EMPLOYMENT TRIBUNALS

Claimant: Mr M Ainsworth

Respondent: Royal Mail Group Limited

Heard at: Manchester by CVP **On:** 22 October 2020

Before: Employment Judge Holmes (sitting alone)

Representatives
For the claimant: In person
For the respondent: Ms S Percival, Solicitor

RESERVED JUDGEMENT

It is the judgment of the Tribunal that the claimant was not unfairly dismissed, and his claim is dismissed.

REASONS

1. This has been a remote hearing which has been consented to by the parties. The form of remote hearing was a code V , with all parties appearing by CVP video link. A face to face hearing was not held because no-one requested the same , it was not practicable , and all issues could be determined in a remote hearing . The documents that the Tribunal was referred to are in a bundle of 219 pages, the contents of which are recorded.

2. By a claim form presented to the Tribunal on 17 January 2020 the claimant claimed that he had been unfairly dismissed by the respondent , with notice , on 19 October 2019. The respondent admitted dismissal, but contended that the dismissal was for the potentially fair reason of conduct, and that it was fair in all the circumstances. In the alternative , it argued that the claimant should not be reinstated (the remedy he sought) , and any compensation should be reduced, by reason of his contributory conduct. Further potential issues as to remedy were also raised.

3. A final hearing was listed for 8 June 2020, but due to the Covid – 19 pandemic this was converted into a preliminary hearing, at which fresh case management orders were made, and this new hearing date was fixed.

4. Whilst the claimant had made a claim in respect of holiday pay, the respondent had made a payment to him of £515.12, which he agreed met this claim, leaving only his complaint of unfair dismissal before the Tribunal.

5. The claimant appeared in person, and proposed to call Janet Lee, his partner, but her witness statement was agreed, and hence taken as read. The respondent called Alan Gidman, the dismissing officer. There was an agreed bundle. Having heard the evidence, the Tribunal heard submissions. Ms Percival had prepared written closing submissions, and spoke to them. The claimant , who it was agreed would make his submissions his after the respondent, made oral submissions. At the very end of these his CVP connection was lost, so he was invited to add any further points by email by 23 October 2020. He did so by three further email submissions, one on 22 October 2020,another on 23 October 2020, and a third on 25 October 2020. The first relates to telephone calls that the claimant had made to his mother on 26, 27 and 28 July 2019 when he was off work sick, the second relates to pages 143 and 153 of the bundle, where the claimant refused to sign documents that he was asked to sign, and the third provides details of a dog bite incident in December 2015, and the claimant's subsequent attendance at A & E. These have been considered by the Tribunal.

6. Having heard the evidence, read the documents in the bundle and considered the submissions of the parties, the Tribunal finds the following relevant facts:

6.1 The claimant was employed as a postman ("OPG") by the respondent from 24 September 2007 until 17 January 2020. He worked at the Bolton North Delivery Office ("DO").

6.2 The claimant's employment was expressly subject to the following terms, and policies, and collective agreements:

The Royal Mail Group Conduct Policy (pages 41 to 47 of the bundle)

The Attendance Policy (pages 48 to 56 of the bundle)

The National Attendance Agreement (pages 60 to 66 of the bundle)

The Policy Guidelines (pages 81 to 124 of the bundle)

The Absence Notification and Maintaining Contact – Guide for employees (pages 125 to 129 of the bundle)

6.3 It was expressly provided by those terms and policies that , in the case of any sickness absence the claimant must :

Advise his manager of his absence as soon as possible, and before the start of the shift or usual start time;

Discuss with his manager the reason for the absence, the likely duration and anticipated return date;

Discuss with his manager any support that the respondent may be able to offer , including support that may be able to assist him in his return to work.

6.4 The claimant had been off work sick prior to July 2019. In particular he had been absent in 2015 and 2018.

6.5 Upon his return to work in 2015 he was spoken to by his manager, who had experienced difficulty in contacting the claimant during is sickness absence (see page 138 of the bundle), and he was shown a "storyboard" in which the correct absence notification procedure was explained .

6.6 Upon his return to work in June 2018 after sickness absence with a stomach bug, in a Return to Work Discussion on 8 June 2018 his manager Davina Woolley recorded that he was made aware of the correct procedure for ringing in sick, not to send a text, but to speak to a manager (pages 34 and 35 of the bundle).

