



EMPLOYMENT TRIBUNALS

Claimants: Mr R Cooper
Mr D Adamson

Respondent: Royal Mail Group Limited

Heard at: Manchester **On:** 12 and 13 September 2019
24 October 2019
(in Chambers)

Before: Employment Judge Feeney

REPRESENTATION:

Claimants: Mr G Saville, CWU Representative
Respondent: Miss R Driffield, Solicitor

JUDGMENT

The judgment of the Tribunal is that the claimants were unfairly dismissed.

REASONS

Introduction

1. The claimants brought claims of unfair dismissal following their dismissal for misconduct by the respondent.

Claimants' Submissions

2. The claimants submitted that the matter which they were dismissed for, failing to report quickly enough missing mail, was unfair because there was no well-known rule that mail had to be reported immediately whilst they were making diligent efforts to find the mail, also that even if it was it was disproportionate to dismiss for the offence in question. They also called into question the actions of the manager who

had “found the mail” as he had subsequently resigned allegedly because he had been discovered burning mail at home.

Respondent’s Submissions

3. The respondent submitted that it was well-known that if mail was missing it should be reported immediately to the office and that dismissal was a proportionate response. The matter of the manager was irrelevant. If there was an unfair dismissal there was contributory conduct.

Witnesses

4. The Tribunal heard from both claimants and Mr Graham Sutcliffe who gave evidence for the claimants, and from Mrs Jan Mullin who conducted the appeal. The dismissing officer was not available. There was an agreed bundle.

Findings of Fact

The Tribunal’s findings of fact are as follows:

5. The claimants worked for the Royal Mail as Operation Postal Grade at Eccles Delivery Office: in Mr Cooper’s case from 4 December 2005 to 1 August 2018 when he was dismissed; and in Mr Adamson’s case from 5 December 2005 to 31 July 2018. Mr Cooper had spent some four years mainly working in the locker room, i.e. where undelivered items are picked up by the public, which also has some supervisory responsibilities.

6. On the morning of 3 July 2018 Mr Cooper came into work early to undertake, in effect, overtime sorting out drivers’ licence checks. At 8.00am he went to undertake his normal job. This involved going to his frame to bundle the mail for his round. There was a meeting which lasted 15 minutes when the claimant was undertaking this job. Mr Adamson was also at this meeting. Mr Adamson arrived at the normal time.

7. Following the meeting the claimants went back to the frame and finished off bagging the remainder of the mail for their round and put it in the van. They started their round and noticed that some mail was missing but decided to carry on delivering the rest as they assumed that the missing mail would be hidden under parcels and other bags and would be visible once the van was emptier. Towards the end of the round when they cleared the van and this mail was still missing, as it was a small amount they thought it was probably back at the office and decided to check the office when they returned to work. On his return Mr Adamson spent the time moving vans, as asked to do so by CN, and Mr Cooper was searching for the mail.

8. Mr Cooper was intending to speak to the Duty Manager, CN, about the matter but she started talking about her personal life and he just never got round to it. He also had an underlying feeling that for some reason she was not trustworthy and he did not want to necessarily share the information with her. Mr Cooper was also quite upset and disrupted at this time as he was moving out of his flat following the breakup of his relationship and living on a sofa at his parents’ house, so he said he was distracted.

9. The next morning, Mr Adamson was called in first to see LW as he arrived earlier. He said that another senior manager, Darren Banks, was already in the office before he arrived and subsequently he was suspicious about that and felt that Mr Banks had influenced what subsequently happened. He was asked who delivered to the addresses of what turned out to be the missing mail.

10. Mr Cooper was called into the office when he arrived and was asked by LW where did he deliver. LW had a picture of the frame's delivery point and Mr Cooper pointed out where he delivered. After going through the delivery for a while LW pulled a box out from under his frame and showed it to Mr Cooper, and asked him did he know what it was. Mr Cooper volunteered that "it must be the mail that went missing yesterday". He was then told to go back to what he was doing.

11. LW called both of them in and told them they were suspended.

12. There was a factfinding interview from 5 July with one of the claimants' colleagues AB (name redacted) who was asked to explain the events "on Wednesday morning". LW who was conducting the interview says:

"Can you tell me what happened on Wednesday morning with the mail that was found in the tray top box of the Bridgewater and Winton frames?"

13. The answer was partially redacted, which was not completely explicable as the redaction was larger than the person's name, suggesting some text had been removed:

"Since I had some extra I went through the dropdown boxes of all the frames looking for spare dog pegs. When I got to the Winton frame I opened the tray top and saw that there were two bundles of mail and my initial thought was that it was kill-off so I took the mail out and I went to the Bridgewater and there was another bundle in there."

"Where was the mail for?"

"The mail was for Wellington Road Pub all the way to 2 Bridgewater Street...The dates on the mail were from the previous day. There was also a copy of Dave Adamson's Courier there with the mail for 155 Peel Green Road which is where he lives."

"What did you do then?"

"I took the mail out of the boxes and reported to my manager, LW, when he arrived in the office about 6.00am."

"Did you speak to anybody else about it?"

