EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102407/2017

Held in Glasgow on 12, 13 and 14 February 2018

Employment Judge: Ms M Robison

Mr A Abercrombie **7a Balmalloch Road** **Kilsyth** **G65 9AJ**	**Claimant** **Represented by** **Mr G Booth** **Employment Consultant**
Royal Mail Group Ltd **100 Victoria Embankment** **London** **EC46 0HQ**	**Respondent** **Represented by** **Dr A Gibson** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claim is dismissed.

REASONS

Introduction

1. The claimant lodged a claim with the Employment Tribunal on 12 August 2017 claiming unfair dismissal and public interest disclosure, the latter claim subsequently being withdrawn. The respondent lodged a response to that claim, arguing that dismissal in the circumstances was fair.

2. At the hearing, the claimant was represented by Mr G Booth, consultant. The respondent was represented by Dr A Gibson, solicitor.

3. The Tribunal heard first from three witnesses for the respondent, namely Mr William Logan, delivery operations manager who conducted the initial fact-finding investigation, Mr Ian McGregor, senior operations manager who

conducted the disciplinary hearing, and Mr Alan Rankin, independent casework manager who conducted the appeal. The Tribunal also heard from the claimant.

4. During the hearing, the Tribunal was referred by the parties to a joint file of productions (referred to by page number).

Findings in Fact

5. On the basis of the evidence heard and the productions lodged, the Tribunal finds the following relevant facts admitted or proved:

6. The claimant, Mr Alan Abercrombie, commenced permanent employment with the respondent on 28 March 1988 and worked until he was dismissed for gross misconduct effective 18 March 2017, that is for almost 29 years.

7. The claimant was based at Kilsyth Post Office, which is a small post office, with around 20 members of staff. In the morning he would undertake sorting duties and deliveries and after that on a rotational basis, along with five other colleagues, he would undertake collections up until approximately 6 pm.

Relevant policies and procedures

8. The respondent issued a Code of Business Standards (pages 182 – 202) to all staff in or around 2015. This was posted to each member of staff.

9. A jointly negotiated Royal Mail Group Conduct Agreement (pages 203 – 234) was also issued in 2015.

10. Managers periodically carry out briefings with staff, at work time listening and learning (WTLL) sessions. In December 2015, Access/Collections Quality Loss, Managers' Briefing (page 181) was issued to managers. Brian Mitchell, manager at Kilsyth Post Office at the relevant time, issued this briefing to staff ("the barcode brief"). The claimant could not recall whether he had attended that briefing or not. In accordance with the usual practice, that briefing was thereafter placed on the notice board at Kilsyth Post Office.

11. The briefing related to concerns about collections loss and suggested that one of the reasons for this was because of the use of duplicate collection barcodes. It stated that this had resulted in the recent dismissal of some collection drivers.

12. The briefing stated that "there should be no duplicate barcodes anywhere in operation, such as within collection folders; held on keys or tabs; within collection vehicles. That briefing also stated, in bold and underlined that "We are carefully monitoring the collections performance and continue to perform

random checks of boxes and clearances". It continued, "we have the test letters process continuing to operate daily and systematic quality checks on pillar box clearances as well as, from time to time changing barcodes on boxes. We do appreciate that the vast majority of employees serve our customers extremely well so we want to make sure any such malpractice ceases".

The incident on 5 January 2017

13. On 5 January 2017, following a routine collections observation of Collection Route Kilsyth Schedule 1, Shane Ali, a member of staff who assisted in monitoring quality of service, e-mailed Ian McGregor to advise of the following(page 29):

> "I arrived with my Collection Planning Manager (Kevin Garrett) in the area at 16.00 with the intention to test Twechar Post Office hard up against the LAT [latest acceptance time], along with Twechar Box G65 945 and the Mill Road Box G65 277.
>
> -Collecting driver parked in the PO driveway at 16.55, exited the PO at 16.56 and entered his van. He drove off at 16.57.
>
> -I proceeded to post a 1C [first class] RFID parcel [test parcel] at 16.58, where the counter clerk advised that the last collection has been made, and the item will not go until tomorrow.
>
> -Post Office displayed LAT is 17.00 at 2 visible locations. With a scheduled time of 17.05 in CMD [collection data management]. Could not see barcode on display.
>
> Collection driver then proceeded to clear Twechar box G65 945 at 17.00. Final Plate of this box is 16.45. He proceeded to the Mill Road box (G65 277), he then cleared the box at 17.08. Final Plate is 17.00.
>
> Looking at the scans below on CMD for these 3 collection points, the Twechar Post Office is showing as scanned at 17.06. However, the driver was not at the Post Office at this time. Instead he was parked in front of the Mill Road box (G65 277), which is 4 minutes away. In this instance, Twechar Post Office was done early (16.56) and scanned elsewhere at (17.06). 10 mins early. Based on observation the boxes were done on time, but Twechar Post Office was not".

