableness ,but ultimately the question is whether she was entitled to come to that view. What the Tribunal is not going to do however is decide whether the instruction was in fact reasonable, that is not its function, the Tribunal will not decide whether that was a reasonable instruction, it will decide on whether the management's (i.e Mrs Wilkinson's) view that it was is one that it was entitled to come to . Clearly Mrs Wilkinson came to that view and she did so on the basis not only of Mr Skinner's evidence and Mr Murphy's evidence, but also on the basis of Mr Stuart's evidence. Mr Stuart's evidence, of course, does not go to what was said on 27th January because he was not there, but it goes to, and was taken by Mrs Wilkinson, and the Tribunal finds reasonably so the reasonableness of that instruction. That is because it is quite clear that Mr Stuart, who was asked about this specifically, took the view that his colleagues' instruction on the day that he was not there was a reasonable one. Now that reinforces, of course, their view and entitles Mrs Wilkinson to take that into account.

13. This evidence, however, seems to the Tribunal that to have an additional resonance in this sense, that the claimant throughout this matter has rather suggested, and it has not been challenged, that Mr Stuart was a reasonable person with whom he generally got on, and whose decisions and judgments he respected. He was very familiar with the difficulties on these duties, D36 and D38, he had been out on them himself . The claimant considered that he seemed to be relatively understanding, and had worked well with the claimant in terms of prepping these duties, and had been able to reach agreement with the claimant, which, until Mr Murphy's and Mr Skinner's unfortunate intervention on 27th January had gone very well. Consequently, it seems to the Tribunal that his view that the instruction given by his colleagues on a day that he was not there, but in respect of matters with which he was very familiar, that that was a reasonable instruction is one that Mrs Wilkinson was entitled to give considerable weight to .

14. So, quite apart from the fact that Mr Skinner and Mr Murphy took that view, the fact that Mr Stuart also took that view, and would have concurred in it was something she was entitled to take into account in coming to the view she did. It is not just a question of numbers, but in terms of the quality of the information from Mr Stuart, in those particular circumstances, as indeed the claimant seems to concede, he was in a position to have a valid view upon the reasonableness of the instruction.

15. Coincidentally, and its not suggested that this was actually before Mrs Wilkinson and quite how it is in the bundle is unclear but at page 83 of the bundle is an email from Mr Stuart on 2nd February to Mr Skinner, Mr Hill, Mr Ginn, Mr Murphy and others in which he says this "Gents next time D36 and D38 say they can't get round please use the following information and he sets out some fifteen paragraphs thereafter in support of an apparently encouragement to meet any suggestion that D36 and D38 can't be done".

16. Now that does not appear to have been before Mrs Wilkinson or in Mr Doran's, and it is unclear quite how its in the bundle, but it perhaps indicates that Mr Stuart as indeed he told Mrs Wilkinson in his interview which is an important thing was of that view, so in terms of the reasonableness of the instruction and taking into account everything that has been advanced by Mr Williams and Mr Kirkup, particularly in relation to issues such as the 30 minute flex and matters of those matters, ultimately the question is "was that a reasonable instruction and was it reasonable for Mrs Wilkinson to come to that view?" , the Tribunal finds that it was, she being aware of course of all those arguments advanced at some length by the union on behalf of the claimant , which may at times have given a slight favour to this case that it was all about the application of the 30 minute flex rule in Carlisle which ultimately it is not, it is about the fairness of this particular dismissal.

17. So, be that as it may in terms of the decision taken in relation to the 27th January, the Tribunal does find that Mrs Wilkinson had reasonable grounds to come to the view that she did, after some considerable deliberation of all the factors that were put before her in relation to the instruction being given and its reasonableness. Thereafter, there is not really an issue because the claimant did not do it, he accepts he did not do it, in terms of whether or not that was deliberate he has not suggested it was accidental, it clearly was a decision he took. He went in to tell Mr Murphy he could not do it and he did not do it. There has been much made of the location of the York , and Mr Kingston in his closing submissions has made reference to various

