EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondents**
Miss K Chan	and	R1 – Royal Mail Group Limited R2 – Mr Adrian Owen

Hearing held at Reading on:	30, 31 October & 1, 2, 3, 6 November 2017 (Hearing) 7, 8 November 2017 (In chambers)

Appearances:

For Claimant:	Mr M Green, counsel
For Respondents:	Mr C Bailey-Gibbs, solicitor

Employment Judge:	Mr SG Vowles
Members:	Mrs G Bhatt Mr P Miller

UNANIMOUS RESERVED JUDGMENT

Evidence

1. The Tribunal heard evidence on oath and read documents provided by the parties. From the evidence heard and read the Tribunal determined as follows.

Direct Sex Discrimination – section 13 Equality Act 2010

2. The Claimant was not subject to sex discrimination. This complaint fails.

Victimisation – section 27 Equality Act 2010

3. The Claimant was not subject to victimisation. This complaint fails.

Unfair Dismissal – section 98 Employment Rights Act 1996

4. The Claimant was unfairly dismissed. This complaint succeeds.

Wrongful Dismissal – article 3 Employment Tribunals Extension of Jurisdiction (E&W) Order 1994

5. The Claimant was wrongfully dismissed. This complaint succeeds.

2nd Respondent

6. The 2nd Respondent is discharged from the proceedings.

Remedy Hearing

7. The case will now be listed for a one day remedy hearing before the same Tribunal.

Reasons

8. This judgment was reserved and written reasons are attached.

REASONS

Submissions

Claimant

1. On 13 October 2016 the Claimant presented complaints of direct sex discrimination, sex harassment, victimisation, unfair dismissal and wrongful dismissal to the Employment Tribunal. The claims were clarified at preliminary hearings held on 3 January 2017 and 24 January 2017.

Respondent

2. On 14 November 2016 the Respondent presented a response and resisted all claims.

Preliminary issue

3. The first day of this 10 day hearing (reduced to 9 days) was a reading day on 30 October 2017.

4. On 31 October 2017 the parties attended and the Tribunal raised the issue of jurisdiction because of apparent failure to comply with time limits. The Claimant had complained of sex discrimination and referred to events going back to May 2008. The Respondent raised the issue of jurisdiction and time limits in the ET3 response form.

5. Accordingly, the Tribunal decided to deal with this as a preliminary issue and heard evidence on oath from the Claimant and submissions from both representatives.

6. The Tribunal decided that it had no jurisdiction, because of failure to comply with time limits, to consider events before 8 March 2016. Those claims were struck out but the Tribunal agreed that, although it would not make findings regarding those matters as stand alone claims, they could be referred to by way of background and context.

7. The Tribunal gave reasons for its decision and then proceeded to hear evidence regarding the remaining claims which related to the period 8 March 2016 to 8 August 2016.

Evidence

8. The Tribunal heard evidence on oath on behalf of the Respondent from Mr Adrian Owen the 2nd Respondent (Late Shift Manager, formerly the Claimant's line manager), Mr Adam Hinckley (Head of Distribution and dismissing officer) and Mr Stephen Phillips (Appeals Casework Manager and appeal officer).

9. The Tribunal also heard evidence on oath from the Claimant, Miss Kwokwan Chan (Network Distribution Driver).

Findings of Fact

Background

10. The Claimant was employed as a Network Distribution Driver which involved delivering mail in an HGV vehicle to mail sorting offices. The mail was transported in wheeled metal cages called "Yorks" which when empty weigh 25kg and when full could weigh up to 250kg. Some Yorks had a sleeve inside to ensure that small items of mail did not fall out through the metal cage. The bottom of the York had a spring-loaded platform so that as mail was loaded in, the platform would be lowered to the bottom of the cage. Some Yorks did not have a sleeve and were used to transport flat packages which were of such proportions that a sleeve was not required.

11. The Claimant would arrive at the mail sorting office and wheel the Yorks out of the back of the vehicle onto a hydraulic tail lift so that they could be lowered to the ground and then wheeled away by the OPG post operatives who worked at the mail sorting office. Once off the tail lift the Yorks were the responsibility of the OPG operatives.

12. Inside the cab of the vehicle there was an isolating switch to prevent the tail lift from being lowered while the vehicle was in motion. When the vehicle was stationary there were two sets of buttons to operate the tail lift. One was located just inside the box body of the vehicle and the other located just outside the box body.

