



EMPLOYMENT TRIBUNALS

Claimant: Mr M Khanzadeh

Respondent: Royal Mail Group Limited

Heard at: Watford ET by CVP **On:** 31 March 2021

Before: EJ Cowen

Representation

Claimant: Mr M Khanzadeh In person

Respondent: Ms Percival Solicitor

RESERVED JUDGMENT

- 1 The Claimant was unfairly dismissed by the Respondent.
- 2 The issue of remedy will be dealt with at a separate hearing.

REASONS

Introduction

1. By way of a claim issued on 25 March 2020, the Claimant claimed unfair dismissal from his employment as a postman for the Respondent. The case was heard by CVP online hearing on 31 March 2021.
2. The Tribunal was provided with an agreed bundle, access to CCTV footage from a video doorbell, witness statements from the Claimant and his wife and witness statements from John Doyle and Anita Madden on behalf of the Respondent.
3. The Claimant represented himself at the hearing and the Respondent was represented by Ms Percival, a solicitor. The Respondent provided a written submission and case authorities. Both sides made closing submissions, which the Tribunal took into account.

The Facts

4. The Claimant was employed as a post delivery person (Operational Postal Grade) from 10 December 2010 to his dismissal on 21 February 2020. His wife also worked as a post delivery person at the same Ruislip Delivery Office.
5. The Respondent operates a strict Conduct Policy and Business Standards policy which includes standards of security. This sets out that theft by an employee is gross misconduct.
6. The security policy states that “ *A charge of theft should only be made in respect of the employee who stole the item themselves*”. With regard to mis-direction it says “ *Mail clearly and correctly addressed but delivered to the wrong house or business premises. Points to consider;*
 - *Was the item clearly and correctly addressed?*
 - *Was the house/business premises clearly numbered/signed?*
 - *.....*
 - *Was a misdelivery retrieval/apology card used?*
 - *Was the complaint genuine?*
 - *Did the item bear a genuine Royal Mail Group product indicia e.g. a stamp, meter franking impression, PPI, Smartstamp, Wholesale Licensed indicia*
 - *Was the item delivered by Royal Mail?”*
7. The Operational Procedure & How to Fix Guide indicates “*If a Delivery Officer realizes that they have misdelivered mail, an attempt to retrieve the item(s) must be made. If the item(s) cannot be retrieved then a Misdelivery retrieval and apology card should be posted through the letter box of the incorrect address*”.
8. On 1 November 2019 the Claimant offered to cover an additional delivery round, due to the normal staff member being absent. It was agreed that he would be paid overtime to do so. He went with his wife to do her round, and the additional round, before she left to pick up their child and he would finish his work with the overtime. During that round, the Claimant became stressed due to the time constraint and due to the fact that the van was full of parcels and there were more at the office which he also needed to complete.
9. The Claimant made mistakes on the route as it was not familiar to him and when he realised that he had misdelivered post he went back and retrieved it from the letterbox. He believes that he then posted the correct post through the correct letterboxes. It was this retrieval of post from the letterbox which was reported to the Respondent as theft of an envelope, which had been delivered earlier that day by another person(not an employee of the Respondent).
10. On 5 November 2019, he was spoken to in relation to a complaint which

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had been received from a member of the public. The Respondent alleged that video footage showed a female delivering a large white envelope to the premises at house number 238 at 10.30am. This envelope was removed by the Claimant at approximately 1pm when video footage showed him picking the envelope out of the letterbox and posting other items through it. It was alleged by the householder that the Claimant had stolen the envelope from their post box. The Claimant was immediately suspended by the Respondent.

11. An investigation was carried out and the Claimant was interviewed on two separate occasions on 13 and 21 November 2019. On 13 November the Claimant was told in the interview that the item came from Barclays bank. The Claimant asked at that interview for the earlier footage which would show him having delivered items earlier, which he went to retrieve. He also pointed out that the footage of the woman making a delivery does not show her approach to the door, so it was not clear that she had brought the white envelope with her.
12. At a second interview on 21 November 2019 it was confirmed to the Claimant that there was no further video footage available. Thus there was no confirmation of the woman delivering the white envelope. Nor was there any evidence of the Claimant making a prior delivery to 1pm.
13. During this interview, Mr Semke the investigating manager stated that the woman delivered the item. He decided that this was fact and proceeded on that basis, despite the Claimant's submissions that this was not included in the video. The Claimant also confirmed with Mr Semke that this was the same customer who had made a complaint the week before that post was left sticking out of his letterbox. This complaint was also denied by the Claimant, but no formal steps were taken to investigate this matter.
14. The Claimant also raised with Mr Semke that his wife had contacted Barclays (via a message on his phone), who had confirmed that they send their correspondence via the Respondent. This was not followed up as part of the investigation.
15. The Claimant was sent an invitation to a disciplinary hearing which indicated that the allegations against him were; theft of mail, loss of integrity, dishonesty and unauthorised removal of customer property. He was sent copies of the two videos and the wording of the customer complaint. A disciplinary hearing to consider gross misconduct was held on 30 December 2019.
16. At the disciplinary hearing the Claimant once again highlighted that the video of the woman at the door was incomplete. He asserted that he had posted something through the letterbox minutes before and was retrieving it, having identified his error. Mr Doyle, the disciplinary officer said that he could see on the CCTV, that the woman posted something through the letterbox and that when the Claimant arrived, he took something out of the letterbox. The Claimant said that he had to lift the flap on the letterbox to extract the post which he had left a few minutes earlier.