"No, just the manager, as I thought it was important it was properly dealt with."

14. He also added:

"Basically, in my mind if I hadn't said anything I was as culpable as the people who had decided to hide that mail there and I couldn't do that morally."

It would transpire that this account was incorrect. It might also be thought the final comment was somewhat strange as AB did not know that it had been deliberately hidden and why would he even think of not reporting it? Possibly he could have found out whose round it was and spoke to them about it. In any event no-one pursued that point and of course no-one knew the information which would be later given to Mr Saville by AB which showed AB was not telling the truth.

15. The claimants were both invited to factfinding interviews on 7 July.

16. In Mr Cooper's interview he said that he left the office with Mr Adamson and when they got to the first delivery point they realised they did not have the first two loops of mail, so they switched to the next loop because it was quite nearby. They had assumed the missing bundles were at the back of the van or somewhere hidden and they expected to come over them as they delivered the other mail. There was no other mail for the areas of the missing mail, although there were some parcels for that area. LW said:

"When you realised that you didn't have the top two loops of the walk did you raise the alarm?"

RC: "What do you mean?"

LW: "I mean did you raise the alarm by speaking to him or flagging this up to your manager or another colleague?"

RC: "No, we didn't. We just assumed it had been left in the office and we would find it when we got back. I thought maybe the PHG would have rang me if I'd missed something because I have worked as a PHG a lot and if I found mail that has been forgotten before I have always called up the person to let them know they've forgotten something."

17. LW asked him whether he had ever left mail behind and had to call the office. Mr Cooper said:

"No, I don't think I have to be honest. I've never forgotten mail before. But I haven't been delivering walks for that long now as I was in the caller's office before working as a PHG, but I know how to do it and I've got the manager's number to call him."

18. LW was asked by the claimant's representative if he did a clear frame check. LW said he did. He had a walkaround and could not see anything.

19. It was stated that the claimants started to get concerned later on and concluded that the missing mail must be back in the office so they went to look for it after they completed their round. They did not look for it in the street as they knew it was missing from the beginning.

20. Mr Cooper then looked for it and assumed when he could not find it that it must have got sent back to Manchester Mail Centre. He did not look in the top boxes as he had never used a top box so he did not think it could possibly be in there. He agreed they did not mention to anybody else, they just thought it would show up. He volunteered that he had spoken to CN but did not mentioned anything to her. He

had no explanation for why it was found in the top box trays other than he thought it was a set-up. He said:

“I think it’s to do with the fact that like I’ve already said to you I’m leaving soon and people are resentful. Ever since I have had my duty changed and I’m on different walks people have been resentful towards me and have made little comments about me. I think there’s definitely a link between this and the mail that was found. I think it’s even more suspicious since it’s been left in the top box rather than just a tray.”

21. The union representative also said it was very suspicious.

22. Mr Adamson’s interview took place on the same day. Mr Adamson advised that they had started sorting out their mail, had the short training talk and then went back to bagging up, put the bags in the trays and took them over to the van, including the parcels. He said it was quite a light day but they did have quite a few parcels. Their first delivery point was 2 Bridgewater Street but they realised the first two loops of the Bridgewater walk were missing. They checked everything they could see but could not find it so they thought it was probably at the back of the van underneath some of the parcels and bags, so they thought they would leave it, carry on and then come back when the van was a bit clearer. They still had not found it by later on and took everything out of the van to look for it but still could not find it. They did not call anyone as they thought maybe it had been misplaced on another frame or van. They did not call the office because they thought it would just show up and then they would search the office when they got back. They did not contact the manager, they thought it was a case of “finding it ourselves and hoping it would turn up the next day or someone else had delivered it or we would find it in the end”.

23. Mr Adamson realised he had missed a parcel when they got back to the office so he went back to deliver that and left Mr Cooper still looking for the missing loops. They did search the whole office including the pigeon holes of the IPS frames and all the CN, the PHGI Duty Manager, because they thought they would find it themselves. They came in early the next day, did not report it as they thought it would turn up, and then LW brought them in to ask them about it. In respect of why it was in the top box trays, again he thought it had been placed there by someone else as it was so unusual. There was no motive for them to hide the mail or to risk their jobs for two blocks of flats, and in any event they had delivered two parcels on that loop including an international special, so they were not trying to avoid it. He said it was very suspicious, he felt he had some enemies and somebody was trying to get at him or frame him. His union representative said he would not put his career on the line for something as minor as this.

24. LW then interviewed CN the operational postal grade who was the Duty Manager. She confirmed that they did not speak about anything to her and she was not aware that they were looking for anything.

25. On 18 July 2018 LW sent information to the person who was going to hold the disciplinary, GN, to say that Mr Adamson had a few warnings which were expired on his file although it was not clear whether he was found guilty of some of the matters. He had several incidents of coaching/counselling, however Mr Adamson proved not to recall any of these.