6.7 The claimant on 5 October 2018 was disciplined. The outcome was a suspended dismissal , for two years.

6.8 On 25 July 2019 the claimant became ill, and could not go to work. He did not himself ring or text his manager, Ben Tomlinson, but his partner , Janet Lee rang into his office, and spoke to Stephen Swailes . He went to get Ben Tomlinson but by the time he returned to the call with Janet Lee, it was no longer active.

6.9 The claimant did not himself ring Ben Tomlinso that day, or any time subsequently during his sickness absence. He did not have his mobile number. He did text Robert Smith , a manager for BL2, at 6.28 a.m (in what precise terms is unclear), and he replied that the claimant should "follow the process and ring Ben (see page 141 of the bundle). The claimant did not do so, nor did he text or ring Robert Smith to get Ben Tomlinson's number.

6.10 Ben Tomlinson on 26 July 2019 wrote to the claimant (page 142 of the bundle) in respect of his absence from work and asked him to attend an informal meeting on 27th of July 2019 to see how the claimant could be supported through his absence and get back to work as soon as possible. In this letter he stated that it was important that contact continued throughout the sickness absence.

6.11 As the claimant did not make contact with Ben Tomlinson, he sent a further letter to the claimant on 27 July 2019, pointing out that the claimant had not been in contact with him and giving him a further opportunity to do so.(page 143 of the bundle).

6.12 The claimant made no further contact and on 29 July 2019 Ben Tomlinson wrote again to the claimant expressing his concern regarding the level of contact that he had had with him since he went off sick and reminding him of his obligations whilst on sick leave, which included to maintain regular contact with the office, in order that the absence could be

discussed directly with the claimant. He also set out in eight further bullet points the procedures that the claimant should follow in respect of his sickness absence. In this letter he went on to warn the claimant that he needed to follow these procedures to ensure that he continued to meet the criteria in order to receive sick pay, and the failure to comply with the absence reporting procedures could result in stoppage of pay and/or further more serious sanctions. He invited the claimant to attend a meeting on 31 July 2019 to discuss his absence and reconfirm a contact strategy. This was not however to be a formal meeting but the claimant was permitted to bring a union representative or a work colleague if he wished. Ben Tomlinson hand-delivered this letter to the claimant's home address, but got no answer, so posted it through the letterbox.

6.13 The claimant then recovered sufficiently to be able to return to work, and informed Ben Tomlinson of this by text message on 30 July 2019 at 17.10. He replied later that day asking if the claimant could attend a meeting the following day , 31 July 2019, regarding the claimant sickness and attendance. The claimant replied that he could not as he had "things on" (this would not have been a nonworking day for the claimant), whereupon Ben Tomlinson replied that the claimant needed to follow the correct procedure and to call him, or the office, asking for him, to confirm that he was resuming work. He ended this message by saying " we don't accept text messages when reporting absences/sick" (page 146 of the bundle).

6.14 No meeting took place on 31 July 2019 it was not until 2 August 2019 that the claimant had a return to work discussion with Ben Tomlinson, which is noted at pages 147 to 148 of the bundle.

6.15 Ben Tomlinson asked the claimant why his phone had been switched off and put it to him that he failed to follow the correct procedure. The claimant replied that he was at home and was ill in bed.

6.16 As result of this interview Ben Tomlinson escalated the incident for investigation. Investigation was carried out by Paul Longworth, who carried out a formal fact finding interview with the claimant on 16 August 2019. The notes of that interview are at pages 149 to 153 of the bundle. In this interview the claimant was asked if he was aware of the process he was required to follow when reporting sick, and he stated that he was. He said that he should ring the Traffic Office, for which he gave the telephone number, and let the person know he was reporting sick. He explained that he had been given this telephone number during a previous return to work meeting.

6.17 Paul Longworth asked him about the text messages on the morning of 25 July 2019, and in particular the text that Robert Smith had sent him in which he informed the claimant continued to follow the process and ring Ben Tomlinson. He asked the claimant why he hadn't follow this instruction and contacted Ben, to which he replied that he had not seen that text until around 9.00 and he did not have Ben's contact number.