13. The Tribunal was shown photographs of a York. It is approximately five foot tall. With a sleeve fitted, if the sleeve extended to the bottom of the York, then one would not be able to see through the York at all.

Incident - 9 March 2016

14. The Claimant had been working night shifts as a Network Distribution Driver since July 2011. On 9 March 2016 at 03:00am an incident occurred at the Greenford Mail Sorting Office. The OPG manager, Mr Keightley, had found one of the OPG operatives, Mr Frank Maroney, at about 04.00am in the first aid room complaining of being injured. He took him to hospital where he was

treated for a shoulder injury. The matter was reported to the Claimant's line manager, Mr Roger Franklin, who conducted an investigation. His initial report on a *"Safety Root Cause Analysis"* form stated:

"NAME OF INJURED	*Frank ?*
INCIDENT DATE & TIME:	*Wed 9th March 2016 @ 03.00*
INVESTIGATION DATE & TIME:	*Wed 9th March 2016 @ 05.00*
INVESTIGATION BY:	*Roger Franklin*
WHAT: Primary injury & body part:	*Impact to left shoulder and upper arm*
HOW: was the act or condition unsafe?	*K Chan failed to follow the SSOW over loading the tail lift with 5 Yorks*

REVISED PROBLEM DESCRIPTION…
K Chan had arrived at WLDC with work for the office she failed to follow SSOW [safe system of work] *and loaded 5 Yorks on the tail lift (SSOW is 2 York at a time on a tail lift) as Mr Lant and Frank went to help off load 2 Yorks fell off the tail lift as it was lowered. Frank put his arm up to stop the Yorks falling off as a result he was injured."*

15. The Claimant was informally interviewed about the incident by Mr Franklin on 9 March 2016. It was a brief interview and Mr Franklin moved the Claimant away from driving duties until the formal investigation had been carried out.

16. Also on 9 March 2016 Mr Mark Lant provided a statement as follows:

"9/3/2016
About 3am myself and Frank went to unload the van and 2 Yorks fell of Frank put his arm out to protect himself but hurt his arm the lady driver had 5 Yorks on the lift she also said the was a problem with the tail lift."

17. The Claimant (KC) then attended a formal interview with Mr Franklin (RF) on 11 March 2016. She was accompanied by Mr Ian Voller (IV) a trade union representative. The interview included:

"RF: Can you tell what happened on the morning of 9th March 2016 leading up to the incident AOD at WDLC at 03.00? Were there any witnesses? Who said what?

KC: I arrived and Frank was smoking on the other door it was raining. I had all sleeved York and t with trays and I put them on the tail lift.

RF: How many Yorks did you put on the tail lift?

KC: I put 5 Yorks on the tail lift, they were not heavy and I put the brakes on and pressed the button to go down and the York fell off because the brakes did not work properly.

RF: How many Yorks fell off?

KC: 1 sleeve and 1 flats Yorks.

RF: I understand that you said to the staff at WLDC that the tail lift was broken, if this was the case, when did you first notice this? And who did you report this to? And when?

KC: Not that day it was on Tuesday night, a York almost fell off and I stopped it.

RF: How many Yorks did you have on the tail lift on Tuesday night?

KC: 3 Yorks.

IV: I have raised the issue with A Barr with those types of tail lift; they don't lower level and start to tilt.

RF: Do you know what SSOW for operating Yorks on a tail lift?

KC: Yes

RF: Can you tell me?

KC: It should be 2 Yorks as from the training.

RF: Can you tell me why you did not follow the SSOW for unloading Yorks on a tail lift?

KC: The Yorks was not heavy if they are heavy I would only put on 2 Yorks

RF: Do you know why there is a SSOW in place for operating Yorks on a tail lift?

KC: Yes to prevent accidents from happening.

RF: As a holder of the legally required driver's qualification card, can you confirm you received all your DCPC training?

KC: Yes

RF: After the incident can you tell me why you did not report it to me on your return to the office?

KC: He did not give me any impression he was hurt he looked normal; I did not see what happened only when I asked him to help lift the sleeve he said his arm was hurt trying to save my York falling off.

RF: Do you know what was wrong with the injured person before you left WLDC?