26. The previous manager, MR, was asked whether he had done briefings on what to do about missing mail, but he just replied saying there was a folder of the matters he briefed staff on. No evidence was presented at tribunal that he or anyone else had done such a briefing. He also reported that another member of staff had complained about his mail and parcels not being delivered on his day off and one of the people he accused of being involved in that was Dave Adamson, but as there was no evidence nothing was done about it.

27. The formal conduct meeting then took place on 20 July 2018. Mr Adamson was represented by Mr Saville, the CWU representative. He was charged with:

- (1) Alleged unexcused delay to the mail;
- (2) Alleged failure to follow the correct procedure.

28. They went through the facts again and Mr Adamson said they could not find the first two loops when they got to the first loop so they thought they were buried under mail and parcels. He repeated that when they found out that they were not there they tried to find them in the office. Mr Adamson says he was unaware of how much mail was not taken as it was only his second time on that round. He did not know how the bundles got in the drop box but he did know that he delivered the full schedule. He agreed he should have approached the PHG.

29. The CWU representative said that:

“In the past bundles of mail have been left and when he has approached a manager they have told him that it can wait until the next day and they will catch up. In another instance bundles of mail have been sent back to Manchester only to be returned the next day: managers did nothing about that.”

30. Mr Adamson agreed he did not tell CN who was on duty that there were three missing bundles of mail, as he did not get on with her and he did not speak to her.

31. Mr Adamson said that if he had wanted not to deliver the mail he could have put “no access” on the bundles and brought them back. He had a house and children to support so he would not have done this deliberately. He was asked why he did not report it when he first came in at 7.45am on Wednesday 4 July and he said he was scared to lose his job, and everybody was scared of speaking to the manager.

32. Gary Saville also raised that they had seen the statement from CN who suggested that they did not look like they were looking for any mail, however he suggested that she would not have been in a position to really address this and that in the past bundles of mail had been returned to Manchester without any consequences. Mr Saville suggested that the manager was “looking after two people who were after the duties of the two OPGs in this case” i.e. that he wanted to ‘get rid’ of the claimants so he could slot the other two employees into their roles.

33. Mr Adamson also said that were waiting the next delivery of mail to come in as they thought that if it had been sent back to Manchester it would come in on that van which was due at 8.45am, and if it had come in they would have delivered it but of course they were pulled in by LW before then.

34. There was also some discussion in both Mr Adamson's and now Mr Cooper's interview regarding whether they had signed in. Mr Saville stated that the attendance sheets had not been printed out because he was on holiday and that something had been cobbled together so there might have been a makeshift signing in sheet but neither Mr Adamson nor Mr Cooper actually signed in.

35. Mr Cooper said he had only been doing the duty for a few months as he had been full-time in the locker room for about four years, and that there were two separate bags for each loop. He said he had gone for a break to get breakfast at Greggs after they had finished the bagging up and he did not see the bags go on the van. They noticed there were two empty bags but assumed the mail would be somewhere back in the office and carried on as they were finishing early i.e. that they wanted to get the work done. He agreed that he had spoken to CN but he said because she was talking so much about her personal life he did not get the chance to raise the issue of the bags. GN said she was struggling to understand how he could lose three bundles of mail, go back to the office, speak to CN and then go home without telling anyone all afternoon, all evening and then the following day. He said he had considered it but Mr Adamson had said it was better if they just continue with their duty and could look for it when they got back to work. The next day he did not have the opportunity to raise it before LW raised it with him. He had spoken to his manager but he did not want to interrupt the manager as he was talking. He said that nothing like this had ever happened to him before but he accepted "I have really f****d up". He also explained his personal situation which had made things very difficult and that he was having problems with some of the staff in the office who had been saying things about him, but he had not logged a formal complaint.

36. Mr Saville made the point that there was no intention to hide anything. The bags went missing while Mr Cooper had gone to Greggs as he recollected putting the bags into the van. It cannot be his fault and it would be more appropriate to respond with counselling rather than dismissal. He produced a policy document which he asked her to consider.

37. There were 103 items in total that were in the missing mail however both of the claimants were new to the walk and were unaware how much post to expect.

38. On 31 July 2018 GN wrote to Mr Adamson saying that her decision was he should be dismissed without notice, as was her decision with Mr Cooper. She enclosed a report setting out the circumstances as she saw them and the reasons for her decision. She reported that three bundles of mail were found inside the dropdown trays of Bridgewater and Winton walks on Wednesday morning on 4 July. It amounted to almost a whole top row of the first walk and was the start of the outdoor delivery of the first two loops to be delivered. They had corresponded to mail that was due for delivery the previous day, Tuesday 3 July, totalling 103 letters and large letters and four small parcels within the three bundles. The mail was found by an employee of the Eccles Delivery Office. He was looking for dog pegs inside the dropdown trays. He brought the mail to the manager, LW's, attention who then subsequently carried out an informal investigation to establish what had occurred the previous day to cause this mail not to be delivered nor endorsed in any way. He then conducted a formal a formal investigation.