6.18 He was asked why he did not ring Robert Smith to get it. He replied that he was too ill to make a telephone call. He went on to explain how he suffered a stomach complaint, which could lay him out. His partner has contacted the Traffic Office 6.05 to explain he was not coming in. She had done this because he was too ill to do so. Paul Longworth put to him that he had contacted the traffic office, and the phone had been answered by Stephen Swailes, who had asked him to hold whilst he got Ben Tomlinson, but when Ben Tomlinson got to the phone he had rung off. The claimant said this was not the case it was his partner who had phoned.

6.19 Paul Longworth then discussed with the claimant the further attempts Robert Smith said that he had made to contact the claimant. The claimant said he had not received any such call and showed the telephone call log to Paul Longworth.

6.20 Paul Longworth noticed when looking at the claimant's phone there were several calls during 25 July 2019, some of which appear to have been answered. He put to the claimant that he appeared to be able to take calls from family and friends, but the claimant denied this and said that he was too ill to answer the phone.

6.21 Paul Longworth then went on to discuss the letters Ben Tomlinson had sent to the claimant. He asked why the claimant did not respond to them. The claimant said he was not sure when he received these letters, and had opened them both on 30 July 2019 at around 17:00 hours.

6.22 He then had contacted Paul Ashbridge to get Ben Tomlinson's contact details. He then sent a text to Ben Tomlinson to say that he was resuming work. Paul Longworth then put to the claimant that Ben Tomlinson had replied to him that he needed to follow the correct procedure and that text messages are not acceptable. He asked why the claimant did not then telephone Ben Tomlinson. He replied that he had sent a text message saying that he was resuming, and that he thought it was "excessive". He reiterated that he had not had Ben Tomlinson's number.

6.23 Paul Longworth then went on to discuss the letter that Ben Tomlinson had sent dated 29 July 2019. He put to the claimant that Ben Thomason had hand-delivered this letter, and had assumed that no was at home. He asked if the claimant had heard him knocking on the door. The claimant said that he was at home on that day but he was in bed. He agreed that he spent most of the time off sick in bed but he did move around the house. He lived with his partner that she had not made him aware of letters from the respondent. She worked herself, and had left the mail unopened.

6.24 Paul Longworth then moved on to discuss the claimant his understanding of the sickness absence contact strategy, and referred the claimant to 2 documents, a "storyboard" drafted by Neil Holmes in 2015, and a welcome back to work meeting held with the Davina Woolley in April 2018. There was content in both documents which explained that texting the manager was not acceptable, and a verbal conversation needed to take

place. The claimant agreed that he had been spoken to previously about texting, and not speaking directly with the manager. He was asked if he had an issue with speaking to managers, which he denied and whether the illness was of a sensitive nature, which he also denied.

6.25 Paul Longworth asked if he could review the claimant's mobile phone call log, which he did. He noted that the claimant had apparently taken a number of calls during the four days sickness absence. He asked why the claimant could not make any call to the traffic office or his manager? The claimant replied that he did not know. Paul Longworth then went on to review the information from the interview and asked if there was anything that the claimant wish to add. He replied that he was writing to HR to make them aware of his conduct penalty of two years suspended dismissal that he had received. He said that this was not right as he was being punished for failing to deliver packets which he was not being paid for. He went on to say that if Royal Mail thought it was trying to get him on "this little thing", he would be speaking to a solicitor. Paul Longworth replied that he was unaware of the claimant's conduct record , but would document this in the notes.

6.26 The notes were prepared and sent to the claimant but he refused to sign them.

6.27 As part of his investigation Paul Longworth interviewed Divina Woolley on 12 September 2019 (the notes are pages 155 to 156 of the bundle) , Ben Tomlinson the same day (the notes are at pages 157 to 158 of the bundle) and Stephen Swailes (the notes are at page 159 of the bundle).

6.28 By an undated letter (page 160 of the bundle) Paul Longworth informed the claimant following the fact-finding meeting that the case would be passed up for consideration of any further action to Alan Gidman.

