



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr N Shepherd

**Respondent:** Royal Mail Group Limited

**Heard at:** London South                      **On:** 6<sup>th</sup> July 2021

**Before:** **EMPLOYMENT JUDGE BECKETT** (sitting alone)

**Appearances:**

For the Claimant: In person

For the Respondent: Mr R Choudry (solicitor)

Witnesses for the Respondent: Miss J Halliday (Lead Distribution Manager)  
Mrs Knight-Smith (Independent Casework Manager)

## RESERVED JUDGMENT

1. The Claim relating to unfair dismissal is not well-founded and is dismissed.

## REASONS

Issues to be determined

2. What was the principal reason for the Claimant's dismissal and whether it was a potentially fair reason under sections 98(1) and (2) of the Employment Rights Act 1996? The Respondent asserted that it was a reason relating to the Claimant's conduct obtaining a customer's contact details and dishonestly using those details to resolve a complaint made against himself.
3. The Claimant stated that he had been dismissed by the dismissing officer in order that the dismissing officer might draw attention away from her own misconduct.

4. If so, was the dismissal fair or unfair within section 98(4), and, in particular, did the Respondent in all respects act within the band of reasonable responses? The Claimant stated that the dismissal was unfair as others had breached the Data Protection Act provisions and had not been dismissed. Further, he argued that the sanction was not reasonable.
5. In respect of the Claimant's claim of unfair dismissal, the focus under section 98(4) is on the reasonableness of the Respondent's decisions.

### The Hearing

6. The Respondent called evidence from Miss Halliday, the dismissing officer, and Mrs Knight-Smith, the appeal officer. The Claimant gave evidence on his own behalf.
7. I considered the documents from an agreed Bundle of Documents which the parties had introduced into evidence, amounting to 238 pages. The bundle had been redacted to remove the name and contact details of the person who had complained to Royal Mail about the defendant's bad driving and threatening behaviour.

### Findings of facts

8. Based on the evidence heard and the submissions made, I found the following facts.
9. The Claimant worked for the Respondent from 4<sup>th</sup> February 2013 to 18<sup>th</sup> February 2020 as a LGV 1 driver.
10. The Claimant signed the statement of terms and conditions of employment on 6<sup>th</sup> February 2013. He was employed as a driver, on a full time basis.
11. Within that written agreement, the Respondent included a section entitled "Our Code: Code of Business Standards" (at page 35 of the bundle).
12. That section commences as follows:

"You will be expected to comply with the standards of behaviour set out in Our Code: Code of Business Standards, a copy of which can be accessed on the Policy and Information Site or by contacting your Line Manager or HR Services" (paragraph 14 of the agreement).
13. The terms and conditions also referred to the Conduct Policy (at paragraph 15.2). The Claimant was told that he would be subject to the Conduct Policy, and was told how he could access that document.
14. Finally, for the purposes of this case, the Respondent included a clause relating to confidential information provided to employees during the course of their employment with Royal Mail. That clause (paragraph 19) provides

“all property and confidential information provided to you in the course of your employment remains the property of Royal Mail at all times... You shall neither during your employment with Royal Mail nor after that employment ceases, disclose to any other persons... or use for your own benefit, any confidential information relating in any to the activities, operations or business methods of Royal Mail, except as previously authorised in writing”.

15. The Claimant also signed a personal declaration to the Royal Mail Group on 12<sup>th</sup> December 2012. By so signing, he agreed to show high standards of personal conduct at work including integrity. He also agreed that he could commit an offence under the Data Protection Act 1998 if he improperly obtained, held or used information received during his employment.
16. In January 2019 two separate complaints were made about the Claimant's driving. Those were resolved informally by his then line manager, Steve Coltman. They were deemed relevant for inclusion in the fact-finding investigation and procedures thereafter as from those recent complaints, the Claimant had an awareness of how complaints were dealt with.

#### The customer complaint

17. On 4<sup>th</sup> October 2019 a customer, whose details have now been redacted for the purposes of the Tribunal hearing, emailed a formal complaint to Royal Mail regarding the Claimant.
18. On 11 October 2019, a representative dealing with the complaint contacted the customer directly and advised them that they had been able to identify where the vehicle was based and had reported the issue directly to the relevant manager.
19. Thereafter, on 11 October 2019, the complaint was sent to the Claimant's then line manager, Chris Proctor (CP). The email is at page 79 of the bundle. The Claimant accepted in evidence that he had asked CP for a hard copy of the complaint, which included the name and email of the customer, so that he could take it home. He stated that at that time, on 23 October 2019, he was not sure what use if any he would make of the information.
20. However, he also stated in evidence that he sent the first email after returning from the night shift, at perhaps 9 or 10am. It appears that his intention from the outset was to contact the customer himself.
21. In evidence the Claimant accepted that contacting the customer directly had been entirely his own idea, and that management had not asked him to do so. He stated, however, that once he reported back to his manager, he was told that he had done a good job and that the report would be added to the file.

22. The emails sent between the customer and the Claimant were the subject of contested evidence. Both sides allege that the other has edited or redacted the emails. The Respondent accepted redacting the emails solely for the use of the Tribunal and this position was confirmed at the hearing when the unredacted copy was provided.
23. However, the Respondent's case went further than this: they alleged that the Claimant had edited his emails so that his employers were not aware that he had misled the customer. The customer is clearly under the impression that he is in an email exchange with a member of Royal Mail staff that was not the Claimant himself. The customer refers to "your driver's aggressive behaviour" and stated that "if your driver hadn't carried on with the aggressive behaviour all the way down the a 13 and over the Dartford Crossing I wouldn't even bother reporting it" (page 107 of the bundle).