39. It was agreed that they were aware they did not have the first three bundles and assumed it was inside the vehicles and intended to deliver it at the end of the

walk when it became apparent. They searched everywhere for the missing mail when they returned back to work. Neither Mr Adamson nor Mr Cooper spoke to anybody about the missing mail. Mr Adamson went to redeliver a parcel he had misplaced earlier. He did not approach the indoor locker person, CN, who was in effect the Duty Manager, to report that the mail was missing or to ask her whether she had had any mail. Mr Adamson started work at 6.15am on 4 July and did not raise the matter with LW, who then raised it with him at 7.45am.

40. In respect of Mr Adamson, GN noted that there were previous conduct cases with him and whilst they were spent there was relevant advice given in 2010 and 2011:

“I must remind you that if you are any unsure about any aspects of your work then you must speak with your line manager.”

41. GN had investigated whether mail was being returned to Manchester from Eccles and then coming back to Eccles, or whether mail was being messed about within Eccles. A previous manager, MR, reported that mail for DW had been moved on one occasion and when it was being checked this stopped. No other manager recalled any instances. She also recorded that Mr Adamson stated that if he really did not want to deliver the three bundles he could have endorsed them as “no access” as they referred to flats where entry was difficult, so he commented “why would I hide it and risk getting into trouble?”. She said she considered whether somebody had played a practical joke on him or was trying to get him into trouble by hiding the mail where it, however her decision was based not on the mail going missing alone but rather on the fact that Mr Adamson kept this information to himself, likewise Mr Cooper. He admitted he got LW’s mobile contact and had contacted LW on his mobile on previous occasions. The fact that he asserted he did not like CN did not excuse not speaking to her as he was moving vehicles for her in the yard that day. Mr Adamson had time in the morning to alert LW about it but did not do so. GN said in relation to the sanction:

“I did consider other penalties other than dismissal and discounted issuing a warning or a serious warning. This is clearly a case of gross misconduct. I also discounted a suspended dismissal as I have serious concerns due to the responses I have given that Mr Adamson would not act in a similar way in the future leading to future mail integrity breaches and USO failures.”

42. She went on to say she could not understand why he did not report this immediately to the manager, and the fact that the Eccles Delivery Office had had a number of different managers over a short period did really not explain the failure of Mr Adamson to report the matter. She went on to say:

“The standards in delivery are very simple and to follow them it means that if you have a problem you approach your manager on the day and pass your concerns over to them to deal with. You are not responsible for the running of Eccles DO, rather you are responsible for your own individual work area and to safeguard the mail using reasonable means and behaviour.”

She continued:

“Due to your actions Royal Mail did not meet the delivery standard that our shareholders and customers alike expect. Our customers have not had the service they paid for and as a consequence a loss of trust in the service we provide. We did not meet our universal standards obligation to the customers and inadvertently reported falsely by recording a clear office for which the RMG Group could be fined by the regulator for our inaccurate reporting of the mail.”

43. She felt no reasonable explanation had been given as to why he had failed to report the incident on Tuesday 3 or Wednesday 4 July. He had been employed for several years and was fully aware of the respondent’s standard; he was fully trained and had many years of experience in the delivery aspects of working with customers’ mail. She had no confidence that he would not act in a similar way in the future and could not take the risk and therefore was issuing a dismissal.

44. The same points were made in respect of Mr Cooper, although Mr Cooper also raised the unpleasant treatment by some cliques and he believed that somebody may have deliberately interfered with his frame. She repeated the same points as with Mr Adamson save that she also referred to the fact that Mr Cooper spoke to CN that day but did not mention the missing mail. He admitted that it was a stupid thing to do but he had not hidden the mail and he had undertaken the walk even though it was one of the worse in the office. As he had a clean record she also took into account that four of his six years of employment had been in a supervisory capacity within the locker area so he should be fully aware of the respondent’s standards.

45. Both claimants appealed the decision to dismiss them and appeal hearings were arranged for 16 August 2018 with Ms Jan Mullin, who gave evidence to the Tribunal.

46. At the appeal hearing Ms Mullin pointed out the respondent’s conduct agreement which states that:

“Any time mail is delayed for whatever reason Royal Mail employees would attempt to correct the problem efficiently and effectively as soon as possible.”

It also says:

“Where an employee is prevented from completing their delivery for any reason it is essential that this is reported immediate, either by returning to the office or by phone. A written record will be kept. All employees should be informed of local authorised arrangements in writing.”

47. Mr Saville pointed out that no-one in Eccles had ever had this copy of this localised authorised arrangements in writing, and further that the situation did not come within that in any event. Mr Saville pointed out information he had gathered. He had been told by other members of staff that if they found was mail missing when out on delivery:

“They have told me that have come back and looked for it and didn’t report it to the manager. This mail turned up the following day and they just redelivered it.”

48. Mr Saville's information was that this had happened with quite a few members of staff. Mr Saville said he himself found mail one day, saw the manager about it and the manager said, "not to worry, they will catch up". There were no interviews or factfinding in respect of the OPGs whose mail it was. He also pointed out that LW, although he had completed training sessions, had never told staff the process he expected them to follow in these circumstances, not even after Mr Adamson and Mr Cooper had been suspended.