6.29 By a similarly undated letter (pages 161 to 162 of the bundle) Alan Gidman wrote to the claimant inviting him to a formal conduct meeting on 27 September 2019 to consider two conduct notifications namely failure to follow a workplace procedure and failure to follow reasonable instruction. The claimant was advised of his right to be accompanied by a trade union representative or work colleague, and a copy of the investigation, and of the relevant witness statements and other documents that would be referred to, were enclosed with this letter. The claimant was also advised that Alan Gidman would take into account the claimant's conduct record which was currently showing that he was subject to a two-year suspended dismissal. The claimant also advised that these notifications were being considered as gross misconduct, and that , if upheld , one outcome could be the claimant's dismissal without notice.

6.30 The formal conduct interview was held by Alan Gidman on 28 September 2019 (a day later than was originally notified) . The claimant was not represented and confirmed that he was happy to continue without representation or any accompanying colleague. In the initial discussion the

claimant confirmed that he had received the investigation and notes of the interviews with the witnesses. He had not signed the fact-finding notes, which he said were not totally correct. He had not signed the notes as he did not like signing things as he thought he might get sacked if he had signed it.

6.31 Alan Gidman asked the claimant to take him through the events of 25 July 2019 when he went on sick leave, which the claimant did. He explained how his partner had rung in to work on his behalf and had told them that he was sick. He had not been present when she rang in. It was put to him that she had hung up when Stephen Swailes had gone to get a manager, which the claimant did not specifically reply to.

6.32 Alan Gidman referred to the text the claimant had received from Rob Smith and asked why he had sent a text and had not rung. He said he might have been asleep when someone rang back. Alan Gidman put to him that he had been told to ring Ben which was the correct policy and asked why he had ignored this instruction. The claimant replied that he did not have Ben's number. When asked why he did not ring Rob or even text back to explain this , the claimant said this because he was ill.

6.33 There was further discussion about the claimant's condition that day and whether he had stayed in bed all day. He said he had moved around the house. He was asked if he had received a letter from work, and he said that he had not opened any mail.

6.34 There was discussion of the claimant's phone log and he allowed Alan Gidman to see this, but did not permit him to make notes of it. Alan Gidman noticed that the claimant had had a call from Ben Tomlinson on 27 July 2019 but he had not answered it. The claimant said he was too ill, and was too ill to ring him back. Alan Gidman referred to a number of calls during the sickness absence some of which appeared to have been answered. He asked the claimant why he was able to do that but could not speak to his manager. He said it depended if he was awake or not.

6.35 Alan Gidman then moved on to discuss the policy in relation to maintaining contact on sickness absence, and when pressed about not answering or returning calls his manager the claimant replied "bit extreme isn't it I was ill".

6.36 Alan Gidman went on to ask the claimant if he had stayed at home which he confirmed, and then to explore with him why he had not been aware that Ben Tomlinson had visited his house to deliver a letter directly to the claimant. The claimant said he did not hear anyone , and had only seen the letter on the following Tuesday when he rang Paul Ashbridge to get Ben's number. He was then asked why he had texted Ben rather than ringing him, he replied that he had only been off for a few days, and was letting him know he was coming back. When it was put to him that Ben had immediately replied and asked him to attend work the following day to discuss his absence, and was his reply appropriate given the lack of contact, the claimant replied that he was better so he was just letting Ben know.

6.37 When it was put to him that he had been reminded of the process by a text reply from Ben in which he had asked the claimant to ring him, which had been a reasonable instruction that the claimant had ignored, the claimant said that he had let him know and repeated that this was a "bit extreme".

6.38 There was then a discussion of the claimant's previous absence and the storyboard that he had been shown , and the comments made in the welcome back meeting on June 18 the previous year with Davina Woolley. It was pointed out that the claimant had been made aware of the procedure for ringing in, no texts, and to speak to a manager. The claimant said that this was a while ago and what he expected to remember everything?

6.39 The claimant then indicated that he had been there long enough but declined a break in the meeting. He said that he had said all that he could. Alan Gidman asked how he could be sure that the claimant would list the future instructions when he had demonstrated that he could ignore reasonable instructions repeatedly. The claimant said there was nothing else he could say.

6.40 The notes of the conduct meeting were sent to the claimant for him to sign, by letter of 30 September 2019 (page 167 of the bundle), but he refused to do so.