KC: I did not see anything wrong no pain no blood no cry out he gave no sign.

RF: He said he hurt himself stopping the York from falling off the tail lift.

KC: I did not see any physical sign or anything last time when I saw him he was smoking by the other door ten feet away from my tail lift.

RF: Were there any witnesses?

KC: No.

RF: Why did you not report it to the Manager at WLDC before you departed?

KC: Because he never said he was going to report it if he had said I would have gone with him. He looked perfectly alright, he was expressionless not even holding his arm. I just assumed he did not want to help me. Last month at NW1 2 Yorks on the tail lift and due to a faulty brake one fell off, I asked one of the postman to help and he said he had a bad back and it was not his job to help.

RF: So you are fully aware of the SSOW operating Yorks on a tail lift.

KC: Yes."

18. It was only during the course of this interview that an incident on the night before, 8 March 2016, came to light.

19. A complicating factor, although one which the Tribunal did not find of any material significance, was that Mr Keightley had put *"8 March 2016 at 3.00am"* on his Safety Root Cause Analysis form but later said *"But it eventually became clear that the incident in which Mr Lant and Mr Maroney said that the latter was injured took place on 9 March 2016."*

20. The Claimant's account was that although there were two incidents on consecutive nights, Mr Maroney was not injured in either of them. She said that on 8 March 2016 he assisted the Claimant in preventing a York from falling of the tail lift and he did not appear injured at that point. She said that on 9 March 2016 he was nowhere near the two Yorks which fell off the tail lift and could not therefore have been injured. Although she accepted during the interview that Mr Maroney told her that he would not help her lift the fallen Yorks because his arm was hurt trying to save her York falling off, she assumed that if he had been injured, it must have been the night before and could not in any way have been on 9 March 2016 because he was some distance away from the tail lift smoking near the outside doors.

21. The Respondent took the view that, in view of what the Claimant said Mr Maroney had said to her, that he was injured by the falling York on 9 March 2016, she must have known that he was injured.

22. In the event, Mr Maroney went absent on sick leave due to a shoulder injury and was absent for 43 days.

23. Following the interview, Mr Franklin invited the Claimant to confirm that the notes were correct and the Claimant provided handwritten additional notes which were then included in the typed version which is reproduced above.

Conduct Meeting

24. The Claimant attended a formal conduct meeting on 5 May 2016 chaired by Mr Hinckley. She was accompanied by Mr Geoff Loftus a trade union representative. Four allegations were considered by Mr Hinckley and, after hearing from the Claimant and her trade union representative, he adjourned the hearing to make further enquiries.

25. Mr Hinckley then interviewed Mr Maroney on 20 May 2016 and Mr Lant on 1 June 2016. The record of those interviews showed that their accounts were consistent with the accounts which had been given on the night of the incident on 9 March 2016. However, Mr Hinckley did not share those accounts with the Claimant.

26. Mr Hinckley then made his decision to dismiss the Claimant and informed her of his decision at a meeting, which did not involve any further discussion, on13 June 2016. In a letter of that date, he confirmed his decision as follows:

"Deliberations

1. *Breach of Health and Safety rules and guidelines in that you deliberately overloaded the tail lift on 8th March 2016 at Premier Park.*

   You admitted that you fully understood the Safe Systems if work and that the maximum load for the tail lift was two Yorks. You deliberately exceeded this safety limit, and the explanation you gave me does not excuse this. …

   By your own admission you had at least three Yorks on the tail lift. …

   It is therefore my belief that then appropriate penalty in respect of this notification is summary dismissal.

2. *Breach of Health and Safety rules and guidelines in that you deliberately overloaded the tail lift on 9th March 2016 at Premier Park leading to an accident on duty.*

   You admitted that you fully understand the Safe Systems of work and that the maximum load for the tail lift was two Yorks. You deliberately exceeded this safety limit, and the explanation about not wanting the mail to get wet you gave to me does not excuse this, especially as the mail would have been exposed to the weather longer on the tail lift than if it had been inside the truck if you had decanted two at a time. …

By your own admission you had at five Yorks on the tail lift. In all probability the additional weight caused the juddering that caused the Yorks to fall off and injure the employee. There is no record of you PMTing the truck for tail lift issues that day. …

It is therefore my belief that the appropriate penalty in respect of this notification is summary dismissal.

