EMPLOYMENT TRIBUNALS

Claimant: **Mr A Hayward**

Respondent: **Royal Mail Group Ltd**

Heard at: **Bristol** **On: 11 and 12 January 2021**

Before: Employment Judge Midgley
Ms S Maidment
Mr J Ruddick

Representation
Claimant: In person.
Respondent: Mr J McArdle, Solicitor

RESERVED JUDGMENT

The claims of unfair dismissal and direct race discrimination are not well founded and are dismissed.

REASONS

Claims and Parties

1. By a claim form presented on 11 October 2019, the claimant brought claims of unfair dismissal and direct race discrimination.

2. The claimant is an experienced driver and was employed by the respondent's group company, Parcelforce Worldwide, between 21 July 2014 and 15 May 2019.

3. The respondent is a household name, and the events in question relate to the Parcelforce Worldwide Depot in Gloucester.

Procedure, Hearing and Evidence

4. The parties provided us an agreed bundle of 138 pages, a Statement of Agreed Facts, and the following witness statements for the parties: for the

claimant, the statement of the claimant himself. For the respondent the following statements:

4.1. Mr Anthony Mabbs, the Delivery Manager for Parcelforce Worldwide in Gloucester.

4.2. Mr Nicholas Day, the Operations Manager for Royal Mail.

4.3. Mrs Jan Mullins, the Independent Casework Manager, based in Wirral.

5. Prior to hearing evidence, I clarified the nature of the claims with the claimant, seeking to understand whether he was alleging that his dismissal was itself an act of discrimination, given the allegation at issue 10.1.2 in the Case Management Summary of 17 April 2020. The claimant confirmed that he was not alleging that his race was a reason for his dismissal, and that he therefore withdrew allegation 10.1.2.

6. We heard evidence from each of the witnesses by oath or affirmation, and each answered questions from the opposing party and from the Tribunal.

7. The parties provided written closing arguments and expanded upon those orally. An Excel document was attached to the respondent's closing argument which consisting of a clearer version of spreadsheet on page 48 of the Tribunal Bundle. There was no objection to its inclusion or our consideration of it.

8. There were some difficulties with the connection to the hearing of some parties and, at one stage a Tribunal member, and that led to closing arguments ending at 12 o'clock on the second day of the hearing, rather than the end of the first day as envisaged in the proposed timetable. In consequence we reserved Judgment, to avoid the need to rush our deliberations or delivery of the Judgment. In any event, there would have been insufficient time to consider remedy, if that had been required.

Issues

9. The issues are those set out in the Case Management Summary of 7 April 2020, save that issue 10.1.2 had been withdrawn by the claimant at the start of the hearing.

Factual Background

10. We make the following findings of fact on the balance of probabilities in light of the documents which we read (detailed above) and the evidence that we heard. We have been greatly assisted by the Statement of Agreed Facts, which are incorporated into our findings of fact.

11. Prior to his employment with the respondent, the claimant worked for a number of parcel couriers, including DHL, City Link and Yodel, both on an employed and self-employed basis. He had approximately 23 years of experience in the industry.

12. The claimant was employed by the respondent as a Customer Service Provider from 17 July 2014 until his dismissal. He was based at its depot in

Gloucester.

13. Throughout the course of the claimant's employment with the respondent, he worked predominantly as a 'reserve' driver, covering various routes within the depot based on annual leave/other absence. At times, when there was insufficient delivery work, he worked in the warehouse or undertaking administrative duties.

The contract and conduct policies

14. The claimant signed a contract of employment on 4 October 2015, the terms of which provided:

    14.1. At paragraph 6 that the claimant could be required "to undertake such other duties as may be required from time to time" which the respondent reasonably regarded him as being competent to perform.

    14.2. At, paragraph 14 that employees will comply with the "Code of Business Standards."

    14.3. At paragraph 27.1, that the claimant was required to 'perform all acts, duties and obligations and comply with such rules, instructions and other directions, policies, or procedures as may from time to time relate to [his] employment and be required or be made by Royal Mail'; and

    14.4. At paragraph 27.4, that 'breach of [the above] provision may lead to disciplinary action including, in appropriate cases, dismissal with or without notice'

15. The respondent operates a Conduct Policy. The policy identifies employee obligations as including the requirement to "follow any reasonable instructions of their manager". Failure to follow a reasonable instruction is not, however, listed among the examples of gross misconduct.

16. The Conduct Policy provides for a 'precautionary suspension' where a serious incident occurs. The failure to carry out a reasonable instruction is listed amongst the examples within the policy of where such suspensions are potentially appropriate. The policy requires that if the manager believes that the incident is serious and he or she has a reasonable belief that a serious breach might be repeated, the manager should send the employee home. In those circumstances, the manager must discuss the case with Human Resources and determine the appropriate course of action.

17. Furthermore, the policy provides as follows, "Where the employee has refused to carry out a reasonable instruction they should be given 10 minutes "cooling off time" to reconsider their actions."

18. Further employee guidance addresses the circumstances in which a 'precautionary suspension' should be applied. It specifically identifies a failure to carry out a reasonable instruction as a circumstance in which a precautionary suspension may be considered but directs that the employee should be given 10 minutes to cool off and, if possible, should be able to discuss the incident with their local union representative. Where a manager concludes that such a suspension may be appropriate, the guide states that

the manager should "arrange to meet the employee on the following working day or shift" and should consider whether to suspend following meeting, identifying whether further investigation is needed, and if so whether it is appropriate to suspend the employee because of a high risk of reputational or actual damage to the respondent or its staff if the employee will return to work.