6.41 By letter of 19 October 2019 Alan Gidman sent the claimant his decision which was for dismissal with notice. He enclosed his decision report which set out the background, his deliberations and conclusions (pages 168 173 of the bundle). This letter was in fact delivered personally to the claimant outside his home address. This was to ensure that he received it, and not to prejudice the time limit for any appeal.

6.42 In summary , Alan Gidman set out the factual background which was not disputed by the claimant. In his deliberations Alan Gidman referred to the facts that the claimant's partner had contacted the unit to report the claimant was sick but had not stayed on the line to speak to his manager. The claimant had failed to respond to 3 letters sent to his home address including one that had been hand-delivered by Ben Tomlinson. He had been instructed to ring Ben Tomlinson but had failed to do so despite being reminded that this was the correct procedure. The claimant had admitted that he knew of the process of needing to speak to a manager and that text was not acceptable. The claimant had twice previously failed to maintain this procedure, despite this being brought to his attention. The claimant had been able to make and receive multiple personal calls during his sickness absence but would not grant any further more detailed access to his phone. Additionally the claimant had a two-year suspended dismissal on his record which did not expire until October 2020.

6.43 Alan Gidman concluded that the claimant had received an instruction to contact his manager by phone, but had ignored this. He

therefore found the charge of failing to follow reasonable instruction was proven. The claimant admitted that he had been told in the past about non-compliance in relation to maintaining contact whilst off work sick and that a text message was not acceptable. Despite this he failed to follow this procedure, so the charge of failing to follow workplace procedure was also proven.

6.44 In his deliberations Alan Gidman also took into account the claimant's negative and dismissive attitude throughout the investigation and he did not believe , moving forward, that the claimant would adhere to policy and procedures.

6.45 Having considered that the first notification that the claimant had failed to follow workplace was proven, he considered that this in isolation would warrant a penalty at the first line level, i.e. a warning. In relation to the second notification failure to follow reasonable instruction, he considered this too was proven, and this would warrant a penalty at the second line level which could be dismissal or suspended dismissal.

6.46 Taking into account however that the claimant already was subject to a suspended dismissal, he did not believe given the severity of the behaviour and lack of remorse on the part of the claimant that the risk could be effectively managed through a further suspended dismissal from the respondents employment. He therefore considered that dismissal was an appropriate sanction and went on to decide that in the circumstances it should be with notice.

6.47 The claimant was advised of his right of appeal, which he was required to exercise within three working days of receipt of the dismissal letter.

6.48 The claimant did not formally notify his intention to appeal but informed Alan Gidman verbally that he may wish to appeal. Consequently the case papers were forwarded to the respondents HRSC Gateway for processing (see page 173a of the bundle).

6.49 An appeal was accordingly arranged for the claimant on 31 October 2019. He was notified of this by letter of 23 October 2019 (pages 174 to 175 of the bundle). The claimant in fact did not attend that appeal hearing and did not pursue his appeal. It nonetheless proceeded in his absence and an appeal decision document upholding his dismissal dated 4 November 2019 subsequently sent to him.

6.50 The claimant was not required to work the 10 weeks notice period to which is dismissal was subject. An issue did arise in relation to the classification of the claimant's status during the final period of his employment, as recorded in an Absence Record at pages 136 to 137 of the bundle document produced by the respondent wherein the claimant as recorded as having had 72 days of sickness absence from 1 November 2019

for back pain. This was disputed by the claimant and subsequently agreed by the respondent as being inaccurate.

6.51 The two-year suspended dismissal sanction was imposed on 5 October 2018 for intentional delay of the mail, and unacceptable behaviour by leaving the claimant's delivery partner with no way of getting back to the office. The papers relating to this disciplinary process and the sanction imposed are at pages 185 to 209 of the bundle. They reveal that an investigation was carried out into the two allegations, witnesses were interviewed as was the claimant and he was represented throughout by a trade union representative. The decision was taken by Andy McAleavey, the Delivery Office Manager. His deliberations and conclusions are set out at pages 206 to 208 of the bundle.

