



EMPLOYMENT TRIBUNALS

Claimants: 1 Mr M Leonard
2 Mr P Taylor

Respondent: Royal Mail Group Ltd

Before: EMPLOYMENT JUDGE CORRIGAN
Sitting Alone

Representation

Claimants: In person
Respondent: Ms R Driffield, Solicitor

Heard at ASHFORD

On: 30 January, 14 February & 10-11
November 2020

RESERVED JUDGMENT

This hearing commenced face to face but the part heard hearing on 10-11 November 2020 was converted to a remote hearing which was not objected to by the parties. The form of remote hearing was V - CVP. A resumed face to face hearing was not held because it was not practicable. I had before me the paperwork from the face to face hearing, the remedy paperwork and the medical evidence supplied by Mr Taylor after the face to face part of the hearing.

The Claimants were not unfairly dismissed by the Respondent and their claims are dismissed.

REASONS

CLAIMS AND ISSUES

1. The Claimants claim unfair dismissal only. The issues were agreed between the parties to be as follows.
2. What was the reason for the dismissal? Was it misconduct? Alternatively was it for another reason. The Claimants assert that it was due to redundancy/desire to close Canterbury depot or in the case of Mr Taylor his health/absences.
3. If the reason was misconduct, did the Respondent have a genuine belief in misconduct, based on reasonable grounds after a reasonable investigation?
4. Was it within the range of reasonable responses to dismiss?
5. If the Respondent had adopted a fair procedure would the Claimants have been fairly dismissed in any event?
6. Did the Claimants contribute to the dismissal?

Hearing

7. This matter commenced as a face to face hearing but did not complete in the allotted time and was re-listed for a 2 day resumed hearing on 14 and 15 May 2020. Unfortunately, by then the pandemic had commenced and the face to face hearing could not go ahead on that date. The part heard hearing was eventually held by CVP with the agreement of the parties.
8. On the Respondent's behalf I heard evidence from Mr Twinn (Distribution Manager), Mr Lewis (Medway Distribution Manager) and Ms Knight-Smith (Appeal Manager). I heard evidence from each of the Claimants on their own behalf. There are other members of staff referred to in the decision who did not give evidence, in particular two other drivers who were disciplined at the same time as the Claimants. Where relevant, staff who did not give evidence will be referred to by their role and the two other drivers as Driver 1 and Driver 2. There was also a third driver who was not alleged to be involved in the misconduct who will be referred to as Driver 3.
9. There was a bundle of documents and further documentation was added during the hearing.
10. The parties made oral submissions.

11. Based on the evidence heard and the documents before me I found the following facts.

Facts

12. Mr Leonard commenced employment on 3 March 1998. Mr Taylor commenced employment on 13 November 1998. Both therefore were long serving employees and had clean disciplinary records at the relevant time.
13. At the relevant time both were employed as drivers at the Canterbury depot of Medway Mail Centre. Mr Leonard worked as a reserve driver covering absences. Mr Taylor had been absent and then on a rehabilitation plan but returned to his normal duties on 16 July 2016.
14. The Respondent is subject to a Universal Service Obligation which sets out minimum service standards independently audited by Ofcom. Issues with duty sheets not being completed could have potential impact on service to customers which in turn could have serious implications for the Respondent. The Canterbury depot has its own 'O' licence held by Mr Twinn which if lost would affect all drivers at the depot. The site was managed at the relevant time by the Acting Canterbury Distribution Manager who mainly worked on the night shift. The Respondent keeps a driving record to ensure compliance with the relevant regulations and the O licence, see for example p92. Mr Taylor accepted he was in a position of trust with no manager on site and that he was paid a premium for that. Mr Leonard also agreed that as a reserve driver he was in a position where trust was fundamental. As drivers of heavy goods vehicles it was important that the Respondent knew where they were by reference to the tracking system. It was accepted that it was important that changes were notified to a manager.
15. The Respondent has a conduct policy (p61). It provides that no employee will be dismissed for a first breach of conduct, except in the case of gross misconduct. Examples of gross misconduct are set out at page 64 and the Respondent relies upon deliberate disregard of health, safety, and security procedures or instructions. There is also a policy on personal behaviour which includes a policy on use of company funds and property. At page 85 this states that an employee must not claim money from the company for hours you did not work. It makes clear this is unacceptable and may be treated as gross misconduct. It warns employees that if fraud is involved the company is likely to prosecute.
16. The policy also states that employees are expected to act honestly at all times, be productive during working hours, use sound judgment and be personally accountable for actions at work. It states that breaking any of

the Respondent's business standards may be dealt with under the conduct policy and any finding of misconduct could result in action up to and including dismissal.

17. Both Claimants were to follow a duty sheet (see for example p 88) known as the 318. On this it states that they must work as directed by the supervising officer or as detailed on the duty sheet. It states all staff must observe the health and safety rules at all times. The relevant duties in this case are the two Saturday duties from Canterbury depot which run 05.20-15.20 and 5.10 to 15.10 respectively. They involve delivering mail to local delivery offices, bringing "containment" back to Canterbury and collections from various offices. There is one business customer collection in the first duty referred to above. This will be referred to as the business customer collection below. Mr Taylor was responsible for the first duty and Driver 2 was responsible for the other. Driver 1 and Mr Leonard were reserve drivers who covered sick leave and annual leave. There was another driver, Driver 3, who sometimes covered the duties.
18. An accident occurred involving Driver 1 on 17 September 2016. The driver concerned was in a location not covered by his duty but the duty assigned to Mr Leonard that day. It led to an investigation into why Mr Leonard had claimed for 10 hours overtime pay for 17 September 2016 (the date of the accident) when the tachograph showed he had stopped driving early. It also led to a wider investigation into the Saturday drivers working from the Canterbury depot including the Claimants. It was suspected that they were not following their duty sheets.
19. There had been a 5 week period before the 16th April 2016 when Mr Taylor was off sick when management had approved a temporary change in duties. On 16th April 2016 the two duties were to resume as normal but then there was a vehicle breakdown and an emergency alteration of duties. Pp125-126 show that tachograph records revealed a pattern from 23 April 2016 to November 2016 (when the accident came to light) on the Saturday shift of one driver finishing driving early (between 9am and 10.30am approx.) and the other on time (just before 2pm). The pattern commenced with Driver 1 and Driver 2 alternating this pattern of one finishing driving very early. Mr Leonard then covered a duty on 28 May 2016, when driver 1 finished driving early (8.57) and Mr. Leonard completed the shift. The pattern continued between Drivers 1 and 2 and then again on 9 July 2016 Mr Leonard covered a full shift but Driver 2 finished at 9.27am. Mr Taylor resumed Saturday duties on 16 July 2016 when he finished driving early at 08.54 and Driver 2 completed his duty. The pattern did not occur when Mr Taylor was on duty on 23 July 2016 with Driver 2. On 30 July 2016 it did, with Mr Taylor completing a full duty and Driver 1 finishing at 10. The other pattern which emerged was this

pattern did not continue on weeks when a driver was on duty with Driver 3. The pattern continued with Mr Taylor participating every week between 6 August 2016 and 3 September 2016. There then followed three weeks when Mr Leonard worked with Driver 1 and the pattern continued. Until then Mr Leonard had not himself failed to complete a duty but on 10 September and 17 September 2016 he did finish driving early. Mr Taylor then continued the pattern with Driver 2 until November when the matter was investigated.