19. The respondent's Business Standards require employees to show respect for each other and management and to be polite towards them.

20. The parties agree that the terms of the contract were in force at the time of the events which form the subject of this Tribunal claim.

The Blue Print Agreement and 'British Standard Institute ("BSI") collections

21. The respondent is a unionised workforce; the recognised union is the Communications Workers Union ("CWU").

22. Parcelforce Worldwide and the CWU entered into a blueprint agreement ('BPA') addressing ways of working to ensure the success of the respondent's enterprise. The BPA sets out the optimum operational model for units and states that collection and delivery duties should be based upon a 90% 'utilisation.' This means that, aside from meal relief and other incorporated breaks, collection and delivery drivers should have enough work to be busy for 90% of their contractual hours of work.

23. The 'British Standard Institute' ("BSI") is the method by which driver productivity figures are calculated for operational purposes. On the basis of the requirements set out by the BPA, a 90% BSI or 'utilisation' figure is calculated for each template delivery route, representing the number of stops that must be completed to ensure that drivers are busy for 90% of their hours. That calculation includes many factors, such as reducing costs, increasing revenue, and maintaining excellent customer standards. It was reached following consultation between the local depot managers and the respective unit CWU representatives.

24. The BPA provides for a review to ensure that the aims of the agreement are being met and that its terms are appropriate.

25. The 90% BSI applies to collection and deliveries, indoor duties, and administrative duties. The BPA expressly refers to varying routes for "drivers… from day to day depending on traffic volumes and staffing levels."

The practice of applying BSI to routes

26. A BSI for a route essentially identified the number of stops that a driver was required to make, rather than the number of parcels that the driver was required to deliver at each of those stops. The business expectation was that drivers would load sufficient parcels to meet their BSI stops for the route in question in accordance with the BPA.

27. There was a similar expectation that the drivers should, if possible, deliver to all the stops indicated by the BSI for the route, but there was no express or contractual requirement to do so, because of uncontrollable variables such as

traffic conditions or vehicle failure.

28. Furthermore, there was a practice in the Gloucester depot that the BSI for the routes could be varied depending upon, for example, the volumes of mail on any given day (which can fluctuate) and the experience or capabilities of the employee, so that the BSI for a route would be reduced for less experienced employees. Mr Mabbs, the Delivery Manager, exercised a discretion to make such reductions.

29. However, the general expectation was that an experienced driver should be capable of delivering the BSI and, to that end should ensure that his van was loaded with sufficient parcels to meet that BSI. If subsequent events indicated that it would be impossible for the BSI to be met, the respondent's practice was to reallocate drivers who were free to take some of the stops from the struggling driver. This was reinforced at a briefing, given to all drivers who were required to sign indicate they had attended; the claimant received his briefing on 19 February 2018 (page 47).

30. In practice, it was quite common for drivers to deliver less than the BSI indicated stops for a route. There was no evidence before us to suggest that that would be regarded by the respondent as a disciplinary offence, or that it was treated as such in practice.

The events of 17 April 2019

31. On 17 April 2019, the claimant was assigned to cover route GL101 due to the usual drivers' absence. The BSI for route GL101 at 90% equates to 114 stops ('90% BSI').

32. The claimant had undertaken approximately 10 deliveries on the route in the previous 18 months. However, he was a very experienced delivery driver, and the route covered postcodes which were well known to him given he had lived in the relevant areas for much of his life. There was no evidence before us that claimant had previously suggested that the BSI for the route was inappropriate or unreasonable. However, he had delivered on that route on the previous two days, and on the last of those, when it appeared that he would not be able to make all the stops, assistance was sent in accordance with the practice described above.

33. On the morning of 17 April 2019, the was a delay in scanning the parcels that would be loaded onto the claimant's van, and thus in the loading of the van itself. It is not until that parcels have been scanned that the drivers receive a manifest on a device which indicates the number of parcels to be delivered and the number of stops at which they should be delivered.

34. On this occasion, the claimant was concerned that it would be impossible to meet the BSI for the route because of the delay in loading the van and in his consequent late departure. Thinking of those matters, he began to unload parcels for the postcodes GL1 1 and GL4 which were closest to the depot (amounting to a quarter of the post codes for the route), with the intention that another driver would be able to deliver them. Mr Mabbs approached claimant, who told him that he was leaving postcodes GL1-4 behind. Mr Mabbs stated "if you have your BSI, that's okay." The claimant replied to Mr Mabbs "I doubt it," or words to that effect.

35. Although neither Mr Mabbs nor the claimant were aware of this at the time, all the available lorries were in use and there was therefore no one available who could deliver the packages in question. Secondly, at the time the claimant removed the parcels and at all times during his conversation with Mr Mabbs (as detailed below) he did not have the manifest for his route and did not know precisely how many stops and how many parcels he was therefore being required to deliver.

36. Mr Mabbs told the claimant that he should take the BSI. The claimant responded angrily, adopting a loud and aggressive tone, stating that it was impossible to deliver the BSI for the route and that only the designated driver for the route could do so. He took the keys to the van and offered them to Mr Mabbs, stating if he could find someone other than the designated driver who could leave late and make the BSI, with a break, Mr Mabbs should assign the delivery to that individual. Mr Mabbs told him that he was instructing him to take the BSI on the vehicle, and that if he refused Mr Mabbs would suspend him. The claimant said that he was having a laugh and again refused. Mr Mabbs told him that he should go and sit in the canteen for five minutes and think about what he'd been told, because if he were to continue to refuse to take the BSI for the route, Mr Mabbs would have no option but to suspend him as he was failing to follow a reasonable managerial instruction.