3. Failing to report an accident that occurred at Premier Park on Wednesday 9 March 2016

You were asked on several occasions by your manager if everything was okay around 4.30, and again later. …

The fact that two Yorks fell off and you had asked the two employees to help pick up the mail would lead me to absolutely believe that you were dully aware that something had happened. The fact that you didn't see the injury itself would not have stopped you from raising this with your manager when he asked you later. …

It is therefore my belief that the appropriate penalty in respect of this notification is summary dismissal.

4. Failing to report an incident whilst at NW1 in February 2016.

…I therefore have dismissed this notification, and no further action will take place in relation to this notification."

27. In this decision report Mr Hinckley confirmed that he had given consideration to the Claimant's length of service (36 years) and clear conduct record. He said that he considered the severity of the Claimant's actions in deliberately disregarding health and safety procedures and loading excess Yorks onto the tail lift, and deliberately not reporting the accident, were matters which outweighed the Claimant's length of service and unblemished record.

Appeal

28. On 16 June 2016, the Claimant appealed as follows:

"Notification 1 and 2 – I appeal as the Yorkies were particularly light and didn't exceed the weight limit, and also it is very regular practice by many other drivers to put more than 2 Yorkies on the lift. Notification 3 I appeal as I have not seen any evidence of actual injury. There was no incident to report. I believe Frank is falsely claiming an injury, and on the wrong day for reasons unknown to me."

29. An appeal meeting was held on 12 July 2016 chaired by Mr Phillips. The Claimant was accompanied by Mr Ian Murphy a trade union representative. Mr Phillips upheld the decision to dismiss summarily and his decision was confirmed in a letter to the Claimant dated 8 August 2016.

30. Those are the background facts.

Claims, Relevant Law and Decisions

31. The complaints remaining to be determined by the Tribunal were those at paragraphs **(30) – (36)** of the ET1 claim form as set out below.

32. For discrimination claims under the Equality Act 2010 the burden of proof provisions are as follows.

33. Discrimination Burden of Proof – section 136 Equality Act 2010

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the [Employment Tribunal] could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

34. There is guidance from the Court of Appeal in Madarassy v Nomura International plc [2007] IRLR 246. The burden of proof does not shift to the employer simply on the Claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate a possibility of discrimination, they are not without more sufficient material from which a Tribunal could conclude that on the balance of probabilities the Respondent had committed an unlawful act of discrimination. The Claimant must show in support of the allegations of discrimination a difference in status, a difference in treatment and the reason for the differential treatment.

35. If the burden of proof does shift to the Respondent, in Igen v Wong [2005] IRLR 258 the Court of Appeal said that it is then for the Respondent to prove that he did not commit or is not to be treated as having committed the act of discrimination. Since the facts necessary to prove an explanation would normally be in the possession of the Respondent, a Tribunal would normally expect cogent evidence to discharge that burden of proof and to prove that the treatment was in no sense whatsoever on the prohibited ground.

36. In Hewage v Grampian Health Board [2012] IRLR 870 the Supreme Court said that it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

37. Direct Sex Discrimination - sections 13 and 39 Equality Act 2010

Section 13

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

Section 39

(2) An employer (A) must not discriminate against an employee of A's (B) –

…

(c) by dismissing B;

(d) by subjecting B to any other detriment.

(30) As to the disciplinary, the Claimant was further subject to direct sex discrimination in that the Respondent:
(i) Did not discipline male colleagues for having more than 2 Yorks on the tail lift in general, or the specific case cited by the Claimant's representative.

38. There was no evidence that anyone, male or female, had been formally disciplined for putting more than two Yorks on a tail lift before the Claimant was disciplined for this act. Three trade union representatives (Mr Loftus, Mr Murphy and Mr Clements) had all raised concerns about overloading of Yorks being prevalent. However there was only one specific incident referred to and that was by Mr Clements who said that he had reported to Mr Hinckley, on a date between February and April 2016, having seen four Yorks being lowered on a tail lift. This was explored by Mr Phillips at the appeal hearing. He obtained an account from Mr Hinckley who explained that he had taken action by speaking to the driver who was an agency worker and not an employee. He said the worker had not been trained and had told him that he did not know about the restriction of no more than two Yorks on the tail lift. No injury was involved. In these circumstances, Mr Hinckley gave the worker a verbal warning.

