THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH EMPLOYMENT TRIBUNAL**

BEFORE: **Employment Judge Webster**

BETWEEN:

Mr S Lane **Claimant**

AND

Royal Mail Group Limited

Respondent

ON: **31 October 2018**

Appearances:

For the Claimant: **In person**

For the Respondent: **Ms Hobson (Solicitor)**

JUDGMENT

1. The Claimant's claim for unfair dismissal is not upheld.

WRITTEN REASONS

Case summary

2. The claimant was employed under a contract dated 1.12.97 as a post person. On Monday 19 February the claimant left his post vehicle with his keys in and the engine running and a third party stole the vehicle and drove off. The respondent dismissed the claimant for gross misconduct with a termination date of 9 March 2018.

The Hearing

3. The tribunal was provided with 3 witness statements (1 for the claimant and 2 for the respondent) and an agreed bundle of 195 pages. All 3 witnesses gave evidence in person.

4. The claimant represented himself but was assisted at the table by his father who did not ask questions on the claimant's behalf but helped him to formulate them and deal with the evidence.

5. The list of issues was agreed with the parties at the outset of the hearing.

The Issues

6. What was the reason for dismissal? Was it a potentially fair reason for section 98(2) Employment Rights Act 1996. The respondent asserts that it was a reason related to conduct and the claimant has agreed that this was the reason for his dismissal.

7. Did the respondent hold its belief in the claimant's misconduct on reasonable grounds including whether the investigation into the alleged misconduct was reasonable?

8. Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer?
The claimant relies upon the following to show that it was not within the range of reasonable responses:

(i) That the procedure had not been fair because Mr Johnson had not waited for his notes on the disciplinary meeting minutes before reaching his conclusion.
(ii) That the decision had been rushed and not followed the correct procedure.
(iii) That the claimant's mitigating circumstances, namely that he was rushed that day and that he was distracted because his neighbour had recently committed suicide, had not been properly taken into

account.

(iv) That Mr Johnson had falsely accused him of being dishonest and lacking integrity.

(v) That Mr Johnson and Ms Knight Smith had failed to properly consider other employees in similar circumstances who had not been dismissed.

(vi) That the respondent had not considered an alternative sanction short of dismissal.

9. If the dismissal was unfair did the claimant contribute to the dismissal by culpable conduct? This requires the respondent to prove, on balance of probabilities that the claimant actually committed the misconduct alleged.

The Law

10. Section 98 of the Employment Rights Act 1996 (ERA) provides as follows:
    (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair it is for the employer to show –
        (a) The reason (or if more than one, the principal reason) for the dismissal, and
        (b) That it is either a reason falling within subsection (20 or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
    (2) A reason falls within this subsection if it –
        (a) Relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
        (b) Relates to the conduct of the employee,
        (c) Is that the employee was redundant, or
        (d) Is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
    (3) In subsection (2)(a)
        (a) ‘capability’ in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental qualify and
        (b) ‘qualifications in relation to an employee means any degree, diploma or other academic technical or professional qualification relevant to the position which he held.
    (4) In any other case where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismiss 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 reasonable 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.

11. The respondent's case was that this was dismissal for conduct. That is a potentially fair reason under s 98(2)(b) ERA. In the event that the respondent is correct in that context a determination of the fairness of the dismissal under s98(4) is required. This involves an analysis of whether the respondent's decision makers had a reasonable and honest belief in the misconduct alleged. Further a tribunal must determine whether there were reasonable grounds for such a belief after such investigation as a reasonable employer would have undertaken. The burden of proof is neutral in relation to the fairness of the dismissal once the respondent has established that the reason is a potentially fair reason for dismissal. The tribunal must also determine whether the sanction falls within the range of reasonable responses to the misconduct identified. This test of band of reasonable responses also applies to the belief grounds and investigation referred to.

12. In the event that the claimant is found to have been unfairly dismissed a monetary award is made under s119 ERA (basic award) and s123 ERA (compensatory award). Reductions may be made to those awards. For the basic award a reduction cane be made where the tribunal considers that any conduct of the claimant before the dismissal was such that it would be just and equitable to reduce the amount of the basic award, then the tribunal is to reduce that amount accordingly. Under s123 ERA subsection 6, where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce the amount of the compensatory award by such proportion as it considers just an equitable having regard to that finding.

Findings of Fact

13. It was not in dispute that the claimant had worked for the respondent for almost 20 year, had a clean disciplinary record and was considered a good employee throughout that period.