20. I agree with the Respondent that this appeared to be a clear pattern of the four drivers covering each other's duties so that the other could finish a duty early.
21. There was a discussion about his 17 September 2016 overtime claim between Mr Leonard and the Medway Distribution Manager on 21 November 2016. He was sent home pending investigation but then HR the next day confirmed he should not be suspended but removed from driving pending investigation (p159). He was then invited to a fact finding meeting on 28 November 2016. The notes of the meeting are at pp 158-159 bundle.
22. It was put to Mr Leonard that Driver 1 had been doing Mr Leonard's duty on 17 September when he had the accident whereas Mr Leonard's tachograph for that date showed he was not driving at the relevant time. Mr Leonard said he had commenced his duty and then received a call about problems at home and he had asked Driver 1 to cover his duty. He said there was no manager at Canterbury on a Saturday so he was not able to tell anyone. He provided a note signed by Driver 1 confirming this (p151). He said he had no idea he had been paid overtime as he went straight on annual leave for 18/19 days and he said he was more than happy to pay the money back. It was put to him that when he returned from leave he completed a manual entry that he had worked until 15.30 when he had not. The Claimant said it was a mistake.
23. The Medway Distribution Manager had conversations with both Mr Leonard and Mr Taylor on 9 December 2016 about the apparent pattern of not performing duties. In his, Mr Leonard mentioned doubling up on duties with the other driver (later recorded on page 180) and Mr Taylor is recorded as initially giving no comment and then saying he could not remember (later recorded at page 201).
24. As part of the investigation the Medway Distribution Manager emailed questions to the delivery office managers at Margate, Deal, Sandwich and Dover (pp162-164). These office managers said they had only ever seen one person doing collections at Ramsgate, Deal and Dover (pp162-164 and 172). A statement was obtained from the manager of a business

customer that he had only ever seen one driver and one person load onto the collections vehicle. He said he could not see the passenger seat (p165). The Medway Distribution Manager also asked managers working at the Canterbury Depot if the drivers did dock work on a Saturday. The Fleet and Facilities Manager who works Saturdays until 2pm said he assumed that as of 9.30 on a Saturday there was no drivers allocated to dock work as he rarely observed them working on the dock. The only driver he had on occasions seen working on the dock was Driver 2 (p166). A delivery Manager at Canterbury who worked until 2.40pm on a Saturday said he was not often on the bay for long periods so did not often see the drivers (p167). Another said he did not work in the right location so would struggle to make an informed statement (p168). Another Delivery Manager working Saturdays said her perception was that the drivers come into work in the morning and take the mail to the delivery office and that is it. She did not really know who the drivers were (p170). The weekday Collections Manager who intermittently worked overtime on Saturdays said he occasionally saw Mr Taylor and Drivers 2 and 3 but never saw any of them on the dock (p174). A Saturday dock operative confirmed he was the only dock worker between 12 and 3pm on a Saturday (p175).

25. Mr Leonard was invited to a further meeting on 23 December 2016. Those minutes are at pages 179 -183 and amended at pages 191-199. In that meeting he confirmed that he was aware of the legalities regarding correct completion of the digital tachograph card. His union representative relied on an email about an informal meeting dated 9 November 2016 with Driver 2 when the Acting Distribution Manager said to perform the duty sheet as it was written. His representative argued on Mr Leonard's behalf that this was an informal resolution as per the conduct code (p67). It was said this information came from Driver 2. It was accepted Mr Leonard himself had not had an informal meeting with any manager. It was argued that since then Mr Leonard had not performed either duty. Mr Leonard said the drivers had doubled up duties on their own initiative as they did not have a manager on a Saturday. He confirmed managers had not been told. He declined to give details of his domestic issue on 17 September 2016. He declined to provide evidence of receiving the emergency call.
26. The Medway Distribution Manager then obtained a statement from the Acting Canterbury Distribution Manager who confirmed he recalled a conversation with Driver 2 in the week commencing 5 November 2016 where he said he needed to be careful around what he was doing as he had identified Driver 2 was going to a café on a Saturday morning after he had performed part of his service (p187). Driver 2 also confirmed that the manager concerned had told him on 9 November 2016 that "Managers up Medway are looking at all your tach cards....Can you make sure you do your duty as they are checking". He said he had passed this on to the Claimants and Driver 1 (p188).

27. The Medway Distribution Manager also followed up a question with the Acting Canterbury Distribution Manager who confirmed he had said “as there was no canteen open at Canterbury they could get hot food while they were out” but “as regards to the off route I would never tell a driver to go off route unless for extreme circumstances.”
28. Mr Taylor was invited to a fact finding meeting on 13 January 2017 (p161). The notes are at pages 200-208. He was also asked if he was aware of the legalities regarding correct completion of the tacho cards. He did not dispute that drivers were changing the duty and incorporating duties. He said there were no managers to inform on a Saturday but he appeared initially to have accepted he could have told Delivery Managers, the Medway Distribution Manager or the Acting Canterbury Distribution Manager. He was asked why he had not told anyone and the recorded answer is that he did not feel he needed to (though this has been amended to add that would have informed the Acting Canterbury Distribution Manager). He also then said he could not get through to Medway and that the telephone number he had must be wrong.
29. When asked about the 16 July 2016, his first day back he said he went home because of back pain as he had not long returned after a long absence. He said that he had told the Acting Canterbury Distribution Manager on the following Monday and that he had tried the Medway number but got no answer. He added that he had to take heavy painkillers and then could not drive. He said on 23 July 2016 he had gone home early (though not as early as his tachograph indicated he stopped driving) and that this was probably because of his back. Again he was asked who he informed and there is a suggestion he may have informed the Acting Canterbury Distribution Manager. He challenged the duty that he was supposed to perform.
30. In respect of the August dates when the tachograph showed he finished early he said he would either have doubled up with the other driver or returned to work in the yard. He suggested that when Driver 2 stopped early it would have been due to migraines. In respect of 3 September 2016 he said he went out with Driver 1 as he was on painkillers. He said he would probably have told the Acting Canterbury Distribution Manager. He said he was using his initiative with the duty. He said he was doing the work in a much more efficient way. When challenged as to why the duties were performed correctly with Driver 3 he responded that no one liked her. He said no one included her as they did not want to listen to her “ranting”. His representative made the same point as set out above for Mr Leonard (at paragraph 25) in respect of arguing there was informal resolution in respect of the conversation with Driver 2. Mr Taylor said the manager concerned had also mentioned it direct to him on the 9 November 2016.