Initial Investigation

14. It was subsequently understood that the collecting driver in question was the claimant. William Logan was instructed by Ian McGregor to interview the

claimant to undertake an "initial review" which took place on Monday 9 January 2017 (pages 31-32). The purpose of that meeting was to check that the person in question was indeed the claimant. At that meeting, the claimant confirmed that he was covering the collection on Thursday 5 January. While the claimant initially indicated that he was not aware of any irregularities in the collections in Kilsyth, he subsequently admitted that he had attended Twechar Post Office nine minutes before the scan time of 17.05, and that he had a scan time of 17.06, when he was witnessed parked outside the Mill Road box.

15. He admitted that he had used duplicate bar codes and he took Mr Logan to their location. He produced a laminated sheet which had four duplicate bar codes on it, one for Twechar Post Office, and three for firms on the collection route.

16. At the end of the interview, the claimant stated, "I know I have done something wrong but we all do it and I promise that if I am given a second chance nothing like this will ever happen again".

17. Mr Logan also checked the collections management database which records the time of the bar code scans.

18. The claimant was advised that he was to be put on precautionary suspension, and this was confirmed in writing (page 30).

19. The claimant was subsequently invited to a fact-finding meeting which took place on Tuesday 17 January 2017 (page 32), at which the claimant was accompanied by his CWU representative, Stuart Davidson. The purpose of that meeting was to further investigate the alleged irregularities and use of duplicate barcodes.

20. At that meeting, the claimant explained that he was trying to make up time, having agreed to take his van, which had a defective clutch, to the workshop at the Glasgow Main Centre which he wanted to get done as quickly as possible so that he could get home to see his daughter before she returned to University in Edinburgh. He said that he had "made a grave error of judgment" and that he was "stupid". He admitted that he did not always follow the route and had on other occasions scanned the barcode away from the post office. He explained that he collected early from the firm BGS because they shut earlier than the official time for collection; and in respect of the firm Biz, they no longer required a collection because they were usually closed and simply put post in the pillar box opposite. He said that "I don't know why we wouldn't just make the collection as shut. I should have followed the process". He said that he should have asked his manager to change the time of the collection. He said that they had been doing this "since the collections changed". He said that he used the bar codes just because they were there,

and that he didn't think using them was wrong because everyone was using them. He said that he was not sure whether he got the barcode brief.

21. The claimant was advised on 17 January that the precautionary suspension would continue, and subsequently advised by Mr Logan that the case was considered to be sufficiently serious to be passed to Mr McGregor to consider further action, because the potential penalty was considered to be outside his level of authority.

22. As the existence of the duplicate bar code sheet was a serious cause for concern, Mr McGregor instructed Mr Logan to carry out a wider investigation into the circumstances of its use when he ascertained that other post operatives may be involved. Mr Logan conducted eight interviews in total. He dealt with two individuals where he had authority to sanction the appropriate disciplinary measures. The others were referred, along with the claimant, to be investigated by Mr McGregor.

Disciplinary hearing

23. By letter dated 3 March 2017, the claimant was notified by Mr McGregor of the requirement to attend an interview to formally investigate the following allegations:

> "1. It is believed that you scanned duplicate barcodes for your evening collection route on Thursday 5th January 2017, which demonstrates behaviours in contravention of our collection standards and code of business standards.
>
> 2. It is believed that you collected the Twechar Post Office early, on Thursday 5 January 2017 which demonstrates behaviours in contravention of our collection standards, and code of business standards. This places the quality of service we are entrusted to provide for our customer at risk.
>
> 3. It is believed that by scanning duplicate barcodes, you collected firms mail early and scanned the barcodes at a different time of day, which demonstrates behaviours in contravention of our collection standards, and code of business standards. This places the quality of service we are entrusted to provide for our customer at risk.
>
> 4. It is believed that you scanned the Twechar Post Office barcode away from the collection point to disguise your early collection of the Post Office, which demonstrates behaviours in contravention of our collection standards, and code of business standards".

24. The claimant was advised that if substantiated these would be regarded as gross misconduct which could lead to dismissal, and furnished him with the documentation gathered at the fact-finding stage (pages 26 – 115).

25. Due to illness on the part of the claimant, that interview was rescheduled from 6 March to 8 March 2017. The claimant was accompanied by his trade union representative Stuart Davidson. Notes were taken at the meeting by Mr McGregor which were subsequently typed up and sent to the claimant who made some annotations (pages 48 – 60).

26. Because the claimant had indicated that managers were aware of the practice, Mr McGregor subsequently interviewed various managers, and made notes of the interviews, including the manager at the time of the incident (PQ – pages 76-79), the previous long-standing manager (BM pages 66- 69)) and managers who covered as relief and for annual leave (RA – Pages 72-75; JC pages 80 – 82) and CB (pages 83 – 85). He ascertained that none of these managers had known about the duplicate bar codes. He ascertained from PQ that the claimant had been asked to take the van with the defective clutch to the Glasgow workshop in the morning, but he had chosen to undertake that task after the collections.