17. Although Mr Doyle questioned why there was no video of the Claimant's earlier visit he took no steps to investigate this further. He chose to ask the Claimant to allow him to look at the PDA, a device which traces the Claimant's movements by way of GPS tracking. However, this is not allowed by agreement between the Respondent and the Trade Union and this was pointed out by the Claimant's Union representative. This is reflected in the National Agreement between the Respondent and the CWU union which is dated April 2018 and indicates that *"This new technology is not being introduced to track individuals or to be used for individual performance management and therefore it is confirmed that the data generated will not be used for this"*. It goes on to say *"It is agreed that this new technology is not being deployed for, or will be used as, a disciplinary tool. As such, it will not enhance the ability of manager, or the evidence available, to take disciplinary action"*.
18. It was also pointed out by the Union representative that there is no evidence of the customer missing any item.
19. Shortly after the hearing, the Claimant indicated to Mr Doyle that there were matters missing from the notes, including the fact that the Claimant had raised grievances against his manager previously. The Claimant also gave permission for his PDA to be considered.
20. Mr Doyle undertook some further investigation by way of checking whether there were mis-delivery cards available at the Ruislip office, obtaining the PDA maps and reconstructing the route taken by the Claimant.
21. His decision to dismiss was based on his conclusion that, the fact there was no video evidence of the Claimant's prior visit indicated that there had not been such a visit and that as the round was delivered from high to low numbers, he ought to have been coming from the left and not from the right on the video, in order to retrace his steps.
22. Mr Doyle also concluded that the envelope taken by the Claimant was the one which had been posted by the woman who delivered something earlier in the day and the Claimant's looking around was not checking the door number, but looking to see if the 'coast was clear'.
23. Mr Doyle also relied on the fact that his reconstruction of the route showed doubling back on the PDA, whereas the printout and explanation from the Claimant did not. He went on to say that he did not use this as primary evidence, but only as secondary evidence.
24. The Claimant attended a meeting on 21 February 2020 in order to receive the outcome of the disciplinary. At this meeting Mr Doyle told the Claimant the outcome and handed him his dismissal letter and report.
25. The Claimant appealed the outcome, which was heard by Mrs Madden on 9 March 2020. His grounds were that he denied "theft of mail, loss of integrity, dishonesty and unauthorized removal of a customer's property" and also that he felt the process had been unfair.

26. Following her meeting with the Claimant Mrs Madden interviewed the customer and Mr Doyle and took into account the PDA reports by the Claimant and Mr Doyle.
27. The Claimant raised the fact that the PDA reports of his round and that of Mr Doyle were not the same size and therefore could not be compared accurately. Mrs Madden did not investigate this further, or take steps to see them in equal sizes, nor to consider the pattern of each of the maps. The Claimant's union representative expressed to Mrs Madden by email on 1 April 2020 that PDA should not be relied upon for the purposes of a conduct disciplinary.
28. The Claimant's union representative raised the fact that there is no evidence of any theft of mail. This was not investigated further by Mrs Madden.
29. Mrs Madden wrote to the Claimant on 1 April 2020 giving him the opportunity for further reply. He replied to her on 4 April 2020, sending her a copy of the national agreement between the Respondent and the CWU outlining that it was prohibited to use PDA for disciplinary matters, his points of dispute and his hand-drawn map.
30. Mrs Madden set out her decision on the appeal in a report sent to the Claimant on 24 April 2020. She set out the evidence she had reviewed and then concluded that she had seen all available CCTV. That there was no way of knowing what the item was that was delivered by the woman prior to the Claimant going to the door.
31. Mrs Madden found that she did not accept that the Claimant had mis-delivered an item, but that he removed the item placed in the letterbox by the woman.
32. She also found that the Claimant had given his permission for the PDA to be used in the disciplinary process. She accepted Mr Doyle's evidence that he had walked the same route and that it produced a different outcome on the PDA. She referred to the customer complaint and the CCTV as the primary evidence and the PDA as the secondary evidence.
33. Mrs Madden concluded that the Claimant had stolen the item from the letterbox and that he had been dishonest about his actions. She upheld the dismissal.

