EMPLOYMENT TRIBUNALS

Claimant: Mr A Briggs

Respondent: Royal Mail Group Ltd

Heard at: Manchester **On:** 3 and 4 August 2020

Before: Employment Judge Holmes

REPRESENTATION:

Claimant: In person
Respondent: Mrs Cairney, Solicitor

RESERVED JUDGMENT

It is the judgment of the Tribunal that:

1. The claimant was unfairly dismissed.

2. The Tribunal considers the claimant is not entitled to any compensatory award as, had a fair procedure been followed, his dismissal would still have occurred on the date that it did, and consequently the Tribunal makes a 100% reduction on the basis of ***"Polkey"***.

3. The claimant is entitled to a basic award. The Tribunal makes no reduction to reflect the claimant's conduct before the dismissal, pursuant to s.122(2) of the Employment Rights Act 1996.

4. The Tribunal proposes to make a basic award of **£1320.00**. The parties are invited to agree remedy in the light of the Tribunal's calculations , in default of which they are to notify the Tribunal by **11 September 2020** as to whether any remedy hearing is required, or whether they require the Tribunal to determine any disputed amount of the basic award on written representations.

REASONS

1. The Tribunal convened to hear the claimant's complaint of unfair dismissal. The claimant's claim arises out of his dismissal from his post as a postman (OPG) which he held with the respondent based at the Radcliffe Delivery Office from 24 April 2015 until the date of his summary dismissal on 2 October 2018. Whilst the

claimant had ticked the boxes in the ET1 for holiday pay , arrears of pay and other payments, these were not pursued.

2. The respondent admits that the claimant was dismissed, but contends that it was for the potentially fair reason of conduct, and that it was fair in all the circumstances. Alternatively, the respondent pleads that if the claimant was unfairly dismissed, any compensation payable to him should be reduced on the basis of ***Polkey v A E Dayton Services Limited [1987] IRLR 503***, by up to 100%, and/or that any compensatory award should be reduced for contribution.

3. The respondent called Peter Kelly , the dismissing officer, and Simon Walker, the appeals officer. The claimant gave evidence himself. There was an agreed main bundle (references to page numbers are to that bundle), and a supplementary bundle (reference to the pages of which will be in the format "SB1" etc.). The parties made oral submissions at the close of the evidence. As there was insufficient time to consider the judgment and to deliver it the same day, the Tribunal reserved its judgment which is now given.

4. Having considered the evidence, and the documents presented to the Tribunal, and heard the submissions of the parties, the Tribunal now finds the following relevant facts:

4.1 The claimant was employed as an Operational Postal Grade (OPG) based that the Radcliffe Delivery office. His employment commenced on 24 April 2014. His contract of employment is at SB1 to 14.

4.2 On 3 March 2015 the claimant signed a personal declaration (page 62 of the bundle) in which the claimant stated that he had read and fully understood the document, which included the following:

"SAFETY OF POSTAL PACKETS

It is a criminal offence to steal, deliberately destroy or damage a letter, parcel, mailbag or any other postal packet in course of transmission by post. It is also an offence to open or delay (contrary to your duty) a letter, parcel, mailbag, or any other postal packet in course of transmission by post. Persons suspected of criminal offences will be subject to investigation which may lead to prosecution in the criminal courts. Serious penalties , including terms of imprisonment, are provided for such offences. Other misconduct which endangers the safety of a mailbag or postal packet may lead to termination of employment or engagement or contract with Royal Mail Group."

4.3 The claimant's employment was subject to collective agreements, including the National Conduct Procedure Agreement (pages 46 to 58 of the bundle). Amongst its provisions there appears the following (age 53 of the bundle):

"Gross misconduct

Some types of behaviour are so serious and so unacceptable , if proved, as to warrant dismissal without notice (summary dismissal) 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:

- *(four examples which are N/a)*
- *Intentional delay of mail."*

4.4 At pages 10 to 11 of this document (pages 55 to 56 of the bundle) there appears the following, which requires rehearsal in full:

*"**Safeguarding customers' mail***

Delay to customers' mail

Our customers trust us to collect process and deliver their mail securely.

The responsibility for avoiding delay to the mail and giving it prompt and correct treatment is one of the most important duties of all Royal Mail Group employees.

Training

It is essential that all Royal Mail Group employees receive the correct training and support to enable them to provide an excellent service to our customers and complete their work entirely in accordance with the requirements of the job.

Managers are responsible for ensuring appropriate training is delivered to all employees.

Employees who feel they need coaching or training may discuss this with their manager or workplace coach.

Delay to mail

Delay to mail can be treated as:

- *Unintentional delay*
- *Unexcused delay*
- *Intentional delay*

Unintentional delay

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 instance.

Unexcused delay

Various actions can cause mail to be delayed , for example, carelessness or negligence leading to loss or delay of customers' mail, breach or disregard of a standard or guideline. Such instances are to be distinguished from intentional delay

(see below) , although they may also be treated as misconduct and dealt with under the Conduct Policy , outcomes may range from an informal discussion to dismissal.

Intentional delay

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

Where proven, such breaches of conduct can lead to dismissal, even for a first offence; indeed intentional delay is a criminal offence and can result in prosecution."

4.5 Whilst the claimant was primarily engaged in postal delivery, on occasion, some 50 times or so over the 18 months preceding his dismissal, he undertook collection duties, as this would enable him to have a Saturday off. He was so engaged in such duties for the two weeks of 6 and 13 August 2018.

4.6 On 16 August 2018 Lee Humphreys the Delivery Office Manager at Radcliffe received a report of a customer complaint that a pillar box on Stand Lane, Radcliffe, no. 294, had not been emptied for two days, and was overflowing with mail. He therefore attended at the box, and emptied it. He found that some items near the bottom were dated 13 August 2018, and there were some 162 items in the box.

4.7 Each pillar box has a number, and , inside the door, a barcode. This barcode is read by a handheld device issued to OPGs, known as a PDA. An OPG emptying a pillar box scans the barcode. This records that he or she has accessed the pillar box and has (or ought to have) emptied it. The information recorded by the PDA device is transmitted to other systems (Pegasus, Pre - Com), from which it is possible to ascertain where the PDA device was when the barcode was scanned.

4.8 Lee Humphreys attempted to retrieve this information , but could not do so. He therefore went to the Prestwich office, where Chris Mellor , another Delivery Office Manager, could access it. Lee Humphreys noted that the information recorded on the systems showed that the barcode scans on Monday 13, Tuesday 14 and Wednesday 15 August 2018 had taken place away from the pillar box in question.

4.9 Lee Humphreys asked to see the claimant later that day. He asked him if he had emptied box 294 on Monday, Tuesday and Wednesday that week. He recorded, though the claimant disputes this, that the claimant told him that he had, in fact stating that he definitely had emptied the box. Lee Humphreys then told him that he had received a customer complaint, and how he had then gone to the box that morning and found it overflowing . He pointed out that he had found items from 13 August in the box, whereupon the claimant told him that he had only been able to partially empty the box on 13 August, because his sack was already half full, so he had only half emptied the box. He was asked why he had not simply put the extra mail into his van (by "handballing" it) , to which he allegedly replied that he was rushing. He was asked to confirm that the barcode scans were done at the pillar box, which he did.

4.10 Lee Humphreys sent the claimant home. He carried out more enquiries, including contacting two customers whose details he had obtained from mail he had

retrieved from the box. Having spoken to one in person, and another by telephone that afternoon (16 August), he prepared letters for them setting out what they had told him, and asking them to sign and return them if they were correct.

4.11 At some point photographs of the retrieved mail, or parts of it, were taken, They have not been retained, and were not available for the internal appeal.

4.12 On 17 August 2018 Lee Humphreys held a further meeting with the claimant in his office. The claimant was accompanied by his CWU representative Vic Shaw. On this occasion the claimant said that he had only partially emptied the box on Tuesday, and had not emptied it at all on Wednesday. It was put to him that he had not mentioned this in the initial discussion, but the claimant said that he had. He confirmed that he had not emptied it all on Wednesday.

4.13 He was then asked why the box was showing as scanned if it had not been emptied. The claimant then told Lee Humphreys that he had a barcode on his phone, which he had been scanning. He allegedly told Lee Humphreys that he did this because he was rushing and wanted to save time. He went on to say that he was really sorry. He had never made any mistakes, and was risking losing everything because of this.

4.14 Lee Humphreys then suspended him, and gave him a letter, dated 17 August 2018, in which his suspension was confirmed. This letter (page 65 of the bundle) enclosed a "report" giving details of his decision. This was probably the document that Lee Humphreys had prepared , at pages 63 to 64 of the bundle. This is a combination of the actions that Lee Humphreys took, the enquiries that he made, and his record of the two meetings he had with the claimant, the first on 16 August 2018, when the claimant was alone, and the second on 17 August 2018, when he was accompanied by his representative , Vic Shaw.