6.52 In these proceedings there were two allegations. The first was the claimant had failed to deliver all of his mail, and had thereby intentionally delayed the mail. Some 15 items of mail were failed, which were apparently parcels. This arose in connection with the claimant losing contact with his partner, who was new to the round and was not a driver. The claimant had in effect lost his partner in circumstances where at the very least he should have contacted the office to inform his employer of this problem. The result of this was that the claimant's partner was left out on the round with no means of returning by vehicle to the delivery office.

6.53 From a perusal of the papers in these proceedings, it appears that the claimant did not dispute the basic facts of what was alleged against him, but sought to argue mitigation in relation to the seriousness of his actions. This was not accepted and he was consequently subjected to the sanction of suspended dismissal. He did not appeal.

7. Those then are the relevant facts. There was little disagreement on the facts, and nothing in this judgment turns upon the credibility of any witness or party.

The submissions.

8. The parties made submissions. For the respondent, Ms Percival had prepared written closing submissions which set out the respondents contentions that this dismissal was fair . He had little to add to these closing submissions which had been provided to the claimant. The respondent had shown a potentially fair reason, conduct, for the claimant's dismissal, had followed a fair procedure, has conducted a fair investigation and had genuinely , and on reasonable grounds, concluded that the claimant had been guilty of the conduct alleged against him. Dismissal for that conduct fell within the range of reasonable responses, particularly given his lack of consideration for, or appreciation of , the severity of his actions.

9. In relation to the appeal, the claimant had actually been given longer than would normally been the case in which to submit an appeal but ultimately had not pursued one.

10. The claimant was offered time , if he required it, to prepare his submissions , but was content to proceed . Not being legally qualified represented he was not expected

to deal with the various legal points made in the respondent's submissions but he did make the point that the cases referred to in Ms Percival's submissions seemed to be somewhat old . The Employment Judge pointed out that that was often the way with case law, as old cases often established principles that remain valid for many years to come.

11. The claimant pointed out that he would be seeking reinstatement if successful. He had only been ill for a few days and his previous suspended dismissal was for as he put it "just a few parcels". He highlighted his own work in staying out late when others did not, and his willingness to drive every type of van, when others would not.

12. In relation to the three letters that he was sent, he was surprised at this. When he was feeling better he did get back to his employers but he thought it was all "a bit much really". He had not appealed his suspended dismissal, and referred to the notes of that procedure which were at the back of the bundle. He sought to go into some detail of the facts of this matter, and why he considered this sanction was unfair.

13. He complained that his dismissal was carried out in the street, when he was handed the dismissal letter outside his house, which he considered to be unfair and unnecessarily public.

14. He had only had a short period of illness, so how could he be expected to get in for meetings during that period?

15. He made reference to the incorrect recording of his sickness absence and annual leave, but then he suffered connection problems which meant he could not complete his submissions, although he was clearly very close to doing so.

16. As indicated above the Tribunal received three further email submissions from the claimant which have been considered in reaching this judgement.

The Law.

17. The relevant provisions of the Employment Rights Act 1996 are as follows:

"FAIRNESS

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."

The relevant caselaw was correctly summarised in Ms Percival's submissions.

Discussion and findings.

18. The first issue for the Tribunal to decide is whether the respondent has shown, the burden being upon it to do so, a potentially fair reason for dismissal. The reason relied upon is conduct, and the claimant has not challenged that this was the reason for his dismissal. The Tribunal accepts that his conduct was indeed the reason for his dismissal, and proceeds to the real issue in the case, namely whether it was fair in all the circumstances.

19. The claimant is not a lawyer, and is not legally represented. His case on unfairness is really twofold. Firstly, he seeks to argue that his previous warning was unfair, and should have been disregarded, and secondly, he argues that in any event, the sanction of dismissal for not following the absence notification procedure to the letter is excessive.

20. Dealing with the first of these, as was explained to the claimant in the course of the hearing, the extent to which a Tribunal is permitted to go behind a previous warning is limited. The question is whether a dismissal was fair, not whether a previous warning was fair.