27. Mr McGregor produced a full decision report which he forwarded to HR (pages 86 – 100) and upon which he based his decision letter dated 17 March 2017 to the claimant.

28. In the decision report (pages 96 and 97), Mr McGregor stated that the use of the firms' bar codes away from the collection point alone, referred to in allegations 1 and 3, may not have led to summary dismissal.

29. In the letter (pages 101 to 109), he notified the claimant that he had found each of the allegations upheld and concluded that the claimant was guilty of misconduct, for which the penalty was summary dismissal. In particular, the claimant was advised that his actions had breached the code of business standards by putting quality of service at risk. He concluded that the claimant was "culpable and complicit". Mr McGregor stated that he had taken the claimant's points of mitigation into account, namely the added time pressure that evening; that customers wanted pick up times changed so that it was to keep them happy; that he had been trained to carry out tasks this way, that he gained no advantage and that he had a clear conduct record. In addition, he made reference to his service of 29 years

The Appeal

30. The claimant exercised his right of appeal by setting out the grounds of appeal in a letter dated 21 March 2017 to Mr McGregor (Pages 110 -112), which he forwarded to HR in accordance with the usual practice.

31. The claimant was advised by letter dated 25 April 2017 that his appeal would be heard by Mr Alan Rankin. At the claimant's request the date of the hearing was delayed, and it took place on 10 May 2017. At that meeting, the claimant was accompanied by his trade union representative, and Mr Rankin typed up notes (pages 125 to 133).

32. At the outset of the hearing, the claimant passed a number of questions to Mr Rankin which he said he hoped to have answered (pages 134 – 140). Mr Rankin explained, and Mr Davidson agreed, that the appeal should take the standard format and it was not the role of the appeal chair to answer questions in that way. The claimant accepted that at the time, and subsequently agreed that all but one of his questions was answered during the course of the appeal.

33. Prior to making a decision, Mr Rankin undertook further investigations. In particular, he e-mailed BM (page 147) who confirmed that he had carried out the briefing on duplicate bar codes and that he was not aware of the duplicate bar codes. He also e-mailed PQ to obtain further information regarding the van issue (page 149) and on whether he knew anything about the duplicate barcodes (page 154). He e-mailed Mr Logan who confirmed that he took handwritten notes at the interviews which were not recorded (page 150). He also interviewed SM, who confirmed that he had originally made up duplicate bar codes for the three firms, and also that he did not recall attending the briefing and nor did others he spoke to (pages 151- 153).

34. He emailed Mr McGregor regarding the question of inconsistent treatment (page 156). In his response to that question, Mr McGregor stated that:

> "both employees dismissed were found to be taking deliberate action that could affect the quality of service to the business and therefore negatively impacting on the collections USO. One employee was found to be doing so by collecting early and this was witnessed by two collections managers during a test. He stated that he wanted to do so as he was keen to see his daughter prior to her leaving him for a period of time, which is unacceptable to place the business in such a position. The other employee created the barcode which allowed this to happen and did so as he disagreed with the collection route, which is again unacceptable as it also exposes the business to criticism of seriously inappropriate commercial negligence in the eyes of our regulatory body. Both instances were deliberate and unavoidable. A third employee was found to be collecting early although demonstrated at interview that he believed he was collecting at the correct time. This was deemed to have been plausible and he was issued with the lesser penalty of suspended dismissal. This employee used no excuses to mask irregularities. A

further five people were interviewed and there was no evidence that any of them collected the post office early. One was counselled for his part, another was issued a 2 year serious warning, and both these cases were dealt with by Billy Logan. I dealt with the remaining three cases and they were issued with suspended dismissal as there again was no evidence they had cleared early from the post office. The difference with those dismissed is that the firms had requested the early collections and although it was wrong to allow such early collection practices, it had been a long-standing practice viewed by the collection team as beneficial to the customer, albeit wrong and inappropriate and therefore worthy of serious penalties. Both employees dismissed were guilty of carrying out acts that had no possible benefit to the customer or business and doing so due to their own individual perceived needs, ie going home to see his daughter or disagreeing with a collection route".

35. Mr Rankin's notes were subsequently forwarded to the claimant for his approval. The claimant acknowledged receipt of them, thanked him for hearing the appeal and took a last opportunity to "put forward how remorseful I am for my actions and can assure you nothing like this would ever ever happen again" (page 144).

36. Mr Rankin set out his decision in an appeal decision document (pages 165 – 178) in which he advised that the appeal was rejected and the original penalty of dismissal stands.

Relevant law

41. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996. Section 98(1) of this Act provides that, in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason for dismissal and, if more than one, the principal one, and that it is a reason falling within Section 98(2) of the 1996 Act or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. Conduct is one of these potentially fair reasons for dismissal.

42. Section 98(4) provides that 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, 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 dismissal and this is to be determined in accordance with equity and the substantial merits of the case.

