



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106862/2017

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Held in Glasgow on 1, 2 & 3 October and 17, 18 & 19 December 2018

Employment Judge: Frances Eccles

10 **Mr L Horsfield**

Claimant
Represented by:
Mr S Smith -
Solicitor

15 **Royal Mail Group Ltd**

Respondent
Represented by:
Dr A Gibson -
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant was not unfairly dismissed by the respondent.

REASONS

BACKGROUND

- 25 1. The claim was presented on 23 November 2017. The claimant complained of unfair dismissal. The claim was resisted. The respondent, while admitting dismissal, denied any substantive or procedural unfairness. The reason advanced for the claimant's dismissal was tampering with the mail, amounting to gross misconduct. The claim was listed for a full hearing. The Tribunal
30 heard evidence for the respondent from Tommy Boyle, Line Manager; Scott Forsyth, lead investigation Manager; Roddy Fullerton, investigation Manager; Collette Walker, independent case work Manager and Anthony McAloon, Early Shift Manager and Dismissing Officer. The claimant gave evidence.

E.T. Z4 (WR)

He called Stephen Millrine and Norrie Watson, both trade union representatives of the CWU. The Tribunal was provided with a joint bundle to which documents (P37 to P39) were added during the course of the hearing. The Tribunal was also shown CCTV footage by the claimant. At the full hearing, the claimant was represented by Mr S Smith, Solicitor. The respondent was represented by Dr A Gibson, Solicitor.

FINDINGS IN FACT

2. The Tribunal found the following material facts to be admitted or proved; the respondent provides the main postal service in the UK. It is a large employer. The claimant was employed by the respondent as an Operational Postal Grade Postman ("OPG") from 21 April 1980 until 1 September 2017 when he was dismissed. The claimant worked at the respondent's Glasgow Mail Centre. He worked nightshifts. At the date of his dismissal, the claimant was aged 61. His weekly pay was £545. His weekly take home pay was £410.

3. The claimant was required to operate an Intelligent Letter Sorting Machine ("ILSM"). This involved the claimant lifting bundles of mail from mobile shelving units known as 'cake stands' and feeding the mail into the ILSM for sorting and onward delivery. Towards the end of the nightshift of 8 to 9 December 2016, the claimant's line Manager, Tommy Boyle was approached by another OPG who worked alongside the claimant. The OPG was visibly upset. He informed Tommy Boyle that he should '*watch Lennie*'. Tommy Boyle was surprised by the OPG's remark and asked him for an explanation. The OPG responded that he could no longer deal with the situation as the claimant had been stealing from envelopes all week. The OPG remarked that the claimant was '*being bold*' and doing it in full view of him. He accused Tommy Boyle of "*not doing his job*" and said that he should be watching the claimant. The OPG did not wish to become involved. He was afraid of being ostracised by fellow workers for reporting his concerns about the claimant. Tommy Boyle was taken aback by the OPG's remarks. He had worked with

the claimant for many years. He liked the claimant and did not believe that he would tamper with mail.

4. During the nightshift of 9 to 10 December 2016, Tommy Boyle watched the claimant working at the ILSM. He observed the claimant selecting coloured envelopes from the mail on the cake stand and opening them before transferring the mail to the ILSM. He observed the claimant leaving a piece of mail to one side. He stopped the ILSM and requested that the claimant and other OPGs move to another machine. Tommy Boyle intended to check the piece of mail that the claimant had left to one side while he was working at the other machine. As Tommy Boyle was supervising the other OPGs, he observed the claimant returning to the ILSM and placing pieces of mail from the ILSM into a tray for damaged items of mail known as the re-wrap tray. Tommy Boyle observed that the items of mail removed by the claimant from the ILSM were coloured envelopes. Tommy Boyle was shocked and very concerned at what he had observed. He reported the matter to his Line Manager, Ronnie Johnston.
5. Tommy Boyle continued to observe the claimant for the rest of the nightshift of 9 to 10 December 2017. He observed the claimant opening envelopes and on at least one occasion putting something into his pocket. At the end of the nightshift of 9 to 10 December 2017, Tommy Boyle retrieved items of mail placed by the claimant in the re-wrap tray which he later passed to the respondent's security team. Tommy Boyle contacted the security team who informed him that they would attend the Glasgow Mail Centre to investigate the matter.
6. During the nightshift of 12 to 13 December 2016, Tommy Boyle and Ronnie Johnston participated in surveillance of the claimant alongside three members of the respondent's security team, Scott Forsyth, Roddy Fullerton and Kim Riddoch. The claimant was observed by the members of the security team through CCTV cameras. Tommy Boyle and Ronnie Johnston observed the claimant from the shop floor. Observations made by the security team during the surveillance were logged by Kim Riddoch (118- 124). Kim Riddoch logged