39. There were no facts from which it could be found or inferred that male colleagues were not being disciplined for overloading or that the Claimant had been treated less favourably than male colleagues.

(ii) Did not discipline the male colleague who had contributed to his own injury by breaching the SSOW not to stand at the back of vans when the tail lift was in operation.

40. It is true that Mr Maroney was not investigated or disciplined for having contributed to his own injury by standing too close to the tail lift when it was in operation. Mr Phillips considered the position of Mr Maroney and concluded that his circumstances were different from the conduct of the Claimant and that the primary cause of the accident was due to the Claimant's conduct overloading the tail lift.

41. Although the Tribunal is critical below of the failure to investigate Mr Maroney's contribution to the accident in its decision on unfair dismissal, there was nothing upon which a finding or inference of sex discrimination could be

based. The failure to investigate and/or discipline him was not tainted by sex discrimination.

(iii) Dismissed the Claimant when a hypothetical male comparator would not have been dismissed.

42. There was no evidence whatsoever to support this allegation.

(iv) Moreover, given that the Claimant was discriminatorily given more runs than male colleagues, the Respondent put her in a situation where she had to find some way of speeding up to finish on time. Adding additional Yorks therefore was a direct result of the discrimination against the Claimant and was a solution that others adopted and that the Claimant never thought or was told would lead to her dismissal.

43. This allegation was effectively withdrawn by the Claimant during the course of cross examination. She conceded that she had been given an extra run because she was the reserve driver and it was a reserve duty. It was not because she was a woman.

44. Victimisation - section 26 Equality Act 2010

(1) A person (A) victimizes another person (B) if A subjects B to a detriment because-

(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act –

(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(31) Further and/or in the alternative, the Claimant was subject to victimisation in that the attitude towards her worsened as a result of the grievance against Mr Owen alleging sex discrimination to the point that she was dismissed as a result of having brought allegations of sex discrimination against Mr Owen

45. Although in his witness statement Mr Hinckley denied being aware of the Claimant's grievances against Mr Owen alleging sex discrimination, he conceded in his oral evidence that he had been copied in to the Claimant's letter dated 22 November 2015 in which the Claimant had said:

"I genuinely feel I am being discriminated against in my workplace.
1. Because when I went to a Tribunal it was found in my favour.
2. Prejudice because I am a woman.
3. Prejudice against me as I am an ethnic minority."

46. Notwithstanding the third comment, no allegation of race discrimination was pursued by the Claimant.

47. It was clear that the letter of 22 December 2015 was not related to any complaint about Mr Owen but about a revision of duties in 2011 and again in July 2015. There was no mention of Mr Owen. Indeed, the Claimant moved to night shift in July 2011 and from that point Mr Owen ceased to be her line manager. The last complaint of sex discrimination against Mr Owen was made by the Claimant in May 2011.

48. Additionally, there was no evidence upon which to base a finding or an inference that Mr Hinckley had taken account of the complaints in the letter during the disciplinary process and in his decision to dismiss. There was simply no causal link or evidential connection. He had non-discriminatory grounds for the dismissal.

49. Additionally, the Tribunal accepted that Mr Phillips knew nothing about the Claimant's grievances at all.

50. The Claimant was pressed in cross examination to state where the causal link with gender could be found in respect of the above complaints. She was unable to point to any evidence of any causal link and it was clear that her allegations of sex discrimination and victimisation were based upon perception which had no evidential foundation. It was simply because she believed it to be so. The Tribunal found that that was no basis for the allegations set out above, none of which the Tribunal has found to be well founded.

51. Automatically Unfair Dismissal – section 104 Employment Rights Act 1996

52. *Section 104. Assertion of statutory right.*

> *(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee -*
>
> *(a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or*
>
> *(b) alleged that the employer had infringed a right of his which is a relevant statutory right.*

(32) In the alternative, the Claimant contends that she was automatically unfairly dismissed as the reason, or principal reason for her dismissal was her having issued proceedings in the Employment Tribunal against the Respondent for unlawful deduction from wages.

53. This paragraph is based upon the Claimant's successful Employment Tribunal claim in April 2010 which involved a complaint of unauthorised deduction from wages. Clearly Mr Hinckley was aware that the Claimant had previously brought proceedings in respect of this Tribunal claim as set out in the letter

dated 22 December 2015 but he had no further details of the matter. Mr Phillips was not aware of it at all. Both had a non-discriminatory reason for the dismissal and the appeal outcome. There were no facts from which it could be found or inferred that the dismissal was because of the previous Tribunal proceedings.

