EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr A Saroye **v** **Royal Mail Group Limited**

Heard at: Watford **On**: 28 & 29 November 2019
Before: Employment Judge Bartlett (sitting alone)

Appearances
For the Claimant: Ms Kudakowski
For the Respondent: Mr McArdle

JUDGMENT

1. The claimant's claim for unfair dismissal fails and is dismissed.

2. The claimant's claim for wrongful dismissal fails and is dismissed

REASONS

The issues

1. The Issues are as follows:

   1.1 What was the reason for the claimant's dismissal – section 98(1) of the Employment Rights Act 1996?

   1.2 Was this reason potentially fair – section 98(2) of the ERA?

   1.3 Was the dismissal procedurally fair?

   1.4 Was dismissal within the range of reasonable responses open to the employer?

   1.5 The respondent contends that the reason for dismissal was conduct.

   1.6 **British Homes Stores Limited v Burchell [1978] IRLR 379** sets out a three limbed test which must be applied to misconduct dismissals:

      1.7 Did the employer believe the employee to be guilty of misconduct at the time of dismissal?

      1.8 Did the employer have in mind reasonable grounds on which to sustain that belief?

      1.9 When the employer formed that belief had it carried out a reasonable investigation in the circumstances?

1.10 Was the claimant wrongfully dismissed? E.g. was the claimant in repudiate any breach of contract entitling the respondent to summarily dismiss him without notice?

1.11 A hearing was set for 30 January 2020 to address issues relating to remedy.

Application to amend ET1

2. At the start of the hearing the claimant repeated an application to amend his ET1 to include a claim of wrongful dismissal. This application had first been made in writing on 28 August 2019 and EJ Anstis had directed that this application would be dealt with at the start of the full hearing.

3. The respondent objected to the application to amend.

4. I considered the submissions of both the claimant and the respondent and made a decision to allow the amendment for the following reasons:

   4.1 The claimant delayed in making the application to amend but it was made three months before the hearing;

   4.2 the respondent was on notice of the application and did not object in writing;

   4.3 I considered the factors set out in **Selkent Bus Co Ltd v Moore 1996 ICR 836, EAT** which included the need to identify and balance any prejudice which the parties would suffer;

   4.4 there would be clear prejudice to the claimant if amendment was not permitted because he would lose his rights to bring a wrongful dismissal claim and the associated remedies;

   4.5 the same facts relate to the unfair and wrongful dismissal claims; it is the legal test which needs to be applied by the tribunal which is different;

   4.6 because the same facts are relevant to the unfair and wrongful dismissal claims there is little prejudice to the respondent in preparation and presentation of the case.

5. The respondent requested a reconsideration of my decision on the basis that my judgement had failed to make reference to time limits.

6. I reconsidered my judgement of 28 November 2019 to permit the claimant to amend his claim to include a claim of wrongful dismissal.

7. I had made reference to the delay in the claimant making the application but I did not make specific reference to time limits.

8. The power to permit or deny amendments is an exercise of the tribunal's discretion under rule 21.

9. The EAT case of **Selkent Bus Co Ltd v Moore 1996 ICR 836, EAT** sets out the key principle that the tribunal must have regard to all the circumstances and in particular to any injustice or hardship which would result.

10. Mummery J (as he then was) set out in **Selkent Bus Co Ltd v Moore 1996 ICR 836, EAT** that a tribunal must have regard to the nature of the amendment, the applicability of time limits and the timing and manner of the application.

11. In relation to the nature of the amendment I find as follows:

    11.1 the amendment is an addition of another label to facts that have already been pleaded;

    11.2 this takes it beyond the category of mere correction of clerical errors;

    11.3 it is not an entirely new factual allegation;

    11.4 it does not change the basis of the existing claim.

12. I find that this amendment is an alteration of the basis of the existing claim and therefore it is not good law to apply time limits to these amendments.

