THE EMPLOYMENT TRIBUNAL

BETWEEN

Claimant	**and**	**Respondent**
Miss R Whitfield		**Royal Mail Group Limited**

Held at London South **On 20 February 2019**

BEFORE: Employment Judge Moore (Sitting Alone)

Representation

For the Claimant: **Mr L Bennett, Claimant's Partner**

For the Respondent: **Miss A Whitehouse, Solicitor**

JUDGMENT

The Judgment of the Employment Tribunal is:-

1. The Claimant's claim for unfair dismissal succeeds. The Claimant's compensatory award (to be determined) will be subject to a 50% deduction due to contributory fault.
2. The Claimant's claim for wrongful dismissal succeeds.

REASONS

Background

1. The ET1 was presented on 2 July 2018. The Tribunal heard evidence from the Claimant and a Ms A Walsh for the Respondents and had sight of a Bundle which

ran to 261 pages. There was insufficient time to arrive at a decision and therefore the decision was reserved.

2. The following issues arose at the outset of the hearing.

3. The Claimant had made an application for a witness order and disclosure on 24 October 2018 for a number of documents, namely:-

    1. "Annex A, overrunning delivery OPG notification listing for ME 15 Section" for January and February 2018; and
    2. Signing in sheets and IWT performance summaries for the same dates.

4. By a letter of 24 November 2018, Employment Judge Balogun informed the parties that the request for a witness order was refused and the Respondent was ordered to bring copies of the documents requested by the Claimant to the hearing so the Tribunal could decide whether they should be admitted. The Respondent had not brought the relevant documents to the hearing and it was ascertained that the letter containing these instructions had been emailed to a fee earner at the Respondent's representative who had gone on maternity leave notwithstanding that the Respondent had informed the Tribunal service of this.

5. Following discussion with the parties, as the Respondent accepted that the day in question relevant to the Claimant's dismissal, namely 14 February 2018, was a busier day than other days in January and February 2018 the need for Annex A fell away. The parties agreed that we would proceed without the documents that had been sought by the Claimant and in any event, I was satisfied that there were other documents that could address the points of the Claimant wished to make within the documentation in question.

6. The issues before the Tribunal were explained to the parties and were as follows:-

7. <u>Unfair Dismissal – S98 Employment Rights Act 1996</u>

- Has the Respondent shown the reason for dismissal? The Respondent relied upon conduct which is a potentially fair reason for dismissal.

- Was a fair procedure followed under Section 98(4)? If not what was the percentage change of a fair dismissal?

- Was the dismissal within the range of reasonable responses?

- Was there a failure to comply with the ACAS code?

- Did the Claimant contribute to her own dismissal?

8. Wrongful dismissal

- Was the Claimant guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment thereby entitling the Respondent to summarily terminate the contract?

9. Relevant Law

10. The relevant law in relation to the unfair dismissal claim is set out in Section 98 of the Employment Rights Act 1996.

11. In a conduct dismissal case **British Home Stores v Burchell [1980] ICR 303**, the Court of Appeal set out the criteria to be applied by Tribunals in cases of dismissal by reason of misconduct. Firstly the Tribunal should decide whether the employer had an honest and genuine belief that the employee was guilty of the dishonesty in question. Secondly the Tribunal has to consider whether the employer had reasonable grounds upon which to sustain that belief. Thirdly at the stage at which the employer formed its belief, whether it has carried out as much as an investigation of the matter as was reasonable in all of the

circumstances. Although this was not a case involving dishonesty it is well established that these guidelines apply equally in cases involving misconduct.

12. The relevant authorities in relation to reasonableness under Section 98 (4) were considered by the EAT (Browne-Wilkinson J presiding) in **Iceland Frozen Foods v Jones [1982] IRLR 439**. The test was formulated in the following terms:

"Since the present state of the law can only be found by going through a number of different authorities, it may be convenient if we should seek to summarise the present law. We consider that the authorities establish that in law the correct approach for the Industrial Tribunal to adopt in answering the question posed by [ERA 1996 s 98(4)] is as follows.