43. In a dismissal for misconduct, in **British Homes Stores Ltd v Burchell [1980]** ICR 303 the EAT held that the employer must show that:

    - He believed the employee was guilty of misconduct
    - He had in his mind reasonable grounds upon which to sustain that belief, and
    - At the stage at which he formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.

44. Subsequent decisions of the EAT, following the amendment to the burden of proof in the Employment Act 1980, make it clear that the burden of proof is on the employer in respect of the first limb only and that the burden is neutral in respect of the remaining two limbs, these going to "reasonableness" under section 98(4) (**Boys and Girls –v- McDonald [1996] IRLR 129, Crabtree –v- Sheffield Health and Social Care NHS Trust EAT 0331/09).**

45. In considering the reasonableness or unreasonableness of the dismissal the Tribunal must consider whether the procedure followed as well as the penalty of dismissal were within the band of reasonable responses (**Iceland Frozen Foods Ltd –v- Jones [1982] IRLR 439**). The Court of Appeal has held that the range of reasonable responses test applies in a conduct case both to the decision to dismiss and to the procedure by which that decision was reached (**Sainsbury v Hitt 2003 IRLR 23**). The relevant question is whether the investigation falls within the range of reasonable responses that a reasonable employer might have adopted.

46. The Tribunal must therefore be careful not to assume that merely because it would have acted in a different way to the employer that the employer therefore has acted unreasonably. One reasonable employer may react in one way whilst another reasonable employer may have a different response. The Tribunal's task is to determine whether the respondent's decision to dismiss, including any procedure adopted leading up to dismissal, falls within that band of reasonable responses. If so, the dismissal is fair. If not, the dismissal is unfair.

47. A lack of consistency may give rise to a finding of unfair dismissal (**Post Office v Fennell 1981 IRLR 221**). However, it is now established (**Hadjioannou v Coral Casinos Ltd 1981 IRLR 352**) that a complaint of inconsistency of treatment would only be relevant in limited circumstances and that is:

    - Where employees have been led by an employer to believe that certain conduct will not lead to dismissal;

- Where evidence of other cases being dealt with more leniently supports a complaint that the reason stated for dismissal by the employer was not the real reason, and
- Where decisions made by an employer in truly parallel circumstances indicate that it was not reasonable for the employer to dismiss.

Respondent's submissions

48. Mr Gibson supplemented written submissions with oral submissions. He set out the issues, and argued that the reason for the dismissal was conduct, and that the respondent had a genuine belief that the claimant was guilty of misconduct alleged. This was not disputed by Mr Booth.

49. Relying on **Shrestha v Genesis Housing Association [2015] EWCA Civ 94**, Dr Gibson submitted that the respondent had carried out a reasonable investigation fitting with the circumstances of the case, particularly in light of the claimant's admissions. While he accepted that the question of the claimant's culpability did require investigation, specifically in respect of his claims that everyone on the rota used the bar codes and that managers knew or ought to have known, eight people within a staff of 15-20 were interviewed. It came to light that the six members of staff doing collections were using the duplicate bar codes, but the fact that everyone was involved in the wrong going was not mitigation.

50. Dr Gibson submitted that had the managers had been aware that would be mitigation, but Mr McGregor interviewed six managers who worked or had worked at Kilsyth for varying lengths of time, none of whom knew about the duplicate bar codes. Mr Rankin subsequently asked PQ and BM.

51. He submitted that the issue of the van going in for repair and wishing to see his daughter were red herrings, because the final collection place was Kilsyth Post Office which had to be picked up at 17.15. As there was no duplicate bar code for that collection, the claimant would not be saving time anyway by collecting mail early from Twechar. Notwithstanding, these issues were investigated by interviewing PQ.

52. Relying on the evidence, Dr Gibson then set out a list of twelve issues which he relied on to support his submission that the respondent's belief that the claimant had committed misconduct was based on reasonable grounds.

53. He argued that the decision to dismiss was within the band of reasonable responses, bearing in mind the core business of the respondent, and the taboo in particular in picking up mail early, particularly in light of the quality of service expected by customers and the fact that the respondent now faces competition from a large number of courier firms, but is also regulated and

case face being fined for failing to meet required standards. Here unilaterally making unauthorised changes to suit the firms was serious misconduct, it would most likely not have led to dismissal but a lesser penalty. However, here the claimant had deliberately and knowingly picked up mail early and used duplicate bar codes to disguise it.

54. With regard to the claimant's argument that there was inconsistent treatment, this can only relate to NL because MM was dismissed. The others were found not to have collected early from Twechar. Relying on **Hadijiouannou v Coral Casinos Limited [1981] IRLR 352** and **Paul v East Surrey District Health Authority [1995] IRLR 305 CA**, here the facts were not sufficiently similar to support an argument of inconsistent treatment. Mr McGregor gave a very cogent explanation why he had accepted NL's explanation that he had not knowingly collected early, whereas the claimant's actions were deliberate. Further, his argument is significantly weakened by the fact that another colleague was dismissed also. This issue of inconsistent treatment was explored by Mr Rankin in the appeal. His evidence in Tribunal was consistent with the explanation which he gave to Mr Rankin in the e-mail of 30 May 2017 (page 156).