allegations made by management, in the course of the appeal in particular, which might suggest that the York "moved" location in their accounts, to put it that way and it was being suggested by management to be in a more sinister place than it ever actually originally was. That was put to Mrs Wilkinson who basically responded to it this way, which was it did not greatly matter, what was clear was that the claimant on his own admission, did not leave it outside the office of the manager which is where he would have left it normally, and indeed, it is significant that in the interview with Mr Stuart at the very beginning of all of this, Mr Stuart says to him words to the effect "why didn't you do what you normally do with me i.e. leave it outside the delivery office?". The claimant accepted, and it was accepted in the hearing that he did not do that, so to some extent where it actually was does not greatly matter, and did not greatly matter to Mrs Wilkinson. Whether or not there has been an attempt to "over egg" the pudding, as it might be put, and the managers might in the course of the appeal been seeking to make things look worse than they were seems to me not to matter. Mrs Wilkinson's decision is what matters and in terms of what significance that had , she did not act on that basis, she acted simply on the basis that on the claimant's own admission he did not leave it outside the delivery office, and consequently it was not there to be seen by the managers. Consequently they came upon it subsequently, which is clearly a finding she came to and was entitled to, so whatever the peripheral issues in relation to this York and its location, ultimately Mrs Wilkinson did not consider that it mattered. The Tribunal accepts that evidence and ultimately that made no difference, so in terms of the first charge and upholding the Tribunal would find that on appeal in particular (and that is no disrespect to Mr Doran) but particularly on appeal, she was entitled to come to the conclusion she did in relation to the charge being established. I will come in due course as to the sanction, but in terms of that finding that is one that the Tribunal finds was open to her, and was a reasonable one to make.

ii(b)The second allegation.

18. Now in terms of the other charge, this is a different charge, it was dealt with at the same time for reasons one can understand, but, of course, it is a wholly separate incident involving potentially different witnesses, although one is common to both and that is Mr Skinner. In relation to that the Tribunal has to ask itself the same questions, was there a genuine belief in the misconduct of the claimant and if so, was it on reasonable grounds and if so, was it after a reasonable investigation. Now again in terms of the genuineness, there is no issue, to some extent the claimant having admitted that the entries on page 84 of the bundle were incorrect, to use that terminology. There was clearly something there and something that the respondents were entitled to investigate, and to take a view upon. There were clearly two possibilities. One is that it was an innocent mistake, the other was that it had been done deliberately for some purpose of the claimant's, albeit perhaps not one for financial gain, but certainly an improper purpose. Those are the only two possibilities, the claimant has not disputed, as he did not throughout the investigation that the entries were not right, so in terms of the first part, the genuineness of the belief there clearly was a genuine belief that had happened.

19. In terms of the reasonable grounds in relation to the finding that this was deliberate , and not merely innocent mistake, that is where the Tribunal must now turn its attention. To some extent the reasonableness of the grounds for that belief elide somewhat into the reasonableness of the investigation into this particular

charge, and in relation to that as has already been expressed in the findings of fact there were some things that did not happen in relation to this charge. Firstly, Caroline Park was not interviewed, the only evidence from her was the handwritten statement dated 19th May, which was produced during the course of the enquiries but she was not interviewed face to face by anybody, Mr Stuart appears to have been given that statement, but that is not the result of any interview which is recorded anywhere. Mr Doran of course did not interview her, and neither did Mrs Wilkinson. It only emerged later in the investigation that Ms Park, and not Mr Stuart had taken the photograph what was produced. Further, again, as set out in the findings of fact, when Mr Stuart was interviewed by Mrs Wilkinson in the course of the appeal whilst she did ask him about 27th January and his views on the reasonableness of the instruction she asked him nothing about the 4th February incident.

20. Given that the evidence in relation to the 4th February incident in terms of what actually happened at that stage was only, in terms of direct evidence, from Andrew Skinner and was contested by the claimant that the Tribunal considers that that is a potentially serious omission. The claimant clearly had issues with Mr Skinner, yet he was the only person who had given direct evidence of the time that he had seen the claimant in the office, it would be apparent to Mrs Wilkinson as indeed to anybody that Mr Skinner and the claimant by that time had issues, clearly the claimant was disputing the events of 27th January. So in terms of Mr Skinner and the claimant, that is not on the face of it, a relationship which necessarily would be a good one, and might give rise to the need to check whether or not Mr Skinner was correct in what he said. But the fact that Miss Park was not interviewed at all is even more surprising given the conclusions to which Mrs Wilkinson came, which I have just read out at the very conclusion of her appeal, where on the very bottom at page 308 in the bullet point relating to the 4th February, she actually refers to Caroline Park raising concerns about the claimant. This is in addition, of course, to the evidence that was before her by this time that Mark Stuart said that she, and indeed other OPG's had been complaining on the 4th February about the claimant going home early. So one has not only one or two, but several potential witnesses. Now it may not be unreasonable to fail to interview them all, but there seemed to be two key players who could have corroborated, or otherwise, what Mr Skinner said and in particular Miss Park must have stood out like a sore thumb as the person who actually had been sufficiently motivated by what she saw to go and complain to Mr Stuart about it. If she was right then she may well have been the prime witness as to when the claimant was actually in the delivery office on that day. Ineed Mr Stuart could probably also have given that evidence but he was not even asked about it when Mrs Wilkinson actually interviewed him .