- *the starting point should always be the words of [s 98(4)] themselves;*
- *in applying the section an Industrial Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Industrial Tribunal) consider the dismissal to be fair;*
- *in judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what the right course to adopt for that of the employer;*
- *in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;*
- *the function of the Industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair'.*

13. In assessing whether the Claimant's conduct amounted to gross misconduct that conduct must be deliberate wrong doing or gross negligence. In the case of deliberate wrong doing it must amount for wilful repudiation of the express or implied term of the contract **(Sandwell and West Birmingham Hospitals NHS Trust v Westwood).**

14. If the dismissal is procedurally unfair I must assess the percentage chance of the Claimant being fairly dismissed **(Polkey v AE Dayton Services Ltd [1987] IRLR 503, [1987].**

15. I must also consider whether, under S207 (2) TULRCA 1992 there is any provision of the ACAS Code of Practice on disciplinary procedure which appears to be relevant.

16. Lastly whether the Claimant's basic and or compensatory award should be reduced under S122 (2) and S123 (6) ERA 1996. The wording of the two provisions are not identical and differing reductions can be made in principle. S122 (2) provides that where the tribunal considers any conduct of the Claimant before the dismissal was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly. S123 (6) provides that 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 and equitable having regard to that finding.

17. In **Steen v ASP Packaging Ltd [2014] ICR 56** (Langstaff P presiding) the EAT stated that the application of those sections to any question of compensation arising from a finding of unfair dismissal requires a Tribunal to address the following: (1) it must identify the conduct which is said to give rise to possible contributory fault; (2) having identified that it must ask whether that conduct is blameworthy—the answer depends on what the employee actually did or failed to do, which is a matter of fact for the Tribunal to establish and which, once

established, it is for the Tribunal to evaluate; (3) the Tribunal must ask for the purposes of ERA 1996 s 123(6) if the conduct which it has identified and which it considers blameworthy caused or contributed to the dismissal to any extent. If it did cause or contribute to the dismissal to any extent then the Tribunal moves on to the next question; (4) this is to what extent the award should be reduced and to what extent it is just and equitable to reduce it.

Findings of Fact

18. I made the following findings of fact on the balance of probabilities.

19. The Claimant commenced employment for the Respondent on 9 November 1998 as an Operational Post Grade ("OPG"). The Claimant was provided with a statement of terms and conditions of employment which was signed by the Claimant, which referenced at paragraph 16 the Royal Mail Code of Conduct to which the Claimant would be subject. The Respondent had produced a version of the Royal Mail Group Conduct Policy in the bundle dated 2 January 2018. Whilst the Claimant's evidence was she had not seen this conduct policy before, the Claimant accepted that she understood that intentional delay of mail was potentially a gross misconduct offence and also a criminal offence and was extremely serious.

20. The National Conduct Procedure Agreement between the Respondent and CWU and Unite CMA set out the approach to be taken if an employee of the Respondent did not meet expected standards of conduct and behaviour. Under the section "Safeguarding customers' mail" there were three categories of delay to mail; unintentional delay, unexcused delay and intentional delay.

21. Unexcused delay was defined as follows:

"Various actions can cause mail to be delayed, for example carelessness or negligence leading to loss or delay of customers' mail, breach or disregard of a standard or guideline. Such instances are to be distinguished from intentional delay (see below), although they may be treated as misconduct and dealt with under the Conduct Policy, outcomes may range from an informal discussions to dismissal.

Intentional delay was defined as follows:

"Intentional delay of mail is classed as gross misconduct which, if proven, could lead to dismissal. The test to determine whether actions may be considered as intentional delay is whether the action taken by the employee knowingly was deliberate with an intention to delay mail."

22. The Conduct Procedure set out different sanctions. Gross misconduct was cited as a sanction for intentional delay of mail. There were a number of lesser sanctions that require identification namely serious warnings (which could be on record for 12-36 months in cases of dishonesty), serious warnings with transfer and suspended dismissal (12-36 months).Suspended dismissal was akin to a suspended sentence, if there was further misconduct during the relevant period the dismissal would become effective.