55. Dr Gibson set out why he said that the procedure was fair. He lodged a revised schedule of loss. Although he accepted that the claimant had sought to mitigate his losses, it would not be just and equitable to award beyond six months, not least because the claimant's evidence was that he had received an offer of a bus driving job but had failed the medical. In any event, contributory fault and Polkey considerations meant that any compensatory award should be reduced to nil.

56. With regard to the question of redeployment, Dr Gibson argued that other roles, such as deliveries and sorting also required the respondent to have trust in the claimant.

Claimant's submissions

57. Mr Booth accepted that the claimant had been dismissed for his conduct and that it amounted to misconduct. However, he questioned the extent of the investigation which led the respondent to conclude that there was misconduct, or at least which led the respondent to conclude that the misconduct warranted dismissal. He submitted that the longer the service the more serious the investigation ought to have been taken, and here it was not as thorough as it should have been given his length of service.

58. He argued that Mr McGregor and Mr Rankin had paid lipservice to procedures and made no effort to fully explore the mitigation which the claimant had put forward. In particular, they had failed to ask follow up questions, and had been too quick to accept the first answers during the

interviews. He submitted that the investigation was insufficient, because they saw and heard what it suited them to see and hear. This was because their decision was pre-determined and they needed a scapegoat.

59. The delivery office at Kilsyth is small but all the managers interviewed said that they had no knowledge of the bar codes. Mr Booth submitted that they must have known. They say that what they thought they saw in the tray was the route header, but it would have only one bar code on it, and it was kept in the office, whereas the sheet in question had four. These managers did have something to gain in turning a blind eye to the use of the duplicate bar codes, because it meant that performance levels could be maintained at 100%; but reasonable people would have wondered why they were performing so well.

60. Mr Booth said the focus of his argument was on the question whether dismissal was reasonable in the circumstances, and on the lack of consistency. Relying on **Post Office v Fennell [1981] IRLR 221**, he submitted that where there is inconsistency of treatment, then the employer will not have acted fairly. In this case, he drew the comparison between the way that the claimant had been treated, and the way that NL had been treated. He said that it was nonsense to suggest, as Mr McGregor did, that he was an inexperienced employee, and did not know the route, whereas according to the claimant had had worked there for around 8 years. Whereas it was concluded that NL was helping business customers, so too was the claimant, and this is another indication that things were pre-judged.

61. Mr Booth submitted that Mr McGregor was not a credible witness and his evidence to the Tribunal was long-winded, self-serving and illogical and that he had to be pinned down over the code of business standards. His justification for imposing a different sanction on NL was disingenuous.

62. Further, with regard to SM, he was guilty of producing the duplicate codes, it was accepted that was wrong and that he had breached the code of business standards, and yet no action was taken against him. Another member of staff who had also made duplicate bar codes was sacked. All of this demonstrates a lack of consistency.

63. The inconsistency of treatment meant that dismissal in this case was not within the band of reasonable responses. Mr Booth also argued that the sanction of dismissal was not within the band of reasonable responses, because the respondent failed to take account of the claimant’s length of service. The claimant’s evidence shows remorse and if he had been given a similar sanction to others then the respondent would have protected itself against further breach. In particular, the respondent failed to consider the option of redeployment, whereas a large employer like the respondent ought to be able to redeploy the claimant, but the respondent had failed to

demonstrate that he could not be redeployed. If the respondent had taken the proper approach to this case, then the claimant would not have been dismissed. The sanction was too harsh, not least because of the failure to be inconsistent.

5 64. He argued that there should be no finding of contributory fault, because others had committed similar offences and not suffered financial hardship. Mr Booth produced a schedule of loss and argued for future loss of 12 weeks.

Tribunal's deliberations and decision

Observations on the evidence and witnesses

10 65. I accepted that all of the witnesses were credible witnesses. Indeed, as Mr Booth said, clearly Mr McGregor and Mr Rankin were very well versed in what their role entailed, but also what giving evidence in Tribunal involved.

66. Although the claimant in this case was dismissed for actions which were dishonest (in disguising the collection times), I accepted that in giving 15 evidence in this tribunal the claimant was essentially being honest. He was however rather indignant, although I accepted that was explained by his genuine sense of unfairness at what he saw as differential treatment and that he genuinely regretted having lost his job in such circumstances.

67. There was however little dispute on any of the key facts (except the question 20 of whether the barcode brief had taken place, but that was not in any event material to the outcome of the case). Rather, as is often the case in these types of hearing, the debate was over the interpretation of the facts and how the key legal tests should be applied. As Mr Booth knows well, the role of this Tribunal is not to "rehear" the case or to take a view on whether or not the 25 Tribunal would have dismissed in the circumstances, but rather to assess whether the respondent had acted within the band of reasonable responses open to an employer.