14. The claimant accepted that he was aware of and understood all the various documents which cover the Royal Mail's policies on ensuring mail safety and the individual employee's responsibilities in preserving mail safety. The tribunal was taken to the policies which confirmed amongst other things that:

(i) The safety and security of the mail was of paramount importance.
(ii) That the respondent was statutorily required to take all necessary steps to ensure the safety of the mail.
(iii) That the respondent's license to carry mail was dependant on the above.
(iv) That employees must not leave mail unattended in an insecure place at any time.

(v) That any vehicles carrying mail must not be left unattended at any time
(vi) That leaving mail unattended was a gross misconduct offence that could result in summary dismissal

15. The claimant accepted that he knew of and understood those policies at the time of the incident and his dismissal.

16. It was also not in dispute that, on 19 February 2018 the claimant had left his postal vehicle with the keys in and the engine running whilst he collected some mail from a post-box and during that period the van was stolen. The claimant called the police immediately and informed the relevant supervisor at Royal Mail. It was not in dispute that the claimant was honest about the incident throughout the disciplinary process and before the tribunal today.

17. The claimant was suspended and understood the reasons for his suspension. He attended a fact-finding meeting on 24 February 2018. He was then written to and invited to a disciplinary meeting on 1 March 2018. The letter inviting him to that meeting set out what the allegations were and informed him that one outcome of the meeting could be dismissal. The claimant was accompanied to that meeting by his union representative. Following that meeting the claimant was called to a meeting on 9 March at which he was summarily dismissed.

18. The claimant contended that the original decision to dismiss him was unfair for several reasons namely:
(i) That the procedure had not been fair because Mr Johnson had not waited for his notes on the disciplinary meeting minutes before reaching his conclusion.
(ii) That the decision had been rushed and not followed the correct procedure.
(iii) That the claimant's mitigating circumstances, namely that he was rushed that day and that he was distracted because his neighbour had recently committed suicide, had not been properly taken into account.
(iv) That Mr Johnson had falsely accused him of being dishonest and lacking integrity.
(v) That Mr Johnson and Ms Knight Smith had failed to properly consider other employees in similar circumstances who had not been dismissed.
(vi) That the respondent had not considered an alternative sanction short of dismissal.

19. The claimant contends that the minutes of his meeting were not received by him until 6 March and that he did not have an opportunity to respond to them until after it appears Mr Johnson made his decision. He says that Mr Johnson told him at the dismissal meeting on 9 March that he had not received the claimant's amendments until that morning

and that they had not formed part of his decision-making process.

20. Mr Johnson's evidence on this was that he would have sent the notes out on the same day or the following day as he did with every investigation and that he did take the amendments to the notes into account when he made his decision. He does not think that he made the decision on 5 March despite the letter at page 153-155 but he did confirm he had made the decision by 7 March when he signed the Penalty Decision Record. However he also confirmed that he could not remember the entire process and had no specific memory of when the notes were sent to the claimant and appeared unsure as to whether he bore them in mind when reaching his decision.

21. I believe the evidence of the claimant that he did not receive the notes until 6 March regardless of when Mr Johnson sent them out - and that Mr Johnson did not read the claimant's comments on them until after he had made his decision to dismiss the claimant. I believe it more likely than not, given the dates on the documents that Mr Johnson made his decision on 5 March 2018. I consider that this was a technical breach of the Royal Mail disciplinary policy.

22. However, I believe very little turns on this as the amendments to the notes were relatively minor and nothing in them addressed the fundamental issues which Mr Johnson relied upon to dismiss the claimant namely that he was aware of the relevant policies and procedures regarding the safeguarding of the mail and that he had breached those policies by leaving the keys in the van and the engine running.

23. It is also clear that Mr Johnson made no effort to investigate the possibility that other members of staff had not been dismissed when other cars belonging to the respondent had been stolen. Mr Johnson said that he was personally not aware of any such cases and that he could not track down the ones that he had been referred to by the claimant's union because the information was so vague. However he made no effort to ask for any more information either at the meeting itself or subsequently. He explained that this was because he felt he should consider this case individually on its own facts. It is clear then that the other cases were not considered at all before Mr Johnson came to his conclusion about the claimant.

24. The claimant also stated that he felt his mitigating circumstances had not been properly considered by Mr Johnson. He referred in the fact finding meeting to the suicide of a neighbour and said that he had been distracted because of the emotional impact this had had on him. Mr Johnson's evidence on this was that he felt that it was a bit vague and that it was not clear to him why this would affect the claimant some 3-4 weeks later given that the claimant had worked without a problem in the intervening period and that he was not sure how that affected the claimant. I find that Mr Johnson did consider this point but that he did

not attach much importance to it.