23. At the time of dismissal, the Claimant had no live matters of conduct or issues on her file. The Tribunal had sight of some notes from 2009 which regarded an incident where the Claimant was said to have been responsible for delay of mail in August 2009. The reason that it was in the Bundle was that the Claimant relied upon it to explain her actions on the day in question in 2018. In the minutes of the meeting in August 2009 between the Claimant and her delivery manager at that time, the minutes record that the delivery manager reinforced to the Claimant the necessity of ensuring mail takes precedence over packets and that this will always be the case, reiterating whether the Claimant understood that procedure. The same notes were also relied upon by the Respondent as the minutes went on to say that in the future the Claimant must inform her line manager if she could foresee any problems in completing her deliveries.

24. In the 2009 incident the allegation was in respect of unexcused delay of mail. The Claimant had failed to inform the office that she was unable to complete her delivery. There was no evidence as to what if any sanction the Claimant received following this incident.

25. In October 2013, the Claimant had an IVA due to financial difficulties that she was experiencing. As a result, the Claimant was unable to work overtime for the Respondent for a period of 5 years. During Christmas 2017 the Respondent agreed if the Claimant needed to work extra hours she was able to claim time back in lieu instead of overtime. This was withdrawn on or around 24 January 2018 by Mr Turner.

26. Due to a number of different issues in respect of the Claimant's health, she had some months off sick in 2017. After being put on a rehabilitation programme, the Claimant commenced full duties in September 2017 in respect of being able to undertake full deliveries. The Claimant was employed as an OPG but assumed duties as a delivery driver. It was normal practice for OPG's to deliver in pairs.

27. The Claimant would be allocated different rounds by the Respondent, different duties and would not always work in the same pair, these were the usual arrangements in place for employees where the Claimant worked.

28. In January 2018 the Claimant was paired with a colleague called Ms Bloomfield who was partially deaf. Prior to the incident in question, the Claimant had a good relationship with her then line manager, Ken Nichols. They had a good level of communication insofar as if the Claimant felt that she was not going to be able to complete her delivery she would raise this with Mr Nichols and he would contact her during the delivery or she would ring him to update him on how the delivery was going.

29. On 14 February 2018, (Valentine's Day), it was common ground that this was a busy day in respect of the extra mail and packages that required delivery. The Respondent referred to such busy days as "red dot" days. The Claimant commenced work as usual at 6.15am and on this date a new deputy manager was on duty called Kevin Alexander. Whilst Mr Alexander was new to a management role he had in the region of 10 years' experience as an OPG in the same delivery office where the Claimant was based.

30. In accordance with the standard practice, if a day was particularly busy, the OPG's could be asked to assist with sorting the post before starting deliveries

and on this day Mr Alexander requested the Claimant to go and assist with sorting. There was a dispute between Ms Whitfield and Mr Alexander as to what subsequently happened following that instruction. According to Mr Alexander's later statement he accepted that the Claimant informed him that she would struggle to complete her workload as she had been asked to help with sorting and in response Mr Alexander agreed to remove "lapsing" from her duties that day. Lapsing is postal round which is not allocated to a full time OPG and therefore has to be shared amongst the other OPGs. Following removing lapsing, the Claimant's case was that she spoke to Mr Alexander again and informed him that even though he had removed the lapsing, she would still struggle to complete her delivery with over 40 large packets that she had to deliver. The Claimant says that she was informed by Mr Alexander that in his opinion what was left was achievable within the time for delivery and then he walked away. Mr Alexander's evidence was different, he said that the Claimant did not report any further concerns to him after he had removed lapsing, so as far as he was concerned effectively, once he had removed lapsing from the Claimant he had understood that the round was achievable.

31. The Claimant was also assigned some special deliveries. Her evidence was that she again informed Mr Alexander that she was not going to be able to complete the driver's packets.

32. I find that the Claimant did repeatedly inform Mr Alexander she would not be able to achieve packets before she left for his delivery. The difference in accounts can be explained by a misunderstanding between them as to how the situation had been left and Mr Alexander had believed he had resolved matters.