31. With respect to 1 October 2016 Mr Taylor said he had to go home early as his partner's father had been rushed to hospital and then subsequently died. He said he had tried to call Medway but had been unable to get through and that he had told the Acting Canterbury Distribution Manager the following Monday. In respect of 8 and 29 October he thought Driver 2 might have had a migraine. He said on 22 October 2016 he had done dock work as his back was aching. He said that on 12 November 2016 he had gone to the Canterbury business customer and that it had been closed but that he had driven to the back and spoken to someone who said it was closed. When asked why it did not show up on his driving record for that date he said he did not even stop the truck. He was asked to demonstrate when he went to the same customer on other days. He said that he thought the Medway Distribution Manager had a hidden agenda of wanting staff at Medway.
32. The Medway Distribution Manager wrote to the business customer concerned who confirmed they did have a collection on 12 November 2016 (p210).
33. Mr Taylor's account in respect of 16 July, 23 July, 3 September and 1 October were checked with the Acting Canterbury Distribution Manager who said that he was on annual leave 13 July to 25 July, that he did not recall a conversation about 3 September but he did recall being told about Mr Taylor's father in law being in hospital but not the date he was told.
34. Driver 3 was interviewed and asked why she did not participate in the practice of incorporating duties to enable the other driver to go home early. She responded that she is paid to work the hours and therefore works the hours. She said the other drivers do not really speak to her about what is going on. She said on a couple of Saturdays Mr Taylor was not there due to health problems.
35. Mr Taylor's evidence that he had also been informally warned on 9 November 2016 was not substantiated by the Distribution Manager concerned. He said "I can guarantee that no conversation of that nature took place between myself and [Mr Taylor] on the morning in question" (p215).
36. The Medway Distribution Manager also investigated whether the issues with the relevant duties and the issue of doubling up was raised in a meeting about the Professionalising the Area Distribution Project. The relevant staff member said that there had been a meeting but no conversation about the relevant duties or about doubling up, or these would have been actioned.

37. All four drivers' cases were passed up to Mr Stewart Twinn (Medway Distribution Manager) to be dealt with at formal conduct meetings.
38. A statement was obtained by Mr Twinn about the 318 drop off times not being manageable from the Delivery Office Manager at Dover (p223). He accepted that there was a switch between Sandwich and Dover (p269 Mr Taylor's interview).
39. Mr Leonard was invited to a formal conduct meeting by letter dated 3 February 2017. The charges against him were set out as follows:

"You are being charged with gross misconduct for dishonesty, fraud, and a disregard for Health and Safety in that-

 1. Between the period of 16.04.16 and 12.11.16 you did not perform [your] assigned duty content on multiple occasions. This meant that you, with the collaboration of three others, left designated places of work before your assigned duty finish times without any management notification/agreement.
 2. Between the period of [16.04.16] and 12.11.16 you repeatedly completed business documentation that was not a true reflection of your work activities. This was in order to allow yourself and three collaborative others to mislead the business into believing you were carrying out your assigned duty on designated routes and locations.
 3. On the 17th Sept 2016, the deception outlined in charge 1 and 2 resulted in the fraudulent claim of 5 hours overtime that you consciously obscured from the business."
40. Mr Taylor was invited to a formal conduct meeting by letter dated 6 February 2017. The charges in his letter were similar save that he was not charged with fraud and did not have the third charge in his letter.
41. Driver 2's conduct meeting took place on 7 February 2017. He said: "[Driver 1] suggested we could cover the duties with one person. We were taking it in turns to cover the contents and go home". He confirmed that doubling up did not happen. He said on 9 July when Mr Leonard covered he did go home. He said that occasionally he stayed at work but he did have migraines and was very tired when he did go home. He said that on 13 August 2016, when Mr Taylor had covered the duty he did go home early. He said that when he incorporated Mr Taylor's duties on 20 August 2016 Mr Taylor had the opportunity to go home but he could not confirm that.
42. Mr Leonard's disciplinary meeting (formal conduct meeting) with Mr Twinn took place on 8 February 2017. The notes are at pages 230-241. He did not dispute that on 28 May 2016 he had incorporated his colleague's duty.

He said it was the way it had always been done and that management had always been aware. It was put to him that Driver 1 had said they were playing pool together on that day. He agreed that he had not done the 318 as scheduled. He said the duty was wrong and that the Acting Canterbury Distribution Manager had known for a long time that this was what they were doing. He said they had always been doubling up. He did not dispute he had incorporated duties on 9 July 2016. He said that was how it had always been done. He said he could not remember what Driver 2 had done but that they normally go in one vehicle. He said that on 10 September 2017 he was with Driver 1 after he stopped driving. He said that on 17 September 2017 he had left early due to the personal problem and that there was no manager on site to inform. When it was put to him that there is a manager on site just not a Distribution Manager and there is also a manager at Medway he said he did not think of it at the time. He said all he was focused on was getting home. He was asked again if he wanted to provide evidence of the call. He said it was an incoming call so it would not show on his bill and he was not prepared to provide evidence. He raised that he felt that the management team want Canterbury closed and this is their way to do this.

43. Mr Taylor's disciplinary meeting was on 10 February 2017. The annotated notes are at pages 263-278. Mr Taylor confirmed that his colleague incorporated part of his duty on 16 July 2016 as he had left early. He said he tried to call Medway but had not got an answer. Mr Twinn showed him the telephone call records from that date which did not show a call. He said he probably used his mobile in that case. He was asked if he could produce evidence of that. He said he could not do so as he then had a new phone. He said he had been advised he could not drive on painkillers. He should have been on reduced hours any way and if he could not have carried on it would have been because of his back. He said that the Acting Canterbury Distribution Manager would have been informed on the Monday. He was asked if he could evidence calls to his partner to pick him up. Again he said he had a new phone though he had kept the same number.
44. In respect of his colleague incorporating the Canterbury business customer enabling him to stop at 12.14 he said the problem with that customer was that they have 3-4 "yorks" which are very heavy. He suggested that if he was taking pain killers the weight of the yorks could be damaging to his back. He explained how the 318 was changed. He said management knew about this and he had been asking for it to be changed. In respect of 30 July 2016 he said that his colleague had gone home early and Medway knew, the reply from Medway having been "sort it amongst yourselves". In respect of 6 August 2016 he said "it" was probably his back and he might have doubled up with Driver 2 and that "it" would have been because he was taking pain killers. He said the Acting

Canterbury Distribution Manager was aware. He emphasized there had been no failures of the mail. He said if he covered 13 August 2016 it would have been because Driver 2 had a migraine.