37. In intimating that the claimant would be suspended if he did not take the BSI, Mr Mabbs did not adhere to the precautionary suspension guidance, in that he did not offer the claimant the opportunity to cool down and meet the following day, prior to making the decision to suspension.

38. The claimant walked towards the canteen, and then made his way through the warehouse door to the car park, telling the colleagues that he met that he had been suspended, as he made his way to his car. Mr Mabbs had watched the claimant's progress and intercepted him as he was leaving the respondent's premises and asked him where he was going. The claimant said that he was going home as he'd been suspended, and Mr Mabbs told him that he was suspended.

39. The claimant contacted Mr Day, the Operations Manager, to advise him what had happened. Mr Day said that he would be prepared to meet with the claimant to discuss it, and that if he left the shift, he would be abandoning it and he should be careful about his actions. He asked the claimant to return to work and said he would speak to Mr Mabbs and suggested the claimant should go back and deliver as much as he could. The claimant responded that he was going to go home because he had been asked to do too much.

40. Later, on 17 April 2019, Mr Mabbs wrote to the claimant advising him that he was precautionarily suspended from work. The claimant received two further letters from Mr Mabbs on 18 and 29 April 2019 confirming the continuation of his suspension in accordance with the policy.

The disciplinary investigation

41. Mr Mabbs made a statement in respect of the incident on 17 April 2019. The claimant received a copy of this statement, at the very latest, during his appeal. The claimant produced his own statement of events that day or

shortly thereafter.

42. Mr Mabbs invited the claimant to attend a fact-finding meeting on 26 April 2019. The claimant attended together with a union representative. During the meeting the claimant maintained that it would have been impossible to achieve the BSI in the circumstances that presented themselves on 17 April. Mr Mabbs reiterated the respondent's practice in relation to BSI, as described in our findings above.

43. During the meeting the claimant maintained that the instruction to take BSI was an unreasonable one and read out the statement that he had written in relation to the events. He accepted that he did not know whether he had loaded sufficient parcels to comply with the BSI. Mr Mabbs explored with claimant why he thought that he was able to override the business decision in relation to the BSI for route 101. During the ensuing discussion the claimant suggested that given his experience he thought maybe he should be a manager, and that he had been using his initiative. He argued that "the fact that my manager tells me to do something does not mean I have to do it," if the claimant perceived that the instruction was wrong or unreasonable.

44. The claimant reviewed the minutes on 30 April, and added an annotation indicating that he apologised for refusing to comply with what he felt was an unreasonable instruction, complaining that he received more work than others, but indicating that in the future if given such an instruction he would comply with it.

45. It was decided that the claimant had a disciplinary case to answer. Consequently, he was invited to a Formal Conduct Interview with Mr Day on 7 May 2019. The claimant attended with Mr Miller, his union representative. Mr Day had read the minutes of the fact find in preparation for the hearing. The claimant again read out the statement he had prepared.

46. During the meeting the claimant argued that he had been instructed to make the deliveries, not just take the parcels for those deliveries. Mr Day rejected that argument given it was inconsistent the claimant's statement that he had prepared and with the context of the text message that he had sent to Mr Day on the day. The claimant accepted that his conduct in waving his keys at Mr Mabbs was rude and unwise, however, when asked to reflect on what had happened the claimant would only say "in your eyes, my conduct was wrong.… I will put my hands up and say I was wrong if that is what you want me to say". When pressed he maintained that he thought the instruction was unreasonable.

47. The claimant's union representative requested a 10-minute break, during which Mr Day overheard the claimant shouting across the depot to the usual driver for route 101 "I hope you've got your BSI on." Mr Day regarded that as an act of belligerence, aimed at mocking the disciplinary process, and one that was totally inappropriate.

48. By a letter dated 13 May 2019, Mr Day wrote to the claimant informing him of his dismissal without notice. In the accompanying report, Mr Day noted that throughout the incident and ensuing disciplinary process the claimant had demonstrated a lack of respect towards his managers and a lack of remorse

in relation to his actions. He concluded that the claimant had only been asked to take the parcels on the lorry, not to ensure that he delivered them and that that request was a reasonable one. Further he concluded that the claimant's actions in dangling the keys in front of Mr Mabbs and effectively abandoning his delivery could amount to gross misconduct. Mr Day expressed his concern about the claimant's lack of respect for the process being demonstrated by his actions during the break in the disciplinary hearing itself and concluded that the claimant was entirely lacking in insight and remorse, the latter because it was clear the claimant did not view himself as having done anything wrong.

49. He concluded that the appropriate sanction was therefore dismissal with notice.

50. The claimant appealed Mr Day's decision. An appeal hearing was conducted by Mrs Mullins, an Independent Casework Manager, on 5 June 2019, as a rehearing of the disciplinary allegations. The claimant attended the meeting, with his union representative, Steve Dallas. He maintained that Mr Mabbs had instructed him to deliver all the BSI, rather than simply load it on the van. In addition, his union rep argued that there was inconsistency between depots in relation to whether the BSI should be taken. His main argument was that Mr Day had erred in regarding the claimant's conduct as more than an isolated incident relating to the stress and pressures of his work, and a lesser sanction should have been applied as it was a first offence.