Law

34. The Claimant claims Unfair Dismissal under s. 95 and 98 Employment Rights Act 1996 ('ERA'). The Respondent asserts that a potentially fair reason under s.98 was conduct.
35. Where there is a dismissal s.98(4) ERA the Tribunal must consider the fairness of the dismissal

“(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."

36. The leading case of *British Home Stores v Burchell* [1980] ICR 303 indicates that the Tribunal must consider the following factors in a matter of Unfair Dismissal for reasons of conduct-
 - a) Did the Respondent have a genuine belief that the Claimant had committed misconduct,
 - b) Was that belief based upon reasonable grounds
 - c) Were those grounds the result of a reasonable investigation
 - d) Did the Respondent follow a fair procedure.
37. Furthermore, the Tribunal must consider-
 - a) Was the decision to dismiss within a band of reasonable responses.
 - b) Whether the equity and the substantial merits of the case point to an unfair dismissal.
38. If the Tribunal consider the dismissal was unfair, it must consider what the outcome of a fair procedure would have been; *King and ors v Eaton Ltd (No.2)* 1998 IRLR 686, Ct Sess (Inner House),
39. The Tribunal must also consider under s.123(6) ERA 1996 whether deduction should be made from the compensatory award for any contributory actions by the employee which could be said to be blameworthy and have led to the dismissal.

Decision

40. In considering whether the Respondent had a genuine belief that the Claimant had committed the alleged acts, the Tribunal must consider whether the investigation was reasonable in all the circumstances and whether Mr Doyle's analysis of the evidence was one which a reasonable employer would have applied.
41. Mr Doyle's decision to dismiss was based on the lack of evidence of an earlier visit by the Claimant to house number 238, as he had asserted. Mr Doyle did not carry out any investigation to identify why there was no video evidence of this. This would have been a reasonable matter to consider, particularly as the Claimant said that this customer had made a previous complaint about his delivery, which had not been fully investigated. No attempt was made to consider whether the customer evidence was credible.
42. Another point which Mr Doyle did not investigate further which had been raised by the Claimant in the investigation and his disciplinary meeting, was the fact that the video of the woman did not start until she was at the door, but the one of the Claimant showed him walking down the path to the door. The Respondent's own mis-delivery security policy refers to consideration

of whether the complaint is genuine and whether the item had a stamp or franking impression on it. These matters were not considered by Mr Doyle, particularly in light of the previous complaint by the same customer.

43. Furthermore, neither Mr Semke, nor Mr Doyle investigated whether any of the houses to whom the Claimant claimed to have mis-delivered could assist with video recordings of that day.
44. In contrast Mr Doyle chose to refer in his disciplinary report to the PDA evidence and said “ *I have not used this as a primary evidence for making my decision but only as secondary evidence*”. Mr Doyle relied on this evidence as a reason to negate the Claimant’s concerns about the lack of complete video evidence, thus it has influenced the outcome of the disciplinary hearing. Furthermore, it is not clear what Mr Doyle meant by ‘secondary evidence’ and how he considers that this is not part of his decision making.
45. Mr Doyle said the Claimant suggested that Mr Semke shouted at him, then retracted this allegation is an indication that the Claimant is prepared to lie. I do not consider that this one incident where the Claimant has exaggerated should be considered a sufficient basis to undermine the whole of the Claimant’s evidence.
46. The Claimant’s evidence that Barclays send their correspondence by the Respondent’s service was not investigated. No attempt to ask Barclays whether something was delivered by hand to the customer on that day, was attempted. This meant that Mr Doyle could not know whether the evidence as presented by the customer, was reliable.
47. Mr Doyle did not take account of the fact that the customer could not prove that they had any item missing. This is fundamental to an allegation of theft. Further, he did not take into account the fact that the item was not posted via the Respondent and therefore any act by the Claimant was not an act of theft of mail.
48. Essentially, the investigation undertaken by Mr Doyle related to the PDA, which by his own admission he should not be relying on in order to make a decision. His comparison of the Claimant’s PDA to his own, or indeed reliance on it to decide that the Claimant had not retraced his steps was not allowed by the Respondent’s agreement with the Trade Union. It therefore cannot have been reasonable or appropriate for Mr Doyle to have done so. Furthermore, Mr Doyle was aware by the time he carried out the reconstruction what it was that he was trying to disprove and therefore the weight associated with the reconstruction ought to be have been considered in that light.
49. Based on the evidence before him, the investigation had failed to conclude whether the Claimant had taken an item of post, or indeed taken anything at all. Instead, it decided that he had not mis-delivered post and not retraced his steps to correct his error. Together with a lack of testing of the credibility of the customer’s evidence, this meant that the Respondent was not able to reasonably conclude on a balance of probabilities, that the Claimant had

taken any post.