33. The Claimant subsequently went out with her partner Ms Bloomfield. The Claimant was the driver. A round was planned in two loops. The walker within the pair (Ms Bloomfield) had a longer walk loop delivering mail and small packets. The driver also had a walking loop and small packets, but was also required to deliver large packets using the van. Ms Walsh's evidence was that the Respondent expected the large packets should be delivered during each loop as this was the most efficient way of covering the ground. The Claimant's case was

that she had never been trained in this way and since returning to delivery in September 2017 had always worked in a different way which was to complete all of the loops, delivering the mail and small packets and then drive around the loops again and deliver the large packets that were too heavy or too large to carry in the trolleys.

34. There was no evidence that the Claimant had been trained in a requirement to perform the loops in a particular way or that there was any specific instructions regarding this actual procedure. I accepted the Claimant's evidence that she had not been specifically instructed to complete her delivery in the way described by Ms Walsh.

35. Returning to 14 February 2018, the Claimant had embarked on her duties with her delivery partner Ms Bloomfield at 9.55 in the morning. At 14.30 the Claimant noticed by an alarm that she had set on her phone that they were at the cut off point for which they would have to get back to the office and after speaking to Ms Bloomfield they agreed that they work extra time to complete the mail in the delivery. The Claimant said she relied on the instructions she had been given in 2009 to prioritise mail over packets, at this point they had over 40 large packets left to deliver, many of which contained flowers and gifts for Valentine's Day.

36. When they finished the delivery, Ms Bloomfield later gave evidence that she asked the Claimant if they were going to do the large packets, to which the Claimant replied, "no we are going back to the office" and when Ms Bloomfield asked her what about the packets they had not delivered, the Claimant is said to have replied "tough that is a management problem let them sort it out". The Claimant accepted that she made a comment along the lines of "it's tough for me as management don't want me owe too much time anymore and its now down to the manager to sort out the packets as we are over our time". This was an important matter in dispute Ms Walsh later drew an inference from what Ms Bloomfield had reported the Claimant as saying in that she concluded from this comment that the Claimant had intentionally and deliberately delayed the delivery of the packets. The Claimant denied making that statement and said that

Ms Bloomfield has misheard what the Claimant had said, being partially deaf, and it being said whilst the Claimant driving in a van.

37. The Claimant and Ms Bloomfield subsequently returned to the delivery centre; at this point the Claimant had worked over her allocated hours (for which she was unable to claim either overtime or time in lieu (see paragraph 22 above)), but returned over 40 large packets to the office that should have gone out that day. Mr Nicholls did agree after the Claimant returned that the additional 30 minutes could be claimed back as added time.

38. On 15 February 2018, on reporting for duty, the Claimant was suspended. There was a later statement by a work colleague of the Claimant called Tina Pye relied upon by Ms Walsh. Ms Pye was the one who had to deliver the parcels that had been left behind by the Claimant on 14 February, on 15 February and that she reported that Ms Whitfield thought this was funny. Ms Whitfield accepted that she may have laughed on seeing Ms Pye, but that she had just been suspended and was not laughing at the situation of having left the packets.

39. The Claimant was asked to attend an investigation meeting on 17 February 2018 with her line manager Mr Nichols. The Claimant complained that she had not been able to put her case at this meeting and simply had been asked a series of questions but the notes record that whilst there was a series of questions the Claimant was able to add any further matters at the end of the meeting that were recorded. The Claimant accepted that she could have handled the situation better and had better communication with the manager on that day.

40. Following the investigation meeting, the Claimant was invited to attend the disciplinary hearing which was conducted by Mr Wayne Turner, Delivery Office Manager of the Maidstone Depot on 28 February 2018. Statements had been taken from Mr Kevin Alexander who disputed that that the Claimant had raised any further concerns regarding being able to deliver her packets after he had removed lapsing. There was also a statement from Ms Bloomfield dated 20 February 2018. On 13 March 2018 the Claimant was invited to a further meeting at which she was informed by Mr Turner she was summarily dismissed. Mr

Turner concluded that the Claimant would be dismissed for gross misconduct for intentionally delaying 40 packets or parcels and that he had lost faith in her ability to represent the Respondent having proven that in his view she had showed little or no regard for the Code of Business Standards Values and Procedures. Mr Turner said that he had considered a lesser penalty of suspended dismissal which was available under the Respondent's disciplinary procedure but concluded summary dismissal was reasonable citing a loss of trust and faith. This was confirmed in an undated letter. The Claimant was advised her last day with the Respondent was 14 February 2018.