Reason for dismissal

68. The Tribunal considered the tests for establishing unfair dismissal. The first 30 issue to consider is whether the respondent has shown that the claimant has been dismissed and that the reason for the dismissal was misconduct.

69. The claimant did not dispute that he had used the bar codes, and he did not dispute that he had been guilty of misconduct. He did not dispute that the respondent's belief was genuine and that he had been dismissed for 35 misconduct. The Tribunal therefore concluded that the first limb of the **Burchell** test had been met and that the respondent believed the claimant to be guilty of misconduct.

70. Accordingly the respondent has shown that the reason for the dismissal of the claimant was conduct, which is a potentially fair reason for dismissal.

Reasonableness of decision to dismiss

71. The Tribunal then turned to consider whether the respondent acted reasonably in dismissing the claimant for misconduct. The question is whether it was reasonable in all the circumstances for the respondent to dismiss the claimant for misconduct. As discussed above, the issue is not whether this Tribunal would have dismissed the claimant in these circumstances but whether the dismissal was within the band of reasonable responses available to the respondent in all the circumstances.

72. In determining whether or not dismissal was reasonable in all the circumstances, the Tribunal first considered the second limb of the **Burchell** test, that is whether or not the respondent had in mind reasonable grounds upon which to sustain the belief that the claimant was guilty of misconduct.

73. Mr McGregor formed the view that the claimant was guilty of misconduct based on his interview with the claimant and subsequent enquiries. Here there was evidence that the claimant had been observed picking up early from Twechar Post Office, there was electronic evidence that the bar code for the Post Office had been scanned away from the Post Office and the claimant admitted that. He also admitted that he had been using duplicate bar codes on more than one occasion, and that they had been in use for some time. He very quickly accepted that he knew that he was wrong to have done so, and that he had made a "grave error of judgment" and he asked for a "second chance".

74. Given that information from those sources, the Tribunal considered that Mr McGregor had in mind reasonable grounds on which to sustain his belief that the claimant was guilty of misconduct.

75. The Tribunal then turned to the third limb of the **Burchell** test. The question is whether at the stage at which the respondent formed the belief that the claimant was guilty of gross misconduct, he had carried out as much investigation into the matter as was reasonable in the circumstances. The range of reasonable responses test applies to the question of the investigation as well as other procedural aspects leading up to dismissal.

76. Mr Booth argued that this limb was not satisfied in this case. His particular concern related to the depth of questioning and the failure to ask appropriate and relevant follow up questions during the investigation interviews. He said that when the managers said that they were not aware of the duplicate bar codes, he considered that there should be more follow-up questions, and as I understood it, the claimant's position put to them. In relation to the interview

of SM by Mr Rankin, when he had admitted that he had produced the original duplicate bar code list, no further questions had been asked about when that had happened or the reasons for it. Further, there had been a failure to investigate sufficiently the question of whether the barcode briefing had taken place, and in particular to follow up the fact that it appeared that the signoff sheet which would have confirmed who attended had been removed, and a failure to follow up the references to the brief in December 2015 and December 2016.

77. As Mr Booth argued that the flaws in the investigation meant that the respondent could not claim to have a genuine belief on reasonable grounds that the claimant was guilty of misconduct, the Tribunal gave careful consideration to the extent of the investigation conducted by the respondent.

78. The requirement is to conduct as much investigation as is reasonable. The criticism here is the depth of questioning. There was no suggestion that there were others who should have been interviewed or other avenues which should have been pursued. I noted that Mr McGregor made some initial inquiries before meeting with the claimant (page 64 and 65). He interviewed no less than six managers to ascertain whether any of them were aware of the duplicate bar codes. I did not accept Mr Booth's submission that the questioning was not sufficiently rigorous. I accepted Mr McGregor's conclusion that the manager's responses were plausible because they had nothing to gain but a lot to lose by turning a blind eye to the existence and use of duplicate bar codes. Although the claimant relied on the fact that they were in plain sight, and that the tray in which they were kept along with the keys was transferred each day to the collection drivers, I accepted that it was perfectly plausible that if the managers did see sheets with bar codes on them that they would assume that they related to legitimate business, such as the route headers. The evidence was that bar codes for a variety of purposes are now in common use. Further, as Mr McGregor contended, had managers known, this is surely the first thing that the claimant would have said at the initial meeting, whereas he did not make this clear until the interview with Mr McGregor on 8 March.

79. Then at the appeal stage, which was said to be a rehearing, Mr Rankin made a number of enquiries by e-mail to follow up areas of concern which the claimant had raised, including interviewing SM. I did not accept that the supplementary questions which Mr Booth thought Mr Rankin should have asked indicated that the investigation was not reasonable or indeed would have made any difference to the outcome in this case.