21. So what one is left with is:

Mr Skinner's disputed account, which, in other circumstances may have been enough on its own, but given that he was the protagonist also in the 27th January incident this might give rise to some concern as to whether he could be accepted at face value, especially when this was disputed by the claimant;

a handwritten statement from Caroline Park dated 19th May 2016 some three months after the incident, it has to be observed, giving rise to obvious questions as

to why it was only then she gave such a statement, for which there may well be a perfectly valid explanation;

an untimed and undated photograph and an email exchange from which it was said the photograph can be timed.

22. All of that may well have some explanation, and may well have resulted in further evidence against the claimant, but in relation to the investigation carried out into this incident the Tribunal has to observe that these were gaps, and somewhat glaring ones, in contrast to the investigation carried out in relation to the 27th January. Now in terms of the reasonableness of the investigation the Tribunal accepts Mr McArdle's submissions that in looking at that issue too the Tribunal does not substitute its own view, and again must look as to whether the investigation fell within the band of reasonable responses, in other words no reasonable employer in these circumstances would have failed to carry out those enquiries and the Tribunal takes his point.

23. In terms of the requirements of the investigation then under the ***Burchell*** test, and indeed the ACAS code of practice, an investigation needs to be appropriate to the circumstances of the case , and, as the ACAS code of practice, at paragraph 4.12 in my version says "the nature and the extent of the investigations will depend on the seriousness of the matter and the more serious it is then the more thorough the investigation should be". Pausing there, there is not much more serious than an allegation of fraud, which is what charge two was, it was frankly the more serious of the two allegations the claimant faced, but it was the one that received the lesser attention, and had these significant omissions from the investigation that I have just identified. Whilst taking Mr McArdle's point, I nonetheless do conclude, and the Tribunal is satisfied, that the nature and the extent of the investigation in relation to the second charge was deficient, and it was not a reasonable investigation to fail to make those, with all due respect to Mrs Wilkinson, fairly obvious enquiries, particularly given the seriousness of the allegation. A simple interview with Caroline Park, or Mark Stuart about this episode on 4th February, in which they could be asked about their sighting of the claimant, and the time at which he was back on site, may well have done the trick, but that did not occur, and that omission the Tribunal finds is a failure to make a reasonable investigation in relation to the second charge.

24. That is not to be critical, because one can understand how that occurred and it may be a consequence of these two matters being put together. In hindsight perhaps that might well not have been a good idea, it might have been appropriate at the time and one can see the attraction, but perhaps one of its consequences is that this meant that the whole matter became rather large and unwieldy. Indeed a consequence of that is the very length of Mrs Wilkinson's decision report, but perhaps one of the casualties of the joinder of these two matters is the detail, and the detail in relation to the second charge, and so it may well be that that is the reason why , and not to be critical, this was overlooked, and had this matter stood alone it may have been more obvious that enquiries of this nature should have been made. But ultimately, whatever the reason the Tribunal does find that because of the deficient nature of the investigation into the second far more serious charge that the respondent did not act reasonably.

25. Now where does that leave the dismissal, because of course the claimant was dismissed for two matters? In relation to those two matters the Tribunal was quite satisfied that where it only the first matter that the claimant had faced, the probability is that he would not have been dismissed. The best evidence for that is what happened to Mr Quays , who was facing the same charge in the same terms, and received a two year warning. He appealed that unsuccessfully, but as recited in the findings of fact, one of the bases upon which he sought to do so was to try to draw a difference between himself and Mr Turley which Ms Wallbank rejected, and, the Tribunal would say, rightly rejected. They were effectively, or would have been, the Tribunal is satisfied, treated the same and it is a feature of both Mr Doran's findings and indeed Mrs Wilkinson's, that this was not a one off incident, this was two incidents that the claimant was found guilty of , and clearly the second had a considerable influence in relation to the finding on the first. The Tribunal is satisfied that but for the second allegation the likelihood is that the claimant would not have been dismissed.

26. It therefore follows that because of the failure to carry out a reasonable investigation into the second charge, the dismissal as a whole was unfair and the claimant succeeds on that basis.

iii)Polkey and contribution.