4.15 The claimant did not agree with the record of the meetings, and so wrote on the reverse of this document when he received it, with his corrections to the notes of the meetings. He sent it back to Lee Humphreys, or to the respondent, if not to him personally. In it he sought to correct the impression that that he had initially claimed to have emptied the box on all three days, whereas he maintained before the Tribunal that he had always admitted only partially emptying it on Tuesday 14 August, and to not emptying it all on Wednesday 15 August.

4.16 The claimant's handwritten notes have not been found. He did not himself keep a copy of them, and they were not before the conduct or the appeal hearings.

4.17 The two customers to whom Lee Humphreys wrote returned their letters , signed and dated on 18 August 2018 in the case of one customer, and 19 August 2018, in the case of the other. The former stated that she had posted a 2nd class letter to her daughter in the pillar box at Stand Lane on Sunday 12 August 2018, and was then shown it by the delivery office manager on 16 August 2018. The latter confirmed that he had posted letter to an address in Stoke – on – Trent just before 5.00 p.m. on Monday 13 August 2018, and he was told by the delivery office manager that his letter had only been cleared from the box on the morning of 16 August 2018. These letters are at pages 68 and 69 of the bundle.

4.18 Lee Humphreys then held a fact finding interview with the claimant on 22 August 2018. It is unclear from the bundle how that meeting was convened , for no invitation letter appears in the bundle, so it is similarly unclear precisely what, apart from Lee Humphreys "report" document , the claimant had been provided with prior to this meeting.

4.19 The claimant attended, again accompanied by Vic Shaw as his union representative. Lee Humphreys' notes of this meeting are at pages 70 to 76 of the bundle. Again , the claimant does not agree that these are accurate.

4.20 Lee Humphreys took the claimant through a series of questions. From the claimant's answers it was established that he had been employed for over three years, and had been doing collections for about 18 months. He had done the afternoon collection on about 50 occasions. He was asked to talk through the process which he did. His union representative asked if he understood the importance of scanning barcodes, and he replied that he had never been shown the importance of scanning a barcode. He was just to make sure that his PDA was clear of jobs, as previous managers had said they did not want pressure from the collections team over a missed collection. He made reference to a previous manager, Martin Robotham, and how he had told him about how he had photos of all the barcodes in the boxes in case he needed to scan them. He also made reference to another manager, Sean, who had been there when Lee Humphreys was on leave, and how on a day when his (i.e the claimant's) PDA had failed, he got the claimant in the office to discuss failed collections, and had said that in case anything like that happened again , he should take a picture of the route header so that could be downloaded onto the PDA. To be clear the route header is not the same thing as the unique barcode inside each pillar box.

4.21 There was a discussion about Monday 13 August 20198 when the claimant had experienced problems with the PDA he was using (these are not personal to OPGs, but are picked up each day for use on their rounds) in terms of the time it was displaying, and he had contacted Lee Humphreys about this.

4.22 When he was asked about any issues that had occurred in relation to clearing the box between 13 and 16 August 2018, the claimant replied that there were no problems with the box , but he was later than he would normally have been in getting to it because of roadworks, accidents and the pressure of getting to Prestwich. If he did not get there in time he would have to run the mail to the mail centre in Manchester, as he had had to do the previous week when he had experienced a tyre blowout. He did not want to go through that again, and felt under pressure to complete the collection even if he did not want to. he also said he had a "lot of stuff going on at home" and wanted to finish (page 72 of the bundle).

4.23 The claimant was asked to explain why he did not fully clear the box on 14 and 15 August as he had told Lee Humphreys. The claimant repeated his explanation for the first instance as being that his sack was nearly full, so he could not completely empty the box. He therefore opened the box, scanned the barcode, and took a handful of mail out to fill his sack. In response to a question from Vic Shaw about any contingency plans for when failures in collection occur, the claimant said he was not aware of any, and he believed that he was responsible for mail that he collected that was in his van, and would be liable for it if he had left the van in Radcliffe.

4.24 He went on (page 73 of the bundle) to give further explanations in relation to both the Tuesday and Wednesday collections. In relation to the former he said he had removed some of the mail from the box, and had scanned the barcode. In relation to the latter, he explained how there had been numerous road closures, and other problems which made him late in reaching his boxes. He was on his last box (the one in question) , and had thought he would miss the last van in Prestwich, traffic was a hightmare, and he made a "split second" decision. He did not stop to empty the box, and whilst in traffic, scanned his barcode on his phone. He said previous managers had stressed to him to make sure the route was clear on his PDA.

4.25 When asked why he had not made an extra effort to clear the box on the Wednesday when he knew he had not been emptied fully the previous day, he replied that he honestly believed he box got emptied during the day , and if he had realised that it was not, he would have emptied it before his collection started.

4.26 In reply to a question why he had not reported this , he replied that he did not think it was such an issue, he did not realise the box was only emptied once a day, and did not realise it was important.

4.27 He went on to confirm that he had emptied the box fully on Monday 13 August. He then went on to say that, knowing what he knew then, he was ashamed , he was an honest person and would never try to deceive anyone. He had never previously not cleared a box.

4.28 He was asked (page 74 of the bundle) for what purpose he had pictures of the box barcode on his phone. He replied that it was to scan the box because on the Monday he was under pressure, so he had taken the picture on the Monday. He had taken it for emergency use in case he was late again. He thought this was OK, due to previous managers saying it was. He thought it was more important to actually scan the box than empty it, and was trying to save the manager "an arse kicking" by failing the box. He confirmed that he had scanned the barcode in the box on Monday and Tuesday, but had scanned the picture on his phone on the Wednesday.

4.29 He was aware, he said , that the location of his PDA when used would be visible on Pre - Com, but he had missed the meeting about that. He could not think of any logical reason why the location of the collection scans for box 294 would not be at the box location. He had scanned the barcode on Wednesday near the roundabout joining Stand Lane and Ringley Road West. He was near the box, but did not open it. He was under pressure on that day, and was later than normal.

4.30 Vic Shaw then raised (page 75 of the bundle) with the claimant whether there had been other instances of mail failing in the Radcliffe Delivery Office, and he replied that he was. He went on to cite examples of full walks being returned, and half walks, mail being left in, and parcels not going for 3 days or a week. This was not to criticise Lee Humphreys, but because it had never been drilled into him or taken seriously he did not see the importance of making sure all mail was delivered.

4.31 In conclusion, he asked if he was facing dismissal on something that he did not know or was not trained on? Lee Humphreys replied that he was not sure. The claimant replied that he was sorry, but did not realise that it was such a serious issue.

4.31 Vic Shaw, in conclusion, stated that the claimant was a popular person, who would go the extra mile, and perform overtime. There had been a neglect in training in the unit, mail was frequently failing, conduct was rarely applied. The claimant had a clean record, and he would reflect on the facts. He hoped that dismissal would not be considered, and a serious reprimand would be a preferred option.

4.32 The claimant was provided with a copy of the notes of this meeting, and invited to sign, or make any amendments. The claimant did have amendments to make, and sent them to the respondent. The respondent, however, did not retain, action or otherwise deal with his amendments. His amendments, however, were retained by him and are at page 156 of the bundle. He in fact only had amendments to five replies to questions by Lee Humphreys. In relation to question 10, he had replied that he had been "begged" to complete the delivery (which the Tribunal takes to be in general, not this specific collection) so that managers did not get into trouble with the collections team, and it was stressed that he could not return with outstanding collections on his PDA. He went on to record how Lee Humphreys had in the fact finding meeting gone on to say that the claimant should have phoned him, taken the van back to Radcliffe, and posted the keys through the letter box. The claimant then questioned how it could be right to leave a van full of collected mail parked up outside on a public car park overnight. Lee Humphreys replied that it would then have been his responsibility to ensure the mail got to the sorting office.

4.33 His other amendments were to his reply to Q13 about his belief that the box would be emptied the following day. In relation to Q19, relating to his knowledge of the PDA locations being visible on the Pre-Com system , he added that he had been informed about this in passing by members of staff, rather than being told formally.

4.34 The claimant was by an (undated) letter invited to a Formal Conduct Meeting to be held by Peter Kelly , the Manchester NWMPU Delivery Office Manager, to whom the disciplinary process had been allocated (pages 78 and 79 of the bundle). He was informed of his right to be accompanied, and warned that one outcome could be dismissal without notice. The claimant was provided in this letter with details of the investigation , and copies of relevant witness statements, and other documents what would be referred to during the meeting. It is not entirely clear what these documents were, but the Tribunal considers it most likely they would comprise the report of Lee Humphreys (pages 63 and 64), the notes of the fact finding meeting on 22 August 2018 (pages 70 to 77), and the two statements from customers (pages 68 and 69).