51. The theme of the claimant's argument was that it was unreasonable to expect him to undertake the same amount of work as other drivers, who were paid the Scheduled Allowance for the route, whereas the claimant was not, and he was contractually required to do less hours but was being instructed to undertake the same amount of work.

52. On 10 July 2019, Ms Mullin held an investigatory interview with Mr Neil Partridge (Acting Manager); he confirmed that Mr Mabbs had only instructed the claimant to take his BSI on the van and that the claimant was leaving the depot when Mr Mabbs asked where he was going, and the claimant responded he was going home.

53. On 16 July 2019 Ms Mullin held an investigatory interview with Mr Day. Mr Day confirmed that the claimant would not be paid the Scheduled Allowance for the route, but rather the expectation was that he would be required to work the hours necessary to deliver on the route and would be paid overtime in respect of any additional hours.

54. On 17 July 2019, Ms Mullin wrote to the claimant enclosing further evidence (namely the interview notes with Mr Partridge and Mr Day, a 'PSP all absence report' and a copy of the 'Manifest Console' for 16 April 2019) and requested his comments.

55. On 22 July 2019 the claimant wrote to Ms Mullin with his comments on the further evidence. He suggested that Mr Partridge's evidence was simply untrue. At the end of the comments the claimant wrote "if I were to be successful [in the appeal] my aim would be to do exactly the same, a fair day's work for a fair day's pay."

56. On 24 July 2019, Ms Mullin wrote to the Claimant and informed him that his

appeal was not successful and that the original decision of dismissal without notice was appropriate in the circumstances. In essence, she concluded that the claimant did not have the manifest for his deliveries when he sought to suggest that it was impossible to deliver BSI on the route, and therefore his conclusion that the instruction was unreasonable was not based on any evidence. She concluded that Mr Mabbs's instruction was reasonable in relation to the route and the claimant's experience, including the fact that the previous day he had delivered a similar volume to that he was being asked to deliver on the day in question and that help had been sent to him.

57. Mrs Mullins accepted that Mr Mabbs had failed to invite the claimant back to the depot on the 17th or 18th of April before suspending him and that that was a breach of the relevant procedure. However, she concluded that it did not render the decision unfair because, in her view, the claimant had no intention of considering his position, but rather had made up his mind that he was going home, as evidenced by his failure to engage with Mr Day's suggestion that he should return to the depot and complete his deliveries. Similarly, Mrs Mullins concluded that the claimant had been disrespectful in the way he had dangled his keys in front of Mr Mabbs's face and in the comments he had made during the adjournment of the disciplinary hearing.

58. In those circumstances, she concluded that claimant had failed to follow a reasonable management instruction and that the appropriate sanction was dismissal. In reaching that decision she concluded that she had lost trust and confidence in the claimant, given his attitude in suggesting that it was his right to identify what was a fair day's work on any date, and that he had shown little remorse. In those circumstances she did not believe that a lesser sanction would be corrective of his attitude or approach.

The comparators

59. The respondent employs (or has employed) a number of other 'reserve' drivers at its Gloucester depot including the following employees, named by the claimant as 'comparators' in respect of his claim for race discrimination:

    59.1. Mariusz Mrula, who worked for the respondent between 30 October 2013 and 22 December 2018 (a total of approximately 5 years);

    59.2. Adrian Groemeck, who worked for the respondent for approximately 8 months (between February and October 2018) and is of Polish nationality; and

    59.3. Mindauska Poska, who has worked for the respondent since 14 January 2019 (and for approximately 3 months as of 17 April 2019) and is of Lithuanian nationality.

The Relevant Law

Unfair dismissal s.98(4) ERA 1996

60. The reason for the dismissal relied upon was conduct which is a potentially fair reason for dismissal under section 98(2) (b) of the Employment Rights Act 1996 ("the Act").

61. The principal reason for the dismissal is "a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee" (see Abernethy v Mott, Hay and Anderson [1974] ICR 323).

62. We have considered section 98(4) of the Act which provides:

> "…. 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".

63. We have considered the cases of Post Office v Foley, HSBC Bank Plc (formerly Midland Bank plc) v Madden [2000] IRLR 827 CA; British Home Stores Limited v Burchell [1980] ICR 303 EAT; Iceland Frozen Foods Limited v Jones [1982] IRLR 439 EAT; Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR; Nelson v BBC (No 2) [1980] ICR 110 CA and Polkey v A E Dayton Services Ltd [1988] ICR 142 HL. The Tribunal directs itself in the light of these cases as follows.

64. The starting point should always be the words of section 98(4) themselves. In applying the section, the Tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair.

65. In judging the reasonableness of the dismissal, the Tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the Tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

66. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion. A helpful approach in most cases of conduct dismissal is to ask three questions (as to the first of which the burden is on the employer; as to the second and third, the burden is neutral):

    (i) whether the employer believed the employee to have been guilty of misconduct;

    (ii) whether the employer had in mind reasonable grounds on which to sustain that belief; and

(iii) that the employer, at the stage (or any rate the final stage) at which it formed that belief on those grounds, had carried out as much investigation as was reasonable in the circumstances of the case.

67. The band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss.

68. When considering the fairness of a dismissal, the Tribunal must consider the process as a whole Taylor v OCS Group Ltd.

Contributory conduct

69. Compensation for unfair dismissal is dealt with in sections 118 to 126 inclusive of the Act. Potential reductions to the basic award are dealt with in section 122. Section 122(2) provides:

> "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 the amount accordingly."