54. Unfair Dismissal – sections 94 and 98 Employment Rights Act 1996

55. *Section 94. The right.*

(1) An employee has the right not to be unfairly dismissed by his employer.

56. *Section 98. General.*

(2) 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.

(3) A reason falls within this subsection if it-

(a) …

(b) relates to the conduct of the employee, …

(4) …

(5) 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.

57. For cases involving misconduct, the relevant law is set out in section 98 of the Act and in the well-known case law regarding this section, including British Home Stores v Burchell [1978] IRLR 379, Post Office v Foley [2000] IRLR 827, and Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23. From these authorities, the issues for the Tribunal to determine were as follows.

58. Firstly whether there was a potentially fair reason for the dismissal under section 98(2) and did the employer have a genuine belief in the misconduct alleged. The burden of showing a potentially fair reason rests with the employer.

59. Secondly whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating the misconduct as a sufficient reason for dismissing the employee under section 98(4), in particular did the employer have in mind reasonable grounds upon which to sustain a belief in the misconduct and, at the stage at which the employer formed that belief on those grounds, had it carried out as much investigation into the matter as was reasonable in all the circumstances of the case. Did the investigation and the dismissal fall within the range of reasonable responses.

60. Thirdly the Tribunal must not substitute its own view for that of the employer, but must assess the actions of the employer against the range of reasonable responses.

61. In Santamera v Express Cargo Forwarding [2003] IRLR 273 the EAT said that fairness does not require a forensic or quasi-judicial investigation for which the employer is unlikely in any event to be qualified and for which it may lack the means. In each case the question is whether or not the employer fulfils the test laid down in British Home Stores v Burchell and it will be for the Tribunal to decide whether the employer acted reasonably and whether or not the process was fair.

(33) Irrespective of any discrimination, the Claimant also contends that she was unfairly dismissed both procedurally and substantively.

(34) The Claimant contends that the dismissal was substantively unfair as the Respondent:

(i) Found that the offences of loading too many Yorks on a tail lift and failing to report a colleague's injury were individually (or even together) enough to warrant summary dismissal in circumstances where:

a) The Claimant was not aware and was not warned this could lead to dismissal.
c) Other members of staff regularly loaded too many Yorks due to the 'rush culture'.

62. The Tribunal found that the Claimant was not aware and was not warned that overloading the tail lift could amount to a dismissible offence. She said in her appeal:

"Notification 1 and 2 – I appeal as the Yorkies were particularly light and didn't exceed the weight limit, and also it is very regular practice by many other drivers to put more than 2 Yorkies on the lift. Notification 3 I appeal as I have not seen any evidence of actual injury. There was no incident to report. I

believe Frank is falsely claiming an injury, and on the wrong day for reasons unknown to me."

63. It was also said on her behalf at the disciplinary hearing by Mr Loftus:

"GL said that KC had put her hands up to the fact that she had 3 and 5 Yorks on the tail lift and is remorseful. This is because there is a rush culture in the business and Greenford, GL said that he had pulled someone up himself at Greenford on Sunday and reminded them of their responsibilities."

64. During the appeal hearing, Mr Murphy said on the Claimant's behalf:

"IM: In mitigation for KC's breach of SSOW, it was habitual and suggests most drivers put more than 2 Yorks on a tail lift. It is a generic action by most drivers and is not managed properly. Delivery offices want the mail as soon as possible; I've been in delivery for 33 years and PC 16 years. That is our experience. It is our belief. What we like to see is KC back at work and some real work between the CWU and RM to manage standards and to ensure they are applied. According to PC's statement, AH had dealt with another incident much more leniently."

65. Despite these warnings by the Claimant and trade union representatives that there was a rush culture and habitual overloading of tail lifts, Mr Hinckley did not conduct any investigation into this matter and instead relied upon his own experience. In this respect, he was acting as a witness and judge at the same time and this was a breach of natural justice.