41. The Claimant appealed the dismissal and an appeal hearing was arranged with Ms Walsh, who was an independent casework manager on 29 March 2018. The Claimant was represented throughout by her CWU Representative, Mr P Wright as he had done at the disciplinary hearing.

42. The Claimant informed Ms Walsh that she had informed her manager Kevin Alexander three times in the morning before she went on delivery that she would be unable to complete the packets delivery that day. She accepted that returning to the unit with 40 packets was not acceptable. She explained that the reason that she had not delivered the packets was that she had run out of time. The CWU representative made a point that prior to September 2017 the Claimant had not done deliveries for 9 years and had not had any formal training. The Claimant described the method she had used to deliver the parcels in the loop (see paragraph 30). The Claimant put forward two people that she said she had worked with in the same method called "Mark Piano" and "Ray".

43. It was discussed at the appeal hearing that Mr Turner had done a comparison between 14 February 2018 and 24 January 2018 during his deliberations as dismissing officer. He concluded that the Claimant had completed the round quicker on the January dates but on the February date had taken longer than it would normally and questioning why it had taken longer. According to his figures, the attendance calls and rates were the same. His point was that the volume was no heavier than a typical Wednesday. There was much discussion about the

figures that had been used by Mr Turner and whether they were accurate. This explained why the Claimant had requested the disclosure discussed above.

44. The parties agreed at the hearing that the figures set out at page 257 were accurate as follows. The figures set out 25th January 2018, (it should be noted Mr Turner had originally quoted 24 January), the number of items delivered was 95,123 compared to 96,494 on 14 February 2018. This did not really take us any further in respect of comparing the two dates as there was a dispute between the parties which I was not able to determine as to whether these figures included large packets or not. What was common ground was that the 14th February 2018 was a busy day in respect of a number of large packets and mail as it was designated a red dot day for reasons that are obvious.

45. Going back to the appeal hearing, the Claimant was questioned as to why she had not contacted her manager on the day, Kevin Alexander, and her explanation was that she did not have his telephone number and/or he should have contacted her. The appeal hearing was adjourned and Ms Walsh undertook to go away and make some further investigations. Ms Walsh spoke to Kevin Alexander, Chris Body (another OPG), Tina Pye and Wayne Turner as well as Ms Bloomfield. Mr Body did not agree with Ms Walsh's assertion that you never go over the same ground twice. Ms Walsh had attempted to speak to colleagues that had been mentioned by the Claimant, namely "Mark Piano" and "Ray" but had been unable to identify who they were. Ms Walsh also re-examined the figures, the weeks Mr Turner had used to compare to the day in question in February, namely IWT performance figures for week 44 and week 47. Ms Walsh also took into account a national conduct procedure and an "overrunning deliveries OPG notification procedure" and these were sent to the Claimant to comment before she reached her decision.

46. The Claimant had not had previous site of the "overrunning deliveries OPG notification procedure"; the version that was produced was dated April 2018 which was after the Claimant's dismissal. There may have been a previous procedure, but there was no evidence of how this had been notified to the Claimant, I accepted the Claimant's evidence that she had not seen it before.

47. The Claimant then submitted a response to Ms Walsh, in the main this was a response to the statements that she had been sent, she continued to dispute that she had not informed Mr Alexander after he had removed lapsing, that she was still going to struggle and she informed Ms Walsh that Tina Pye and her had a chequered history. She also relied on the fact that as Tina Pye and Ms Bloomfield had to stay until 4 o'clock on 15 February to achieve delivery of the packets returned on 14 February that this proved the workload had been unachievable although Ms Pye's statement said they also had parcels on 15 February to deliver.