the claimant opening 27 greeting cards over a 32-minute period. The security team intervened when the claimant was observed putting something into his trouser pocket. Members of the security team approached the claimant. Scott Forsyth as Lead Investigation Manager introduced himself to the claimant and cautioned him in relation to a charge of theft. He requested that the claimant accompany him to an interview room. On his way to the interview room, the claimant made a dash for the toilet. Scott Forsyth pursued the claimant and requested that he empty his pockets before entering the cubicle. The claimant refused. Scott Forsyth requested that the claimant leave the cubicle door open. The claimant refused. While in the cubicle the claimant was heard to flush the toilet.

7. The claimant made his way to the interview room where he was to be questioned by Scott Forsyth. The claimant was informed of his legal rights. He requested the opportunity to consult with a solicitor. A solicitor was contacted for the claimant. Having spoken to a solicitor, the claimant confirmed he was willing to proceed with the interview. Before the interview started, the claimant advised Scott Forsyth that he was feeling unwell and that he had high blood pressure and a heart condition. A first aider and ambulance were called to assist the claimant. The claimant was taken to hospital. The police were called. The police did not become involved. They arrived after the claimant had left in an ambulance.

8. Tommy Boyle and Ronnie Johnston removed pieces of mail from the ILSM that were damaged and appeared to have been opened. Thirty-eight pieces of mail were passed to the security team. Tommy Boyle provided a written statement (P8/30-31). Ronnie Johnston provided a written statement (P9/32).

9. During the claimant's absence, HR discussed with his trade union representative, Stephen Millrine whether the claimant might qualify for ill health retirement should he remain absent from work. The claimant was already in receipt of his occupational pension with the respondent. He informed Stephen Millrine that he did not wish to be considered for ill health retirement and that he was confident that he would make a sufficient recovery

to return to work and defend any allegation against him of misconduct. Stephen Millrine informed HR of the claimant's position. HR took no further action in relation to whether the claimant might qualify for ill health retirement.

- 5 10. The claimant was absent from work until 4 April 2017. On his return to work the claimant attended an investigatory interview with Roddy Fullerton and Kim Riddoch. The claimant was accompanied by his CWU representative, Mr Stephen Millrine. The claimant was shown CCTV footage from the nightshift of 12 to 13 December 2016. The claimant denied any wrongdoing. Roddie
10 Fullerton showed the claimant copy envelopes (P33/125-134) retrieved by Scott Forsyth and Ronnie Johnston on 13 December 2016. The claimant signed the envelopes. The claimant blamed the ILSM and other machinery for damage to the envelopes. The claimant denied that he was tampering with the mail. He described his actions on the CCTV as tidying and 'tucking
15 in' envelopes. He denied that the CCTV footage showed him opening envelopes. The claimant was asked to provide fingerprints. He refused. On 5 April 2017, the claimant was suspended from work on full pay pending further investigation. Roddy Fullerton was not persuaded by the claimant's explanation. He prepared a statement of the security team's investigation into
20 the claimant's conduct (P10).
11. On commencing employment with the respondent, the claimant signed a personal declaration (P6) confirming that he understood his duties as an employee of the respondent including;

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Safety of Postal Packets - It is an offence to **STEAL, SECRETE** or **DESTROY** a letter, parcel or any other postal packet in course of transmission by post, and heavy penalties, including terms of imprisonment, are provided for such offences.

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It is also an offence to **OPEN or DELAY** (without proper authority), a letter, parcel or any other postal packet in course of transmission by post, and penalties of fine or imprisonment are provided for such offences.

The respondent's Conduct Agreement (P37) under the heading "**Security of the mail**", informs employees (at page 13) that;

5 "*Royal Mail Group has an obligation to minimise the risk of loss, theft, damage and interference to mail.*

Deliberate breach of security procedures, intentional delay and theft may all be classified as gross misconduct and can result in dismissal without notice, even for a first offence".