49. GS also pointed out that LW was allegedly given the mail at 6.00am but did not ask for an explanation from anyone until 1½ hours later after he had rung the DSM (Darren Banks) and asked him to be in the office. This seems that he was intending to take action before he had even spoken to the claimants.

50. Also, the PDAs would show that Mr Adamson had delivered parcels all around the area where the missing mail was for, which would show that there was no advantage to Mr Adamson in hiding the mail. It would also show that the van had stopped for 20 minutes when they emptied the van to look for the missing mail.

51. In respect of CN's statement, she said that she did not speak to the partnership whereas in fact she had a 30 minute discussion with Richard Cooper about her personal problems. She denied that they were looking for anything but she could not have seen them from where she was in the office, and that if they interviewed staff at Eccles most of them would not report anything to CN as they do not trust her as she has "done things in the past".

52. Mr Saville said he had asked the manager how the mail had been found and he had told him that the One Plan team were in and they had found it. Mr Saville then went to LW and said why had he lied as the One Plan team was not in, and that Mr Saville had discovered who the person who had found the mail. LW said that person wanted to remain anonymous. GS said he had since spoken to the person (AB) and asked him why he was going through the tray. The first time he said he was looking for dog pegs but he has since come back to Mr Saville and said the manager (i.e. LW) told him to check the frames and therefore Mr Saville believed that it was bizarre and unusual and it did not ring true.

53. In Mr Saville's view, very few people would phone in to say the mail is missing as the mail is usually found and either he (clearly the CWU representative took an active problem solving role at the depot) or the PHG would contact the person, advise them of this and get someone else to take the mail out to them, and nothing would be mentioned. In addition in the meantime somebody else might have picked it up and delivered it. It was reasonable also for the claimants to think when they could not find it back at the office that either it had gone back into Manchester and would come back on the next van or somebody else had delivered it. Mr Adamson said that he himself had delivered mail for another walk that he had found in his van, and that GN had asked managers about mail tampering she had not asked staff so therefore it had not been investigated properly, and that CN's evidence was unreliable.

54. Mr Saville also quoted the Conduct Agreement which said:

"Various actions can cause mail to be delayed, for example carelessness or negligence leading to loss or delay of customers' mail or breach or disregard

of a standard or guideline. Such instances are to be distinguished from intentional delay (see below). Although they may also be treated as misconduct and dealt with under Conduct policy, outcome may range from an informal discussion to dismissal.”

The definition of unintentional delay is:

“Royal Mail Group recognises that genuine mistakes and misunderstandings do occur and it is not our intention that such cases should be dealt with under the Conduct policy beyond informal discussions for the isolated incident.”

55. Mr Saville also advised that he went to the office and saw where the frames were sited and CN could not have seen the PHGs looking for the mail. He also said that the manager, LW, had told two people they would be getting DA and RC’s duties before the disciplinary hearing had even taken place.

56. LW denied it but the people themselves had told Gary Saville: one was Pam Howard and the other cannot say as he has something against Mr Adamson.

57. In Mr Cooper’s hearing Mr Saville made the same points regarding the policy. He also queried the evidence as he said that it was incorrect that Mr Cooper had put the satchels in the van and then went to Greggs, and that is when the bags went missing. He said he normally puts the mail in bags the first two loops. The bags were not there when he came back from Greggs so he assumed that Dave Adamson had put them in the van. It is only when they found the bags empty that they thought the mail must be missing. Mr Cooper confirmed that they had been looking for the mail but that CN had, in effect, nabbed him and talked to him non stop about her personal problems for half an hour. He said in his experience when mail was left and he could not get in touch with the person who should deliver them he just got somebody else to deliver them, and that Mr Cooper believed that either the mail had been sent back to town or somebody else had delivered it when he could not find it back at the office.

58. Mr Saville also said there were some people who wanted to get at Mr Cooper and this had not been looked into. There was no proof that RC or DA had put the mail there; it was not an intentional delay, it was unintentional. Neither had they been instructed at any point that they had to report missing mail immediately. He also mentioned the fact that new people had already been given Mr Adamson’s and Mr Cooper’s jobs.

59. Mr Cooper also pointed out that he never denied that there was missing mail. He also stated that LW had told him the One Plan team had found the mail.

60. Ms Mullin carried out some further investigations, talking to witnesses who she identified as A to G. She also spoke to CN again who did say that she was not able to see if they were looking for mail at their frames given her location. She also said if mail had been left in the office she would have informed the managers and rung the OPG to let them know that mail had been left behind. If she had been wrong in that way and she could find the mail back at the office she would have reported it to the manager. Regarding mail being sent back to Manchester, she had never heard of that happening.

61. The witnesses were asked “what is your understanding of what steps you should take if you are prevented from completing your delivery?” and also “if mail for some of your delivery was found in the office after you had gone out on delivery what would happen”.

62. Pam Howard (OPG) also stated that if she was unable to complete her delivery for any reason the process was to ring the office and inform the manager. Alternatively she would have spoken to CN about any issues. She was not aware of mail being sent back to Manchester for delivery the next day. She did say that LW had offered her Richard Cooper’s duties as part of a duty revision while she was off sick which was before he was dismissed (he actually resigned presumably as a result of the alleged burning of the mail incident) The witnesses that she spoke to confirmed that if they felt mail had been left they would try and ring the manager or the PHG to look for it.