13. Further, in relation time limits I find as follows:

    13.1 the claim is out of time;

    13.2 the ET1 was submitted on 31 January 2018;

    13.3 the application to amend was made on 28 August 2019;

    13.4 the delay between the submission of the ET1 and the application to amend was substantial;

    13.5 the claimant's position was that:

        13.5.1 it was only after submission of the schedule of loss to the respondent that he was alerted to the fact that the words wrongful dismissal were not in the ET1;

        13.5.2 he intended to make an oral application for a hearing that was scheduled for May 2019 but which was adjourned for reasons unrelated to the parties;

    13.6 there was no real explanation as to why the claimant delayed between May 2019 and August 2019 in making his application.

14. In **Conteh v First Security Guards Ltd EAT 0144/16** it was held that the tribunal had focused exclusively on time limits and failed to take into account all the circumstances in the case.

15. In my original decision I considered the balance of justice and hardship between the parties noting that there was substantial disadvantage that would be caused to the claimant as he would be denied remedies which may potentially arise from a wrongful dismissal claim. There was limited hardship to the respondent because the label arises out of the same facts.

16. Taking into account all of these factors I granted the application for amendment.

Evidence

17. At the hearing the Tribunal heard evidence from Mr Denwood (JD) and Mr Philips (SP) for the respondent and the claimant and Mr Thorpe (MT) for the claimant. Each was asked questions in cross examination. The evidence is recorded in full in the record of proceedings.

18. The respondent requested that a clip from CCTV at the respondent which had captured the incident in question was admitted in evidence. The claimant did not object and said that they had nothing to hide. I watched the CCTV footage in open court at the start of the evidence. I was given a USB flash drive which contained the footage and I viewed this in private as part of my deliberations.

Background

19. The claimant been employed by the respondent from 6 April 1998 until he was dismissed without notice on 13 October 2017.

20. The incidents giving rise to this claim can be summarised as follows:

    20.1 on 22 May 2017 the claimant reported an injury at work. This injury was to his right wrist and involved redness and swelling;

    20.2 on 23 May 2017 the claimant attended work and was given light duties;

    20.3 on 24 May 2017 the claimant commenced a period of sickness absence of 19 days due to joint pain in his right wrist. The first seven days of which was self certified absence and the remaining period was certified by his GP under fit notes;

    20.4 the appellant was ultimately dismissed for gross misconduct as the following two allegations were upheld by the respondent:

        (1) "gross misconduct for dishonesty in that you falsely reported the events of an accident in the workplace on 22 May 2017 at 07:32"

        (2) "gross misconduct for dishonesty in claiming an injury which required taking time off work through sick absence."

Undisputed facts

21. The following facts are undisputed:

    21.1 on 22 May 2017 the claimant reported an injury at work (the "Incident");

    21.2 on 23 May 2017 the claimant attended work and work light duties;

    21.3 on 24 May 2017 the claimant commenced a period of 19 days sick leave;

    21.4 on 31 May 2017 the claimant obtained a GPs fit note which stated the reason he was unfit for work was "*wrist joint pain*";

21.5 on 7 June 2017 the claimant obtained a GPs fit note which stated the reason he was unfit for work was "wrist joint pain". It set out that from 12 June 2017 the claimant was able to return to work on a phased return;

21.6 on 12 June 2017 the claimant returned work;

21.7 on 16 June 2017 the claimant attended a fact-finding meeting with his manager Mr Gibbons (VG) and his trade union representative Mark Thorpe (MT);

21.8 at the fact-finding meeting on 16 June 2017 the claimant was presented with CCTV footage of the Incident. He had not been informed that CCTV footage had been obtained in advance and neither had he been permitted to view the footage in advance;

21.9 on 3 August 2017 a fact-finding meeting took place between Devinder Bithal (DB), the claimant and MT;

21.10 on 22 September 2017 the claimant was invited to a formal conduct meeting;

21.11 on 29 September 2017 a formal conduct meeting was held;

21.12 on 13 October 2017 a decision meeting was held;

21.13 on 13 October 2017 the decision was made and communicated to the claimant that he was dismissed without notice for gross misconduct. This was confirmed in a letter of the same date;

21.14 on 13 October 2017 the claimant appealed his dismissal;

21.15 an appeal meeting was held on 17 November 2017 which was chaired by Stephen Phillips;

21.16 on 11 December 2017 the claimant was sent the appeal outcome letter which set out that his appeal was unsuccessful.