10 12. The statements from Tommy Boyle (P8) and Ronnie Johnston (P9) and the security summary from Roddy Fullerton (P10) were passed to Anthony McAloon, Early Shift Manager for disciplinary action. By letter dated 11 April 2016 (P11) Anthony McAloon informed the claimant that his precautionary suspension from duty on full pay would be continued and that he would be
15 dealing with his conduct case. By letter dated 14 April 2017 (P12/37-38) Anthony McAloon informed the claimant that he was charging him with "*Gross Misconduct, tampering with mail*". He enclosed copies the statements (P8 & 9) and security summary (P10) and requested that the claimant provide him with any documentation to be taken into account. He invited the claimant to a
20 conduct interview on 20 April 2017. He confirmed that the possible outcomes of the interview included no further action, counselling or action up to and including dismissal. The claimant was unable to attend the interview due to ill health. An alternative date was arranged for the interview on 18 August 2017. The claimant was accompanied by Stephen Millrine.

25 13. The interview was conducted by Anthony McAloon. The claimant denied tampering with the mail. He denied opening mail. He accused Tommy Boyle of lying. Stephen Millrine disputed that the CCTV footage showed the claimant opening mail. The claimant denied putting anything into his pocket.
30 He denied being asked by Scott Forsyth to empty his pockets before entering the toilet cubicle. When asked why he had not provided his fingerprints, Stephen Millrine explained that in all likelihood the claimant's fingerprints would have been on every item of mail placed in the ILMS and that like

emptying his pockets, would have not have proved anything. Stephen Millrine referred to his discussion with HR about whether the claimant might qualify for ill health retirement. He questioned why, if the claimant was guilty, he would not have" grabbed *that with both hands*". Stephen Millrine questioned the quality of the evidence against the claimant. He disputed that there was sufficient evidence to show that the claimant had tampered with mail. He argued that if "*tucking in*" and "*facing up*" mail amounted to gross misconduct there would be many more GPO's sitting in front of Anthony McAloon accused of wrongdoing.

14. Anthony McAloon was satisfied that the claimant had tampered with the mail. He had regard to the statements provided by Tommy Boyle (P8) and Ronnie Johnston (P9). He spoke to Tommy Boyle and Ronnie Johnston about the content of their statements (P8 & 9). He had regard to the security summary from Roddy Fullerton (P10). He was satisfied that the claimant had been witnessed tampering with the mail. He was not satisfied that the claimant was able to explain why all three witnesses would have provided their statements if he had done nothing wrong. He considered the evidence of the three witnesses to be credible. He was not persuaded that Tommy Boyle would lie about having been approached by another OPG. He considered that the claimant's conduct was brought to light by a member of his team. The claimant's conduct when approached by the security team of refusing to empty his pockets and provide fingerprints and that he "*barged into the toilet and flushed it*" persuaded Anthony McAloon that the claimant had been removing items from the mail.

15. Anthony McAloon watched the CCTV footage. He considered the claimant's concerns about its quality. He decided that it was appropriate to disregard the CCTV footage when reaching his decision. He preferred the statements of eye witnesses who had observed the claimant working at the ILSM. He noted that at no point had the claimant shown any remorse for his actions. He considered the claimant's disciplinary record and length of service. He decided that in all the circumstances, given the serious nature of the conduct

of which he had found the claimant to be guilty, that dismissal was the appropriate sanction.

- 5 16. The respondent prepared a written record of the interview meeting held on 18 August 2017 (P13). The claimant was provided with a copy. Anthony McAloon confirmed his decision to dismiss the claimant effective from 1 September 2017 by letter dated 31 August 2017 (P15). The claimant was advised of his right to appeal against the decision to dismiss him.
- 10 17. The claimant informed the respondent by letter dated 31 August 2017 (P17) that he wished to appeal the decision to summarily dismiss him. Anthony McAloon prepared written reasons for reaching his decision to dismiss the claimant (P16/51-52). In terms of the respondent's Conduct Agreement (P37) (at page 37) it is anticipated that the written explanation of a decision to
15 dismiss an employee will be provided at the time of informing the employee of the decision.
18. Collette Walker, an Independent Casework Manager was appointed to hear the claimant's Appeal. She was provided with an executive summary
20 (P33/113-134) containing a written report of the investigation; a copy of Kim Riddoch's observation log and sample envelopes (P33/125-134); statements (P8 & P9), security summary (P10) and Anthony McAloon's written reasons for his decision to dismiss the claimant (P16). She invited the claimant, by letter dated 6 September 2017 (P19), to an appeal meeting. She enclosed
25 copies of the documents provided to her by the respondent. She informed the claimant of his right to be accompanied at the appeal meeting. The date of the appeal meeting was confirmed as 19 September 2017 by letter dated 7 September 2017 (P20).
- 30 19. The claimant was accompanied by a CWU representative, Norrie Watson at the appeal hearing. At the start of the appeal hearing, Collette Walker informed the claimant that the appeal was a re-hearing of his case and that he should therefore present his reasons and evidence in full including material already presented at his conduct interview; points he may wish to expand