4.35 Whilst the meeting was convened for 31 August 2018, the claimant had not received the whole of the "conduct pack" that was meant to accompany the invitation letter, and the meeting on 31 August was accordingly re-convened on 6 September 2018.

4.36 The claimant attended the meeting with Vic Shaw again as his union representative. The notes of the meeting are at pages 81 to 84 of the bundle. The meeting took the form , initially, of question and answers. Initially the claimant was asked whether he cleared the mail from box 294 on each of the days 13, 14 and 15 August 2018. He is recorded as having said that he had partly cleared the box on 13 August 2018, but this was an error, he said he had partly cleared it on 14 August, and had not cleared it on "the other dates". He went on to explain that the reason for the partial collection was that he had not taken enough bags out, and felt it insecure

to clear all the mail. He said that he had not previously had issues with collection, except for the time that he had a flat tyre, when he had contacted his manager. He went on to explain that he thought that there would be a pick up the following day, and that if he had realised it was serious he would have emptied the box.

4.37 After a discussion about the time he got to the box (which seems to relate to the Wednesday collection) the claimant explained how it had been a split second decision , as he thought he was going to be late for the dispatch , and he did not want all the mail in his van to fail.

4.38 The questions then moved onto the scan, and how the claimant could have scanned the box if he did not open it. The claimant explained how he had taken a picture of the barcode on the previous day , and had used this picture to scan the barcode. He was asked who gave him permission to have barcodes on his phone. He replied that the previous Delivery Office Manager, Martin Robotham, had done so, and had told him to use his phone if he was ever struggling to scan a box, and this had come about the previous Christmas when he (i.e Martin Robotham) had failed to scan a collection. He (the claimant) had been told by Martin to take a picture of the barcode and to use this picture to provide a scan.

4.39 When asked if anyone else had heard this conversation, the claimant replied that the same instruction had been given to Grant Ramsden, David Ball and Ian Wright.

4.40 The claimant was asked if he knew about collection failure codes, and replied that he had not been trained on collections, so did not know about them.

4.41 He went on to say that he honestly thought that the box was cleared more than once a day, and that any failed mail would be recovered the following day. If he had known it was serious, he would have cleared the box or contacted his manager.

4.42 Vic Shaw, summing up for the claimant, pointed out the claimant's clear record of over two years employment, and how he had never received a mail integrity brief, so he did not understand the importance of clearing the box and the impact it could have on the quality of the service. The claimant had been told by a manager that it was OK to scan barcodes off his phone, so he thought this was common practice. He was doing management a favour on the day to cover collections , there was severe congestion in the area due to road closures.

4.43 Peter Kelly did not make a decision at that time, but ended the meeting. He sent the claimant on 26 September 2018 the notes of the meeting, inviting him to sign or make any amendments (page 91 of the bundle) . The version sent to the claimant is at pages 92 to 95 of the bundle. It is dated 12 February 2018, and there is a manuscript correction of the text in the final paragraph on page 95, where Peter Kelly has corrected the name "Holt" to "Briggs".

4.44 The claimant did have amendments that he wanted to make, and these are at page 157 of the bundle. He sent them to the respondent, but they did not reach Peter Kelly, and the notes were never amended, other than to create the typed version at pages 81 to 84 of the bundle Aside from the incorrect February date, the main amendments that the claimant wanted to make related to the incorrect date of the partial collection, which was not 13 August, but 14 August, and to make the point

that he did not intentionally leave the mail, as he thought it was collected again the following morning. He also wanted to record how Peter Kelly had concluded by thanking the claimant for his honesty , and that he had no doubts the claimant had been telling the truth in the interview, and if anything he had been too honest. The other main point was to record that Peter Kelly had told Vic Shaw that he was not interested in any other alleged delivery failures.

4.45 Peter Kelly carried out further investigations. He spoke with Martin Robotham, Grant Ramsden, and David Ball. He obtained written statements from them at pages 85 to 86, 87 to 88, and 89 to 90 of the bundle. He contended that he did this on the same day, 10 September 2018 for all three interviewees. Each statement is signed, and dated 10 September 2018. The claimant, however, challenges that David Ball was interviewed or provided his statement on 10 September 2018. The claimant has produced a text from David Ball on 5 October 2018 (page 100 of the bundle) in which he refers to speaking to Peter Kelly that morning , in which he was asked one question, had he ever been told to put a collections barcode on his phone, and he had said no. He was then "made" to sign a piece of paper. David Ball's statement at page 89 to 90 of the bundle is dated , on the first page, 10 September 2018, and the signature page is similarly dated 10 September 2018. The body of the statement effectively confirms that he had not been told to have pictures of barcodes on his phone.

4.46 The statement from Grant Ramsden (page 87), in answer to the question whether he had ever been informed by a manager that it was OK to have pictures of barcodes on his phone to prevent failures of collection boxes, reads :

".. no, I have overheard a conversation over a failed collection last Christmas it involved 2 staff on delivery that had not scanned their boxes (COLOD) Martin stated that he did it from home, he sorted it out from home."

4.47 Martin Robotham's interview is recorded , in answer to Peter Kelly's question, as follows:

"Mr Robotham replied to this that he had never stated this, and he had only informed staff that they could have pictures of their route headers on their phone in case the PDA needed re-booting whilst they were out on delivery , and he only informed them of this to prevent COLOD failures in the unit".

4.48 The route header is not the same as the barcode with a pillar box. COLOD refers to Collection on Delivery.

4.49 Peter Kelly considered his decision. He concluded that the claimant had intentionally delayed mail, and had been dishonest a number of occasions. He noted that the claimant had initially denied that he had failed to collect the mail on the three dates in August 2018, but had then admitted that he had partially emptied the box on 14 August 2018, and then had admitted that he had not emptied it at all on 15 August 2018. He believed the claimant had also failed to collect the mail on 13 August 2018, and on each occasion had scanned a photograph of the barcode, which had been saved on his mobile phone, despite being near the pillar box, in a clear attempt to deceive the respondent.

4.50 Given the seriousness with which the respondent views intentional delay to the mail, and its exposure to the risk of substantial financial penalties, Peter Kelly determined that the appropriate penalty was dismissal. He took into account the claimant's length of service and his previous clear record, but considered that the claimant had been dishonest about what he had done.

4.51 Peter Kelly therefore wrote to the claimant on 1 October 2018 (pages 96 to 98 of the bundle) informing him that he would be dismissed without notice and that his last day of service would be 2 October 2018. On the second page of this letter (page 97 of the bundle) Peter Kelly dealt with three points that had been raised in the conduct interview. The first was that the claimant had never been trained on collections. His response to that was that the claimant had performed the collection on numerous occasions and it was his belief that he was fully aware that every box needed clearing, as could be demonstrated by the claimant scanning the box from the barcode on his phone. This showed that he was intentionally delaying the mail.

4.52 In relation to the second point raised, that Martin Robotham had told him to use pictures of barcodes to scan boxes that he had failed, he referred to his interview with Martin Robotham , and his belief from that that he had only told the claimant to have route headers on his phone in case his PDA had to be re-powered due to technical difficulties.

4.53 In relation to the third point raised by the claimant, that he thought the box would be cleared later, and did not know that this was such a big issue Peter Kelly stated his belief that he did know that failing the box was a big issue and that this was why he had scanned the box as cleared using the barcode on his phone. It was also his belief that the claimant did not consider the impact of the customer or the impact that this could have on Royal Mail.

4.54 The letter went on to inform the claimant of his right of appeal. The claimant did appeal by letter of 3 October 2018 (page 99 of the bundle), in which he stated as his Grounds of Appeal that the dates and points raised of the formal interview were incorrect, as he did not believe the level of training and instruction from delivery office manager(s) had been fully considered, this was a first offence, and at the time the claimant was not fully aware of the implications.

4.55 The respondent made arrangements for the claimant's appeal to be heard on 25 October 2018 by Simon Walker, an independent casework manager based in Bradford. The claimant was notified of the appeal hearing by letter of 12 October 2018 (pages 101 to 104 of the bundle).

4.56 It is unclear when the corrections to the notes of Peter Kelly's formal conduct interview were received by the respondent, but there is no reason to doubt that these would have been received before the appeal hearing. They were not brought to the attention of Simon Walker in advance of the appeal hearing .

4.57 The form of the appeal was that Simon Walker would conduct a complete rehearing of the matter. The introduction that he gave in that hearing is set out on page 105 of the bundle, in which he explains the procedure. The appeal hearing then took the form of questions from Simon Walker to the claimant, and the notes of the hearing are to be found at pages 108 to 112 of the bundle.