Submissions

22. Mr McArdle made oral submissions which are set out in full in the record of proceedings.

23. Ms Fudakowski supplemented her written submission with oral submissions.

Findings

24. Like most CCTV footage the images are not of the same quality of broadcast television, they are a little blurry, there is no sound but it is in colour, correctly date stamped and it is of reasonable quality.

25. The claimant's case is that:

25.1 CCTV footage should not have been released for use in his case; and

25.2 release of the CCTV footage was contrary to the Royal mail group's code of practice on the use of CCTV and disclosure of CCTV images.

26. The wording of that Code Of Practice sets out in the general section that "*CCTV systems are not be used by operational managers to monitor the general conduct or performance of staff in normal pursuance of their duties*."

27. I find that the release of the CCTV footage did not breach this general principle of the Code of Practice. This was not routine monitoring, it was released to further an investigation.

28. The Code of Practice also goes on to state "*Images captured by any CCTV system will only be analysed or used by RMG Security. The only exception to this would be where a serious accident has occurred or where a serious act of misconduct is identified and employee security or health and safety has been put at risk e.g. criminal damage, reckless driving, blocking of the fire exit. In these circumstances there will be no responsible alternatives other than to analyse/use any relevant images captured or seen.*"

29. The email chain relating to the authorisation of the release of the CCTV footage is entitled "*use of CCTV footage for H&S purposes request form"*.

30. The request from Mr Coke states *"… In order that I can fully understand whether an accident took place and to complete the investigation to what has been alleged*".

31. Mr Lang, who authorised the release of the footage, responded the next day stating "*I've authorised use of the CCTV images for purposes of the accident investigation and dealing with a claim for damages*".

32. The request form sets out that the event was "*box falling on wrist while sorting from conveyor belt*" and it goes on to state "*this incident has raised many questions. Further reconstruction must be looked at before any final conclusion can be reached. Key question: has an accident actually taken place and therefore is there an injury caused in the workplace. Unfortunately OPG has gone on sick leave two days after the incident. This office will interview the OPG ASAP. This may trigger a RIDDOR next week.*"

33. I find that the claimant reported an accident at work. His own evidence was that the belt was overloaded, that it had been for seven weeks and that there had been numerous complaints about this. The request was also made at the very start of the claimant sickness absence and it was unclear how long his absence would be at that stage. I consider that the incident could reasonably have given rise to the respondent having concerns about a safe system of work creating significant health and safety concerns which required investigation.

34. In addition I find that the concerns raised which were whether or not an accident had actually taken place in the workplace despite a complaint being made by an employee identify potentially serious act of misconduct i.e. dishonest reporting by an employee. I find that the situation falls fairly within the Code of Practice which explicitly lists a serious act of misconduct as a reason why the footage would be released. It is obvious that dishonesty concerning a workplace injury could potentially be serious misconduct.

35. Therefore I find that the respondent did not breach its Code of Practice in relation to the CCTV footage.

36. Issues were also raised about employee knowledge of the use of CCTV footage. JD said that the cameras were visible and there were signs on the entrances to the building. Mr Thorpe and the claimant denied this. The claimant denied that he knew where the cameras were. Mr Denwood stated that it was commonly known amongst employees that they were recorded. I recognise that there are complex issues about the use of CCTV footage in the workplace and society in general. However I do not consider that the use of it in the respondent's premises in which the claimant works is not well known. I preferred JD's evidence that there were signs and that at least some cameras were visible. I see no reason why the respondent would have made cameras covert rather than visible. I consider that any attempt to use covert cameras would have been a significant issue for the relevant union. Further, I find that these issues have little relevance to the issues I must decide.