upon and any new evidence that may have come to light since the conduct interview. Collette Walker explained that it was within her power to set aside the decision to dismiss him, reduce the penalty or decide that the penalty should stand. Collette Walker asked the claimant about his job. Points of appeal were identified involving failure on the part of the respondent to involve the police once he was suspected of stealing. The claimant also challenged Tommy Boyle's evidence that he had failed to leave the ILMS when instructed to do so. It was the claimant's position that he had remained at the ILMS to clear a jam in accordance with normal procedure.

20. Norrie Watson identified procedural points of appeal including the alleged failure on the part of the respondent to copy the envelopes retrieved by Tommy Boyle; the lack of any notes of a fact finding interview; the offer of ill health retirement to the claimant which Norrie Watson described as having been offered as a resolution to the case and failure on the part of Anthony McAloon to prepare written reasons for reaching his decision to dismiss the claimant (P16/51-52). He questioned why Anthony McAloon would comment on the claimant showing lack of remorse in circumstances where the alleged wrongdoing was denied. He questioned the quality of the evidence including CCTV footage relied upon by the respondent to substantiate the charge against the claimant. He described himself as a credible witness for the claimant and questioned the identity of the OPG who had initially approached Tommy Boyle.

21. Collette Walker questioned the claimant about why Tommy Boyle would provide a false statement. The claimant remarked that he did not know and that "*Boyle is like that*". When asked to explain his remark, the claimant referred to Tommy Boyle taking other OPGs off machines to meet targets. Collette Walker questioned the claimant about why Tommy Boyle would lie about him stealing. The claimant replied that "*if it was brought to his attention by someone that is probably what has happened*". He denied any wrongdoing. He described Tommy Boyle as "*a bit of a liar*". He described Tommy Boyle's description of him tampering with mail as "*all fictitious*". When questioned about the statement from Ronnie Johnston, the claimant suggested that he

was in collusion with Tommy Boyle. He was unable to explain what their motive might be for doing this. He referred to the CCTV footage as inconclusive. He explained that he had refused to provide fingerprints over concerns that his fingerprints might be inside envelopes that he had “*tucked in*”.
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Norrie Watson emphasised that he had known the claimant for many years and did not doubt his innocence. He requested that Collette Walker speak to Stephen Millrine about the offer of ill health retirement which he described as a “*get out clause*” that the claimant had refused as he wished to clear his name. The claimant described the stress he was under and protested his innocence. Collette Walker prepared notes of the appeal hearing (P22), a
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copy of which she sent to the claimant by letter dated 18 September 2017 (P21).

22. Collette Walker interviewed Roddy Fullerton and Kim Riddoch on 2 October
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2017 (P25). They described the observation process. Collette Walker watched the CCTV footage. Kim Riddoch explained the log entries. Collette Walker was satisfied having viewed the CCTV footage that entries in the log were accurate. Roddy Fullerton confirmed that the envelopes retrieved by Tommy Boyle and passed to the security team had been copied. Kim Riddoch
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confirmed that copies of envelopes had been shown to the claimant when he was interviewed by the security team. She described the claimant’s conduct after he was approached by the security team on 13 December 2017 and that he had “*bolted into the toilet*”. Kim Riddoch confirmed that she believed the claimant had flushed cash down the toilet as he had been witnessed putting
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something into his pocket while searching inside envelopes. Roddy Fullerton and Kim Riddoch denied having any prior knowledge of the claimant. They dismissed the suggestion that management had colluded as being “*ridiculous*”. They were both in no doubt that they had witnessed the claimant tampering with mail.

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23. Collette Boyle interviewed Tommy Boyle on 2 October 2017 (P26). She questioned his working relationship with the claimant which he described as “*very good*” and the claimant as “*somebody that I could have a laugh with, he*

5 *was a people person*". He described being approached by another OPG during the shift 9 to 10 December 2016? who was very upset and felt unable to cope any longer with not reporting the claimant's conduct. He described feeling very shocked. He described observing the claimant tampering with mail during the following shift and while the claimant was being observed by the security team. He was in no doubt that the claimant was tampering with mail. He dismissed the suggestion that he was "*a bit of a liar*" and had fabricated evidence as a "*poor excuse that he has come up with*". Tommy Boyle denied that he would collude with other Managers to fabricate evidence against the claimant. He emphasised that he liked the claimant and had struggled to understand why after 37 years' service he would tamper with mail. He reflected on the claimant's previous conduct when removing items of mail jammed in the ILSM. He denied that he would make anything up and described his sense of shock at the claimant's conduct. Collette Walker also interviewed Ronnie Johnston on 2 October 2017 (P27). He was in no doubt that he had seen the claimant rip open letters and that he had retrieved a number of ripped cards from the ILSM which he had passed to the security team.