63. Witness A said they had known mail to be sent back to Manchester by mistake. Witness B confirmed they would phone a manager if they were unable to complete their delivery or speak to whoever was in the locker. Witness B had never known mail sent back to Manchester. Witness C stated:

“You would ring but you don’t always have a phone and would report it on returning to the office or tell the manager the next morning or leave a note maybe with the PHG.”

64. Witness C said they did not know anything about mail being sent back to Manchester. Witness D said they would phone the manager if they could not complete their delivery. In a situation where mail was left in the office that was due for delivery they had gone back to the office to collect the mail and then delivered it. If the manager was not available they would wait until the next day to raise any issues. Witness D said he knew of occasions whereby mail that was due for delivery had been held back as it was too busy and the manager had decided the mail would be delivered the next day. Witness E said that they would phone the office or speak to a manager or PHG if they were unable to complete their delivery. They would ring them and ask if there was anything no the frame. It had happened to Witness E and they had gone back to the office, collected it and taken it out. If a manager was not available they would write it down to clarify the point and leave it with whoever was the highest rank in the office. They were unaware of mail being sent back to Manchester for redelivery the next day. If mail had been left behind they would phone the office and it could be brought out to them or the non driver stayed on delivery and the driver went back for the forgotten items. Witness F did say that sometimes packets went back to Manchester but he had never known it with letters. Witness G said they would phone the manager to inform him if they were unable to complete a delivery for any reason. If no manager then would speak to the PHG. If they noticed mail was missing whilst out on delivery what would the process be? Witness G said they would come back to the office for it and then redeliver it. If the manager was unavailable they would see the manager the next day or speak to the PHG about an issue, possibly. Regarding mail being delivered to town, they knew that had happened with packets in error but not with letters.

65. Darren Banks was also interviewed. He said that there were vacancies in the office and that is why there had been a recruitment drive, as the vacancies had not

been filled as a result of a decision by the previous Delivery Lead. However, the new Delivery Lead wanted the Delivery Office fully staffed.

66. Ms Mullin noted that Mr Saville had rung her on 11 September to state that LW had resigned after allegations he had been found burning mail in his garden and that a number of items of mail had been found at his address, some of which were due for delivery on 3 July 2018. JM spoke to James Welsh on 19 September and he confirmed that eight trays of mail and two bags of burnt mail had been retrieved from LW's house. GS had gone through the mail. The unburnt mail appeared to have then been delivered after it had been recovered even though it was very late and Mr Saville had not kept any copies or photographs so there was no proof the mail was from the claimants' round although it was not clear how that would help the claimants save it added to the suspicions around LW's conduct.

67. Ms Mullin sent out the additional information she had gathered for comment by Mr Cooper and Mr Adamson. Mr Cooper said that the usual case would be for the PHG to call an OPG to advise and that he also raised the issue of LW who had initially put the case forward and had now been accused of hiding mail. He also said he had planned to tell LW on 4 July the mail had been missing from the delivery but had not had the opportunity.

68. Ms Mullin decided in relation to Mr Cooper that even though the local agreements were not available in writing he was aware of the correct procedures to follow. He could have rung LW at any time. Whilst it was reasonable to expect the email would have been back at the office, in this case the PHG would not have been able to alert Mr Cooper and Mr Adamson to mail being left behind as it appeared to have been hidden in the top boxes and was not visible.

69. As a result of her investigation Ms Mullin did not believe that it was likely or common practice for mail to have been sent back to Manchester. Whilst another OPG could have delivered it Mr Cooper did not check with the manager or the PHG whether it had been so delivered. The claimant was not accused of hiding the mail but of failing to follow the process to notify a manager. She also found it odd that Mr Cooper had a long conversation with CN but did not mention the missing mail. She accepted that LW had been inconsistent in his account of how the mail was found and it was irrelevant to the conduct notifications. It was still the case that he should have reported it immediately. A thorough search of the office might have located it on the day it was due, or at least it could have been accurately reported as a failed delivery so that his failure to report the matters had caused the items to be delayed.

70. Regarding enemies he had, there was insufficient evidence to identify anybody and the evidence given was consistent between most of the witnesses. Ms Mullin upheld the claimant. Her conclusions were the same as in Mr Cooper's case.

71. Under "gross misconduct" in the respondent's Conduct policy it stated that:

"Some types of behaviour are so serious and so acceptable if proved as to warrant dismissal without notice or pay in lieu of notice. It is not possible to construct a definitive list of what constitutes gross misconduct and in any event all cases will be dealt with on their merits. However, the following examples show some types of behaviour which in certain circumstances could be judged to be gross misconduct:

- Theft;
- Violence;
- Abusive behaviour to customers or colleagues;
- Criminal acts against RMG or its employees;
- Intentional delay of mail;
- Deliberate disregard of health, safety and security procedures or instructions;
- Unauthorised entry to computer records;
- A serious or persistent breach of the continuous disclosure and communications policy or the share dealing policy.”