21. The employer's disciplinary procedure provides machinery for an appeal against a warning. In general, an employee is well advised to challenge a warning that he or

she disagrees with immediately under such a procedure. While it is true that a failure to appeal is not automatically to be construed as acquiescence in it by the employee, especially where that employee can point to good reason (or indeed positive advice) not to use the procedure, it must not be assumed that a successful challenge can be maintained to the warning at a later stage, in particular where it forms an integral part of a later decision to dismiss. This is because the issuing of a warning is primarily a matter for the employer , and a Tribunal must be particularly careful not to fall into the error of substituting its own view of whether the warning should have been given in the first place. This issue was addressed in the leading case of ***Stein v Associated Dairies Ltd [1982] IRLR 447***, where the test required to be satisfied before it would be appropriate for a Tribunal to look behind a warning was deliberately couched in more exacting terms than the test for unfairness in respect of a dismissal. It was held that provided the warning was issued in good faith , and there were prima facie grounds for it (or, to put it another way, provided the warning was not issued for an oblique motive or was not manifestly inappropriately issued) the employer and the tribunal are entitled to regard the warning as valid for the purposes of any dismissal arising from subsequent misconduct, provided that the subsequent misconduct is such that, when taken together with the warning, the dismissal or the decision to dismiss is a reasonable one.

22. Here the suspended dismissal was for two offences, one of intentionally delaying the mail, and the other of unacceptable behaviour in leaving his delivery partner with no way of getting back to the office. The thrust of the claimant's arguments in this case in relation to that sanction appeared to be that "it was only 15 parcels". That was mitigation he advanced in the previous disciplinary proceedings. He presumably would likewise say that losing his partner was similarly not a serious matter, and that the sanction was unduly harsh.

23. This Tribunal can see no basis for going behind the sanction imposed in the previous disciplinary process. As noted above, there has to be something quite out of the ordinary to warrant a Tribunal revisiting a previous disciplinary sanction in a subsequent unfair dismissal claim. Further this sanction was not appealed. The Tribunal therefore sees no basis upon which it can go behind it and it is accordingly a relevant matter for the respondent to have taken into account in determining whether or not to dismiss for these subsequent acts of misconduct.

24. It is appreciated , however, that this dismissal was for different conduct, and related to notification of sickness absence. The Tribunal therefore must examine whether it is reasonable of Mr Gidman to take it into account at all in reaching his decision to dismiss for this particular form of misconduct.

25. As ever, and submitted by Mr Perceval in his written submissions, the tribunal must not substitute its own views for those of the employer but must decide whether the dismissal fell within the band of reasonable responses as required by the caselaw cited by him. That test is to be applied in relation to both the procedural and the substantive stages.

26. The tribunal has no hesitation in finding that conduct was indeed the potentially fair reason for dismissal, and equally no hesitation in finding that the respondent followed a fair procedure. The claimant was provided with details of the allegations against him, was given an opportunity to respond to them in both the fact-finding

meeting and the conduct meeting, and was provided with the evidence to be considered by the respondent in determining the appropriate disciplinary sanction. No real complaint was made by the claimant of the procedure but the Tribunal has satisfied itself that it was indeed reasonable. The appeal is something of a red herring, in that the claimant in fact did not appeal. The respondent nonetheless held an appeal in his absence, but that can have no bearing on the fairness of the decision to dismiss.

27. A fair procedure having been followed, the next question is whether the respondent did have a genuine belief formed on reasonable grounds after a reasonable investigation in the guilt of the claimant of the conduct alleged against him. Again the Tribunal has no hesitation in concluding that the respondent did have such a belief, which was indeed formed on reasonable grounds after a reasonable investigation.

28. The respondent having found that the claimant had committed the misconduct alleged against him, the next question and indeed the central question in the claimant's complaint of unfair dismissal, is whether the sanction of dismissal was reasonable in all the circumstances. Those circumstances clearly include the previous and current suspended dismissal, but those are not the only circumstances. The tribunal considers Alan Gidman was entitled to take the suspended dismissal into account, and did. Its relevance however is to the wider issue as to whether a lesser sanction than dismissal would have been appropriate in the circumstances.

29. It is frequently said that disciplinary procedures are meant to be corrective rather than punitive, and if there is a prospect of an employee being able to remedy his conduct in the future, an employer should take that into consideration in deciding whether or not it is reasonable to dismiss that employee. The problem for the claimant is that Alan Gidman considered that he could have no such confidence in the claimant for the future. To some extent the suspended dismissal is relevant to that conclusion, but there are other supporting facts which also entitled Alan Gidman to come to that conclusion. Firstly as the claimant accepted, he had on two previous occasions been told of the correct procedures to follow in relation to sickness absence reporting. The most recent had been that recorded by Davina Woolley in June 2018 only just over 12 months prior to this incident. This was in addition to the respondent's well-publicised policies and procedures of which the claimant was, or ought to have been, well aware as an experienced OPG.