20 24. Collette Walker interviewed Anthony McAloon on 3 October 2017 (P28). He confirmed that he had based his decision to dismiss the claimant on the witness statements provided by those who had directly observed the claimant. He explained that he had informed the claimant of his decision face to face and had been unaware that he was also required to provide the claimant with a written report setting out how he had reached his decision. Collette Walker also interviewed Stephen Millrine on 3 October 2018 (P29). He described being approached by Tony McPherson of HR about whether the claimant would leave the business in ill health retirement. He described finding the approach strange given that the claimant had been accused of theft or tampering with the mail. Collette Walker contacted Tony McPherson by e mail on 24 October 2017 (P30). She requested information about the claimant's position that he was offered the option of leaving the business in the grounds of ill health as a resolution to the ongoing conduct case. Tony McPherson

replied that as the claimant went on sick leave before he could be suspended and disciplined, his absence was managed as sick leave. He explained that the respondent had received advice from their Occupational Health advisers that the claimant was too ill to face disciplinary proceedings. He explained that given the length of the claimant's absence, ill health retirement was raised as an option but was declined by the claimant and following his return to work was no longer an option. On 25 October 2017 Collette Walker wrote to the claimant (P34) enclosing copies of the statements (P25 to P29) and information obtained from Tony McPherson. She requested that the claimant respond in writing with his comments within 5 days from the date of her letter (P34).

25. By 2 November 2017 Collette Walker had received no comments from the claimant to the statements (P25 to P29) and information obtained from Tony McPherson. She considered all of the information available. She concluded that the decision to dismiss the claimant should stand. She considered each point of appeal made by the claimant and Norrie Watson at the appeal meeting. She was not persuaded that management had failed to follow the correct procedure by not involving the police when the claimant was observed tampering with mail. She was not satisfied that the point about whether the claimant had remained at the ILSM to clear a jam was relevant to the outcome of the case. She was satisfied that the envelopes retrieved from the ILSM had been copied and shared with the claimant. She rejected the point made by Norrie Watson that there had been no fact-finding interview. She was satisfied that the claimant had been interviewed by the security team on his return to work on 4 April 2017 and that this met the requirements of a fact-finding interview. Having spoken to Tony McPherson, Collette Walker was satisfied that ill health retirement would have been discussed a possible option under the respondent's sick absence process. She rejected the claimant's suggestion that it was offered to him as a resolution to his conduct case. Collette Walker acknowledged that Anthony McAloon had failed to provide the claimant with written reasons setting out how he had reached his decision. She was not persuaded however that the procedural error on the part of

Anthony McAloon would have affected his decision. She also took into account that a copy of Anthony McAloon's report (P16) was provided to the claimant in advance of the appeal hearing. Collette Walker was not persuaded that knowing the identity of the OPG who had first reported his concerns to Tommy Boyle would have made any difference to the outcome of the case. She was satisfied that Tommy Boyle had behaved correctly by not disclosing the identity of the OPG.

26. Collette Walker considered the evidence available to her including the statements (P8 & 9); security report (P10); observation log (P33) and the claimant's evidence during the conduct and appeal meetings. She found the evidence of the claimant having tampered with mail to be overwhelming. She did not accept the claimant's position that members of management and the security team had lied or colluded to fabricate a case against him. She was satisfied that the evidence showed that the claimant had been dishonest. She was not persuaded that the evidence of management and the security team was the result of any deliberate attempt to discredit him.

27. Collette Walker considered whether there were any mitigating factors that might persuade her to reduce the penalty. She recognised the claimant's length of service and level of commitment to the respondent. She was not persuaded however that given the serious nature of his conduct and the adverse consequences to the respondent's business of tampering with mail that the claimant's length of service was a sufficient reason to reduce the penalty of dismissal. She was in no doubt that the claimant's conduct was serious enough to warrant dismissal. Collette Walker wrote to the claimant by letter dated 6 November 2017 (P31) confirming her decision as follows;

"I have now completed my re-hearing of the case and given full consideration to everything that was put forward at the appeal.