45. He said that on 20 August 2016 it was his back that meant he stopped driving early and the next week it was Driver 2 who had a migraine. He said the Acting Canterbury Distribution Manager knew.
46. He said that in general he was concerned about getting the job done as efficiently as he could without putting pressure on himself and going off sick. He said if this was not the right thing to do he would apologise and would not do it again.
47. He was asked if he could give evidence of his partner's call on 1 October 2016. He continued to say that the reasons he and Driver 2 would stop driving were his back and Driver 2's migraine. He said that apart from those days he admitted he went home early he would have been on the dock or sometimes he and Driver 2 went out together.
48. He said that on 12 November 2016 he had again stopped driving because of pain killers. He had got this date wrong in the fact finding. It was the next week the business customer were closed.
49. He was asked about back problems during the week and also asked why he had not told his manager if he was struggling with the Canterbury business customer. Mr Twinn queried why if there was a conversation about following the 318 on 9 November (the alleged informal resolution), why it was then not followed again on 12 November 2016. Again Mr Taylor said it would have been because of his back. He said that the others were being investigated for what they were doing whilst he was off sick and he was being dragged into it.
50. On 20 February 2017 Mr Taylor wrote a letter to Mr Twinn to advise him that during the period that was under investigation he was being treated for severe back pain and taking nerve blockers and painkillers, one of the side-effects of which is drowsiness. He said some of his physiotherapy and acupuncture appointments fell on a Friday and that this meant sometimes on a Saturday he had to take painkillers which compromised his ability to drive. He said that over the period he had also had three day surgery procedures on his spine. He said all of the appointments and procedures had been provided to the Acting Canterbury Distribution Manager. He also referred to his OH report which included not driving if taking medication.
51. Mr Twinn followed up with the Ramsgate Delivery Office as to whether there had been doubling up. The information provided was that Driver 2

was the regular Saturday driver. The Delivery Office Manager did not recall seeing him with any other drivers but that if someone was sat in the cab he would not have seen them. He did recall one occasion when Mr Leonard and Driver 1 had attended together and he thought it could have been in the summer. He said it could have been more than once, but was definitely at least once (p281).

52. Mr Twinn also followed up with the Acting Canterbury Distribution Manager who said that he was not aware of Mr Taylor approaching him on a Monday or any other day in the entire period to say he had altered his duty pattern on the Saturday. He said that as he does not work Saturday the practice in respect of overtime was to leave him a note of the overtime performed which he would enter on a Sunday night. He said that Mr Leonard had left him a note to enter the 10 hours overtime for Saturday 17 September 2016. He said there was no need to change duties around except occasionally Driver 2 would do so if Medway could cover part of his duty. He said he was not aware of anyone changing duties around and as far as he was aware they had been doing their duties as per the 318s.
53. Mr Leonard was invited to a further formal meeting on 1 March 2017. The evidence of the doubling up at Ramsgate was discussed. Mr Twinn said he had checked the weather for the 2 Saturdays Mr Leonard worked with Driver 1 (28 May 2016 and 10 September 2016) and that this did not match the description that it was hot. It was put to Mr Leonard that the Acting Canterbury Distribution Manager was not aware of the doubling up. There was discussion about how the work had been doubled up prior to April 2016 and was also at the time of the meeting being doubled up, though in both those periods it was with management agreement.
54. There was discussion that the Acting Canterbury Distribution Manager had signed the overtime claim for Mr Leonard and forged his signature. There was reference to separate proceedings for that. Mr Leonard accepted he made a mistake in respect of his tacho as he had been scheduled for 10 hours but had not worked them. He was asked about the note that the Acting Canterbury Distribution Manager said he had left.
55. Mr Twinn also then investigated whether there was record of small vehicle movements as Mr Leonard had raised that he moved vehicles around the yard when he was not driving. The information he received back was that it depended on the type of tacho head in the vehicle but for those which were post 2012 20 seconds of driving in a minute would record as work/rest not as drive, and only if it was going at at least 1km per hour (pp302-303).
56. Mr Taylor produced the statement at page 306 confirming that he had a lift home on several occasions as he had a bad back or had taken pain

killers. Mr Taylor wrote a further letter to Mr Twinn on 17 March 2017 in which he said tachos were not used at all when moving vehicles around the yards (amongst other matters).

57. Mr Twinn also did a test on 29 March 2017 moving a vehicle from one bay to another which took 30 seconds and did show up on the driving record (p309).
58. Mr Twinn wrote to Mr Leonard and put to him that this showed that even moving vehicles around the yard should show up on the records, and nothing had shown up on the relevant dates. He asked for Mr Leonard's comments in writing. The response is at page 311 and he queried whether it was the same programme being used on 29 March 2017 (visionFTA) as on the dates in question. He stated that the new programme had come into use after his suspension and previously FTA was used.
59. Both Claimants were invited to further meetings on 17 May 2017. On that date they were provided with the decision to summarily dismiss them.
60. Mr Twinn took into account that the working arrangements require considerable trust in the drivers on the day duties when the manager is not present.
61. In respect of Mr Taylor he recorded that he had a history of back related issues and that Mr Taylor accepted he had gone home early once due to back pain but that otherwise he had said he was either resting while a colleague covered for him or doubling up to reduce the effects on his back. He referred to Mr Taylor's case that his back caused him to struggle on Saturdays, and that the business customer collections were heavy so it made sense to double up.
62. He ran through the findings for each and every date in question at pages 318-320. These record when duties were incorporated, or done incorrectly, a number of long café visits, and that the manager was not informed. They also record that in respect of 16 July 2016, 6 August 2016 and 12 November 2016 there were conflicting accounts of what had happened, and in the case of 12 November 2016 there was conflict with the records and the customer account (though Mr Taylor had changed his account of this and said he had the date wrong). He referred to the statements that did not support the doubling up/dock work.
63. He went through Mr Taylor's mitigation, namely, that the 318s were not accurate and had not been updated to include suggestions by drivers; the alleged informal resolution; that drivers were using their initiative to double up, as was done in Medway, and that they were only doing what had been done before 16 April with management approval; and that Mr Taylor had

said he had informed the Acting Canterbury Distribution Manager nearly every Monday.