4.58 In this meeting the claimant went through his collection duty for week commencing 13 August 2018. He was also asked about what induction he had received when he started work, and he stated that he had had a day in Preston, but after that it was about learning on the job. In relation to performing collection work the first time he had done this was as overtime on a Saturday , when he was asked by a previous manager , Mary , if he could cover the work. He was handed a PDA , told to follow the route and scan the barcodes. He had not received any training from Lee Humphreys. In terms of his responsibilities on collection duties , he understood that he had to go through the collection, stay on time, do the firms and post offices, put all the mail sacks in the back of the van, with nothing in the front and to ensure that the PDA was clear at the end of the shift, so that the collections manager did not hassle the manager. He also believed that he was only responsible for the mail that he had in the van.

4.59 There ensued a detailed discussion of clearing box 294, the time at which the claimant was due to carry that out and the location of the barcode. Simon Walker took the claimant to the answers he had given to Q13 in the fact-finding meeting with Lee Humphreys. He asked if this was still correct, and had not been amended. This clearly suggests that he was aware that the claimant had proposed amendments to these notes. The answer to this question was about whether the claimant realised that there was not another collection from this box the following day.

4.60 There was a discussion about the collection duty and why the claimant had been rushed on these collections. He was asked if he had made any attempt to clear the box on 13, 14 and 15 August 2018. He replied that the only day he had not done so was Wednesday, but he agreed that on Tuesday was only partly done. He agreed that he had been shown photographs of the items found in the post box by Lee Humphreys at the fact-finding, and was asked for an explanation as to why it was that items were found in the box dated 13 August 2018 if it had been cleared on Monday, 13 August 2018 as the claimant suggested. The claimant replied that he did not know but that he was not going to lie to Simon Walker, the items were not there when he cleared box.

4.61 The discussion then moved on as to why the data showed that the claimant had scanned the barcode of the box in a different location. The claimant replied this would be because he had had a PDA failure on the Monday so that all the timings were out. Simon Walker replied that would not affect where the scans took place, only the time. He went on to ask why, when the claimant had partly cleared the box on Tuesday , the barcode would be scanned in a different location. The claimant replied that it should have been at the same location.

4.62 Simon Walker put to the claimant this was not what he had said previously. Part of his mitigation earlier in the case was that he had been told by others that was okay to keep barcodes on his phone. Why was he now saying something different?

4.63 The claimant then said (and this is not challenged):

“I wasn’t told I could take photos of the barcode , I just did it as an emergency option.”

4.64 Simon Walker then asked if the claimant still had the pictures on his phone but he had deleted them. When asked why he had done that , he said that was

because he had been told it was the wrong thing to do. He was asked if there would still be in his deleted folder, but he said that he did not have that phone any more. It may however be backed up on a home computer.

4.65 There ensued further discussion about the collections in general and management at the Prestwich delivery office. The claimant was asked why he did not mention to Lee Humphreys when he came into work the following day that he had left some mail in the post box. He replied that he thought it would have been collected in the morning , and so would have been empty at that stage. The claimant was later asked what he thought he was asked to scan the barcodes inside the post boxes, and he replied that it was to show that he had done his job. Simon Walker pressed him as to what this meant in terms of what he was required to do, and he replied *"scan the barcode and collect the mail.*"

4.66 Simon Walker asked the claimant if he thought it was reasonable to scan a barcode if the mail had not been collected. The claimant replied that he now understood why it was important , but he did not back then. Simon Walker then asked Vic Shaw about points that he had raised, and other cases of intentional delay which he had described as rife in the Prestwich delivery office.

4.67 For the appeal Vic Shaw had prepared a document entitled "Adam Briggs Dismissal Appeal" (Pages 113 to 114 of the bundle). This was presented to Simon Walker either before or during the course of the appeal hearing.

4.68 In the "General observations" at the commencement of this document, four bullet points are raised, the first of which was that the claimant had returned amended meeting notes to Lee Humphreys and Peter Kelly but these had been disregarded , and only the original versions been provided in the appeal process. The second point was that the date on Peter Kelly's letter had been changed from 12th February , as sent to the claimant to 7th of September on the version included in the appeals pack copy. The third point referred to the amendment of the name from Mr Holt to Mr Briggs in this letter. Finally the question was raised as to why David Ball had been interviewed after the claimant's dismissal.

4.69 This document then sought to respond to points in the minutes of the fact-finding interview on 22 August 2018 with Lee Humphreys, and Peter Kelly's conduct meeting on 6 September 2018. These are not , it seems, corrections as such, but points that Vic Shaw wished to raise in support of the appeal.

4.70 The main points made in this document are:

the claimant's lack of training in mail integrity;

the traffic buildup occasioned by a local murder, which put the claimant under considerable stress;

the claimant's lack of appreciation of not collecting the mail from the box, and his belief that the box would be emptied more regularly than actually was, another matter which could have been addressed by the correct briefings and training being given;

the lack of training on the Pre- Com system;

whilst the claimant had admitted not scanning the box at its location, the PDA did not seem hundred percent reliable in capturing location and giving another location nearby;

there was a general lack of training on mail integrity failures which Peter Kelly had allegedly recognised post conduct interview;

in overall terms the claimant had not been given adequate training which should be the focus instead of conduct or dismissal.

Vic Shaw expressly went on to point out the errors made by Peter Kelly in his documentation , and to suggest that David Ball had been interviewed after the claimant's dismissal he pointed out other deficiencies in the interviews conducted by Peter Kelly with the other witnesses.

In conclusion , Vic Shaw put forward mitigation, highlighting the training issues and how the claimant had been thanked by Peter Kelly for being open and honest. He had simply not realised the importance of his actions , and was very sorry that happened. A serious reprimand should have been given, and not the full weight of the conduct sanction that was applied dismissal. He ended by making reference to an extract from the training section of the conduct code which highlighted the importance of management ensuring that appropriate training was delivered to all employees.

4.71 Following the appeal meeting, Simon Walker conducted further investigations. He sent emails to Lee Humphreys , Mary Lond, Christopher Corris, Sean Cogswell and Christopher Mellor. These were sent mainly on 25 October 2018, save for that to Christopher Mellor which was sent on 29 October 2018.

4.72 In these emails he raised various queries arising from what the claimant had said in the appeal meeting, or previously in the fact-finding or formal conduct meetings. The results of these enquiries were as follows.

4.73 Lee Humphreys was asked some eight questions (page 121 of the bundle) by Simon Walker, with an additional query being raised in a later email on 25 October 2018 (page 124 of the bundle). In his reply (page 129 of the bundle) Lee Humphreys informed Simon Walker that he could not locate the photographs that had been shown to the claimant in the fact-finding meeting , as they had been sent to HR. In relation to the scan locations that had been taken from the Pre-Com system. These too had been sent to HR archives, as the system would only retain such information for 18 days. In answer to Simon Walker's third question, which related to any amendments of the interview that the claimant had sought to make, Lee Humphreys did not provide these, but summarised them by saying that they were in regard to receiving no training to perform collections. He went on to confirm that the claimant had contacted him on 13 August 2018 in relation to a fault with his PDA, and attached images of text communications on the subject, which are the ensuing pages in the bundle at pages 130 to 132. He went on to confirm in answer to Simon Walker's fifth question that the claimant had not requested that the attendance times on his collection be adjusted and the only time that he was aware the claimant had failed to connect at Prestwich after his collections was when he suffered a punctured tyre, and had to wait for repair before he could continue his collection, which was in fact the previous week on 8 August 2018. He confirmed the attendance times for the

relevant duty , and that the time it would take to drive between box 294 and the Prestwich delivery office was roughly between five and 10 minutes dependent upon traffic. Finally an answer to the additional question Simon Walker posted his second email of 25 October 2018 , relating to other delayed mail in the Radcliffe delivery office on a Saturday, Lee Humphreys commented that he believed that there had been such an instance which he had dealt with and had adjusted.

4.74 In answer to the question posed by Simon Walker to Mary Lond, relating to when she asked the claimant to perform a collection duty, she replied (123 of the bundle) that she had no recollection as it was about five years ago.

4.75 There appears to have been no response from Christopher Corris, but Sean Cogswell (i.e the Sean referred to by the claimant in his interview with Lee Humphreys) in response to Simon Walker's questions relating to his performing a manager role in the Radcliffe delivery office on 14 August 2018, and any discussions that he may have had the claimant about missed scans on his collection, he replied on 26 October 2018 (page 128 of the bundle) that he was actually on annual leave from the 10th of 24 August, but either way he had never, and would never, give advice in relation to taking photos of barcodes on postboxes.

4.76 Christopher Mellor, with whom Lee Humphreys had viewed the information on Pre-Com relating to the scanning of the barcodes on the three days in question, replied Simon Walker on 29 October 2018 (page 134 of the bundle), saying that , from memory, the scans all took place on Stand Lane Radcliffe but were a substantial distance away from the box in question. The time of scans was not significantly late, and the Prestwich office was open until 19:00 hours, with the dispatch vehicle not due to leave until 18:45. It would hang on until 19:15 without any issues.