In the light of all the evidence, my decision is that you have been treated fairly and reasonably and therefore I believe that the original decision of summary dismissal is appropriate in this case."

Collette Walker provided the claimant with a copy of her report setting out how she had reached her decision in relation to the claimant's appeal (P32).

- 5 28. The claimant applied for alternative employment (P39). He received Employment Support Allowance until July 2018. He obtained alternative employment with a security firm starting on 15 September 2018. His average take home pay from the above employment is around £390 per week.

10 **ISSUES**

29. The issues to be determined by the Tribunal were as follows;

- (i) What was the principal reason for the claimant's dismissal and was it a potentially fair reason in terms of Sections 98(1) & (2) of the Employment Rights Act 1996 ("ERA")?
- 15 (ii) Was the dismissal fair or unfair in accordance with Section 98(4) of ERA? As the reason advanced by the respondent for dismissal was gross misconduct; did the respondent genuinely believe that the claimant was guilty of gross misconduct? was the respondent's belief based on reasonable grounds & when the belief was formed on those grounds, had the respondent carried out as much investigation into the matter as was reasonable in all the circumstances?
- 20 (iii) Did the decision to dismiss fall within the band of reasonable responses including the procedure followed by the respondent? &
- (iv) If the claimant is found to have been unfairly dismissed what should be awarded to the claimant by way of compensation?
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DISCUSSION & DELIBERATIONS

30. In terms of Section 94 of the Employment Rights Act 1996 ("ERA"), the claimant had the right not to be unfairly dismissed by the respondent. It was

not in dispute that claimant had been dismissed by the respondent. He claimed that his dismissal was unfair. The respondent denied any unfairness.

31. In terms of Section 98(1) of ERA, it is for the respondent to show the reason
5 (or, if more than one, the principal reason) for the claimant's dismissal. While the claimant denied that he had tampered with mail, it was not in dispute that this was the reason for his dismissal. The claimant disputed the evidence relied upon by the respondent to conclude that he was guilty of tampering with mail. He did not dispute however that the principal reason for his dismissal
10 related to his conduct.
32. Conduct is a potentially fair reason for dismissal in terms of Section 98(2)(b) of ERA. The respondent having met the requirement to show that the claimant was dismissed for a potentially fair reason, the Tribunal went on to consider
15 whether the dismissal was fair or unfair having regard to the claimant's conduct. In terms of Section 98(4)(a) of ERA, this depends on whether in the circumstances (including the size and administrative resources of the respondent's undertaking), the respondent acted reasonably or unreasonably in treating the claimant's conduct as a sufficient reason for dismissing him.
20 This must be determined in accordance with equity and the substantial merits of the case in terms of Section 98(4)(b) of ERA.
33. When considering whether the respondent acted reasonably or unreasonably
25 in treating the claimant's conduct as a sufficient reason for dismissing him, the Tribunal must have regard to whether the decision to dismiss fell within the "band of reasonable responses" of a reasonable employer. It is not for the Tribunal to consider how it would have responded to the claimant's conduct. It must consider whether a reasonable employer might reasonably have dismissed the claimant in response to his conduct.
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34. Whether the respondent acted reasonably or unreasonably will depend on the circumstances of the case. Applying the authority of **British Home Stores Ltd v Burchell 1980 ICR 303**, this involves the Tribunal being satisfied that
(i) the respondent believed that the claimant was guilty of the misconduct for

which he was dismissed; (ii) the respondent had in mind reasonable grounds upon which to sustain that belief & (iii) at the stage at which the respondent formed that belief on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

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35. The claimant did not dispute that Anthony McAloon and Collette Walker both believed that he was guilty of tampering with mail. He disputed that they had reasonable grounds upon which to sustain their belief. He challenged the reasonableness of the investigation undertaken by the respondent. Mr Smith referred the Tribunal to three authorities in support of the claimant's position that the respondent had acted unreasonably by concluding that he was guilty of misconduct sufficiently serious to dismiss him. The first case was **A v B 2003 IRLR 405** in which the EAT emphasised the importance of the employer undertaking a careful investigation in circumstances where the nature of the allegation could result in serious consequences for the employee - in the case of **A v B** it was alleged by a child that the employee had been involved in an inappropriate relationship with them. It was not in dispute that, if established, the allegation of tampering with mail could have serious consequences for the claimant including his dismissal and potentially criminal proceedings.