80. I also heard evidence about the respondent's investigation into the reasons which the claimant gave for his actions on the day of the incident. Dr Gibson argued that this was a red herring, because he did not in fact make up any

time that day given that the last collection was at Kilsyth at 17.15 and there was no duplicate bar code for that, but also and perhaps particularly because the claimant had admitted to picking up early from Twechar Post Office on previous occasions and no explanation was given for the rationale for that. Further, it was rather illogical that the claimant would volunteer to take the van to be repaired after his collections, rather than in the morning as he had been requested to do by his manager, if he was pressed for time at the end of the day (unless had had hoped to get paid overtime, as suggested). Dr Gibson said this was not necessary, but notwithstanding the claims were investigated by the respondent.

81. I considered that the investigation which was carried out in this case could in fact be described as thorough. In these circumstances, the Tribunal could not say that the respondent had not carried out as much investigation as was reasonable in the circumstances before concluding that the claimant was guilty of the misconduct alleged.

Reasonableness of the sanction of dismissal

82. The Tribunal then turned to consider whether the sanction of dismissal was reasonable in all the circumstances. In this case, the respondent categorised the misconduct as gross misconduct resulting in summary dismissal. The question is whether that was fair in all the circumstances, having regard to the equity and the merits of the case, including the size and administrative resources of the respondent.

83. This was the key question in this case, and it centred around whether the claimant had been treated inconsistently and whether to dismiss the claimant given this was a first offence during 29 years of service was reasonable.

84. Mr Booth concentrated on the fact that dismissal was not fair in the circumstances because others guilty of the same or similar misconduct were treated differently, so that there was unfairness because there was inconsistency of treatment.

85. The claimant was particularly aggrieved about the fact that he (and I understand two others) were suspended, but three others (who were also on the rota for collections) were not. I did not hear detailed evidence regarding the issue of who was and who was not suspended. The respondent's procedures allow for a precautionary suspension, and I did not understand the claimant to complain that there was any breach of procedure in that regard.

86. The claimant's particular focus in this case was however on the inconsistency of the sanctions. The claimant was particularly aggrieved by the fact that he was one of six on the collections rota, and all of them had admitted to using

the duplicate bar codes, in relation to the firms at least, and that in itself was a serious breach of the code of business standards, but different sanctions have been applied.

87. On the face of things, it is obvious why the claimant would feel aggrieved about that. As Mr Booth submitted, the claimant believed he was a "scapegoat" for a collective wrong on the part of colleagues, and indeed he clearly felt strongly that managers either knew about it or turned a blind eye to the wrong-doing.

88. While it is accepted that inconsistent treatment can give rise to a finding of unfairness, the question is whether there are "truly parallel circumstances". While on the face of things there were parallels here, I had to consider whether the facts did differ in those similar cases to an extent which justified different sanctions.

92. I accepted the evidence of Mr Logan, who set out the rationale for his decisions in relation to WJ and RH. With regard to WJ, he determined that there was no case to answer because he had not been involved in collections, and had only been involved in handing out and receiving in the tray, keys and barcode sheets, but he accepted that he did not know what they were for.

93. With regard to RH, given his denial and the evidence from the CMD, there was no evidence that he had ever scanned the Twechar Post Office later and collected early, which was the most serious of the allegations. Since the breach was not as serious as the others, he got a reprimand from Mr Logan for using the firms barcodes and for not following the correct procedure.

94. The others, including the claimant, were passed up to Mr McGregor because the potential penalty was beyond that which Mr Logan had authority to issue.

95. With regard to JB and AB, Mr McGregor had no scanning data or observation evidence that they had collected early from Twechar Post Office. Although they had carried out the firms' collections using the bar code, and this was considered a serious offence, it was deemed to be the most serious offence short of dismissal, which was a two year suspended dismissal.

96. With regard to SM, he was not a collection driver, but had admitted that he had created the initial bar codes in relation to the firms' collections, which he said he had done to help the customers. While postpersons do not have autonomy to alter the scheduled pick up times, since this was based on genuine intentions and helpful to the investigation to know who had created the first set of bar codes with the firms, Mr McGregor determined that it did not warrant dismissal. This was also because there was no evidence that he had picked up from Twechar Post Office early.

97. In any event, Mr Booth's particular concern related to the way that NL was dealt with, and this was the focus of his argument. Mr McGregor explained that he was issued with a so-called suspended dismissal, which is a major penalty, short of dismissal, for two years. Mr MrGregor's reasons for treating the claimant differently were that he believed he was doing the correct route and the time and he thought that the notice in the Post Office was 5 pm (which it once had been) but that was actually the latest acceptance time; and that the bar code was to circumvent an error in the PDA. He accepted this explanation as credible because it was unique and he made no attempt to create mitigation, and because he accepted he had made errors and showed remorse. While he considered this to be a serious breach he accepted that he did not deliberately or knowingly carry out the incorrect process.