70. The compensatory award is dealt with in section 123. Under section 123(1)

> "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".

71. Potential reductions to the compensatory award are dealt with in section 123. Section 123(6) provides:

> "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."

72. A similar power is contained in relation to the basic award in s.122(2) ERA (as quoted above) in relation to any conduct which occurred before the dismissal, however, that provision does not contain the same causative requirement which exists in s.123(6); the Tribunal therefore has a broader discretion to reduce the basic award where it considers that it would be just and equitable (see Optikinetics Ltd v Whooley [1999] ICR 984, EAT).

73. Three factors must be satisfied if the Tribunal is to find contributory conduct (see Nelson v BBC (No.2) 1980 ICR 110, CA):

73.1. the conduct must be culpable or blameworthy

73.2. the conduct must have caused or contributed to the dismissal, and

73.3. it must be just and equitable to reduce the award by the proportion specified

74. Provided these three factors are satisfied, the fact that the dismissal was automatically, as opposed to ordinarily, unfair is of no relevance (Audere Medical Services Ltd v Sanderson EAT 0409/12).

75. In determining whether conduct is culpable or blameworthy, the Tribunal must focus on what the employee did or failed to do, not on the employer's assessment of how wrongful the employee's conduct was (Steen v ASP Packaging Ltd [2014] ICR56, EAT).

Discrimination

76. The relevant law is contained in sections 39, 13 and 23 of the Equality Act 2010 which provide respectively (in so far as is relevant) as follows:

> *39 – Employees and applicants*
>
> (2) An employer (A) must not discriminate against an employee of A's (B)—
>
> (a) as to B's terms of employment;
>
> (d) by subjecting B to any other detriment.
>
> *13. Direct discrimination*
>
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
>
> *23. Comparison by reference to circumstances*
>
> (1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

77. The tests are subject to the reverse burden of proof in section 136 EQA 2010 which provides:

> (2) If there are facts on which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

78. The correct approach to the reverse burden of proof provisions in discrimination claims has been the subject of extensive judicial consideration. In every case the Tribunal must determine the "reason why" the claimant was treated as he was (per Lord Nicholls in Nagarajan v London Regional Transport [1999] IRLR 572 HL). This is "the crucial question."

79. It is for the claimant to prove the facts from which the Tribunal could conclude that there has been an unlawful act of discrimination (Igen Ltd and Ors v Wong [2005] IRLR 258 CA), i.e., that the alleged discriminator has treated the claimant less favourably or unfavourably and that the reason why

it did so was on the grounds of the protected characteristic. That requires the Tribunal to consider the mental processes of the alleged discriminator (Advance Security UK Ltd v Musa [2008] UKEAT/0611/07).

80. In Igen the court proposed a two-stage approach to the burden of proof provisions. The first stage requires the claimant to prove primary facts from which a Tribunal properly directing itself could reasonably conclude that the reason for the treatment complained of was the protected characteristic. The claimant may do so both by their own evidence and by reliance on the evidence of the respondent.

81. If the claimant does so, the second stage requires the respondent to demonstrate that the protected characteristic was in no sense whatsoever connected to the treatment in question. That requires the Tribunal to assess not merely whether the respondent has proven an explanation, but that it is adequate to discharge the burden of proof on the balance of probabilities that the protected characteristic was not a ground for the treatment in question. If it cannot do so, then the claim succeeds. However, if the respondent shows that the unfavourable or less favourable treatment did not occur or that the reason for the treatment was not the protected characteristic the claim will fail.

82. The explanation for the less favourable treatment advanced by the respondent does not have to be a 'reasonable' one; it may be that the employer has treated the claimant unreasonably. The mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one (London Borough of Islington v Ladele [2009] IRLR 154).

83. Furthermore, it is not sufficient for the claimant simply to prove that there was a difference in status i.e., that the comparator did not share the protected characteristic relied upon by the claimant) and a difference in treatment. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an act of discrimination (see Madarassy v Nomura International Plc [2007] ICR 867 CA; Hewage v Grampian Health Board [2012] IRLR 870 SC and Royal Mail Group Ltd v Efobi [2019] EWCA Civ 18.)

84. The Tribunal does not have slavishly to follow the two-stage process in every case - in Laing v Manchester City Council and anor [2006] ICR 1519, EAT, Mr Justice Elias identified that 'it might be sensible for a Tribunal to go straight to the second stage… where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question whether there is such a comparator — whether there is a prima facie case — is in practice often inextricably linked to the issue of what is the explanation for the treatment." That approach was endorsed by the Court of Appeal in Stockton on Tees Borough Council v Aylott [2010] ICR 1278.

Direct discrimination

85. Where a claimant brings a claim of direct discrimination, they must show that they were treated less favourably than an actual or a hypothetical comparator

and that the reason for the treatment was the protected characteristic relied upon. The circumstances of the comparator must be the same, or not materially different to the claimant's circumstances. If there is any material difference between them, the statutory definition of comparator is not being applied (Shamoon). It is for the claimant to show that the hypothetical comparator in the same situation as the claimant would have been treated more favourably. It is still a matter for the claimant to ensure that the Tribunal is given the primary evidence from which the necessary inferences may be drawn (Balamoody v UK Central Council for Nursing Midwifery and Health Visiting [2002] IRLR 288).

86. A person is subjected to a "detriment" for the purposes of section 39 EQA if "a reasonable worker would or might take the view that the treatment accorded to her had in all the circumstances been to her detriment": Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337.