37. As can be seen from the undisputed facts the respondent carried out an investigation process. I find that the first step in this process was the fact-finding meeting on 16 June 2017 which was held by VG and which the claimant and MT attended. It is accepted by both parties that this meeting was flawed because the claimant had not had the opportunity to view the CCTV footage in advance and neither had he been told that CCTV footage had been obtained and would be viewed at the meeting.

38. However a second fact-finding meeting was held by a different chair and VG no longer carried out the fact-finding. By the time of this fact-finding meeting the claimant and MT not only had warning of the CCTV footage but they had also viewed it in advance. I find that the respondent's decision to hold a second fact-finding meeting and appoint a new investigating manager overcame any unfairness which resulted from the initial fact-finding meeting. This is because at the second fact-finding meeting the claimant had the opportunity to make any comments he wished on the CCTV footage.

39. The second investigating manager, DB, carried out the following steps:

    39.1 He held a fact-finding meeting which the claimant and MT attended and at which the CCTV footage was reviewed;

    39.2 he held a meeting with VG and notes were made of it. He specifically asked VG what he meant by the statement in the RCA "*we must be able to prove this did not take plac*e" to which VG responded "*it is difficult to understand how this was an accident from the evidence, the reconstruction of the incident and injury sustained at the time*."

    39.3 It is evident from DB's reference of the RCA and ERICA reports relating to the Incident in his meeting with VG that he had read the reports.

40. The conclusion of DB was "*this case has now been referred to John Denwood for consideration of any further action. I considered the potential penalty to be outside my level of authority*."

41. JD was the investigator who held the formal conduct meeting I find that his investigation included the following:

    41.1 a meeting was held with the claimant and MT;

41.2 the claimant submitted a mitigation document and statement which was considered;

41.3 viewing the CCTV footage and compiling a timeline which was given to the claimant;

41.4 reviewing the injury bulletin dated 22 May 2017;

41.5 reviewing the safety root cause analysis (RCA);

41.6 reviewing the ERICA form;

41.7 reviewing the claimant's fit notes.

42. In coming to these conclusions I have relied on JD's witness statement which refers to his deliberations. There was no dispute on these issues. The dispute concerns whether he could reasonably rely on all of them and whether or not his decision and interpretation was reasonable.

43. JD also gave evidence that he carried out a reconstruction of the incident. This was disputed however I found JD's evidence persuasive on this. He stated he did it "*for my own peace of mind*". The result was that JD believed that the incident could not have produced the result the claimant claimed it had. I accept that JD held this genuine belief. He was consistent in his evidence, was clear on what matters he could give evidence and provided detailed and informed answers.

44. In evidence JD stated that he formed his view from the whole series of events from how it occurred, the contact that the claimant made with the box and his behaviour afterwards. He gave detailed evidence about what he had learned from the CCTV such as that the packets were light, the appellant did not react significantly after contact was made with his right wrist, that he got out and use his mobile telephone almost immediately after the incident and that he continued to work on the shift easily throwing packages around and gesticulating with his right arm.

45. JD's evidence was also that he believed 100% that the claimant had not hurt his wrist as claimed.

46. JD accepted that he had interviewed the first aider who attended the claimant after the meeting was held with the claimant. This meant that the claimant did not have an opportunity to review that evidence or make comments on it.

47. SP carried out the appeal meeting. At this stage JD's notes of the interview with the first aider were disclosed to the claimant. I find that SP carried out the following dismissal process:

47.1 He considered the points of appeal raised by the claimant;
47.2 he held a meeting with the claimant;
47.3 he reviewed the CCTV footage after the meeting;
47.4 he considered the 119 pages of evidence put together for the appeal;
47.5 he took time to make his decision and did so after the meeting in writing.