98. I accepted Mr McGregor's evidence that there were factual differences between those cases, such as to justify his conclusion that different sanctions were appropriate. In particular, I accepted that the key difference was the fact that NL was found to have not knowingly carried out the incorrect procedure, whereas the claimant was found to have deliberately collected early and disguised his actions. Mr McGregor was also clear about his rationale for accepting NLs evidence as credible, and that related to the fact that his reasoning was "unique" and he had made no attempt to come up with excuses or reasons to explain the errors.

99. Further, I accepted Dr Gibson's submission that the claimant's inconsistency argument is significantly weakened by the fact that MM was also dismissed. This was explained by the fact that he had added the duplicate bar code for the Twechar Post Office and evidence that he too had collected early.

100. One issue upon which there was much discussion and which may have been said to mitigate in the claimant's case was whether or not the claimant had attended the brief relating to the duplicate bar codes, the suggestion being that he didn't know that he was not supposed to or that he did not realise how serious it was.

101. I considered that too to be a red herring, and indeed Mr McGregor said that he did not rely on it in coming to his final decision. I have made a finding in fact that a briefing did take place, on the basis of the enquiries made of BM and his answers. It is not clear whether the claimant attended that or not (and indeed I did become aware that he came back from extended sick leave at the beginning of December 2015; and that the colleagues that SM spoke to had not heard of the briefing). In any event, the brief notice was on the notice board.

102. However even if he did not attend the brief, did not see the brief notice, had not received the code of business standards, it was abundantly clear to me

that the claimant was very well aware of how seriously the incident would be treated and this is clear from his answers in the initial meeting. Although he quickly admitted that he had been involved, it is clear he knew it was wrong, and indeed it was serious, and in his evidence he said that he knew dismissal was a possibility. I accepted the submission of Dr Gibson that the subsequent explanations which he gave were after the event justifications to try to excuse what he knew was a serious wrong-doing, warranting dismissal in these particular circumstances.

103. Mr Booth further argued that the sanction of dismissal was unfair in the particular circumstances of the case, and although he again raised the fact that others had not been dismissed, I understood that to relate to the claimant’s long service, his clean conduct record, and the fact that this was the first offence, and therefore that he should get a second chance.

104. I considered whether dismissal for a first offence following more than 29 years of service including an initial spell as a casual, was within the range of reasonable responses open to the respondent. While the claimant may well consider the outcome to be harsh, especially when others he personally believes to be equally culpable were not dismissed, the band of reasonable responses test is designed precisely to deal with the situation cases such as this, where what is unreasonable in one sector might well be reasonable in another. The test is designed to recognise that while the Tribunal might consider that the actions of an employer were unreasonable, still an employer might act within the band of reasonable responses. In this case Mr McGregor emphasised repeatedly in his evidence how it is essential that the respondent maintains quality standards, and this is particularly because they are operating in a competitive environment, that customers rightly have high expectations in relation to the delivery of their mail, and their standards are regulated by an outside body which has the power to issue a fine. I understood why the respondent had highlighted the issue of collecting mail early was particularly heinous, deemed this such a serious wrong-doing.

105. Mr Booth argued that the respondent failed to demonstrate that they had considered lesser sanctions, and in particular that the respondent had failed to consider the option of redeployment, which in a very large organisation like the respondent, and given the different types of roles which he could have undertaken, would have been reasonable.

106. However, I accepted that the respondent was entitled to conclude, given the accepted dishonestly on the part of the claimant in disguising the collection time, and it would not be acceptable to redeploy the claimant to another role for the respondent. I accepted Dr Gibson’s submission that in other roles such as sorting or deliveries also involve an element of trust and that there is potential for wrongdoing.

107. The Tribunal accepted therefore that dismissal in all the circumstances for this type of misconduct and in this context did fall within the range of reasonable responses open to the respondent. In all the circumstances therefore it was reasonable to conclude that the claimant was guilty of gross misconduct, justifying summary dismissal.

Procedural fairness

108. I did not understand the claimant to be arguing that there was any procedural fairness. Indeed, I understood Mr Booth to concede that the respondent's conduct policy was exemplary and I did not understand him to suggest that there was any way in which the correct procedures had not been followed, beyond a concern that the execution of the procedures had resulted in an unfair outcome, as discussed above.

Conclusion

109. A feature of this case which was troubling was why the claimant had decided to risk his job by using duplicate bar codes. Mr McGregor said that it was a very simple fix to change the times of the firms' collections. Although he believed that the claimant did this just because it suited him to follow a different route to the official route, although he knew he did not have autonomy to change the route. I could only conclude that there was a time advantage, especially given the claimant's evidence that other adjustments were made to the schedule. Why he would risk his job to gain such a small advantage remains unclear.

110. Notwithstanding, the Tribunal has concluded that dismissal for misconduct was within the range of reasonable responses open to the respondent in these particular circumstances, and therefore that the dismissal was not unfair. This claim is therefore dismissed.

Employment Judge: Muriel Robison

Date of Judgment: 21 February 2018

Entered in register: 22 February 2018
and copied to parties