64. He referred to the fact there were no service failures, no customer complaints and all mail was delivered and collected.
65. He recorded that in respect of 16 July 2016 there was no evidence of a call and Mr Taylor was unwilling to show evidence of a call from a mobile. He relied on the conflict between Driver 1 and Mr Taylor and concluded that Driver 1 was not present and calls were not made to Medway on that day and the day was planned so Mr Taylor could finish early. He said the following weeks demonstrated a clear pattern of turn taking to finish early. He said that personal ailments form the core of the reasons given but he considered this contradicted the claim that managers knew about what the drivers were doing. He felt that the pattern was week on and one week off which suggested the ailments were exaggerated.
66. He referred to Driver 2's admission that no other driver came with him and considered there was potential dishonesty in the claim that drivers were doubling up. It was not supported by any other witness for Mr Taylor.
67. He referred to Driver 1 going home on 30 July and informing Medway and so concluded that drivers knew the procedure for informing management. Mr Taylor's account that he informed his manager every Monday was not supported by the manager.
68. He found there was dock time at the end of the two Saturday duties because there was an "artic service" to Gatwick that required loading which left at 3.10pm. However the witnesses did not support that Mr Taylor was ever present for that dock time. He also recorded that Mr Taylor could not name the service or the time of the last artic.
69. He took into account there were no small vehicle movements after 12.15 and therefore it was reasonable to find Mr Taylor was not present at the end of his duty.
70. He found that the claim that issues had been raised about the 318 was not substantiated by the email dated 30 January 2017 from the PAD revision project. He acknowledged there had been a switch in Dover and Sandwich times but that the none performance or incorrect performance extended beyond this. He took into account that the duties were performed correctly when Driver 3 was on duty, concluding they were viable and that the pattern of changes reflected opportunity not health or family issues.
71. He did not accept that the conversation where a manager told Driver 2 to be careful as he knew he was stopping in a café amounted an informal resolution of a minor conduct issue where the employee may not know their behaviour was unsatisfactory. He did not accept there had been such a conversation with Mr Taylor himself, did not consider this minor

misconduct and considered that the drivers knew their behaviour was not satisfactory. He also noted the pattern nevertheless continued on 12 November 2016. He also considered this to reinforce that the drivers knew management were not aware they were not working to 318s prior to this.

72. He did not accept the Claimant's account that his back was the reason for the incorporation of the duties at the business customer as it happened every other week "like clockwork".
73. He took into account that Driver 2 admitted he never doubled up. He also said there was no similar pattern on other working days which he would expect if the back was the reason.
74. He said there were no witnesses to Mr Taylor lying down to rest (although it was not clear that they were asked).
75. He took into account that the witness statements did not support Mr Taylor's account of his whereabouts. He noted that Mr Taylor said this was because they could not see, were very busy or were not on site much but he concluded that over the number of occasions he would surely have been seen on some of the days in question.
76. The conflicting evidence between the drivers referred to above, and the conclusion that they knew how to report to management, on the basis that Driver 1 had informed Medway that he was going home on 30 July 2016, had not previously been put to Mr Taylor for comment.
77. He decided Mr Taylor had shown a high level of dishonesty and deceit in his actions and in his trying to cover them up in the proceedings.
78. He took into account length of service and accepted that Mr Taylor's back did cause discomfort at times, however he considered that as the pattern on Saturdays did not match the rest of the week he did not consider this a significant factor for the majority of incidents.
79. He considered that others may have encouraged him to take part but referred to the Code of business standards which states that employees are expected to use sound judgment and take personal accountability. He said he had not witnessed any attempt to show remorse despite the heavy weight of evidence against Mr Taylor, though he had said he would not do it again.
80. He said he considered suspended dismissal with or without relocation to a site with 24 hour management. However he concluded close supervision would be needed due to the level of dishonesty and that the role would always require self-management for long periods away from manager supervision.

81. He found Mr Taylor had falsified his signing off sheets for the majority of Saturdays along with his tachograph inputs. He said this had legal and health and safety implications. Again he considered suspended dismissal and greater supervision but found that managers of large teams of drivers cannot realistically spend unreasonable amounts of time checking the booking of events by a staff member. Accurate booking of driving and work events is a legal requirement and he decided Mr Taylor was a significant business risk to the site 'O' licence.
82. Turning to Mr Leonard's case, all three charges were upheld and considered to warrant summary dismissal.
83. The reasons are set out at pages 333-348. The relevant dates in his case were said to be 28 May 2016, 4 June 2016, 9 July 2016, 10 and 17 September 2016. Again findings in respect of each date were set out.
84. Mr Twinn recorded the following. On 28 May 2016 Mr Leonard had incorporated part of Driver 1's duty and said that Driver 1 came with him, but other statements contradicted this. On 4 June 2016 the correct duty was completed as Mr Leonard was on duty with Driver 3. This was the only day that duties were not incorporated when Mr Leonard worked in the relevant period. On 9 July 2016 Mr Leonard incorporated duties from the other duty and said he would normally go with Driver 2, yet Driver 2 said he never doubled up.
85. On 10 September 2016 Mr Leonard stopped driving at 9.07. His duty was incorporated into the other duty by Driver 1. No manager was informed. Mr Leonard said he was with Driver 1 but there was no confirmatory evidence. On 17 September 2016 Mr Leonard stopped driving at 9.08. His duties were incorporated by Driver 1. He said he got a call about a personal problem and went home at about 10. He did not inform a manager. He was not prepared to provide evidence of the call from home. He went on leave and then on his return manually recorded his finish time as 2.30pm when he returned from leave.
86. Mr Twinn referred to the one statement which confirmed at least one occasion when the Claimant had been seen with Driver 1 on a hot day. This was a friend of Driver 1 and it was he who had supplied the name. He concluded that there were only two possible dates for this occasion and he had checked the weather, which though not conclusive, did not match the description of hot weather.
87. He recorded that Mr Leonard said the overpayment was a mistake and he was willing to repay it, that someone else signed his driving record that day and he did not sign the overtime claim.

88. He again went through the mitigation raised by Mr Leonard including that the 318s were incorrect and they were completing duties as they were always done; that there had been an informal resolution via Driver 2; that they were completing duties as they would be done out of Medway; and that the Acting Canterbury Distribution Manager was aware.
89. He referred to the fact that Mr Leonard also said that had they investigated prior to 16 April 2016 there would be other examples of him doubling up. Mr Twinn checked this and, apart from 5 weekends when the duties were changed with management approval, all the duties prior to April 2016 were finished at the correct time.
90. Mr Twinn questioned why Mr Leonard would have gone to the business customer and sat in the cab while his colleague Driver 1, who had recently had a serious back problem unloaded.
91. He repeated the points he had made to Mr Taylor about the alleged informal resolution and the evidence about small vehicle movements. Although he noted it had been raised by Mr Leonard he did not address the question about whether the equipment had changed.
92. With respect to the overtime claim of 17 September 2016 he recorded the initial response from Mr Leonard as having been that he had only been assigned 5 hours that day. He had then changed that to accepting it was a 10 hour shift but said he had received the personal call. Mr Twinn noted the call was at the same time as Mr Leonard had stopped driving the previous week. He recorded that overtime is inputted by the manager who would accept an assigned duty was worked unless told otherwise. The Acting Canterbury Distribution Manager said Mr Leonard left him a note saying he had done the 10 hours. He took into account that Mr Leonard did not inform the Acting Manager of his short day, he did not produce evidence of the personal call, and he did not report to a manger that he went home early on 17 September 2016. He had declined to give any details of the reason.
93. Mr Twinn concluded that Mr Leonard had left early twice and incorrectly stated this was payback for three times when he worked his colleague's duty (in fact it was two times). He believed there had not been a family issue which caused him to leave work in an emergency as he had chosen not to provide phone records or details of the issue. He noted that a close colleague had in a similar situation contacted a Medway manager before leaving and he felt the Claimant was experienced enough to know this was required. It was queried why he would need to do a manual input of the wrong hours when the driving time was already recorded. He said Mr

Leonard's claim that he was with Driver 1 after he stopped driving early was not supported by Driver 1 at interview. He said that he considered Driver 1 had signed out Mr Leonard on the vehicle signing in sheet and that Mr Leonard initialled it later.