Discussion and Conclusions

Unfair dismissal

87. We address each of the questions in the Burchell test in turn. First, did the respondent have a genuine belief in the claimant's misconduct? The claimant has not put this in issue, but in any event we unhesitatingly find that it did because of the admitted exchange between the claimant and Mr Mabbs.

88. Next, did the respondent have reasonable grounds on which to sustain that belief? The claimant's argument was that the respondent, were it to have acted reasonably, would have accepted that the instruction he received was unreasonable and therefore would have concluded that there was no misconduct. We reject that argument. The claimant accepted during the fact find, and we find, that the instruction that Mr Mabbs gave the claimant was to load the BSI onto the van. That instruction was consistent with the Blue Print Agreement and accepted practice, to ensure that other drivers could have taken drops from the claimant on route. Importantly, it was not an instruction to deliver all the BSI on the route. Mr Mabbs had, and exercised, a discretion as to whether a driver should take the BSI for the route, assessing the loads of each driver to see whether they were short and could assist, or, as in the claimant's case, may have too many drops and so may need assistance.

89. The claimant argues that he was acting reasonably in leaving the postcodes GL1 1 and GL4 at the depot as they consisted of the deliveries closest to the depot and it made no sense to take them out onto the road. In consequence he argues that the instruction to load them was unreasonable. Whilst the claimant's position may be geographically accurate, it did not accord with the accepted practice, and resulted in the claimant leaving half of the postcodes for the route behind. He did so without knowing how many drops he had and how many parcels in respect of each drop. That was essential information to understand whether he could achieve the deliveries on the route, which is a separate issue to loading the parcels for the drops on the route. It was that action which Mr Mabbs instructed him to perform, and which he refused to do. The claimant eventually and begrudgingly accepted during the disciplinary hearing that it was a reasonable instruction. In refusing to follow such an instruction, even after a warning that failure to do so may lead to suspension,

the claimant committed misconduct. His subsequent actions aggravated the nature of his misconduct: he dangled the keys in from of his manager's face and invited him to find someone who could make the deliveries in a rude and aggressive tone, he then inaccurately reported that he had been suspended for refusing to deliver the BSI and left the respondent's site. Finally, he failed to heed Mr Day's suggestion that he should return to the site and make his deliveries because failure to do so could be viewed as an abandonment of his duties.

90. All those matters were known to the respondent and considered by it at the point it decided that there was a disciplinary case to answer. We are satisfied that it was well within a band of reasonable responses open to a reasonable employer to have formed the viewed that the conduct amounted to misconduct and that the respondent had reasonable grounds for that belief.

91. Finally, at the stage (or any rate the final stage) at which the respondent had formed that belief on those grounds, had it carried out as much investigation as was reasonable in the circumstances of the case? The claimant argues that it had not, because Mr Mabbs instructed him to deliver the BSI for the route and the respondent failed to engage with his argument that he had not delivered BSI on the route at any time and was inexperienced in relation to the route in question, and that it would be impossible to deliver the drops for the route given that he was leaving late. That, in our view, is to misunderstand the nature of the allegation which he was facing. The disciplinary allegation was that he had failed to follow a reasonable managerial instruction. The instruction in question was to load the BSI on to the van. The respondent's investigation provided reasonable grounds for reaching the conclusion that the claimant had failed to comply with the instruction in circumstances which amounted to misconduct as both the claimant's statement and Mr Mabbs's statement recorded the instruction was to take the BSI not to deliver it. At the time of the appeal, which was a rehearing, Mrs Mullins also had the benefit of Mr Partridge's evidence to the same effect. It was well within the band of reasonable responses for her to accept that evidence despite Mr Hayward's argument that it was fabricated.

92. For the reasons addressed in paragraph 89 above, the respondent had reasonable grounds as a consequence of the investigation for regarding the instruction as reasonable. Indeed, both Mr Day and Mrs Mullins made it a particular point of their investigation to ascertain first whether the claimant knew what was on his manifest (which was relevant to whether his refusal was made on an informed basis), second whether the claimant was experienced as a driver generally and had knowledge of the area so that it was reasonable to expect him to conduct 90% of the BSI, and finally whether the claimant had previously delivered on the route and received support and so knew that the practice was for such support to be given. Again, at the time of the appeal Mrs Mullins had the benefit of Mr Partridge's evidence on that point. It was reasonable to speak to him as (a) he was there on the day in question, (b) he was also acting as the Delivery Manager for the depot and so knew the practice and the reasons for it and (c) Mr Mabbs was unavailable due to a personal matter which required leave.

93. Finally, we consider whether dismissal for that reason fell within a band of reasonable responses open to a reasonable employer. This was very finely

balanced, the panel members' joint experience is that failure to follow a reasonable instruction would generally be treated as misconduct and attract a written or final written warning, rather than meriting dismissal. However, the assessment to be conducted is not one which permits the Tribunal to substitute its view for that of the employer, but only to ask whether the employer's actions fell within the band of reasonable responses on the facts that it reasonably found.