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36. The ACAS Guide: Disciplinary and Grievances at Work 2017 advises that when investigating a disciplinary matter; *"The nature and extent of the investigations will depend on the seriousness of the matter and the more serious it is then the more thorough the investigation should be. It is important to keep an open mind and look for evidence which supports the employee's case as well as evidence against it"*. In the case of **A v B**, the EAT emphasised the importance of making available to the employee evidence relied upon during the disciplinary process including statements which may assist the employee to defend the allegations made against them.

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37. The Tribunal was satisfied that the investigation undertaken by the respondent was sufficiently thorough. This was not a case in which the allegation against the respondent derived from one complainant – as in the case of **A v B**. In the claimant's case, serious concerns were first raised by

another employee who wished to remain anonymous. Their evidence however was not relied upon when deciding whether the claimant had tampered with mail. The claimant may well have wanted to know who had reported him to Tommy Boyle. It was unclear however how the employee's identity would have assisted the claimant in relation to the allegation against him. The claimant's conduct was reported to the security team once observed by Tommy Boyle. The Tribunal was not persuaded that the respondent's decision to protect the employee's identity was unreasonable or prejudicial to the claimant. The respondent obtained evidence from Tommy Boyle, Ronnie Johnston and three members of the security team when investigating the allegation against the claimant of tampering with mail. The claimant was provided with the statements obtained during the investigation; the security report, the CCTV footage and envelopes retrieved from the ILSM. He was provided with the above evidence before the disciplinary meeting with Anthony McAloon. The Tribunal did not find that any of the evidence relied upon by Mr McAloon had not been disclosed to the claimant. During the appeal meeting, Norrie Watson claimed that the respondent had failed to disclose copies of the envelopes retrieved from the ILSM. This was not supported by the evidence before the Tribunal that the claimant was shown envelopes (P38/125-134) at the meeting with the security team and which he had signed. The claimant when giving his evidence to the Tribunal did not dispute that he had seen, and signed envelopes retrieved from the ILSM. Before deciding to dismiss him, Anthony McAloon also took into account the evidence of the claimant at the disciplinary meeting. The Tribunal was satisfied that Anthony McAloon was entitled to reject the claimant's position that Tommy Boyle, Ronnie Johnston and three members of the security team had all fabricated evidence that they observed him tampering with mail. The claimant was unable to provide any explanation as to why five employees, including three with whom he had had no previous contact, would all lie about him. At the appeal meeting he described Tommy Boyle as "*a bit of a liar*" and that Ronnie Johnston was in collusion with him. At the same meeting he also stated that "*if it was brought to (Tommy Boyle's) attention by someone that is probably what has happened*". When questioned before the Tribunal about

this apparent inconsistency, the claimant was only able to suggest that he was “*mixed up*” at the meeting.

5 38. The second case to which the Tribunal was referred by Mr Smith was **Salford Royal NHS Foundation Trust v Roldan 2010 ICR 1457**. In **Roldan** the employee was facing the possibility of deportation as well as criminal charges if the allegations against her resulted in dismissal. The Court of Appeal emphasised the importance of testing evidence before reaching a conclusion that might have a seriously detrimental effect on the employee. In the present
10 case, the Tribunal found that the claimant was provided with the evidence against him. He was provided with the opportunity to challenge it and give his own version of events. While the Tribunal noted that, when questioning the claimant at the disciplinary meeting, Anthony McAloon had a tendency to summarise evidence which might have suggested that he accepted it, on
15 balance the Tribunal accepted his explanation that it was unfortunate phraseology on his part and was satisfied that he had approached the meeting with an open mind to any evidence offered by the claimant.

20 39. The third case relied upon by the claimant to challenge the investigation undertaken by the respondent was **Mrs B Tykocki v Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust UKEAT/0081/16**. The case of **Tykocki** was concerned with serious allegations of abusive conduct by a nurse. The EAT identified the requirement of an employer to take account of evidence that might be exculpatory of an employee who is facing a serious
25 allegation of misconduct. It was unclear what evidence the claimant sought to rely on as exculpatory. His witnesses before the Tribunal, Stephen Millrine and Norrie Watson, while very supportive of the claimant as a former colleague had not been present when the claimant was observed working at the ILSM. They did not advance any convincing explanation during the
30 disciplinary process as to why management and the security team would fabricate evidence about what they observed and how the claimant responded when approached by Scott Forsyth. Norrie Watson suggested in his evidence before the Tribunal that Tommy Boyle might have been motivated to lie about

the claimant due to performance issues and how this impacted on his ability to meet targets set by the respondent. This was put to Tommy Boyle during cross examination before the Tribunal. While not disputing that he had targets to meet and had on occasions sought to move employees who might be struggling with their work to another machine, he denied having fabricated his evidence about the claimant for this or any other reason. The Tribunal accepted his evidence. It was credible and straight forward. He readily accepted minor errors in his evidence about dates. The Tribunal found that he genuinely liked the claimant and was shocked and upset when he witnesses him tampering with mail.