72. Of relevance also was the respondent’s policy “Security of Customers’ Mail” and Royal Mail Group Property Guide for Employees”. Under Security of Mail it stated:

“RMG expects high standards from employees when dealing with the protection of mail and its possession and everyone in the business has a responsibility and part to play in maintaining the appropriate level of protection. When mail is put at risk and when any security standards or related standard operating procedures are broken the matter must be fully investigated and action in may be taken in line with the conduct policy. Employees must protect the security of the mail by:

- Ensuring that they are aware of and have access to security standards and related procedures required in their role;
- Individually or collectively working to or compliance with the standards;
- Reporting any instances of loss, theft, damage or interference.”

73. In the personal declaration signed by Mr Cooper and Mr Adamson there was a heading “RMG’s obligations” which said:

“The Royal Mail Group must ensure that letters, parcels and all other communications or items entrusted to it are delivered as addressed promptly and safely and that the information in them reaches no-one not entitled to it.”

74. Under “Safety of Postal Packets” it stated:

“It is a criminal offence to steal, deliberately destroy or damage a letter, parcel mailbag or any other postal packet in the course of transmission by post. It is also an offence to open or delay a letter, parcel, mailbag or any other postal packet in the course of transmission by post...

Persons suspected of criminal offences will be subject to investigation which may lead to prosecution...

Other misconduct which endangers the safety of a mailbag or postal packet may lead to termination of employment or engagement or contract with RMG.”

75. As referred to by Mr Saville there was also a national conduct agreement which said, “delay to mail can be treated as unintentional, unexcused or intentional”.

76. Regarding “unintentional” it said:

“RMG recognises that genuine mistakes and misunderstandings do occur and it is not our intention such cases should be dealt with under the Conduct policy beyond informal discussions for the isolated instance.”

77. Under “unexcused delay” it said:

“Various actions can cause mail to be delayed for example carelessness or negligence leading to loss or delay of customers mail.... Such instances are to be distinguished from intentional delay although they may be treated as a misconduct and dealt with under the Conduct policy, outcomes may range from an informal discussion to dismissal.”

78. Mr Saville has also emphasised the above the difference between intentional and unintentional delay to the mail and that there was no suggestion the delay was intentional.

The Law

Unfair Dismissal

79. Section 98 of the Employment Rights Act 1996 sets out the relevant law on unfair dismissal. It is for the employer to show the reason for dismissal, or the principal reason, and that the reason was a potentially fair reason falling within section 98(2). Conduct is a potentially fair reason for dismissal. In **Abernethy v Mott, Hay & Anderson [1974]** it was said that:

“A reason for the dismissal of an employee is a set of facts known to the employer or it may be of beliefs held by him which caused him to dismiss the employee.”

80. Once the employer has shown a potentially fair reason for dismissal a Tribunal must decide whether the employer acted reasonably or unreasonably in dismissing the claimant for that reason. Section 98(4) states that:

“The determination of the question whether the dismissal is fair or unfair, having regard to the reason shown by the employer:

- (a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as sufficient reason for dismissing the employee; and
- (b) shall be determined in accordance with equity and the substantial merits of the case.”

81. In relation to a conduct dismissal **British Home Stores Limited v Burchell [1980] EAT** sets out the test to be applied where the reason relied on is conduct. This is:

- (1) did the employer Did the employer genuinely believe the employee was guilty of the alleged misconduct?
- (2) were there reasonable grounds on which to base that belief?
- (3) was a reasonable investigation carried out?

82. In respect of deciding whether it was reasonable to dismiss **Iceland Frozen Foods Limited v Jones [1982] EAT** states that the function of the Tribunal:

“...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.”

83. The Tribunal must not substitute its own view for the range of reasonable responses test.

84. In respect of procedure, the procedure must also be fair and the ACAS Code of Practice in relation to dismissals is the starting point as well as the respondent's own procedure. In **Sainsbury's PLC v Hitt [2003]** the court established that:

“The band of reasonable responses test also applies equally to whether the employer's standard of investigation into the suspected misconduct was reasonable.”

85. In addition, the decision as to whether the dismissal was fair or unfair must include the appeal (**Taylor v OCS Group Limited [2006]** Court of Appeal). Either the appeal can remedy earlier defects or conversely a poor appeal can render an otherwise fair dismissal unfair.

Claimants' Submissions

86. The claimants submitted that:

- (1) There was evidence of suspicious activity in the circumstances which led to the claimants' dismissal. First of all, the individual who had said he had searched the top boxes for dog pegs later said that in fact he had been told to search for mail by LW, suggesting that LW knew there was mail there. Further, LW himself had said in one of the factfinding interviews that he had checked all the frames and they were all clear. Either he was lying or somebody had placed the mail there after he had done a check. LW had been found to be hoarding mail and burning it at home. Accordingly this should have alerted the respondent to the possibility that there was something suspicious about the situation.
- (2) The questions asked by in the interviews conducted by Ms Mullin were the wrong questions and the claimants did not believe that when people

said they would ring in that they were talking about the same situation, because the question they were asked was ambiguous.