66. In cross examination it was put to him that overloading tail lifts with more than two Yorks was habitual and that he had impermissibly used his own observations and not taken account of what was said to him by the trade union representatives. He said that he stood at loading bays for periods of one hour regularly over the last five years and was using his own experience. He accepted that the Claimant had brought up the issue of habitual overloading and the rush culture but he said that he had no evidence of others doing it and no evidence that it was habitual. He referred to SMAT reports which are produced weekly by managers undertaking compulsory health and safety observations. He was contemptuous of trade union representatives. He said he did not approach Peter Clements, the full time safety representative because he was also a trade union representative and he thought he might *"taint the case"*. He said that trade union representatives were not accountable and would *"suggest environments which don't exist"*. He said he was confident that any habitual overloading would have been revealed by SMATs reports or by other observations. When it was put to him that his views of trade union representatives was worrying, he said that they were the reasons why the Royal Mail was in a crisis at the moment.

67. This amounted to unfairness. It was not corrected by Mr Phillips because, although he had a report by Mr Clements and the Claimant's appeal both alleging habitual overloading, he did nothing more than refer back to Mr Hinckley and relied upon his observations and experience as Mr Hinckley himself had done. Additionally, although Mr Phillips had the report of Mr

Clements, he did not consult Ms Dunning, another safety representative although he had been requested by the Claimant to do so. He consulted no-one on this issue other than Mr Hinckley. In his appeal outcome, he said: *"I have raised this as a wider issue as this is not something I can investigate further"*.

68. The Tribunal found that although both Mr Hinckley and Mr Phillips purported to take the allegation of widespread habitual overloading seriously, neither of them conducted any investigation into the matter. If they had done so, and found that such a practice was habitual, although it might not have affected their view of the Claimant's admitted misconduct, it would have been relevant to the nature and severity of the sanction especially if the practice was widespread but was not being reported, and if reported, was not being subject to investigation or disciplinary action.

69. The failure to conduct any investigation into this matter was outside the range of reasonable responses. No reasonable employer would have failed to investigate such an obviously relevant matter. It was such as to make the disciplinary and appeal process and the dismissal itself, unfair.

b) The Claimant did not realise her colleague was injured.

70. The Tribunal did not accept the Claimant did not realise her colleague was injured. As set out above, she said in the fact finding interview:

" … I did not see what happened only when I asked him to help lift the sleeve he said his arm was hurt trying to save my York falling off."

d) A colleague involved in the same incident had also breached the Safe System of Work guidelines but it had not even been suggested he might be disciplined.

71. Mr Maroney's conduct was not investigated although he was involved in the same incident. Although it was clear to both Mr Hinckley and Mr Phillips that his conduct may have contributed to the incident, his conduct was not formally investigated. At the appeal hearing, Mr Murphy said on behalf of the Claimant:

"IM: ML says both he and FM were standing by the tail lift and this is not where they should be. ML says he said to FM the middle York was falling. If you go back to page 23, FM says the red sleeved York had fallen off and the middle York was falling on him. ML says FM put one of his arms out to stop it falling, but cannot remember which one. A final point, ML explained he was working on nights to help out and his normal role is delivery OPG. We don't know if he was wearing PPE or not but if he is a delivery OPG then he would not have had the correct PPE. The notes were agreed on 7th June and KC's sketch drawings were also shared with ML, but KC never received any of the witness statements or the ERICA report."

72. If there had been a proper investigation into Mr Maroney's conduct and if he had been found to be culpable to any degree and to have contributed to the

incident and his own injury, that may have affected the Respondent's view of the nature and severity of the sanction imposed on the Claimant.

73. This failure to investigate this matter was also outside the range of reasonable responses and was sufficient to make the disciplinary and appeal process and the dismissal unfair.

e) The Claimant had an excellent disciplinary record.
f) The Claimant had 36 years of service.

74. It is clear that both Mr Hinckley and Mr Phillips in their outcome letters referred to the Claimant's clean disciplinary record and her 36 years of service with the Respondent

(ii) Unreasonably considered these matters constituted gross misconduct and failed to check for consistency with other cases.

75. The Tribunal found that neither Mr Hinckley nor Mr Phillips had consulted with the Human Resources department to ensure consistency of approach and sanction. Although the Respondent is a large organisation with a well resourced Human Resources department, there was no evidence of any serious involvement in this respect.