48. On 13 April 2018, Ms Walsh reached her decision to uphold the Claimant's dismissal and set this out in an appeal decision document of that date. The grounds of appeal were as follows; (it was accepted that the appeal was a complete rehearing)

    a. The Claimant's past conduct should not have been taken into account. Ms Walsh agreed and decided the case should be decided on its own merits and confirmed that she had not taken into account her past conduct record. It was clarified by Mr Turner that the inclusion of the 2009 notes had been to show that the Claimant was aware of the expected standards to contact her manager if she was not going to achieve the delivery.

    b. That the Claimant had not been trained on the delivery methods. Ms Walsh accepted that although there was no documented evidence of the Claimant being trained on new delivery methods, but this did not matter as in her view, the Claimant had made a deliberate intentional choice to undertake work that day in the most inefficient way due to the disagreement between her and Mr Alexander that morning.

    c. The Claimant had informed management that completion was not possible. Ms Walsh preferred Mr Alexander's account of their conversation on that day.

d. Completion was not viable that day as it was extra busy and they had left the office later than usual, Ms Walsh concluded that had the Claimant not followed the route and delivery method that she had undertaken, she may still have had to work very hard but the completion was still possible.

e. That the Claimant should not have telephoned the office, it was the manager's responsibility to check on her, Ms Walsh concluded in reliance on the OPG notification procedure, that it was the Claimant's responsibility. The Claimant admitted she had not contacted the office or Mr Alexander to inform them that it was likely they would be returning with 40 packets. When asked why not her explanation was that she had already informed Mr Alexander 3-4 times before going out on the delivery that it would not be achievable. It was clear from her explanation that the Claimant had concluded that having informed Mr Alexander it was now a management problem and this in my view demonstrated a degree of belligerence on the part of the Claimant.

f. Ms Bloomfield misheard the Claimant when she made the comment "tough it's a management problem". Ms Walsh accepted that whilst it was possible Ms Bloomfield misheard the Claimant, she felt the comment fitted with the Claimant's attitude, in particular that she had no responsibility for her actions. Ms Walsh concluded that the Claimant was an experienced OPG.

49. Ms Walsh reached an overall conclusion that the Claimant had intentionally delayed mail and this amounted to gross misconduct. She considered whether or not there should be suspended dismissal but this was discounted by Ms Walsh as she considered someone with the Claimant's experience of 19 years, should have led the way in demonstrating the importance of getting mail out every day but had failed to do so. Further that the Respondent operated under a very strict universal service obligation, a breach of "mail integrity" which could risk a fine and that the Respondent was working to a difficult economic climate with increasing competition and it was crucial they had reliable employees who could work unsupervised and be trusted to give proper treatment to each item of mail. The Claimant had demonstrated in Ms Walsh's view she could not be

relied upon, she considered mitigation in that she had 19 years' service and a recent death of her cousin, but did not consider this was a warrant to reduce the penalty.

Conclusions

50. I have taken some time to set out the facts as in my judgment this is a case that turns on two issues. Firstly, the Burchell test and secondly whether the decision to dismiss was within the range of reasonable responses. There was no real issue about procedural unfairness in terms of the process followed by the Respondent. Although we did not hear evidence from Mr Turner as he has left the Respondent's business, it was common ground that Ms Walsh conducted a complete re-hearing at appeal stage in any event.

The Burchell test

51. Firstly considering whether Ms Walsh had an honest and genuine belief that the employee was guilty of the misconduct in question which was that the Claimant had intentionally delayed mail. I conclude that Ms Walsh did have a genuine belief. Ms Walsh was a clear and compelling witness and there was no evidence to suggest that her belief was not genuinely held. Ms Walsh clearly believed that the Claimant had deliberately delayed the mail on 14 February 2018.

52. Secondly whether the employer, Ms Walsh, in hearing the appeal had reasonable grounds upon which to sustain that belief. Were there reasonable grounds to sustain a belief that the Claimant had intentionally delayed mail? The key issue here was whether there were reasonable grounds to conclude that the delay was intentional or deliberate as opposed to an overly busy day where according to the Claimant there was simply too much post to deliver in the time allocated. Ms Walsh relied upon the following in her conclusion the Claimant's conduct had been intentional:

a) The method the Claimant chose to deliver was deliberately chosen so that the delivery would not be completed due to the dispute between the Claimant and Mr Alexander that morning.
b) Ms Bloomfield reporting she had heard the Claimant say "tough it's a management problem" or words to that effect and this reflected the Claimant's overall attitude.
c)That the Claimant had not contacted the office to inform them of the problem with the delivery.