4.77 On 29 October 2018 Simon Walker raised another query (page 133 of the bundle) with Lee Humphreys in relation to the obtaining of the statements from the two customers which had been included in the evidence, and he replied later that same day confirming that both customers had been interviewed on the doorstep and had confirmed that their items had been posted on Sunday 12 August in one case, and Monday 13 August in the other.

4.78 On 26 October 2018 Simon Walker sent the claimant a copy of the notes of the appeal hearing (page 127 of the bundle), and on 31 October 2018 the claimant replied by email (page 143 of the bundle) that he was happy with the notes of the interview, save that he wished to add comments made by himself and Vic Shaw at the end of the meeting the effect that it was easy to answer the questions in hindsight after he had realised the severity of what he had done.

4.79 On 30 October 2018 Vic Shaw wrote to Simon Walker closing a copy of a Joint Statement of the respondent and the CWU (pages 138 to 140 of the bundle) relating to the use of PDA equipment, and inviting Simon Walker to take it into account, particularly in relation to references to how all staff should be briefed or trained.

4.80 On 31 October 2018 Simon Walker sent to the claimant copies of the documents he had obtained in the course of his further investigations, which, although not specifically identified or indexed in this letter, are likely to have

comprised of the email investigations carried out and referred to in the preceding paragraphs.

4.81 The claimant replied on 1 November 2018, clearly having seen the investigations made with Chris Mellor, Lee Humphreys, and Sean Cogswell, as he commented upon what they had said. In relation to the latter, he contended that this must be the wrong Sean, as the manager was definitely called Sean and he was covering for another manager, Neil. Either with this letter or separately, Vic Shaw also prepared a further response to the information provided by Simon Walker, which is dated 2 November 2019, but is clearly meant to be dated 2018 (page 145 of the bundle).

4.82 In this latter document Vic Shaw suggested that yet further enquiries be made in relation to whether Sean Cogswell was on site in the days in question. He mentioned the need for training logs and records to be provided, and wanted clarification of what Chris Mellor meant by use of the term “significant” in relation to barcodes being scanned away from pillar boxes.

4.83 In relation to Lee Humphreys, he pointed out that the claimant’s actual amendments had not been provided and were missing. He again sought further information in relation to sign in sheets and attendance times. He reiterated that if clear guidelines and instruction, backed up by adequate training had been given, he was sure the claimant would not now be in this position. He went on to make other points about Lee Humphreys appearing to be defensive , particularly in relation to allegations that have been made about other delivery failures in the Radcliffe delivery office.

4.84 Simon Walker made his decision which was notified to the claimant under cover of a letter dated 9 November 2018, and to which he attached an Appeal Decision Document (pages 146 to 154 of the bundle.

4.85 This is a lengthy document, in which Simon Walker sets out his deliberations and conclusions. The main salient features of his decision are as follows.

4.86. He did not believe that the claimant had been informed by managers that it was acceptable to hold photographs of collection barcodes on his mobile phone. In any event that was not the reason for his dismissal. He did believe that the claimant did not clear any mail from box 294 on all three days, and considered that the claimant had changed his account as the investigations progressed, having initially denied failing to clear the box at all , but then, admitting that he had only partially cleared it on Tuesday, 14 August 2018, and then admitting that he had not cleared it at all on Wednesday, 15 August 2018. He considered that this brought the claimant’s integrity into question. He did not accept that Radcliffe delivery office was regularly leaving mail in the office with managers’ knowledge and consent.

4.87 In relation to the conduct interview with Peter Kelly, he recorded that it was unfortunate that the actual amendments presented by the claimant were no longer available to be viewed, but he was satisfied that Peter Kelly had considered the amendments prior to him deliberating his decision. Paragraph 12 of his witness statement to the Tribunal was in similar terms, but he accepted, as Peter Kelly had done, that the claimant’s amendments to the notes of the conduct interview had not been seen by Peter Kelly before he made his decision.

4.88 Simon Walker went on to say, however, that the claimant had presented those amendments as part of his appeal, by which the Tribunal takes him to mean that the points that would have been made in the amendment document were nonetheless made to Simon Walker as part of the appeal. Simon Walker considered these matters, particularly in relation to the alleged permission given by management to take photographs of barcodes on the claimant's mobile phone. He concluded from the evidence of Lee Humphreys and Chris Mellor, from their review of the Pre - Com scans that these were performed at a different location from where box 249 was located on all three occasions. He concluded on a balance of probabilities that the claimant had taken the photograph of the barcode earlier than he had suggested, which he considered, brought the rest of his evidence within those investigations into serious doubt. He also made reference to the claimant accepting in his appeal hearing that he was never told to take a photograph of a barcode and that he had done it as an emergency option.

4.89 Simon Walker went on to consider the contention that the claimant had suffered from a lack of development, and was unaware of the importance of clearing all the mail from postboxes on his collection route , and that he had not had sufficient time to clear the box. He did not believe it plausible that after 3 ½ years of employment the claimant thought it was acceptable to knowingly leave items of mail in a post box that was part of his collection route. This process involved confirming by use of scanning the barcode that the box had been cleared of all mail. He noted that it was "regrettable" that no documentation was held locally to confirm the claimant had been briefed on probably the most important responsibility of an OPG. Nonetheless it was confirmed the claimant did receive the one day formal induction training on commencing his employment, and he referred to the personal declaration which the claimant completed shortly after the commencement of his employment. The claimant had performed this duty on some 50 separate occasions and had given no impression that he was unaware of what this duty entailed. He had in any event accepted that by not clearing the box , mail would have been left until the following day. He also took into account the initial response of the claimant when first asked by Lee Humphreys on 16 August 2018 if he had cleared the box on all three occasions he had replied that he had definitely entered the box which led him to consider that it was implausible that the claimant did not understand that his prime responsibility was to avoid delaying the mail.

4.90 He did not accept that the claimant could believe that he was out of time to clear the box in the light of the evidence from Christopher Mellor that the last scan was at 17:50 , when he was only between 5 and 10 minutes away from the Prestwich delivery office to connect with the Manchester van at 18:30. He had considered the document submitted by Vic Shaw in relation to the use of PDAs, but did not consider that this case related to that issue but to the claimant's understanding of his responsibilities in respect of the safeguarding of the mail on his collection route. He considered the claimant fully understood those responsibilities, and for all these reasons rejected the appeal.

4.91 Simon Walker did give consideration (para. 5.5, page 153 of the bundle) to a penalty less than dismissal, but because he considered the claimant had been extremely reticent, and indeed had lied, there could be no guarantee that he would not continue to operate in such a way in the future. Similarly he considered (para.5.6) that the claimant had shown very little sign of remorse for the risk that his

actions had exposed the respondent to and had been quick to blame others rather than take responsibility for his own actions. He concluded that it had been proven that the claimant had continued to lie in the investigations by suggesting that he had cleared postbox 294 on Monday, 13 August 2018, and as such he was unable to conclude that the claimant would not act in a similar way in the future. He considered that any regret the claimant had was due to being caught rather than anything else. He continued to set out the reasons why he regarded claimant's conduct is so serious in terms of the potential consequences for the business and how any sanction less than dismissal would be to ignore the respondent's commitment to its customers, and the trust and integrity necessary between the respondent and its employees.

4.92 Other than the documents in the bundle , no training records or other relevant documents were provided by the respondent, the claimant's handwritten amendments to the meetings held with Lee Humphreys remain unavailable, the photographs shown him taken by Lee Humphreys have remained unavailable, and the information viewed by Lee Humphreys and Chris Mellor taken from the Pre- Com system recording the location of the scans of the barcodes that the claimant took on 13, 14 and 15 August 2018 have similarly not been produced to the Tribunal or to either the dismissing or the appeals officer.

4.93 It is not disputed that on 8 August 2018 the claimant suffered a blowout on his van which was reported to his manager (page 158 of the bundle), and that as a result of this the claimant had to await a repair , and then drive his collected mail to a Manchester office for onwards transmission. This substantially delayed the completion of his duty that day.

5. Those then are the relevant facts. In terms of the actual events of 13, 14 and 15 August 2018, the Tribunal has primarily the claimant's own evidence, although this was somewhat lacking from his witness statement which did not actually address those events. Whilst Simon Walker, and possibly also Peter Kelly, doubted the claimant's honesty, and this has been a substantial factor in the decision to dismiss, the Tribunal has been given no real cause to entertain any such doubts. This is largely because the respondent has not put before the Tribunal the best contemporaneous evidence that was originally available, but is not before the Tribunal, and was not even available for the disciplinary or the appeal hearing.

Submissions

(i)The respondent.