94. We find that the respondent had reasonable grounds following the investigation for regarding the claimant's overall conduct as amounting to gross misconduct in the circumstances of this case because:

94.1. the claimant's conduct on the day exacerbated the situation – his insubordination in dangling his keys in Mr Mabbs' face, and leaving the site and abandoning his duties, despite the suggestion from Mr Day that he should return to the site and make the deliveries; and

94.2. his lack of insight and remorse in relation to his actions. That was manifest in his suggestion to Mr Mabbs that he could perform the delivery manager's role and needed only to follow instructions that he believed were reasonable, his insistence that the instruction was unreasonable and his belated and insincere acceptance that it was in fact reasonable (which he had abandoned at the time of the appeal), and his general contempt from the process demonstrated by his comments about delivering BSI which he made in the adjournment of the disciplinary hearing. Mr Day acted well within the band of reasonable responses in regarding the claimant's begrudging apology after the adjournment as being insincere. Finally, at the time of the appeal, the claimant sought to suggest that the BSI was not applicable to him as he should not be treated as a driver for the purposes of the Blue Print Agreement, and that his actions were somehow justified as he did not receive the Scheduled Allowance. All those matters were reasonably viewed by the respondent as not only demonstrating a lack of remorse but also as indicating that the issue for the claimant remained a live one and was therefore likely to be repeated. It was that concern that led first Mr Day (as evidenced by his statement in the appeal) and subsequently Mrs Mullins (as evidenced by her decision report) to conclude that the claimant's conduct would be likely to be repeated, even were he given a written warning, and therefore to conclude that the appropriate sanction was dismissal.

94.3. That decision was certainly at the harsher end of the permissible band of responses, but it was within the band, in our view.

Procedural failings and Polkey

95. The claimant argues that the dismissal was nonetheless unfair because of two procedural errors. First, that he did not receive the statement of Mr Mabbs (which he had made on 17 April 2019) prior to the disciplinary hearing, the second that he was not invited back to a meeting to consider whether he should be suspended within 24 hours of the incident which led to his suspension. We address each allegation in turn.

96. The evidence does not establish, on balance, that the claimant did not receive Mr Mabbs' statement prior to the disciplinary hearing. Mr Day was convinced it was in the pack of documents which he had for the disciplinary, a copy of which had been sent to the claimant. Neither Mr Day nor the claimant made any express reference to the document during the disciplinary hearing itself. It was only at the appeal that the claimant first asserted that he had only received the statement prior to the appeal and did not have it at the disciplinary hearing.

97. In any event, we are satisfied that if the claimant did not receive the statement it made no material difference to the course or outcome of the disciplinary hearing. The statement recorded that Mr Mabbs had instructed the claimant to take the BSI and that he intercepted the claimant as he was leaving the respondent's site, at which point the claimant stated he was going home. The claimant's statement (which he read at the fact find and the disciplinary hearings) made the same points. The claimant's statement recorded him offering Mr Mabbs the keys to his van and suggesting that he should find someone who could deliver the BSI if he believed it possible. It was that conduct taken together which led to the conclusion that a disciplinary hearing was necessary. The claimant had the statement at the time of the appeal, and therefore any procedural defect was cured by the appeal. We note that no point of any substance was made about the statement then.

98. Accordingly, we find that the failure, if it occurred, did not render the dismissal unfair. In the alternative, if we are wrong about that, we find that there is a 100% certainty that the claimant would have been fairly dismissed had the procedural error been corrected for the reasons set out above.

99. Secondly, we consider the procedural step of having a meeting with the claimant the day after the incident to allow the claimant to cool off prior to the decision to suspend being made. That step was missed. Mr Mabbs stated that he did not regard it as necessary as he had instructed the claimant to cool off in the canteen and the claimant had reacted by telling all who would listen that he was suspended (which was untrue) and by leaving the site and abandoning his duties. We find that even had the procedure been followed it would have had no effect on the outcome of the disciplinary. In particular, we find that the claimant's view was entrenched at the point at which he was instructed to cool off in the canteen and did not alter at any stage thereafter, even when Mr Day suggested that they should meet at the depot and discuss his concerns but that the claimant should return and conclude his deliveries. The claimant rejected that entreaty and maintained in the weeks that followed that the instruction to load the BSI was unreasonable and he was entirely justified in acting as he did. In effect, he became more resolute in his position, and began to argue that the BSI requirement could not apply to him and/or that if he did, he did not have to comply with it because he was not paid the Scheduled Allowance and/or he was unfamiliar with the route in question. Each of those arguments was misconceived and largely irrelevant to the nature of the disciplinary allegation. It was his conduct during the disciplinary process that was a direct cause of the decision that the appropriate sanction was summary dismissal.

100. Accordingly, we find that the procedural failing did not render the dismissal unfair. In the alternative, if we are wrong about that, we find that there is a

100% certainty that the claimant would have been fairly dismissed had the procedural error been corrected for the reasons set out above.

Contributory conduct

101. We find that the claimant committed blameworthy or culpable conduct which was 100% causative of his dismissal. That conduct consisted of the following: he refused to comply with a reasonable instruction to load the BSI onto his van, he did so in an insubordinate manner by dangling his keys in front of his manager and telling him to find a driver who could make the deliveries, and then inaccurately informed his colleagues that he had been suspended. He subsequently abandoned his duties and left the depot and did not engage with Mr Day's entreaties to return to make the deliveries and then discuss his concerns with Mr Day. He showed a complete lack of insight and understanding as to the consequences of his actions and failed to demonstrate any remorse during the subsequent disciplinary process but rather, during the adjournment in the disciplinary hearing, mocked the very issue which had been the cause of that process.

Direct discrimination

102. The claimant makes two allegations of direct race discrimination:

102.1. He was instructed to undertake a minimum of 114 collections and deliveries on route 101; and

102.2. Dismissing him when he refused to follow that instruction.

103. The claimant's argument in relation to the first point is that the 90% BSI for route 101 was 114 collection and deliveries and that he was instructed to undertake those deliveries on the route, but his comparators were not. He relies upon a document showing the deliveries and collections for the route on various dates in relation to he and his comparators (page 48, a clearer spreadsheet of which was provided by the respondent).