30. Secondly, Alan Gidman was also entitled to take into account, and did, the claimant's reaction to this disciplinary process. Far from showing an appreciation of the seriousness of his position, the claimant continually made light of it , and expressed the view that it was all "a bit extreme". His employer did not take that view. The reason it did not take that view was that managing short-term sickness absences in an operation that depends upon reliable postal delivery by OPGs to achieve prescribed levels of public service is made considerably more difficult if the respondent's employees do not adhere to it sickness notification policies. These are designed to maximise the opportunity for managers on the ground to deal with sudden and unexpected changes to the availability of their workforce. The respondent took the view, as the Tribunal considers it was entitled to, that mere notification of sickness absence without an opportunity for a manager to at least have a discussion with the absent employee is not sufficient. Managers need as much information as possible as

soon as possible in order to manage such sickness absences. By avoiding direct communication with managers , employees who do not notify them directly , when possible , deny them this opportunity and thereby considerably impede their ability to manage sickness absence. The claimant appears to have no comprehension of this concept, and is either unwilling or unable to appreciate how seriously the respondent takes this issue, and why it is reasonable for it to do so.

31. The claimant accepted that he had not made direct telephone contact with Ben Tomlinson. It is clear from the respondents policies and procedures, and the information provided to the claimant previously that he should have done so. He did not do so even when prompted to do so by text message from either Rob Smith or Ben Tomlinson himself. Whether he did or did not open the three letters sent to him during his sickness absence is not clear, but the respondent was entitled to be sceptical as to whether that was actually the case.

32. Furthermore, the Tribunal would make this observation. The claimant's contention that he could not ring Ben Tomlinson because he did not have "his number" is not a relevant factor. By "his number" it is presumed that he means his mobile telephone number, but his partner clearly could and did ring the respondent, and ask to be connected with him, but was unable to complete the call. If she could do so, why, the Tribunal wonders, could the claimant not use the same number to seek to contact him, or leave a message for him? He clearly had the relevant office number , as he provided it in the conduct interview with Alan Gidman . The fact is he did not, and he made no attempt to do so. Given that he was able in that period to telephone his mother, the Tribunal appreciates for far more pressing and caring reasons, why could he not have taken a minute to call his employer? It is, however, of course, irrelevant what the Tribunal thinks, the test is whether it was reasonable for the employer to have such a view. It, in the person of Mr Gidman, clearly did consider that the claimant could have telephoned himself, but did not do so. That was a view to which he was clearly entitled to come.

33. In determining therefore whether dismissal fell within the band of reasonable responses for the conduct that the respondent had reasonably concluded the claimant had committed the Tribunal considers Alan Gidman was indeed entitled to have no confidence , given the claimant's previous suspended dismissal, his relatively recent reminder of the correct procedure to follow, and his continued lack of appreciation of the seriousness of the conduct that he had committed , that there would be no repetition of such conduct in the future. In the circumstances the decision to dismiss clearly fell well within the band of reasonable responses the claimant's complaint of unfair dismissal is accordingly dismissed.

Post – script : the sickness absence record.

34. Whilst not germane to the Tribunal's decision, it is however only fair, however, to observe , as it was during the hearing, that , whilst it may have appeared unimportant provided that the claimant suffered no financial loss, the erroneous recording of the claimant's absence record showing 72 days of sickness absence during his notice period is something that should be corrected. There may well be occasions in the future when information about the claimant's employment record is sought by other employers or potential employers, who may thereby be provided with

an erroneous impression of the claimant's absence record. The respondent will doubtless ensure that the necessary corrections are made to prevent the claimant being prejudiced in any future employment by any inaccurate reference or other information provided by the respondent.

Employment Judge Holmes

DATED : 13 November 2020

RESERVED JUDGMENT SENT
TO THE PARTIES ON
19 November 2020

FOR THE TRIBUNAL OFFICE