5. Both parties made oral submissions. For the respondent, Ms Cairney's submissions, as one would expect, focussed upon the correct legal test to be applied to conduct dismissals of this nature. Reference was made to the correct legal tests to be applied such as those in ***British Home Stores Ltd v Burchell [1978] IRLR 379***, and in ***Iceland Frozen Foods Ltd v Jones [1982] IRLR 439.***

6. She contended that the respondent had satisfied the test for a fair conduct dismissal, having a reasonable belief on reasonable grounds, after a reasonable investigation , that the claimant had been guilty of serious misconduct. The decision fell within the band of reasonable responses. Whatever formal training the claimant had received, he had signed the Personal Declaration, had been an OPG for 3.5

years and had done the collections duty on 50 or so occasions. He knew that he should contact a manager in the event of difficulty, and had done this the previous week. He had said he was rushed, and his was why he did what he had done. He had initially denied failure to empty the box, but then admitted he had done so, when made aware of the customer complaint.

7. Whilst the claimant's amendments were not available to Peter Kelly, they would have made no difference. In any event, Simon Walker had carried out a complete re-hearing. He made even more enquiries, and the claimant has not actually suggested what more he should have done.

8. The decision to dismiss was within the band of reasonable responses. Mail integrity is key to the respondent's business , and it can face large fines from Ofcom if it fails in its responsibilities. The most important duties of its employees is to safeguard the mail. The claimant had signed a personal declaration, and was aware of this. The consequences of delay had been spelled out in great detail, with intentional delay a dismissible offence.

9. The claimant had failed to collect on three occasions, 162 items had been delayed, possibly more.

10. In the alternative , if the dismissal was found to be unfair, there should be a reduction on the basis of ***Polkey*** . Given the claimant's conduct he would have been fairly dismissed in any event.

11. Alternatively, there should be a reduction in any compensatory award, under s.123(6) of the Employment Rights Act 1996, for the claimant's contributory conduct. She cited ***Nelson v BBC (No 2) [1979] IRLR 346*** and ***Steen v ASP Packaging Ltd. [2014] ICR 56*** as to the test to be applied. There were four questions to be answered:

What was the conduct in question?

Was it blameworthy?

(In relation to the compensatory award) did it cause or contribute to the dismissal?

To what extent should the award be reduced?

(ii)The claimant.

12. The claimant, not being a lawyer or legally represented, focussed upon his denial of any wrongdoing, the manner in which the respondent carried out the investigation and the hearings, the lack of training, and harshness of the decision. He initially made observations about the respondent's conduct of the response, and the fact that a preliminary hearing was needed, which were not, however, germane to the issues in the claim, though the Tribunal understands why he mentioned them.

13. He took the Tribunal through the collections duty he carried out from 6 August 2018.He had suffered a blow out on 8 August, and then had to take the mail to Manchester. On 14 August he had half emptied the box. He had been told that it was a dismissible offence to leave loose mail in the van He did not consider he had enough training, There were different job descriptions for the two roles, and he noted

how it was "unfortunate" that his training records were missing. It should not be the employee's role to ask for training. Would it be reasonable to expect an employee with only induction training to know to telephone Lee Humphreys? Peter Kelly had said that he had lied, but at the end of the meeting had thanked him for his honesty. David Ball's interview was after the dismissal, and this had been raised. Peter Kelly said he had taken everything into account, such as length of service and his record, but all his records, including training, should have been at Radcliffe.

14. Simon Walker said he had no reason to doubt managers, but he doubted the claimant . He could have asked to see the signing in book for the days in question. He did not question David Ball about when he signed the interview document. He also had said that Peter Kelly had taken the amendments that the claimant wanted to make into account, but then accepted that he had not.

15. The claimant had had inadequate training, a one day induction session. It was unusual that there were no training records. Was it reasonable to dismiss rather than train or re-train ? He believed that there had been a misunderstanding, there was no intentional delay of the mail. He had never set out to deceive anyone, he did not deliberately or knowingly delay the mail. He had acted on the honest belief that he had done the right thing, rather than leave a van full of mail overnight on a car park, where it would not be safe. He had complied with all commands and request from the fact – finding interview all the way to the Tribunal claim. He had always told the truth, and had admitted what he had done.

The Law

16. The relevant statutory provisions are set out in the Annex to this Judgment. In relation to the tests to be applied in respect of unfair dismissal cases, as the respondent's submissions rightly set out, in determining whether the dismissal was fair the Tribunal considers whether the decision of the employer fell within the band of reasonable responses, both procedurally and substantively, and must not substitute its own view for that of the employer (***Foley v Post Office*** and ***Midland Bank v Madden [2000] ICR 1283***).

17. Further, in relation to the test to be applied in relation to conduct dismissals, the classic statement of the law to be applied is contained in ***British Home Stores Ltd v Burchell [1978] IRLR 379***, which laid down many years ago the principles to be followed in determining whether a conduct dismissal was fair. They are that, first of all, there must be established by the employer the fact of the belief in the guilt of the employee, and that the employer did actually believe that. Secondly, that the employer had in its mind reasonable grounds upon which to sustain that belief, and thirdly that the employer at the stage at which the employer formed that belief on those grounds had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. The Tribunal has also considered two authorities: ***Royal Society for the Protection of Birds v Croucher [1984] IRLR 425***, and ***Sharkey v Lloyds Bank PLC [2015] UKEAT 0005/15***, in the context of how the Tribunal should approach procedural flaws.

Discussion and Findings

18. The first issue, therefore, is whether the respondent has established a potentially fair reason for the dismissal. The Tribunal is quite satisfied that the

claimant's conduct was the reason for his dismissal, and the claimant has not suggested any other motive or reasons. The Tribunal has to be satisfied that the respondent had a genuine belief in the misconduct on the part of the claimant, the tribunal is quite satisfied that Peter Kelly and indeed Simon Walker both had such a genuine belief.

19. Having accepted that the respondent has established a potentially fair reason for dismissal, namely the claimant's conduct, the next and indeed central issue in this case is whether the dismissal was fair in all the circumstances, and it is to that issue the Tribunal now turns.

20. In terms of the fairness of this decision, the Tribunal has to look at both the procedure followed and the substantive decision taken. Starting with the first aspect, there are the Tribunal considers, and the respondent may not be surprised to learn, a number of features of the evidence in this case which are less than satisfactory. Firstly, regardless of whether there would be any entitlement to do so, the claimant clearly attempted to provide amendments to Lee Humphreys' accounts of meetings that he had with the claimant. These were informal meetings, albeit Vic Shaw was present at the second of them. Thereafter there was a formal fact-finding meeting. The claimant prepared and sent to the respondent, the Tribunal is quite satisfied, his proposed amendments to the records of those meetings. The respondent either lost, or did not act upon , those documents.

21. It is right that in the appeal Simon Walker did raise this with Lee Humphreys, but his response was somewhat dismissive , and suggested that the claimant had only raised one particular issue. What he did not do was produce the claimant's amendments, or explain what had happened to them. Whilst this may not seem to be necessarily an important matter, when one considers that part of the rationale for Simon Walker's conclusion the claimant had been dishonest in the course of the investigations was what he had allegedly originally told Lee Humphreys when first confronted with these allegations, the importance of accurate recording of what the claimant said becomes much greater. The claimant maintains that he never denied partially emptying the box on Tuesday 14 August, and completely failing to empty it Wednesday 15 August. His initial account as recorded by Lee Humphreys suggests that he did make such initial denials. The amendments that the claimant wished to make to the notes of these meeting therefore become very important.

22. Secondly , Lee Humphreys had gone to the trouble of taking photographs of the mail that he recovered from the pillbox. He showed them to the claimant in the fact-finding meeting. Those photographs then disappeared. They were not available for the disciplinary hearing, nor the appeal , nor for this Tribunal.

23. Thirdly , having been provided with the notes of Peter Kelly's formal conduct interview, the claimant sought again, as invited, to make amendments. These too were lost, or not acted upon. Peter Kelly , the Tribunal is satisfied, made his decision without the benefit of sight of the amendments.

24. Fourthly, the data that had been viewed by Lee Humphreys and Chris Mellor, from the Pre-Com system, and which is essential evidence showing where the claimant scanned the barcodes, has similarly not been retained, and was not available , even for the appeal.

25. Add to all that the understandably human, but nonetheless unprofessional, errors made for example in the date of the letter sent to the claimant by Peter Kelly, and the use of another employee's name, which then had to be amended by a hand written change, one can appreciate how the claimant may feel that his dismissal has been handled in a somewhat sloppy and careless manner.

26. That is not, of course, necessarily to say that it was procedurally unfair, and in approaching procedural unfairness the Tribunal must, as with substantive unfairness, not substitute its own views , but must consider whether the procedure adopted by the respondent fell within the band of reasonable responses within circumstances. Those circumstances, of course, include the size and resources of the respondent. This respondent, of course, is of considerable size and resource, has a dedicated HR function, and well established procedures for handling of disciplinary matters.