104. During the hearing, the claimant's argument focused less on an instruction to deliver 90% BSI and more on the instruction to load 90% BSI on the van.

105. The respondent accepts that certain of the comparators took out less than the 90% BSI for the routes as demonstrated by the spreadsheet. It argues however that the reason for that disparity was not race, but rather (a) the relative experience of the driver in question; an inexperienced driver would not be required to take 90% BSI, and (b) the reasonable exercise of the Delivery Manager's discretion to instruct drivers to take more or less depending upon the manifests of each driver and the volumes to be delivered on any route on any day.

106. The claimant relied upon two pieces of evidence from which he argued that the Tribunal should draw an inference both that the instruction was given as he alleged, and that the reason for the instruction was race. First, an exchange of Facebook messages with one of the comparators (page 138-142) and secondly an apparent contradiction between Mr Mabbs' evidence in the fact find meeting that he had instructed all of the other drivers to take the

BSI and his answer in cross-examination that he had not instructed any of them to do so. We address each in turn.

107. The messages in question are, in our view, ambiguous. The claimant asks, "can I ask can you remember when doing Gloucester town center route GL 101 were you ever told you had to take out the apparent minimum of 114 steps and any idea what the most you ever did was?"

108. Mr Mrula replied "yes I'm remember this is for the fucking hard route in Parcelforce - like we cover Mark and if I'm doing half of this plus collection I'm lucky."

109. The claimant subsequently repeated the question "I'm asking were you told you had to take 114 at least?"

110. Mr Mrula replied "yes I'm agree with you is very specific route this is city center all fucking shops the company always say Mark do it 114 stops and always if you under the score is fucking problem for me 98 stops is a great score and I'm never make that many stops if I'm cover…"

111. We concluded that the evidence about the claimant's comparator, Mr Mrula, was ambiguous. There is clear ambiguity between the claimant's question "were you told you had to *take* 114 at least?" and Mr Mrula's response "the company always say Mark *do it* 114 stops." It is unclear whether Mr Mrula was referencing an instruction to *deliver* all 114 stops, or merely to *load* 114. However, it is clear from the spreadsheet that he consistently delivered less than the 114.

112. On balance, we concluded that it was not appropriate to draw an inference from that evidence. First because the evidence was ambiguous, and secondly, when viewed against the undisputed evidence that the respondent had not taken disciplinary action in respect of any driver who had failed to deliver the 90% BSI for the route, we concluded that the more likely and appropriate understanding of Mr Mrula's response was that he had been told to take 114 stops for the route.

113. We then considered the claimant's argument in relation to Mr Mabbs's evidence. During the fact-finding meeting the claimant asked Mr Mabbs "how many of these drivers have you asked to take out the BSI?" Mr Mabbs responded "all of them, they will go out with the BSI and we will assist them where we can if they need help for whatever reason." When cross-examining Mr Mabbs, the claimant asked him:

> "Of the other people who have covered the route, from the date that it was decided that everyone must take a minimum of 114 stops, how many did you insist took 114?"
>
> Mr Mabbs replied: "none, because none refused to take that amount of work on routes."

114. In our view, the exchange demonstrates that all drivers were expected to take the 90% BSI of 114 stops with them; only the claimant refused to do so, and therefore only the claimant was instructed that he must take that number.

115. Consequently, we do not accept the claimant's argument that any of the matters he relies upon demonstrate primary facts from which, properly directing ourselves, we could draw an inference that the reason for the instruction was the claimant's race. In any event, it seems to us that this is a case where it is appropriate to ask ourselves what the reason for the instruction was ("the reason why"). Here, in our view, there is a clear reason. That reason is that the claimant informed Mr Mabbs that he had left half of the postcodes behind for the route, Mr Mabbs asked him whether he had the BSI on the van, and the claimant replied "doubtful". Mr Mabbs instructed the claimant to take the BSI on the route firstly because that was the known and understood practice, set out in the Blue Print Agreement, and which formed the day-to-day practice and expectation of the delivery drivers, and secondly because the claimant had informed him that it was doubtful that he had sufficient parcels to comply with the 90% BSI requirement. The instruction had nothing whatsoever to do with the claimant's race.

116. For those reasons, the claim of direct discrimination in relation to the instruction is not well-founded and is dismissed.

117. We turn then to consider whether the claimant was dismissed because of his race. We reject that argument. The reason for the claimant's dismissal was identified in the issues set out by Employment Judge Harper, namely that the claimant refused to comply with the instruction to load the 90% BSI onto the van. The claimant has adduced no evidence from which we could properly infer that the reason that the claimant was dismissed, rather than receiving a lesser sanction, was because of his race. Rather, the evidence, in our view demonstrates overwhelmingly that the reason that the claimant was dismissed was, as set out in our findings above, because of the way he behaved firstly in relation to the instruction itself, and secondly in relation to the resulting disciplinary proceedings. That was the reason why the claimant was dismissed, it had nothing whatsoever to do with his race.

118. For those reasons the claim of direct discrimination in relation to the claimant's dismissal is not well-founded and is dismissed.

Employment Judge Midgley

Date 20 January 2021

Amended Judgement & Reasons sent to Parties: 28 January 2021

FOR THE TRIBUNAL OFFICE