76. In considering the issue of possible disparity, the Tribunal took account of the guidance in Hadjioannou v Coral Casinos Ltd [1981] IRLR 352 as approved in MBNA Ltd v Jones [2015] UKEAT/0120/15/MC. Where the EAT said:

> *"Firstly, it may be relevant if there is evidence that employees have been led by an employer to believe that certain categories of conduct will either be overlooked, or at least will be not dealt with by the sanction of dismissal. Secondly, there may be cases in which evidence about decisions made in relation to other cases supports and inference that the purported reason stated by the employers is not the real or genuine reason for a dismissal. … Thirdly, … evidence as to decisions made by an employer in truly parallel circumstances may be sufficient to support an argument, in a particular case, that it was not reasonable on the part of the employer to visit the employee's conduct with the penalty of dismissal and that some lesser penalty would have been appropriate in the circumstances. …"*

77. Had Mr Hinckley and Mr Phillips looked into the above matters and found that the overloading of Yorks was widespread and was being overlooked, they may have taken a different view of the Claimant's conduct and concluded that she may well have been misled into believing that such conduct would be either be overlooked, or at least would not be dealt with by the sanction of dismissal or concluded that in these circumstances some lesser penalty was appropriate.

(iii) Failed to properly consider alternatives to dismissal, particularly given that the Claimant had not been suspended and had been working in the processing unit since 9th March.

78. The Tribunal found that although both Mr Hinckley and Mr Phillips had considered redeployment of the Claimant, in view of her length of service, previous clean record, failure to properly investigate the matters referred to above and the Claimant's employment in the processing unit after 9 March 2016 without incident, there was no serious consideration of what other roles she might be able to undertake without risk. This failure was outside the range of reasonable responses.

(35) The dismissal was also procedurally unfair in that the Respondent:
(i) Failed to take statements from witnesses until many weeks after the incident.

79. The Respondent did take witness statement from Mr Lant and Mr Maroney albeit after some delay due to sickness and other absence.

(ii) Failed to provide the Claimant with copies of the witness statements, which were not even taken until after the disciplinary hearing.

80. This was a procedural failure because Mr Hinckley did not provide copies of these statements to the Claimant. This was however corrected on appeal.

(iii) Failed to carry out a reasonable and thorough investigation – significant inconsistencies in the evidence were not addressed and various avenues were not followed up.

81. There were inconsistencies regarding diagrams of which shoulder was injured and the date of the event which caused the injury. However, these had no significant impact on the fairness of the procedure or dismissal.

(iv) Failed to allow the Claimant to consider and respond to the evidence.

82. See (ii) above.

(v) At the appeal hearing, made assumptions upon which the Claimant had no opportunity to comment.

83. It was not clear what this complaint was referring to.

84. The Tribunal found that the reason for the Claimant's dismissal was misconduct. Although the Claimant alleged that the reason was tainted with sex discrimination and victimisation, the Tribunal found above that this allegation was not well founded.

85. The Tribunal found, as set out above, that there was a failure to conduct a reasonable investigation. The investigation was outside the range of reasonable responses.

86. Although the Claimant made admissions of conduct which amounted to misconduct, not all misconduct justifies dismissal. The lack of a reasonable investigation made the decision to dismiss outside the range of reasonable responses and unfair.

Wrongful dismissal

(36) The Claimant was dismissed without notice or payment in lieu of notice.

87. The test for wrongful dismissal is different to the test for unfair dismissal. In the former the reasonableness or otherwise of the employer's actions is irrelevant. The question is whether the employee was guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract.

88. The Tribunal looked objectively at the evidence placed before it and could find no reliable evidence of gross misconduct such as to justify summary dismissal. Although the Claimant's admissions were sufficient for the Tribunal to conclude that she was guilty of misconduct, they were not sufficient to support a conclusion that it amounted to gross misconduct, particularly in light of the evidence of the Claimant and the trade union representatives that overloading was widespread and was being overlooked. These were matters which were relevant to the assessment of the seriousness of the conduct.

89. It was likely that the overloading of Yorks was widespread and was being overlooked by management, and that the Claimant had been misled into believing that her conduct would be overlooked. In these circumstances her conduct was not so serious as to amount to a repudiatory breach of contract.

90. The dismissal was wrongful.

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Employment Judge Vowles

Date: ……………30/11/17……………..

Sent to the parties on: ....

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For the Tribunals Office