27. The question for the Tribunal is whether any of the deficiencies referred to above make the dismissal procedurally unfair. The Tribunal considers that in not retaining and actioning the amendments which the claimant attempted to make to the record of not one , but three, important meetings in which is responses to the allegations being made against him were being recorded by the respondent for use within the disciplinary process , the respondent indeed did fail to follow a fair procedure. The respondent actually invited the claimant, as part of its own procedures, to make amendments and he sought to do so. In some circumstances, leaving aside any considerations as to consequences pursuant to ***Polkey***, defects in disciplinary procedure will not render a dismissal unfair in themselves. The Tribunal can appreciate that it will not be in every case where an employee's proposed amendments to investigatory or disciplinary meeting notes are not acted upon that the Tribunal will then find that the dismissal was unfair because of what may be a relatively minor defect in procedure.

28. Where however, as here, much is subsequently made by the dismissing officer, and then the appeal officer , of what the claimant has allegedly said in the course of the initial investigation meetings , the denial of the opportunity for the claimant to dispute the record of those meetings becomes much more serious. That other original and important evidence, obtained at the time of the initial investigation, in the form of the Pre-Com data , and the photographs taken by Lee Humphreys also was unavailable for the formal conduct interview , and the appeal (which was only some two months after the original incidents giving rise to the dismissal) further compounds the unfairness of the procedure adopted by the respondent.

29. Further, whilst it is not perhaps necessary to "pigeon-hole" unfairness into specific aspects of the dismissal process, the Tribunal does consider that these elements of unfairness also impinge upon the fairness of the investigation, as particularly the initial meetings and formal fact – finding meeting with Lee Humphreys were all part of that investigation process. A process which does not afford the employee an effective opportunity to correct notes of what he is alleged to have said in his initial responses to the allegations is not a reasonable investigation.

30. In cases of conduct dismissals, a respondent only acts reasonably if it conducts a reasonable investigation, from which it forms a genuine belief in the guilt of the claimant. The failure of the respondent to take adequate care of a, or to act upon , the proposed amendments that the claimant made to notes the fact-finding investigation were also a failure to carry out a reasonable investigation. A reasonable

investigation accurately records of both sides' accounts. The claimant considered that the respondent had not accurately recorded his account, and wished to advance an alternative account of what he said in those meetings. The loss of his proposed amendments thus renders the investigation unfair.

31. In other respects, the investigation conducted by the respondent would have been reasonable, both in terms of the initial investigation conducted by Lee Humphreys at the time, and subsequently by Simon Walker. Peter Kelly , it must be observed , also carried out further enquiries, mainly in relation to whether the claimant had been given permission, or otherwise encouraged, to take pictures of barcodes on his mobile telephone. There is clearly a question mark over the timing of the statement obtained from David Ball, but leaving that aside, Peter Kelly clearly carried out some further investigation into this aspect of the mitigation advanced by the claimant.

32. Simon Walker's investigation, as befits a person re-hearing disciplinary case, was , the Tribunal considers , commendably thorough. He was naturally seeking , when asking for the photographs and copies of the Pre-Com data , the very information which a reasonable investigation would require. He , however, was thwarted in that endeavour by the loss of, or failure to retain, this information. He appears to have been somewhat confused as to whether Peter Kelly did or did not receive the claimant's proposed amendments, and ultimately accepted that he had not. Given , however, he himself was carrying out a rehearing, he could reasonably have considered that he did not need to investigate the extent to which Peter Kelly did , or did not , take those amendments into account in reaching his decision.

33. Simon Walker, however, was not in the position that he ought to have been when carrying out his re-hearing and his further investigations because of the previous failures to retain or act upon the claimant's attempts at amendments , and loss two important sources of primary and contemporaneous evidence in the form of the photographs and the data from the Pre – Com system.

Substantive unfairness and Polkey.

34. Having determined that the dismissal was unfair for the reasons set out above, the Tribunal has to go on to consider whether it was not only procedurally unfair but substantively unfair. Further , and allied to this issue , is the respondent's alternative plea that even if the dismissal was unfair , there should be a reduction on the grounds of ***Polkey*** to the extent of 100% , or such a figure as the Tribunal thinks it.

35. The dichotomy between "procedurally" and "substantively" unfair dismissals has exercised Employment Tribunals for some time. At one extreme is the view that virtually any procedural defect should render a dismissal unfair, with the consequences of any such procedural defects being considered at remedy stage, under the ***Polkey*** principle. At the other is the view that procedural unfairness need not necessarily render a dismissal unfair, and that in certain, albeit rare, circumstances a dismissal can still be found to be fair, notwithstanding procedural unfairness. This latter view has received some support from the recent EAT decision in ***Gallacher v Abellio Scotrail Ltd. (UKEATS/0027/19/SS*** where the EAT upheld a dismissal where there had been procedure carried out. It was, however, acknowledged that such a finding would be unusual . The essence of the decision is

that in certain , if limited, circumstances where any procedure would be futile (indeed, there was evidence that it may have exacerbated a difficult situation) , where, for example there was fundamental breakdown in a relationship between two senior mangers, a Tribunal may find a dismissal fair.

36. The Tribunal does not, however, consider that this is one of those rare instances where the unfairness can be overlooked, and the Tribunal can find this was a fair dismissal. As noted above the deficiencies were not merely procedural, they affected the fairness of the investigation, and may have had an influence upon the views of the Peter Kelly and Simon Walker as to the claimant's veracity.The Tribunal notes that Simon Walker in particular was clearly much influenced by his belief that the claimant had been dishonest during the investigation process. This belief this has its roots in the disputed initial accounts given by the claimant to Lee Humphreys. It is also sustained , as Simon Walker's appeal decision shows, his belief , based upon the evidence of where barcode scans were performed, that the claimant had scanned the barcode from the picture on his phone away from the pillar box on three separate occasions, but would only admit to doing this on one occasion.

37. This belief , of course, is based not upon the raw data from the Pre-Com system , but upon the evidence of Lee Humphreys and Chris Mellor as to what they saw as the results of their examination of the system. The claimant's union representative, Vic Shaw, in his submissions during the appeal (see page 113 of the bundle) did raise the issue of whether the PDA was hundred percent reliable at capturing the location and giving another location nearby. He pointed out the claimant had admitted not scanning the box at its location (i.e on one occasion) , and there would be no logical reason why he would mislead on the location that he had given us he had admitted not being at the box on that occasion. Other than to raise the question with Lee Humphreys and Chris Mellor, Simon Walker made no further enquiries into this issue, and it may have been too late for him to do so. As this was clearly a central issue, it was one that the respondent needed to investigate further.

38. On the other hand, it was clear from Simon Walker's evidence that he took a fairly robust and straightforward approach to the claimant's conduct. Whether he had or had not been encouraged by any manager to have a photograph of the barcode on his mobile phone, the simple fact was that the claimant had on at least two occasions admitted that he only partially emptied, or had failed to empty , the box. Even if he believed, reasonably or otherwise, that there would be a further collection the following day was , he was thereby nonetheless delaying that mail. He was thereby doing so intentionally, and Simon Walker could not accept that any OPG with over three years' service would not be aware , whatever their formal training, that failing to make such a collection was a very serious matter.

Polkey.

39. The Tribunal thus finds that the dismissal , whilst for the potentially fair reason of conduct on the part of the claimant, was unfair. The respondent, however, invites the Tribunal to reduce any award that it makes in terms of the compensatory award on the basis of ***Polkey***, and/or in relation to both basic and compensatory awards on the basis of contribution by the claimant.

40. In relation to ***Polkey***, this is a reference to the case of ***Polkey v A E Dayton Services Limited***, well known to employment lawyers but probably new to the claimant, in which it was established that if a dismissal is unfair because of procedural failings the Tribunal should reduce the amount of compensation to reflect the chance that there would have been a fair dismissal in any event if the dismissal had not been procedurally unfair. In terms of how this is to be applied in practice, the guidance of the EAT in a case called ***Software 2000 Ltd v Andrews [2007] IRLR 568*** from Elias, then the President, is helpful, where he said this:

"(1) In assessing compensation the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.

(2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future.)

(3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.

(4) Whether that is the position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.

(5) An appellate court must be wary about interfering with the Tribunal's assessment that the exercise is too speculative. However, it must interfere if the Tribunal has not directed itself properly and has taken too narrow a view of its role.

(6) [Now irrelevant following repeal of s 98A(2) ERA] ……..It follows that even if a Tribunal considers that some of the evidence or potential evidence to be too speculative to form any sensible view as to whether dismissal would have occurred on the balance of probabilities, it must nevertheless take into account any evidence on which it considers it can properly rely and from which it could in principle conclude that the employment may have come to an end when it did, or alternatively would not have continued indefinitely.