94. In respect of the doubling up this was not supported by Driver 2 nor the witness statements, with the exception of the evidence which he had discounted as per paragraph 86 above. He took into account a mismatch in accounts as to where breaks were taken.
95. He decided Mr Leonard had shown a high level of dishonesty and deceit in both his actions and his response to the investigation.
96. In respect of charge 1 he found he had "frequently" not performed his assigned duty on a Saturday. This was not accurate as there were only two. For the same reasons as Mr Taylor he found charge 1 upheld and that dismissal was the appropriate sanction.
97. He found that Mr Leonard had completed business documentation in such a way that they allowed him and his colleagues to mislead the business into believing he was carrying out assigned duties. For the same reasons as Mr Taylor he found that suspended dismissal and relocation to greater supervision would be too great a risk.
98. With respect to charge 3 he found there was insufficient evidence of a family issue that warranted him leaving at such short notice and he believed he had continued the pattern of previous weeks to take his holiday early. He did not consider it material that someone else signed the sheet for Mr Leonard as the process for claiming overtime is an electronic one. This would have been completed on the basis of the scheduled hours unless the manager was informed differently. Whether or not he left a note he believed that Mr Leonard had knowingly not let the manager know he had left early so that he would still process the 10 hours. He then specifically amended his CDU to enter an incorrect entry. He did not accept that if there had been such a significant family emergency that Mr Leonard would then have forgotten on his return to work. He found a high level of dishonesty and deceit. Again he considered alternatives to summary dismissal but considered Mr Leonard would remain a significant risk to the business.
99. As had been the case for Mr Taylor, the information Mr Twinn relied on that had come from Driver 1 was not put to Mr Leonard for comment.
100. Driver 1 was also dismissed. Driver 2 was given a suspended dismissal with relocation where he could be more closely supervised. Mr Twinn explained this difference in treatment by reference to his exceptionally long length of service (in the region of 36 years) and that he had admitted the conduct and aided the investigation which left some trust to be built

upon. He accepted he had actually gone home early on more occasions but for him the important question was the degree of honesty in his saying what had happened, which gave him something to work with going forwards. He also considered Driver 2 a more timid personality, whereas Driver 1 was more assertive and Mr Twinn felt there had been pressure exerted.

101. The Claimants both appealed. Their appeals were heard by Ms Knight-Smith. Ms Knight-Smith is a long serving employee who works in a separate part of the organisation. She said she has no management alignment to anyone in this part of the country but answers to a manager in Birmingham.
102. Mr Taylor's appeal meeting took place on 31 May 2017. Some issues were repeated but new issues were also raised. He said with hindsight he had returned too soon after sick leave. Mr Taylor's representative raised that there was a desire to shut the satellite offices such as Canterbury and this incident had been used to do so. The statement from a former colleague at page 356 was referred to. He said he felt interrogated by Mr Lewis, the Medway Distribution Manager, and pressured by Mr Twinn to say certain things. His representative referred to text messages that referred to the rumoured outcome in the cases sent some two months prior to the outcome. He said it was common practice to record start and finish times on the signing in sheets, that this had never been challenged and no change was made if leaving early. He raised the fact that a colleague had indicated he wanted a job at Canterbury based on the results of this investigation. This was a reference to the statement dated 16 January 2017 that a member of staff had expressed interest in a driving role to the Medway Distribution Manager.
103. He queried why Driver 2 was reinstated in March and he did not get his own decision until June (pp358-367).
104. Mr Leonard's meeting also took place on 31 May 2017. Some of the points raised previously were raised again and some similar points were made to those raised in Mr Taylor's case. He said that the reason he left on 17 September 2016 was that both his parents have disabilities and are reliant on him and his brother. His mother had suffered an aneurysm and he had needed to take 2 weeks special leave. It was pointed out there were only two days he had not worked a full duty whereas Driver 2 had 10 days queried but kept his job. The point was raised again that the machine used to test the vehicle use was not in use until February 2017. It was argued that, at worst, Mr Leonard had at worst left early twice and been overpaid 5 hours.

105. In her decision she took into account Driver 2's account that they were taking it in turns to cover and go home. She found no evidence that Mr Taylor had indicated to any manager that he was not fit to perform his duties. She found he did not bring to his manager's attention the impact of physiotherapy and acupuncture on making him feel tired. She found no evidence of coercion by the other drivers. She noted that once he was aware of checks being made Mr Taylor appeared to have been able to complete his duty correctly. Her conclusions, at page 386, for Mr Taylor's case were as follows:

"The conduct investigation was based on the suggestion that certain of the drivers working on Saturday were working together to allow an unofficial early finish time. This was investigated in great detail and it appears from the data available that when any two of the four named drivers were working together on a Saturday that one would stop driving hours before the end of their duty [but] when a fifth driver was working the duties would be performed properly.

[Mr Taylor] in common with his three colleagues was given every opportunity to offer an honest explanation of his actions but... he chose not to do so."

106. She said Driver 2 was ultimately felt to be more forthcoming and confirmed that the four colleagues were taking it in turns to cover each other's work. She said that although Driver 2 did not confirm that Mr Taylor left early there was no evidence that he carried out any meaningful work on the several occasions he stopped driving early.
107. She noted Mr Taylor's argument that on occasion he was physically unable to complete driving duties due to his health problems and the medication he was taking, but like Mr Twinn she noted that the data suggested that on one week he would be unable to complete his work but the following he will be fit to complete a double duty. She noted that he provided statements to support the fact that he continued to suffer from back pain but that he had not spoken to his manager to say that on occasion he was struggling, despite the previous arrangements that had been made to support him. She concluded that on the balance of probability Mr Taylor did leave work early and that he sought to conceal this fact. She concluded he then was not open and honest when questioned. She noted that when he was first interviewed he gave a "no comment" interview. She considered whether the decision to summarily dismiss was the appropriate outcome taking into account his length of service and previously clear conduct record. She also considered the role required trust and she found that his actions had damaged the bond of trust between him and his employer. She therefore concluded that the decision to dismiss was in the circumstances both fair and reasonable.