48. SP's evidence was that he accepted that the claimant had an injury, it had happened quite recently at the time of the incident but he did not accept that the injury occurred in the way the claimant described. He did not know how the claimant got the wrist injury and it was not for him to investigate how the claimant might have incurred that injury. It was for him to investigate if he had received it by a parcel falling on his wrist or striking it.

Decision and Conclusion

Did the respondent believe the claimant was guilty of misconduct at the time of dismissal?

49. The claimant argued that the real reason for dismissal was the respondent's desire to reduce long-term absences (LTA's). By linking the claimant's absence to misconduct and subsequently dismissal it meant that the respondent did not have to report or record his absence as an LTA. Reference was made to a document which set out that HWDC did not have any LTA's in 2017 which indicated that the claimant's absence was not recorded. MT gave evidence that there were rumours that managers bonuses were linked to the reduction of LTA's. As this was nothing more than rumour I have given it no weight.

50. JD's evidence was that the claimant was not in HWDC so his absence was not recorded against it instead he was under ICR and that was where his absence was recorded. MT did not agree with JD however I consider that JD had particular knowledge of this as he worked in HWDC and he gave a credible explanation.

51. The claimant argued that the respondent approached the decision with a closed mind and that this was evident from Mr Gibbons initial recording of the incident and how he had completed the various forms such as the RCA and ERICA. I accept that the RCA and ERICA which was submitted reasonably shortly after the incident happened set out concerns from VG as to whether the incident had happened as the claimant alleged and that his statements went beyond this and even said "*we must be able to prove this did not take place.*" If Mr Gibbons had been the deciding manager I would have had real concerns about the respondent's belief. However after the initial fact find the investigations, decision to dismissal and appeal were taken by different individuals. I do not accept that they did not approach their decision with an open mind. I accept JD's evidence about all of the different sources of information he considered. I find that SP read the hundred and 19 pages, considered the claimant's appeal points and reviewed the CCTV.

52. I find that the respondent did believe the claimant was guilty of misconduct at the time of dismissal. I do not accept that JD was part of a wider management plan to eliminate or reduce LTA's by any means necessary which included dismissing employees for misconduct when they had taken sick leave. I also do not accept that JD and SP had their minds closed and therefore could not have formed a genuine belief. I accepted SP's evidence that he only chose to view the CCTV evidence after the meeting with the claimant because it was only at that point he decided that he needed to do so. I consider that this shows that he had an open mind and considered all of the issues. I accepted

JD's evidence about the thought process that he had gone through and I find that it shows that he considered the issues fully.

Did the respondent have in mind reasonable grounds to sustain its belief that the claimant had committed gross misconduct?

53. I accept the respondent's evidence that the grounds they had in mind to sustain its belief that the claimant had committed gross misconduct were as follows:

    53.1 A fact-finding investigation had taken place;

    53.2 JD completed his own investigation and relied on the evidence set out in his witness statement;

    53.3 JD's conclusions were that having reviewed the CCTV footage the Incident could not have caused the injury the claimant claimed. I accept his evidence that he reviewed the CCTV footage and in particular:

        53.3.1 watched the contact that was made with the claimant's right upper limb - there was no box falling on his right wrist. The packages were a maximum of 5kg's each;

        53.3.2 the claimant's behaviour immediately afterwards which included being able to take his mobile telephone out of his pocket with his right hand and manipulate the phone and continue working normally after the event which included picking up packages and parcels and throwing them with his right hand. He also used his right hand for other things such as gesturing to colleagues;

        53.3.3 the conveyor belt was not moving quickly;

        53.3.4 the images did not show momentum or a significant collision with the claimant's right wrist;

        53.3.5 no sharp or heavy objects were involved.