(7) Having considered the evidence, the Tribunal may determine

(a) That if fair procedures had been complied with, the employer has satisfied it—the onus being firmly on the employer—that on the balance of probabilities the dismissal would have occurred when it did in any event. ……...

(b) [N/a]

(c) That employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in the ***O'Donoghue*** *case.*

(d) Employment would have continued indefinitely.

However, this last finding should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored."

41. Thus it is clear that the range of options open to a Tribunal is considerable. It may make a 100% reduction in an appropriate case, a lesser reduction if it thinks the changes of the claimant being fairly dismissed are less than 100%, or may make none.

42. In this case the Tribunal has considered whether or not it should make such a reduction and considers that it should. Having considered all the evidence, the Tribunal considers that had a fair procedure been followed, the claimant's amendments been admitted in evidence and considered, and had some further enquiries been made, the claimant would , on a balance or probabilities, still have been dismissed, and the respondent would have been entitled to dismiss him.

43. The primary reasons for that finding are as follows. The evidence that the claimant had not collected from the box in question on three consecutive occasions comes not only from the scanned barcode data, but primarily from the evidence of two customers , obtained perfectly properly by Lee Humphreys at the very beginning of his investigation. Their evidence is clear, very recent, and compelling. That of the first customer who had posted her item on Sunday, 12 August 2018, which was found when the box was emptied on Thursday, 16 August 2018, is strong evidence that the box was not emptied between those two dates. To some extent the claimant's admissions merely corroborate that, as do the barcode scans. That evidence alone, in the Tribunal's view, would have been sufficient upon which the respondent could have formed a reasonable belief that the claimant had not entered the box on three occasions.

43. Further the relevance of an admission that the claimant , even on one occasion , had used the scan of the barcode on his phone when he had not actually emptied box, is that it is an admission that he was seeking to present a false impression to his employer. As he accepted , the purpose of scanning the barcode is to show that the duty been performed , and the box emptied. Clearly , on at least one occasion this had not been done , on his own admission. That he was doing this for what he saw as laudable motives to assist his managers avoid criticism or challenge from the collections team is mitigation, but is mitigation that the respondent would equally be entitled either not to accept , or to consider was not sufficient to outweigh the seriousness of the claimant's default. Further the claimant accepts, even with his amendments, he had said that he was rushed, and did not want to have to drive to

Manchester, if he missed the collection that Radcliffe or Prestwich. Given his recent history on 8 August 2018 of his tyre blowout, and his subsequent need to then take his mail to Manchester , the respondent would have been entitled to consider that this was highly likely to have been the reason for his actions on these occasions.

44. Whilst much was made in the conduct hearing before Peter Kelly of the claimant allegedly being given permission , or at least , encouragement, to take a photograph of the barcode on his phone, which was investigated by Peter Kelly, this rather falls away as a relevant issue, given the claimant's (unchallenged) answer in the appeal hearing (page 110 of the bundle) that he was not told he could do that, he just did it as a emergency option.

45. The Tribunal was concerned that the absence of any records of the training that the claimant had been given, and notes that there is no evidence that he was given any specific training on collections. Tribunal does not, however, consider that is very relevant, and, more importantly considers that the respondent would be entitled to reject that as a relevant consideration. The process of emptying a box, and scanning the barcode inside it, is a simple one, of which the claimant was aware. He was , or could reasonably have been taken to have been, aware that the PDA scanning is meant to show that mail has been collected from the boxes, by opening the box, and scanning the barcode. Scanning a barcode way from a box can only be viewed as an attempt to make it appear that something had been done which had not been. The respondent would have been entitled , in the Tribunal's view, to conclude that this is what the claimant had done, on at least two occasions, probably three.

46. The rather wider defence advanced was that the claimant was not aware of the seriousness of not making collections , and thereby delaying mail in this manner. The absence of training records does not assist the respondent here, and this line of defence has more potential force. That said, regardless of what any specific training the respondent can point to which the claimant will have undergone in the course of the 3 ½ years that he served with it, the Tribunal accepts that the respondent would have been entitled to consider that as an OPG would be well aware of the potentially serious consequences of any delay to the mail , other than that which was beyond his control, whether it be on delivery , collections or in any other operation. That he used his PDA in this manner to scan a photographed barcode , thereby creating a false impression, is something that the respondent would have been entitled to take into account in determining how blameworthy this conduct was.

47. Thus, whilst finding the dismissal was unfair, the Tribunal has come to conclusion that had a fair procedure been followed and the deficiencies identified above remedied , the respondent would have been entitled to have come to the same conclusion that the conduct of the claimant was such as to warrant dismissal , and that he would then have been fairly dismissed. As there would not appear to have been any difference in the timescale that such a procedure would have taken , the Tribunal would not propose to make any award under the compensatory award, which it reduces by 100% to reflect the ***Polkey*** deduction.

Contribution.

48. In these circumstances it is not necessary to consider whether any reduction should be made for contributory fault pursuant to section 123(6) of the Employment

Rights Act 1995 (see ***Rao v Civil Aviation Authority [1994] ICR 495)***, which determined that the correct order of reductions in these circumstances is for the Tribunal to apply the ***Polkey*** reduction first, and then to apply any reduction for contributory fault at that stage. Given the 100% reduction for ***Polkey***, there is no requirement for the Tribunal to consider contributory fault.

49. For completeness, however, and for the purposes of assessing the basic award (although Ms Cairney for the respondent appeared only to make submissions seeking a reduction for contributory fault in respect of only the compensatory award), the Tribunal records that it would not make such a reduction. In order to make such a reduction the respondent would have to show that the claimant was actually guilty of conduct which would merit the making of such an award. That, of course, is different from establishing what the respondent reasonably believed, or would reasonably have believed. It usually requires more direct evidence as to what actually occurred, as opposed to the results of its investigations which informed the respodent's belief.

50. In this context the respondent would need to have adduced better direct evidence than was available to the dismissing and appeal officers. In short, the respondent would need , at the very least , to have called Lee Humphreys, probably Chirs Mellor, and to provided the photographs and most vitally the Pre – Com data in order to establish precisely, what the claimant had done. Whilst accepting that the claimant probably acted in a foolish fashion, and his own union representative acknowledged that a reprimand would be in order, the Tribunal would not have made any reduction to the compensatory award for contribution. This is, of course, academic, given the 100% reduction for ***Polkey***

43. There is authority (***Rao*** and ***Steen v ASP Packaging Ltd*** cited above) that if the Tribunal is to make reduction in the compensatory award the contribution the same reduction should be made to the basic award. The converse, presumably, also applies, though the two sections are in different terms. Section 122(2) of the Employment Rights Act 1996, provides that if the Tribunal considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce the amount of the basic award to any extent then the Tribunal shall reduce that amount accordingly. This is a slightly different provision from section 123(6) which applies to the compensatory award. There is no requirement for the conduct in question to have contributed to the dismissal, although the authorities make it clear that it would be rare to make a reduction under section 123(6) without also making the same reduction in respect of section 122(2).

44. The Tribunal does not consider that it would in this instance be just and equitable to reduce the basic award. Whilst concluding that the claimant was guilty of conduct which was at best foolish, these were serious deficiencies in the dismissal process, such that it would not be just and equitable to reduce the amount of the basic award.

Remedy.

45. In terms of the calculation of the basic award, the Tribunal notes that in the claimant's Schedule of Loss (page 155 of the bundle) he has sought a basic award based on gross weekly earnings of £440.00 . A Variation to Contract document (pages SB15 to 16) shows his weekly pay from 5 February 2018 as £412.30. The monthly pay that the claimant entered on is ET1 (page 5 of the bundle) is £1,943.

That equates to an annual salary of £23,316.00, which would be weekly pay of £448.38., slightly more than the £440 figure used by the claimant . In the response (page 15 of the bundle) the respondent unfortunately did not tick either box at section 5.2 of the ET3, so it is unclear whether the respondent agrees the claimant's figure.

46. The claimant's entitlement to a basic award, given his age and service, is to three weeks' pay, calculated on a gross, not net basis. The parties can doubtless agree this figure, and the Tribunal need not make any further determination. If, however, that is not correct, the parties are to inform the Tribunal and seek a remedy hearing, which could be determined on paper if a simple issue.

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Employment Judge Holmes

Dated: 18 August 2020

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

26 August 2020

FOR THE TRIBUNAL OFFICE

ANNEX

The relevant statutory provisions : the Employment Rights Act 1996.

98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), 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 a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

122 Basic award: reductions

(1) [N/a]

(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

(3) [N/a]

123 Compensatory award

(1) Subject to the provisions of this section and sections 124[, 124A and 126], the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

(2) The loss referred to in subsection (1) shall be taken to include—

(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and

(b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.

(3) [N/a]

(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.

(5) [N/a]

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.