- (3) The penalty was far too severe. Firstly, GN had settled on that penalty because she said she did not believe they would not do it again: she had absolutely no evidence to suggest this. Mr Adamson had had counselling and improved. Mr Cooper had never had any conduct issues raised against him. Further, they had not had training and were not aware of the local arrangements.
- (4) Their mitigation was not taken into account. Mr Cooper was having difficulties. Both of them felt there were individuals who resented them at work, and further that they were going to report it if the mail did not arrive on the van from Manchester, which was due at 8.45am.
- (5) It was clearly outside the range of reasonable responses to dismiss in all these circumstances.

Respondent's Submissions

87. The respondent submitted that:

- (1) The respondent's policies clearly showed that it could be a dismissal offence even if the delay in the mail was unintentional.
- (2) That even if the matter was a set-up in terms of the mail going missing it was the claimants' responsibility that they failed to ring in and report this, and that is what they were dismissed for. The respondent by the time of the appeal had spoken to numerous witnesses who all confirmed they would have rung in if they had missing mail. Jan Mullin interviewed Darren Banks and looked into the LW issue.
- (3) Dismissal was within the band of reasonable responses. Whilst it might not be for another employer it was very important, in view of the nature of the respondent's business, that mail was delivered on time. It was what the customer had paid for. The mail was delayed and worse could have happened due to them not reporting it was missing.
- (4) Although nothing was raised at the time to say there was anything procedurally unfair, Mr Adamson now said he was not told that he had been suspended or why he was suspended, nor that he had received the letter setting out the reasons.

Conclusions

BHS v Burchell test

88. I find firstly that the respondent meets the **BHS v Burchell** test because there was no dispute that the claimants failed to contact the office to report that they had mail missing, and that sufficient investigation was undertaken into the factual matrix of how this occurred. As was repeated on a number of occasions, whether LW and anybody else was up to "no good" did not make any difference to the fact that the claimants did not ring in to report the matter. Whether that was a requirement is

more relevant to the issue of whether dismissal was within the range of reasonable responses.

89. In respect of whether dismissal was within the range of reasonable responses, however, I find that it was not for the following reasons:

- (1) The respondent accepts that no training on this issue was ever undertaken.
- (2) That the local arrangements which suggested employees should ring in if mail was missing were never brought to anyone's attention.
- (3) That although Jan Mullin's interviews suggest that everybody knew to ring in, I do not accept this was actually the case. The question she asked was somewhat ambiguous and I heard evidence from Graham Sutcliffe that it was not the case that people would automatically ring in and there was evidence within Jan Mullin's interviews that in fact people who had experienced this had often gone back to the office to look for the mail; generally they had found it and then delivered it, or the PHG on duty had rung them and told them that the mail had been found. Neither of those two scenarios match what happened here, so I do not accept there was a hard and fast rule that people knew they had to ring in when this occurred.
- (4) Further, the behaviour of LW does have some bearing on the situation. Although it related to the mail being hidden it did affect the fact that the claimants could not find the mail as it seems likely the mail had been deliberately hidden, possibly not where it was eventually found, and then placed where it was eventually found later. The respondent did not go into this scenario at all but if one accepts that it was reasonable for the claimants to search for the mail before reporting it then if LW had undertaken these actions that would have been relevant. Further LW had clearly fabricated the fact finding interview with AB. This would have been a reason for considering there was an element of set up which would have been a reason for not dismissing the claimants but choosing a lesser sanction.
- (5) There was some evidence, although it was not overwhelming, that on occasions mail would be taken back to Manchester and therefore there was some reasoning involved in waiting for the van to come back until 8.45am to see whether it was on there.

90. I have taken into account the unique nature of the respondent's business and the fact that matters which would not be so important for somebody else are very important, and that having strict rules also avoids the need for investigations to be made into whether fraud has occurred or whether there has been deliberation.

91. However, I also take into consideration the respondent's Code of Conduct which, while it suggests that dismissal could be an outcome for unintentional delaying of the post, it is not necessarily such an outcome, and the respondent has not explained to my satisfaction why in this case they would choose the sanction of

dismissal within what is clearly potentially a band of actions in their Code of Conduct as well as obviously legally there is a band.

92. Whilst Ms Nevins has indicated in her unsworn evidence, as she did not attend, that she did not believe that the claimants would not do this again, the submissions of the claimants are persuasive namely that the evidence she based this on was flimsy and unconvincing.

93. Accordingly, whilst I am fully aware that it is not my role to substitute my own view for that of the employer, and I am fully aware of the uniqueness of the employer's situation, I find that dismissal was outside the range of reasonable responses.

94. The matter should be listed for remedy but are issues regarding contributory conduct which I have not adjudicated on in this judgment as I felt I required more in depth submissions and the parties are required to provide submissions to each other on contributory conduct prior to the remedy hearing .

Employment Judge Feeney

Date: 11 November 2019

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
14 November 2019

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