27. That is not however the end of the matter because the respondent does plead in the alternative two grounds for reducing compensation which would not make the dismissal fair, but would potentially affect any compensatory award to be made and they have set out in paragraphs 28 and 29 of their response document 25 and 26 of the bundle the two challengers that they make to seek to reduce compensation, the first is what is referred to as the ***Polkey*** reduction, and the second is contributory fault. ***Polkey*** for the benefit of the un-initiated is a short hand reference to a case which determined long ago (this is a reference to the decision in ***Polkey v A E Dayton Services Ltd [1988] ICR 142*** a House of Lords judgment) that if a dismissal is procedurally unfair, or unfair for other reasons, but that had a different procedure, or in this case a fuller investigation been carried out, it would have made no difference then the Tribunal can reduce the compensatory award to reflect that probability, or possibility, because a reduction on this basis can be as much as 100% , if in fact the defect is only a minor one and which the Tribunal is satisfied could and have been remedied. If this would have had the same result , that could be a100% reduction. If, however, the Tribunal takes the view that there was a percentage chance that the dismissal would have occurred anyway, then it can make a percentage reduction and the Tribunal is invited to do that in this case.

28. Mr McArdle for the respondent has been content to advance the argument on the basis of the evidence before the Tribunal, which is solely that of the dismissing officers, the Appeals Officer and the Dismissing Office. The Tribunal has not heard from any person actually involved, it has not heard from Mr Skinner, Ms Park, Mr Stuart or any of the witnesses as to what they would have said, or indeed what they would say to the Tribunal . So the Tribunal can make no findings of fact as to what actually happened, and it will probably be noticed the Tribunal has not done that. Indeed the Tribunal does not need to, but in relation to a ***Polkey*** reduction to be able make one the Tribunal needs evidence from which it can conclude what would have happened had a proper investigation been carried out. In this case that might have

been, for example, Ms Park attending saying this the statement I would have given, this would have been my evidence or Mr Stuart saying that, but we have not got anything like that, and so it must remain a matter of pure speculation as to whether or not that would have made any difference. It may have done, but the burden is on the respondents seeking a ***Polkey*** reduction to establish it and if they do not put the evidence before the Tribunal from which it can do so the Tribunal cannot make a ***Polkey*** reduction and the Tribunal will not do so.

29. Similarly, in relation to contributory fault it is of course another basis for reducing compensation, under Section 123(6) of the Employment Rights Act , that a Tribunal may reduce a compensatory award if a claimant has contributed to his own dismissal, in other words has effectively brought it on himself by some form of conduct in this case.

30. To make such a finding the Tribunal has first of all to find what the claimant has done as a matter of fact to contribute to his own dismissal, and so needs to know what it is that it could rely upon as amounting to contributory fault. The claimant was not cross examined upon that, it was not put to the claimant that he had in fact sought to defraud by the entry that he made in relation to the 4th February, or that he had actually been given the instruction, Mr McArdle for perfectly understandable reasons put to him the alternative case on the unfair dismissal i.e. that the respondents reasonably believed in his guilt and he proceeded on that basis, as was entirely proper to do so, so in terms of establishing what happened no attempts have been made to do that, nor have any witnesses been called to actually establish what happened. That again would have involved the evidence of Mr Skinner, Mr Murphy, Ms Park, Mr Stuart and so on, so again before the Tribunal could begin to make any findings of fact to entitle it to make a contribution reduction it would have to have that evidence , which it has not, so there is no basis for making a reduction for ***Polkey*** , and there is no basis for making a reduction for contributory fault . The Tribunal would add that given that it was the second charge of fraud which effectively led to the dismissal, it would only have been in relation to that allegation that any contribution argument could seriously have been advanced, but as the respondent has failed to adduce evidence to establish that the claimant was actually guilty of a fraudulent entry on his timesheet, the Tribunal cannot make any such finding. So in due course when the Tribunal comes to make an award the compensation awarded will be on a 100% basis.

Postscript.

31. Whilst not mentioned in the oral judgment, the Tribunal would add this to its judgment. The claimant did raise with the respondent the issues of CCTV, and swipe cards, effectively saying that these could prove that he did not come back early as alleged. The evidence was that there was none available from which his attendance at the delivery office at any particular time of day could have been established one way or the other. The Tribunal accepted Mrs Wilkinson's evidence on this issue, and would not find the failure to obtain and view any such CCTV footage as unreasonable , or in any way, in itself , as rendering the investigation inadequate. Further, swipe cards would not be determinative, as they did not cover all of the areas where the claimant may go. That these materials were sought by the claimant, however, was or ought to have been, a prompt to focus on the simple issue he was raising in his defence to the second charge , namely that he was not back at

the delivery office when Andrew Skinner claimed to have seen him. In the absence of CCTV, or other electronic recorded evidence, gathering evidence from others who had also alleged that they had seen the claimant at the crucial time became , or should have become, rather more important.

Employment Judge Holmes

Dated: 3 August 2017

REASONS SENT TO THE PARTIES ON
4 August 2017

FOR THE TRIBUNAL OFFICE