53. I have given this particular issue very careful consideration and have been mindful not to substitute my own view for that of the employer. The conduct the Claimant was accused of required an assessment of the Claimant's state of mind to establish a reasonable belief of intention. This was a case where some of the mail had been delivered but a very significant number of packages had not. There were two conflicting explanations as to why this happened. The Claimant's case was this had happened because there was insufficient time to make all the deliveries and she had informed her manager of this fact. Ms Walsh concluded that whilst the Claimant might have had to work "very hard" to achieve the delivery she did not as a result of the Claimant's deliberate intentional actions on selecting an inefficient route.

54. The Respondent in these circumstances were in my view required to balance the Claimant's previous clear record and length of service as well a good level of communication and relationship with her former manager against the behaviour on the day in question in order to arrive at a reasonable belief as to whether the behaviour was deliberate.

55. I have concluded that there were not reasonable grounds on which to form a belief that the Claimant had intentionally set out that morning to delay mail by choosing an inefficient route. Ms Bloomfield's witness statement made it clear that they had undertaken that method of delivery previously. So the evidence before Ms Walsh was that this was the way the Claimant had always done the delivery. The Claimant had not received any training or instructions that this

method was incorrect. It therefore in my view was not reasonable to conclude, on the basis of a dispute between the Claimant and her line manager, that on this particular day the Claimant had deliberately done something in a way as she had always done it in that way.

56. Turning now to the other two factors that led Ms Walsh to conclude the delay had been intentional. It is plausible and Ms Walsh accepted that Ms Bloomfield misheard the Claimant. The exact wording is not of any significance as the Claimant accepted she had said “tough” and it was effectively down to management to sort out the fact that the packages were left over. This comment was made towards the end of the shift when the Claimant was returning to the depot. The fact that the Claimant and Ms Walsh had worked extra time over their shift end was not taken into account. Someone working beyond their paid hours when they know they will not get time in lieu back does not sit well with an intention to delay mail. It was reasonable to conclude that the Claimant was annoyed about the situation and felt that it was down to poor management but in my judgment there were not reasonable grounds to go from this state of affairs to conclude there was an intention to delay mail.

57. Lastly that the Claimant had not contacted the office to inform them there would be a delay. I accepted that the Claimant had not previously seen the formal OPG notification procedure but it was clear that the Claimant was well aware and had previously contacted her line manager when there was insufficient time to deliver the mail. This was in my view the most concerning element of the Claimant’s conduct on that day. The Claimant’s explanation was that she did not know Mr Alexander’s telephone number but in reality this was not a plausible excuse as she must have known the depot number or been able to locate it very easily. I did not consider this to be a satisfactory explanation and Ms Walsh was reasonable to discount it. Having discounted the other factors relied upon by Ms Walsh to conclude reach the reasonable belief were not reasonable, was, in isolation, the failure to report it to the office enough to form a reasonable belief there was an intention to delay the mail. I found above at paragraph 48 (e) that the Claimant had decided, having informed Mr Alexander the round was

unachievable, it was a management problem. It must have become apparent to the Claimant earlier than 14.30 that not all of the large packets were going to be delivered and she should have taken steps to inform her manager earlier. Ms Walsh was reasonable to have concluded this was culpable conduct on the part of the Claimant. The first the Respondent became aware there were over 40 packets undelivered was when the Claimant returned to the depot.

58. Whilst this behaviour was belligerent and amounted to misconduct, in my judgment it did not amount to the charge that had been put to the Claimant of intentionally delaying mail. The delay of the mail came about not because of anything the Claimant did deliberately or intentionally. Ms Walsh accepted that the Claimant would have had to work "very hard" to achieve the delivery that day. The charge of intentionally delaying mail is rightly a very serious matter but it is relevant that the Respondent's National Conduct Procedure demarks a difference between unexcused delay and intentional delay.