25. The claimant also stated that the fact that he was so rushed on the day in question should have been considered. Mr Johnson was aware of this factor when he made his decision but stated that it was frequently the case that employees cut short their rounds if they did not have sufficient time to complete their work within their hours and that where this occurred they dealt with it. He said that no operatives were under any extreme pressure to work beyond their hours. This evidence was not challenged by the claimant and I accept it though I also accept that the claimant felt under pressure that day because of various delays that occurred. The claimant did not challenge however that the respondent allowed people to cut short their shifts, nor did the claimant establish why he felt under so much pressure on that day in circumstances were he was allowed to cut short his work if needs be.

26. Mr Johnson's dismissal letter specifically states that one of the reasons for the claimant's dismissal was that he doubted his honesty and integrity. This statement has caused the claimant considerable upset. In evidence Mr Johnson said that he meant that he could no longer trust the claimant because he had deliberately failed to follow procedures despite knowing about them clearly. Mr Johnson clarified in evidence that he did not dispute that the claimant had been honest about the event but that he interpreted the claimant's failure to follow procedures in such a blatant way as being dishonest and resulting in a breach of trust.

27. I agree with the claimant and Ms Knight Smith that it was unfortunate that Mr Johnson chose to use the word dishonesty to reflect a lack of trust. However I do not believe that the language Mr Johnson used belies a different reason that we are not unaware of as being the reason he dismissed the claimant. I do not believe that Mr Johnson's poor choice of words reflects that he in fact felt that the claimant had lied at some point or had given inaccurate information to the investigation. I find that Mr Johnson dismissed the claimant for the reason that he considered the breach of procedures so serious as to warrant dismissal. The reasonableness of that conclusion I discuss below.

28. I accept Mr Johnson's evidence that he did consider sanctions short of dismissal – but not for long. I believe that Mr Johnson felt that the situation was so serious that he had little option but to dismiss the claimant and believe that not much else mattered because of the seriousness of the incident and therefore not much else was seriously considered by Mr Johnson. However it is clear that the claimant was a good employee and I do not accept that Mr Johnson would want to have dismissed a good employee without what he considered to be good cause. I accept his evidence that he did not enjoy dismissing the claimant and that he had, as part of his decision making process considered a sanction short of dismissal but felt that he could no longer trust the claimant because he had committed such a blatant breach of

so many policies and procedures whilst in full knowledge of the importance of those policies and procedures .

29. The claimant was entitled to appeal the decision to dismiss him and had an appeal hearing on 16 March 2018. That appeal was a complete re-hearing by Ms Knight Smith. The claimant's concerns regarding the appeal were:

    (i) the delay in the outcome of that appeal being communicated to the claimant,
    (ii) the lack of communication with him during that time; and
    (iii) the factual mistakes that were made in the written outcome document.

30. I accept, as did the claimant today, Ms Knight Smith's evidence that the delay was caused by IT problems. I accept that this delay caused the claimant a lot of stress and must have been difficult. I find that the failure to communicate with the claimant to let him know about the reason for the delay is a technical breach of the policy which requires the respondent to remain in touch with the claimant.

31. It is clear that there were mistakes the outcome letter including, most importantly, the cover letting saying that she was upholding the sanction imposed, but describing the sanction incorrectly. The covering letter stated that he was getting a suspended dismissal instead of a dismissal. Nonetheless the body of the report confirmed that he would be dismissed. The other mistakes related to dates, one was a date that carried through the entire report and the second was a different date.

32. However I accept Ms Knight-Smith's evidence that these were mistakes as opposed to indicating that, as was put to her by the claimant, that she did not have all the information before her when she reached her decision. I accept her evidence that she had the relevant information in hard copy and that the IT failures prevented production of a report as opposed to access to the relevant information to make her decision. The errors, apart from the covering letter, were minor and insignificant in terms of the decision-making process. I also accept that the covering letter was a mistake albeit a very upsetting one for the claimant.

33. I find that Ms Knight Smith could have done more to find out the details of the comparators who were apparently not dismissed due to similar incidents. She could, as could Mr Johnson, have asked the union or the claimant for more information if she was not aware of who they were referring to.