40. The claimant also submitted that the respondent failed to take account of the CCTV footage. This was not the respondent's position. At best, Anthony McAloon considered it to be inconclusive. The claimant submitted that the respondent's witnesses should have had their evidence tested against the CCTV footage. The evidence of the respondent's witnesses who were shown the CCTV footage during the hearing (Tommy Boyle & Scott Forsyth) was consistent with the evidence they provided to the respondent. It was not in dispute that the recording was limited in scope and less clear than the live footage observed by the security team. The Tribunal was satisfied that in these circumstances the respondent was entitled to disregard the CCTV footage and rely on the evidence of witnesses who had observed the claimant in person and through live footage working at the ILSM when deciding whether the allegation against the claimant was well founded.

41. The Tribunal carefully considered the procedure followed by the respondent including the investigation. Anthony McAloon's failure to provide the claimant with written reasons at the time of his decision was a procedural error. It was not in dispute that the claimant should have been provided with Anthony McAloon's "notes of conclusion" (P16) at the same time as being told of his dismissal. The Tribunal was not persuaded however that this affected the decision in any way or was materially prejudicial to the claimant. The written reasons (P16) were provided to the claimant in advance of the appeal

meeting. It was unfortunate that Anthony McAloon referred to a lack of remorse in his reasons for dismissing the claimant. The claimant understandably questioned why he would show remorse to conduct that he denied. On balance the Tribunal was not persuaded however that lack of
5 remorse was a material factor in Anthony McAloon's considerations about whether the claimant was guilty of tampering with mail. The Tribunal was satisfied that he was entitled to rely on the statements; security summary and the claimant's evidence at the disciplinary meeting to conclude that the claimant was guilty of tampering with mail.

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42. It was not in dispute that the appeal before Collette Walker was a rehearing. The Tribunal was satisfied that any of the above defects in the procedure followed by Anthony McAloon, which the Tribunal did not in any event find to have been material, were remedied on appeal. Collette Walker considered all
15 of the evidence in detail. She carefully considered each of the points raised on appeal and made additional enquiries into points raised by the claimant. She provided the claimant with copies of all the evidence she relied upon. The Tribunal was satisfied that she was entitled to conclude that the claimant was guilty of tampering with mail and that in the circumstances the decision to
20 dismiss the claimant was justified and should stand.

43. In all the circumstances, the Tribunal was satisfied that when the decision to dismiss was taken the respondent had reasonable grounds upon which to conclude that the claimant was guilty of tampering with mail having
25 undertaken as much investigation into the allegation against the claimant as was reasonable in the circumstances.

44. It was not in dispute that if the respondent was entitled to conclude that the claimant was guilty of tampering with mail that in the circumstances of the
30 case his conduct was a sufficient reason for dismissing him and that dismissal fell within the "band of reasonable responses". The claimant sought to show that the respondent must have had some doubt about the claimant's guilt on the grounds that he was offered ill health retirement as an alternative to disciplinary action. The Tribunal was not persuaded that the claimant had

5 been offered ill health retirement. It was raised by HR as an option in the event that the claimant was unable to return to work due to ill health and subject to the claimant satisfying the criteria for ill health retirement. The Tribunal was satisfied that the it was raised by HR in accordance with normal procedure and was not as a means of avoiding disciplinary proceedings. The issue was investigated by Collette Walker and the Tribunal was satisfied that she was entitled to reject it as a ground of appeal. The claimant also questioned why the respondent did not involve the police at the earliest opportunity given the serious nature of the allegation. The Tribunal found that the police were called before the claimant became ill and went to hospital. There was no evidence of any obligation on the respondent to involve the police at any stage in the proceedings and the Tribunal was not persuaded that the respondent was compromised, or the claimant prejudiced, in any way the lack of police involvement.

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CONCLUSION

45. The Tribunal concluded that, in all the circumstances, the claimant was not unfairly dismissed by the respondent.

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25 **Employment Judge: Frances Eccles**
Date of Judgment: 18 January 2019
Entered in register : 21 January 2019
and copied to parties