    53.4 JD also concluded that there were numerous inconsistencies between the claimant's accounts of what had happened. Initially he had claimed a box had fallen on his right wrist but it was not until he saw the CCTV footage that he realised that was not the case and it had been brushed. He was not able to know this beforehand because he was looking at a colleague and not at his wrist.

54. The claimant made criticisms that JD had not taken into account evidence it should have done such as obtaining evidence from the claimant's colleague, and the first aider and that VG's evidence should have been disregarded because he was biased.

55. These are to some extent criticisms that the investigation was not reasonable and of how JD weighed the evidence. The test that I must apply is not whether every decision-maker would have acted as JD or SP did but whether a reasonable decision-maker would have had reasonable grounds to sustain a belief in the claimant's misconduct. I find that a reasonable employer would sustain its belief that the claimant had committed gross misconduct on the evidence that was available to JD and SP.

56. I record that I accept that CCTV is not as clear cut as some people would like to believe. It is a recording of one camera at one angle and it does not necessarily give a full and complete picture. However this does not mean that the respondent was required to disregard it in this case. I accept that JD acted reasonably in placing significant weight on the CCTV footage. Whilst it is hard to discern the incident itself because the moment of contact between the claimant and the parcel is very brief, this is itself of relevance, it also shows the working environment, the speed of the conveyor belt, the size of the packages, the location of the packages and the claimant, the claimant's actions before and after and how the claimant and other employees handled the packages. I consider that it was reasonable for JD and SP to take this into account.

57. JD's evidence was that he had also taken into account discrepancies between several of the claimant's accounts and the CCTV footage. In particular:

    57.1 the claimant's statement of 22 May had three discrepancies when compared with the CCTV footage;

    57.2 discrepancies were also identified in the injury bulletin, RCA and ERICA forms;

    57.3 discrepancies between the 3 August 2017 interview with the claimant and the CCTV.

58. I accept the claimant's submission that the injury bulletin, RCA and Erica forms were not completed by the claimant and therefore discrepancies in it should not be attributed to the claimant. However I consider that this was only one small part of JD's reasoning and it was clear from his evidence that his overriding belief was that the CCTV evidence was incompatible with the claimant's accounts (given in his own witness statement and various meetings) and, most importantly, that the CCTV evidence showed events that were not compatible with the claimant's claim to have incurred the injury that he had which resulted in his 19 days of absence.

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59. I find that the respondent had and could reasonably hold a belief that the claimant had not incurred the injury as claimed. I find that a reasonable employer could reasonably conclude that the claimant had committed gross misconduct by falsely reporting the incident and an injury/accident at work which required time off through sickness absence.

60. I have find that a reasonable employer could reasonably find that the claimant had acted dishonestly in both reporting the incident and in claiming an injury which required taking time off work through sickness absence.

61. I find that the respondent's decision to dismiss the employee for gross misconduct was in the band of reasonable responses. The test of the band of reasonable responses means that the tribunal must not apply a test of what decision the tribunal would have made instead it must consider what a reasonable employer acting reasonably would have done. This legal test gives the respondent a margin in which it can make decisions. The test is not whether another employer would have acted differently and it is not whether I would have made a different decision. The tribunal must not substitute its judgement for that of the employer. The test is whether or not the

respondent's actions fall within the band of reasonable responses of a reasonable employer. This test applies to both the decision to dismiss and the procedure by which the decision was reached.

62. I must consider whether a reasonable employer would have summarily dismissed an employee for gross misconduct who had dishonestly reported the incident and dishonestly claimed an injury which required time off work through sickness absence. I conclude that a reasonable employer would have summarily dismissed the employee. These are serious offences of dishonesty and summary dismissal was a reasonable outcome.

63. The claimant referred to his long and unblemished service. Even taking these into account I find that summary dismissal for gross misconduct falls within the band of reasonable responses.

When the employer formed that belief had it carried out a reasonable investigation in the circumstances?