108. Her decision in respect of Mr Leonard's case is set out at page 388 onwards. It was recorded that the main points raised in the appeal were that on 10 September 2016 he had stopped driving at 09.07 but that did not indicate he had left the office. On 17 September 2016 Mr Leonard was due to work 10 hours overtime but had to leave five hours early for personal reasons. He then went on leave for three weeks and had not noticed he had been paid 10 hours. He had offered to repay the money. For him, there were only two days in question whereas Driver 2 had 10 days queried but kept his job.
109. In her decision Ms Knight-Smith accepted that there was no way of confirming what Mr Leonard was doing on the date in question, and whether or not he left work early on 10 September 2016. However she found it clear that he was not doing what he was supposed to be doing. She noted that in her appeal hearing Mr Leonard had gone into some more detail about why he had had to leave early on 17 September 2016 for personal reasons but she also noted from the chronology produced by Mr Twinn, that what he had said when he was initially challenged was that he had only been scheduled to work five hours and the booking of 10 hours was a managerial mistake. She found it strange that he had offered a different explanation when he was initially challenged. He also made no attempt to advise the manager that he had left early and so was paid for the time. She found this, coupled with the initial explanation of managerial error cast some doubt on his version of events. She took into account that he did offer to repay the amount. She noted that Driver 2 had ultimately been more honest though he had taken advantage of the arrangement more often than his colleagues.
110. She took the reference to Mr Leonard having not left on multiple occasions, as at most it was twice, to suggest that he had indeed left early. This misunderstood this point as it was not a concession, but an argument about the number of times he was accused of leaving early being much less than the others.
111. Her conclusions mirrored those in Mr Taylor's case. She noted that Mr Twinn had concluded that doubling up had not occurred, not least as Driver 2 said there was no point. She said that, whether or not he left early or was doubling up, Mr Leonard was not being productive. She concluded that on the balance of probabilities he did leave early including on the day he worked overtime and sought to conceal that fact. He then was not open and honest when questioned. She found Mr Leonard left early on several occasions and sought to conceal that fact (whereas again it was only two). For similar reasons as for Mr Taylor she found summary dismissal appropriate sanction.

112. There were additional statements in the bundle which postdate the process, produced for these proceedings. The Respondent did not have these at the relevant time.
113. There were text messages from Driver 3 in the bundle which the Claimants argued showed she also changed duties, but I agree with the Respondent that they also show she considered management should be informed.
114. In evidence Mr Taylor suggested there was another witness who should have been spoken to about whether he was present when the articulated lorry was loaded. Mr Twinn said that in the process Mr Taylor had not asked that he be interviewed.
115. With respect to the Acting Canterbury Distribution Manager, he had been forthcoming about having signed documents inappropriately and had been removed from that role. Mr Twinn said he had no reason to disbelieve his evidence that he had not known or authorised any change in the duties.
116. I accept Mr Twinn's evidence that the expression of interest in the driver role by another member of staff (end of paragraph 101) had no relevance on his decision.
117. I accept Mr Lewis's evidence that a decision whether or not to close Canterbury is made well above his level, and up to and including the relevant period the decision had been that it wasn't in the Respondent's interest to close it.
118. Mr Taylor accepted he manually changed his tachographs to reflect the incorrect sign in sheet on the relevant dates.
119. The Respondent's case was the program used to test drive the vehicles being moved around was the version in place at the relevant date.

Relevant law

Unfair dismissal

120. The law in relation to ordinary unfair dismissal is contained in section 98 of the Employment Rights Act 1996. Section 98 provides:

(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). . .

(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.**

121. In considering reasonableness in cases of dismissal for suspected misconduct the relevant test is that set out in *British Home Stores Ltd v Burchell* 1978 IRLR 379, namely whether the employer had a genuine belief in the employee's guilt, held on reasonable grounds after carrying out as much investigation into the matter as was reasonable in all the circumstances of the case.

122. In applying section 98(4) the Tribunal are not to substitute their own view for that of the employer. The question is whether the employer's decision

to dismiss fell within the range of reasonable responses open to the employer, or whether it was a decision that no reasonable employer could have made in the circumstances. The range of reasonable responses test applies as much to the investigation as to the substantive decision to dismiss *Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23.

Conclusions

What was the reason for the dismissal? Was it misconduct?

123. I accept that the reason for dismissal was misconduct. I accept that the decision was solely based on the disciplinary procedure and charges. There was no ulterior reason. Both Mr Twinn and Ms Knight-Smith believed that the Claimants had collaborated with two other drivers to establish a pattern of covering each other's duties on a Saturday to enable the other to go home substantially earlier than they were contracted to do, without management approval and contrary to the documentation they completed. In the case of Mr Leonard they also believed he had dishonestly claimed an overtime payment which he had not worked.
124. There was no evidence that there was any other reason for the dismissal. There was no evidence that the real reason was a desire to close Canterbury depot or absorb the work into Medway. I accepted Mr Lewis's case that the closure of Canterbury would be decided at a level well above his level of management.
125. The reason for dismissal was not Mr Taylor's health issues or recent absence for ill health. The appropriate adjustments had been made following his recent absence and he had not raised any further issues. There was no evidence that he would have been penalized if he had had any further adjustments or absence. He was dismissed because Mr Twinn and Ms Knight-Smith both believed that he had collaborated with the three other drivers in order to facilitate their going home early, without management approval. That Mr Taylor might have been motivated by his health issues was not the reason for his dismissal.

If the reason was misconduct, did the Respondent have a genuine belief in misconduct, based on reasonable grounds after a reasonable investigation?

126. I accept that all the Respondent's witnesses genuinely believed that they had uncovered a pattern of collaboration between the drivers, enabling one driver to go home well before their shift finished each Saturday, without management approval or knowledge. They also genuinely

believed that in the case of Mr Leonard he had falsely claimed overtime for hours he had not worked.

127. The question is whether they had sufficient (reasonable) grounds for that belief and whether the investigation was reasonable. Both Claimants rely on the fact that there is no evidence that either of them went home on the dates in question (save for the dates they accept). However the Respondent does not need to prove this. All that is required are reasonable grounds for the belief, following a reasonable investigation. The investigation does not need to be perfect, simply reasonable.
128. In fact this investigation was thorough. Having established the pattern that the duties were being combined each Saturday the Respondent investigated whether the manager was aware. Each driver was invited to comment on the material in numerous meetings. Their account that they were doubling up or working on the dock or moving vehicles were all followed up and investigated. There was no evidence of the driver whose duty had been incorporated by the other doing productive work. Mr Taylor's account that he had regularly kept his manager informed on Monday's was investigated and it was not corroborated by the manager.
129. There were some issues with the process. Mr Twinn understandably conducted all the disciplinary hearings. This is a reasonable approach to ensure consistency. However it comes with the risk that material from one employee's interview is used against another employee without giving that employee the opportunity to comment. The most significant material was Driver 2's admission that the collaboration did take place between the drivers and that he did not double up and did go home on the Saturdays when his duty was covered by another driver. This was quite properly shown to the Claimants for comment in the process. However, there was also other information or inconsistencies between accounts that Mr Twinn relied on (see paragraphs 76 and 99) that came from Driver 1. These had not been discussed with the Claimants prior to his decision. However, he did refer to these in the decision letters and both Claimants had the right to appeal, which they exercised. They had access to union representation. Therefore they had a reasonable opportunity to comment on these points in the appeal. Overall, the investigation or process was reasonable in this respect.
130. It was not clear whether the Respondent investigated the issue with the program in the vehicles and whether it was the same program on the dates in question as was used on the day Mr Twinn tested the vehicles (the point that was raised by Mr Leonard). However, at best, if Mr Leonard was correct that the program was not the same, this would have left the Respondent with no evidence as to whether vehicles were moved around. Ms Knight-Smith took the view that there was sufficient evidence that the