59. Thirdly at the stage at which the employer formed its belief, whether it has carried out as much as an investigation of the matter as was reasonable in all of the circumstances. Ms Walsh undertook a complete re-hearing. It was a thorough investigation.

Range of reasonable responses

60. If there had been grounds to conclude that the Claimant had deliberately intentionally delayed mail then there is no doubt that summary dismissal was within the range of reasonable responses that a reasonable employer could have reached. I fully accept Ms Walsh's reasoning (see paragraph 28) in this regard. The Claimant's conduct on the day in question did in my judgment warrant disciplinary action. However having regard for her length of service and clear disciplinary record, taking into account that I have found there were not reasonable grounds to believe the Claimant intentionally delayed the mail, summary dismissal for the Claimant's actions on the day in question was not within the range of reasonable responses. The Respondent's representative

pointed to the Claimant's lack of accountability as a factor in support of the dismissal being within the reasonable range of responses but this ignores that the Claimant accepted shortcomings as early as the investigation meeting on 15 February 2018. This is not a case where the Claimant has denied any culpability throughout or shown a complete lack of remorse.

61. The Claimant's conduct in my view fell more within the definition of unexcused delay in the Respondent's National Conduct Procedure Agreement as careless and in breach of the guideline to inform her manager of a delay. The Claimant knew she would be returning with a large number of parcels and failed to inform her manager when she could have done so earlier. These were important parcels for customers who had taken the time and care to arrange Valentine's Day gifts and it is obvious that the customers who did not have their parcels deleivered as expected would have been very disappointed and annoyed with the Respondent's service.

62. The Respondent's conduct procedure contained a range of sanctions that could have been applied. Having regard to their own procedure and sanctions, it is clear that there were some very serious sanctions available to the Respondent that were more within the range of reasonable responses given the Claimant's conduct.

Polkey

63. Turning now to the chance of a dismissal still happening had a fair procedure been followed? The procedure in itself was on the whole a fair procedure. There was an investigation, hearing and an appeal in the form of a re-hearing. There was not one stand out issue with the procedure that rendered the dismissal unfair. This was a case that was more about how the evidence that was gathered was evaluated and the appropriateness of the allegation put to the Claimant in relation to the definitions of delay of mail. As set out above the reason I have found the dismissal to be unfair is that in my judgment there were not reasonable grounds to conclude on a proper evaluation of the evidence before the Respondent that the Claimant was guilty of the allegations that she was

dismissed for. Nothing different about the investigation would have changed the outcome. I therefore am not able to say there was any chance that had a different procedure been followed the outcome would have been the same. The only evidence before me regarding previous sanctions for unexcused mail was that in 2009 the Claimant was not dismissed for unexcused delay to mail.

Contributory fault

64. I have found that the Claimant was partly culpable for the non-delivery of the parcels on the day in question see paragraph 48 (e) as to the conduct I consider gave rise to possible contributory fault and this conduct was blameworthy. It contributed to the dismissal. Had the Claimant contacted her manager or the delivery office during the round the Respondent could have made alternative arrangements. Instead, the Claimant had already decided it was a management problem which she had tried and failed to bring to management's attention as the manager in the Claimant's opinion was not prepared to listen. In determining to what extent the award should be reduced and to what extent it is just and equitable to reduce it I have taken into account that if the Claimant had not failed to inform her manager during the delivery (acknowledging she had done so prior to leaving), as she had done on other occasions, there may never have been a charge put to the Claimant of intentional delay of mail. Once out on the delivery, the Claimant was at some stage in possession of certain knowledge that 40 parcels would not be delivered. This differed from her opinion prior to leaving that the round was unachievable as she knew for sure this to be the case and more importantly the extent of it. Having regard to the degree of contributory fault I have reached the view that a 50% reduction should be applied to a compensatory award.

Wrongful Dismissal

65. As I have determined the Claimant's conduct was not so serious as to have amounted to a repudiatory breach, the Respondent was not entitled to summarily dismiss without notice. Accordingly the Claimant's claim for notice pay succeeds.

66. The case will now be listed for a remedy hearing to determine remedy.

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Employment Judge Moore
Date: 10 April 2019