64. An employer must have carried out a reasonable investigation in all the circumstances before forming its belief in misconduct. After an investigation or disciplinary process has concluded it is almost always possible to identify how it could have been more fulsome or improved in some way. That is not the correct test. The relevant question is whether the investigation fell within the range of reasonable responses that a reasonable employer might have adopted.

65. I accept there were the following flaws in the investigation:

    65.1 VG did not inform the claimant or MT in advance of the fact-finding meeting on 16 June 2017 that CCTV footage would be viewed; and

    65.2 JD interviewed the first aider after the investigation meeting with the claimant and did not provide the claimant with notes of this meeting or an opportunity to comment on them before he made his decision.

66. However I do not consider that these flaws undermine the reasonable nature of the investigation for the following reasons:

    66.1 in respect of VG and the CCTV footage, I find that the flaw was remedied by a new fact-finding investigation taking place under a new investigation manager. Further, the claimant was permitted to view the CCTV footage as was MT. He was able to make comments on it in the investigation meeting with JD and in his appeal meeting with SP;

    66.2 in respect of JD's failure to give the claimant the opportunity to comment on the interview with the first aider, I find that this was cured by the appeal.

67. I find that the investigation was reasonable in all the circumstances for the following reasons:

    67.1 JD and SP did not consider irrelevant evidence;

    67.2 JD and SP considered relevant evidence which included the claimant's statement on the day of the incident, CCTV footage, evidence of the first aider and, in JD's case, a reconstruction;

67.3 they considered the appropriate weight to put on the evidence.

68. The claimant criticised the respondent for not obtaining medical evidence such as not referring the claimant to ocupational health or not seeking the claimant's detailed GP's notes. In respect of the latter the claimant did not seek to provide these as evidence for the hearing and it is therefore hard to consider that they would have been of use. However the main point is that the respondent does not have to be a medical professional when acting as a reasonable employer. The respondent accepted that the claimant had an injury; its position is that it could not have been caused by the alleged accident. I consider that it was reasonable of the respondent to come to that conclusion on the investigation that it carried out. I find that the failure to obtain medical evidence was not unreasonable and it did not fall outside the range of reasonable actions of a reasonable employer.

69. The criticisms made by the claimant were that the analysis of the CCTV was inaccurate, evidence of the claimant's colleague and the first aider had been disregarded, VG was biased against the claimant but his evidence was still relied on by the decision-makers and the second investigator carried out a very limited investigation. Many of the criticisms relate to VG's initial investigation. However the respondent's investigation went substantially beyond that conducted by VG and VG was replaced as an investigating manager after the 16 June 2017 fact find meeting. I find that the evidence that a reasonably thorough investigation was carried out and that it was reasonable in all the circumstances.

70. In conclusion I have found that the respondent has satisfied all three limbs of the Burchell test.

Was the dismissal within the range of reasonable responses open to the employer?

71. I find that dismissal was within the range of reasonable responses open to an employer. The claimant had an unblemished disciplinary record however I consider that the dishonest conduct which the respondent reasonably believed the claimant had committed can reasonably be considered to amount to gross misconduct resulting in summary dismissal. I find that it is sufficiently serious in nature to amount to gross misconduct.

72. I note that alternatives were available to the respondent however I consider that the dishonest nature of the misconduct means it was reasonable to treat that misconduct as a sufficient reason for summary dismissal.

Procedural fairness

73. I consider that the dismissal was procedurally fair. There was an investigation, a meeting at which the claimant gave evidence and it was open to him to submit evidence in support of his case before that and he was given a written outcome. The claimant was given a right of appeal which he exercised.

74. I consider that any defect in JD's process by seeking a statement from the first aider but not making this available for review and comment by the claimant was cured by the appeal.

75. As I have set out above I do not consider that the release and use of the CCTV footage was in breach of the respondent's code. I do not accept that the CCTV recording was covert. In all the circumstances I consider that it was fair to use the CCTV footage and therefore this did not affect the procedural fairness of the dismissal.