50. Furthermore, as Mr Doyle was aware that an allegation of theft is a matter of gross misconduct and the matter had been passed to him due to the potential for dismissal, it was incumbent on Mr Doyle to take reasonable steps in these circumstances to ensure that he had grounds for his belief that the Claimant had stolen an envelope. He failed to take those reasonable steps and therefore could not be said to have a genuine belief in the Claimant's guilt based upon a reasonable investigation.
51. A further point which was not taken into account by Mr Doyle was that on the account that he concluded -that the Claimant had taken the envelope delivered by the woman earlier in the day – the Claimant had not stolen an envelope which had been posted via the Respondent. He had taken an item belonging to the occupant of house number 238, but it was not an item which was "in the course of transmission by post", as set out in the Company Standards. Mr Doyle failed to consider whether this was a matter which in fact fell under the allegation of 'theft of mail' at all.
52. Mr Doyle's conclusion that the Claimant had committed a theft and that he had been dishonest and that his "*dishonesty had continued throughout my investigation and this ultimately compounded the loss of trust*", is not based on a reasonable investigation of the incident and therefore cannot be a fair decision which was within a band of reasonable responses. It also clearly influenced Mr Doyle's decision to dismiss.
53. Mr Doyle's evidence indicated that he took into account a lack of remorse and the experience of the Claimant.
54. The appeal procedure was followed and the Claimant was provided with an opportunity to put his case to Mrs Madden.
55. Mrs Madden's conclusion was that the Claimant had stolen the item which had been placed there by the woman some hours earlier and that he had been dishonest in his explanation of the events.
56. The appeal had not investigated any further the claims which the Claimant made in relation to the veracity of the customer's complaint. Mrs Madden accepted that there was no more CCTV, but did not then re-assess whether the existing evidence was sufficient to show on a balance of probabilities that the envelope which was removed by the Claimant was the same one that had been placed there by the woman.
57. Mrs Madden also relied upon the PDA data which should not have formed the basis for decision making in a disciplinary hearing. Given that Mr Doyle knew of the allegation and what the Claimant's PDA route looked like, she did not investigate what Mr Doyle had actually done.
58. She did not investigate further whether the Claimant's version of events could be supported by other CCTV in the street, or any witnesses. In

essence her appeal did not correct any of the errors highlighted above which had occurred in the disciplinary process.

59. Nor did Mrs Madden consider whether the Respondent's policy which refers to theft of mail applies to items which were not delivered by the Respondent, as she found.
60. Mrs Madden therefore had no evidence to support the allegation that the Claimant had taken something which he had not then re-delivered somewhere else. Nor did she have evidence that the customer had in fact lost anything. She did not refer the matter to the police, so no further investigation was carried out.
61. The Respondent therefore did not have reasonable grounds to believe the Claimant to be guilty of theft, or dishonesty, or loss of integrity. The decision to dismiss could not be within a band of reasonable responses.
62. I must also consider whether the Claimant's actions are blameworthy and contributed to his dismissal. The Claimant admitted that he made a mistake with the delivery and that he was very stressed on the day and trying to work overtime. All of these features increase the risk of mistakes and therefore bring scrutiny to the work he has done. In this situation the customer was also known to have complained on a recent previous occasion about her post being left hanging out of the letterbox. On the Claimant's account, he was able to pull the post out of her letterbox on this occasion too.
63. The mis-delivery and the failure to ensure the post is pushed all the way through, led to the matter arising. On that basis I consider that the Claimant was 20% at fault in this situation and his basic and compensatory award should be reduced to reflect this.
64. I will have to further consider the issue of *Polkey v AE Dayton Services Ltd* [1988] AC 344 reduction and will require to hear from both parties as to their submissions on whether it was likely that, if there had been a reasonable process followed, the Claimant would have been dismissed in any event; *Market Force (UK) Ltd v Hunt* [2002] IRLR 863. This follows the case of *Dunlop v Farrell* [1993] ICR 885 which gives the tribunal power to reduce the award to the Claimant by a percentage chance if it cannot be said for certain that the proper investigation would have resulted in a dismissal.
65. Furthermore, I am aware that due to the time restraints on the parties, I did not hear any submissions on the issue of damages. The Claimant indicated on his ET1 that he may wish to be reinstated and this will have to be considered at a remedy hearing. The parties will receive a separate order for the timetabling of a hearing of remedy.

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Date 5 July 21

JUDGMENT SENT TO THE PARTIES ON

6 July 21

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