34. I find that Ms Knight Smith did consider options short of dismissal and accept her evidence in this regard. She confirmed that the lack of trust created by such a blatant disregard of the policies and procedures and the serious implications of the incident itself meant that this one-off breach was capable of being an act for which dismissal was acceptable.

Conclusions

35. I accept that the reason for dismissal was conduct.

36. I believe that there were minor breaches in the process followed by the respondent namely that Mr Johnson made his decision before he had received the notes back from the claimant. However I do not find that the lack of those notes would have changed the decision in any event and that any such failure was minor and contractual as opposed to indicating that the investigation was so poor as to be outside the range of reasonable investigations for an employer in the circumstances.

37. I do find that the respondent ought to have done more to find more information about the other employees who apparently had received lesser sanctions. They should have asked the union or the claimant were they unable to find the information themselves.

38. However whether that failure renders either the investigation or the dismissal outside the range of reasonable investigations or decisions I now discuss.

39. I find that it was reasonable for the respondent to treat the claimant's case as an individual case to be judged on its own merits. There are various cases on what are known as 'tariff' cases. I have considered Hadjiannou v Coral Casinos Ltd 1981 IRLR 352 and the more recent case of Epstein v Royal Borough of Windsor and Maidenhead UKEAT/0250/07, Harrow LBC v Cunningham [1996] IRLR 256 EAT and Newbound v Thames Water Utilities Ltd [2015] EWCA Civ 677.

40. These cases all state that whilst someone in identical circumstances being given a different disciplinary sanction might be an indicator of unfair dismissal, the employer must take each individual case and decision on its own merits. If there is a distinguishing feature between the two individuals then differential treatment can be justified provided the difference in treatment is not irrational. In the absence of any evidence that shows that the individuals the claimant relies upon were in exactly the same situation, it is difficult for me to speculate that the outcome for the claimant would have been any different. Whilst I can understand the claimant saying that this is the very reason that the respondent ought to have considered them during the investigation, and I agree that the efforts made by the respondent to do this were lacklustre, I do not think that the failure to look into them was so unreasonable as to mean that the investigation itself was outside the range of reasonable responses. It is highly unlikely that any other individual's circumstances would have been on all fours with the claimant's circumstances and I have no evidence to suggest this before me and neither did the respondent at the time they reached their decision.

41. Adopting a case by case decision making process is not unreasonable given that this is what the case law suggests is the safest approach. Therefore I conclude that the respondent's failure to consider what had happened to other people on other occasions wholly unrelated to this incident when they had no specific information about them and they knew that they had occurred elsewhere and some time ago is not so unreasonable as to render the investigation unfair. It would have been good practice to find out more but that does not mean that the investigation was unreasonable or that basing their decision on that investigation renders the decision outside the range of reasonable responses.

42. The claimant did not try to assert that he had been lulled into a false sense of security and that people were not dismissed for similar offences and that this is why he had behaved in the way that he did. On the contrary he accepted that his actions were a significant breach of all the relevant policies and he accepted that he ought to be sanctioned. He just disagreed that he ought to be dismissed.

43. Turning then to the decision itself. I find that the decision falls within the range of reasonable responses. I find that the respondent has clearly demonstrated the importance to it of mail safety and that the claimant was well aware of that importance and the possible repercussions of breaching their policies. I accept that this was a one-off mistake by an employee with an exemplary record but it was a serious mistake with potentially catastrophic repercussions for the respondent. Further the respondent is under a license obligation to ensure that it has robust procedures in place to preserve the safety of the mail. There is no getting away from the fact that what the claimant did on that day was a fundamental breach of all their policies and procedures in this regard and that he did it knowing that he was acting in breach of those policies and procedures. Therefore whilst I believe that this was a very harsh decision I find that it nonetheless fell within the band of reasonable responses for the employer in these circumstances.

44. Even if I am wrong in this and the failure to properly explore the possibility of comparative cases renders the investigation or procedure unreasonable and unfair, I find it more likely than not that the respondent would have dismissed the claimant in any event because it is clear that the claimant's breach of rules was so clear and he had breached them with such negative effect, namely that a van and some mail were stolen by a third party.

45. If I am wrong in that I find that the claimant contributed to his dismissal 100% in any event due to his actions on the day where he failed to secure his vehicle in accordance with the respondent's policies of which he was well aware.

46. I therefore find that the dismissal was fair in the circumstances and the claimant's claim for unfair dismissal fails.

Employment Judge Webster

Judgment delivered orally to the parties on 31 October 2018

Written judgment finalized on 24 November 2018