Wrongful dismissal

76. I have set out above that the test in relation to unfair dismissal concerns how a reasonable employer would act. The test in relation to wrongful dismissal is different and it is has, on the balance of probabilities, the claimant committed such a breach of contract, here of the duty of trust and confidence, that it entitles the respondent to dismiss him without notice.

77. I am satisfied that on the balance of probabilities the claimant gave a dishonest report of the Incident and he dishonestly claimed an injury which required taking time off work through sickness absence. My reasons for this are as follows:

    77.1 the claimant's account on the day of the incident was inaccurate. This has been established by the CCTV footage and it is not disputed. The claimant's reasons for the discrepancies are that he was looking in another direction and therefore did not see what happened. It is correct that the CCTV footage shows that he was not looking in the specific direction of his hand and the boxes on the belt at the time of contact however he is not looking in completely the opposite direction and it is difficult to see how in his peripheral vision he would not have noticed whether or not the boxes fell;

    77.2 the CCTV footage shows that the claimant continued moving his right hand freely after the incident using it tens of times to lift up letters and packages and to throw them, use his mobile phone and gestured to his colleagues. This is inconsistent with the claim of an injury resulting in such a substantial period of absence;

    77.3 the CCTV footage establishes that the conveyor belt was not moving quickly;

    77.4 it is agreed that the packages weighed no more than 5kgs each;

    77.5 I accept that the claimant's claim is that contact was made by the bottom of three boxes and this meant a greater combined weight however the maximum combined weight could only have been 15 kgs;

    77.6 the CCTV establishes that nothing fell on the claimant and therefore there was less force and momentum arising from contact by passing rather than falling;

    77.7 the CCTV shows a minor, slow motion event which is incompatible with the injury claimed;

    77.8 the claimant's evidence was that on the day after the incident on 23 May 2017 his wrist was red and swollen. This indicates that redness and swelling from an injury can last for hours if not days. I find that this is consistent with general knowledge that the length of redness and swelling of an injury can vary wildly from a few minutes to days. Therefore I find

the undisputed fact that the first aider recorded almost immediately after the incident that the claimant's right with was red and swollen does not conclusively establish that that injury was incurred at the time and in the manner in which the claimant sets out that it did;

77.9 I find that sick notes from the appellant's GP do nothing more than record what the claimant said and how he presented. They are of little assistance in establishing that he incurred the injury at work as claimed;

77.10 I find that the CCTV footage ultimately shows that the injury claimed by the claimant (which resulted in 19 days sickness absence) is incompatible with the footage of it and surrounding circumstances.

78. I accept that there is a possibility that the claimant's account is truthful but on the balance of probabilities I find that it was not. I find that on the balance of probabilities the claimant could not have genuinely believed that the contact his wrist made with the parcel was the cause of the injury he had. Therefore by reporting that it was he was dishonest. He was also dishonest in claiming that he had incurred an injury at work on 22 May 2017 which resulted in him taking sickness absence from work. I find that his conduct was clearly dishonest by reference to the standards of ordinary decent people. **Ivey v Genting Casinos UK Ltd (t/a Crockfords Club) [2018] AC 391**.

79. Having found the claimant acted dishonestly as set out above I find that this did undermine the duty of trust and confidence between the claimant and the respondent and it did entitle the respondent to summarily dismiss him without notice.

80. I conclude that the respondent has established that the claimant was dismissed for misconduct and that this is a fair reason within the meaning of section 98(2) of the ERA. I find that the respondent acted reasonably in treating the misconduct as a sufficient reason for dismissal and I find that the dismissal was procedurally fair.

81. For all of these reasons, I find that the claimant was fairly dismissed.

82. I find that the claimant was not wrongfully dismissed.

83. Therefore I am not required to consider any reductions in respect of **Polkey** or contributory fault.

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Employment Judge Bartlett

Date: 2 December 2019…….

Sent to the parties on: .....

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For the Tribunal Office