drivers were not doing the work they were employed to do and that their manager believed they were doing, and there was no evidence of other productive work. This was not an unreasonable conclusion and does not require confirmation of which program was in the vehicle at the relevant time.

131. Ms Knight-Smith did make errors in respect of the number of occasions Mr Leonard allegedly went home, and misunderstood one submission as being an admission (which it was not) (paragraphs 110-111). However the Respondent was not concerned with the number of times each driver had gone home, so much as whether or not they were involved in the collaboration so the error in the number of occasions is not material. It is also clear that Ms Knight-Smith would have come to the same decision whether or not she had interpreted Mr Leonard's account correctly (paragraph 110). This does not render the process and investigation unreasonable.
132. Overall there were reasonable grounds for the Respondent's witnesses' belief that both Claimants were involved in a collaboration with other drivers so they could go home early, which they covered up with the documentation they completed, and was not approved by management; and that in the case of Mr Leonard he deliberately claimed for overtime he did not work.
133. There was no real dispute that the drivers were changing the duties on Saturdays so that one of them covered the other's duty. The relevant manager said he had not approved this and as far as he was aware the two drivers were doing their respective duties as per the duty sheet. Indeed Mr Leonard accepted management were not aware. This is less to do with whether or not the duty sheets were entirely accurate, but whether the two duties as a whole were being done separately or combined.
134. Driver 2 accepted this was happening and that there was such a collaboration, and that this had enabled him to go home on the dates in question. He said he had not doubled up with the Claimants as they alleged.
135. There was no evidence of the drivers regularly doing other work either on the dock, moving vehicles or doubling up. In any event, as Ms Knight-Smith decided they were not doing what they were employed to do and there was no evidence of any other management approved or productive work.
136. Both Claimants admitted there were occasions that they had each gone home early.

137. The pattern occurred when driver 3 was not on duty but the drivers did the correct duties when on duty with her. The duty sheets had been performed correctly until a brief period of management approved changes, and then the pattern commenced.
138. Although Mr Taylor offered medical reasons for his stopping driving early, it was not unreasonable for the Respondent to take account of his ability to cover the duty correctly when he was absorbing the other driver's duty, and when he was working with driver 3, and to conclude that the pattern was too regular to be explained by health issues alone (it was alternating weeks and Mr Twinn described it as "like clockwork". There was also no evidence of his having raised health issues with his manager, despite having just had a period of adjusted duties.
139. All of the above provide reasonable grounds to conclude that, like driver 2 and like they had on the occasions they admitted, the Claimants were also going home early. As said above the Respondent does not have to show this was in fact happening, only that there were reasonable grounds to believe it was. It was therefore also reasonable to conclude that the Claimants were not being honest and forthcoming, especially as Mr Taylor initially gave a no comment interview whereas Mr Leonard initially blamed the overtime payment on managerial error and would not offer up any evidence or detail of the emergency call home on the relevant date.
140. In respect of the overtime claim, Mr Leonard (after initially saying it was managerial error) agreed that he had been paid for the hours he had been due to work but had not worked. He accepted he had been wrongly paid. The manager accepted he had wrongly signed the claim form for Mr Leonard, but said he was actioning a note Mr Leonard had left saying that he had worked the hours. Mr Leonard initially declined to provide details of why he had left early on that date and the evidence was that he had manually entered the wrong "10 hour" finish time the next time he attended work. These grounds, in the context of the wider pattern of a collaboration between the drivers, were reasonable grounds to believe that he had deliberately claimed for overtime he did not work.

Was it within the range of reasonable responses to dismiss?

141. Both Claimants had lengthy service and clean disciplinary records. On the one hand it is arguably harsh to dismiss for this first offence, when the work was covered and there was no actual proven failure of the mail, and the whole team bar one were involved.

142. On the other hand, it was essentially an offence involving dishonesty and the drivers were in a position of trust given they were regularly unsupervised. It was not unreasonable to consider the collaboration between them as an aggravating factor. It was also not unreasonable to see their approach to the process, including the no comment interview/ blaming managerial error, as aggravating factors. It was not unreasonable to consider they had been dishonest and were trying to cover it up.
143. It was not unreasonable for the Respondent to put less emphasis on the number of occasions each driver was responsible for, and whether they had been involved from the start, and more on whether or not they had been involved in the collaboration overall and their approach to the subsequent investigation.
144. The Respondent did the above balancing exercise and took account of each Claimant's individual mitigation. The question for me is not whether or not the decision was harsh, but whether or not it was a decision no reasonable employer could have reached. I cannot find that it is outside the range of reasonable responses given that the offence involved dishonesty, and a long term collaboration between the drivers.
145. It was not unreasonable to distinguish the case of driver 2 for the reasons given by Mr Twinn, including the fact he did admit to the collaboration being in place and to personally going home, and gave Mr Twinn the impression he was contrite, along with his exceptionally long service of 35+ years. Even in those circumstances he received a suspended dismissal and was moved to being supervised. That he was treated differently does not render the decision in the Claimants' cases unreasonable as there are the above distinguishing factors. It is right that that has meant that one of those who benefitted from the collaboration the most and from the start retained his job, but it was not unreasonable to place more emphasis on his subsequent cooperation in the process.
146. In Mr Leonard's case he may have been involved in fewer occasions than the others but his case involved a false overtime claim. Although he said it was a mistake the Respondent believed, on reasonable grounds, that it was deliberate. The Respondent's policy is clear that offences of this kind will be considered gross misconduct. Like offences of theft, it is not the value that is significant, but the dishonesty. Dismissals for this kind of offence are usually within the range of reasonable responses, and it was in this case.
147. Having found the dismissals reasonable it was not necessary to consider the other issues in this case.

148. For the avoidance of doubt there was no evidence of either of these Claimants having already been dealt with informally for the same conduct, as their union representation tried to allege during the process and which they argued again in this hearing.

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Employment Judge Corrigan
5 July 2021

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