#### Fact-finding investigation

24. Manager Michael Hepworth (MH) undertook the fact-finding investigation. Within this role, he contacted the customer directly.
25. When spoken to by MH for the fact finding investigation, the customer told MH that he had been approached by an independent reviewer and that they had spoken and exchanged emails, before coming to a decision that no further action be taken by either side (page 87 of the bundle).
26. The Claimant was invited to a fact-finding meeting, which was held by MH on 19<sup>th</sup> November 2019. The Claimant had a union representative with him, Mr Ian Hedger. A note taker was present, and the notes were within the bundle (pages 92 to 102). It was agreed by the Claimant within that meeting that it was not a normal way of resolving a complaint for the person being complained about to obtain details and then contact the customer directly.
27. He told MH that he had contacted the customer by telephone. When asked how he had been able to do this, he said that he had requested the telephone number via emails. It was noted that the Claimant had not provided that email exchange to MH.
28. Within that meeting there was a discussion about the various policies used by the Respondent. Miss Halliday had made a reference to a policy involving bad driving complaints. It appears that it was initially thought by the Claimant that there was an entire and separate policy relating to such complaints. However, it was clarified at that meeting that such behaviour would be covered by the Code of Business Standards.
29. The Claimant denied referring to himself as an independent reviewer when on the call with the customer.

30. No complaint was made by the Claimant in respect of the procedure or the fairness of the fact-finding meeting.
31. MH sent a letter to the Claimant entitled passing up the case. He stated that following the fact-finding meeting, he was referring the case to Jodie Halliday as he considered the “potential penalty to be outside” his level of authority (page 117 of the bundle).

### Conduct hearing

32. Miss Halliday, Lead Distribution Manager, sent an invitation to a formal conduct hearing. She set out the conduct notifications in clear terms (page 118 of the bundle). Those notifications were the same as those set at the outset of the fact-finding exercise, namely:
  1. “Inappropriate behaviour in breach of our Business Standards, in that on 23<sup>rd</sup> October 2019 you abused a customer’s personal information entrusted to RMG for your own personal use, by emailing ... in order to gain further information regarding a complaint they had made about your driving
  2. Breach of our Business Standards in that on 23<sup>rd</sup> October 2019 you behaved dishonestly and inappropriately, by contacting a customer by telephone and falsely claiming to be an Independent Reviewer for RMG, in an attempt to stop the customer pursuing a complaint against you regarding your driving”.
33. The letter set out the right to be accompanied, and enclosed details of the investigation and other documents to be referred to at the formal conduct meeting. Miss Halliday also advised the Claimant that she would take into consideration his conduct record, which was currently clear, and that the formal notifications were being considered as gross misconduct. He was warned that dismissal without notice was a potential outcome if the notification was upheld.
34. The Claimant attended the meeting on 22<sup>nd</sup> January 2020, with a union representative Mr Colin McErlean. A note taker was present, and the notes are at pages 121 to 137 of the bundle.
35. At the meeting, the Claimant was asked to answer the allegations. He set out the background including the altercation with the other driver (the customer) who had made the complaint. The Claimant confirmed that he had been shown an email by CP and had asked him to print him a copy. CP did so and the Claimant took the email home.
36. When asked why he had contacted the customer, the Claimant replied, “I was pissed off. I did nothing wrong, so I thought let’s get on a even here”. This guy’s a liar and I was trying to prove it to Royal Mail” (page 122 of the bundle).

37. The Claimant and his representative both raised that other staff had also accessed the customer's email with private details.
38. In respect of the previous two complaints, the Claimant said he had not contacted those people as the contact details had not been given to him. He confirmed he had contacted the customer on this occasion as he was upset that the customer had made a fake allegation and he wanted him to admit it was his own fault.
39. The Claimant said that he thought he could contact the customer directly as in previous incidents in 2015 managers had told him to report issues himself. These related to incidents which were reported by him to the police.
40. After sending the initial email to the customer, the Claimant sent an email at 10.09am to the management team. Within that email the Claimant stated the following:

"I am somewhat disappointed of the Royal Mail Groups policy in allowing (layman terms) Mr & Mrs Joe Blogs (and sad fat lorry drivers) report a non factual incident just because A BIG ROYAL MAIL LORRY made their sausage roll/ McDonalds Big Mac ect ect be cold to fill their tummys/he got their first/& other cry baby baby truck drivers sad stories...!! that RMG seem to want to pressure onto their loyal drivers" (sic).
41. The Claimant stated that the tone of that email was out of character and he was emotionally distressed following a bereavement and was "pissed off".
42. I find that the tone of the email supports the contention that the Claimant was dismissive of the Respondent and its policies, and that he did not care that he had breached those policies. Indeed, at the hearing the Claimant asked the Respondent's witness whether that customer was aware of his dismissal or the Tribunal hearing, and questioned what the Respondent would, essentially, be able to do if he contacted him after the hearing to tell him.
43. Two copies of the meeting notes were given to the Claimant, and he provided draft amendments on one copy to Miss Halliday. Those included an email footer which the Claimant had read out at the end of the meeting, but which had not been included by the note taker. Miss Halliday incorporated the amendments.
44. A meeting was arranged for the Claimant to be informed of the decision. That meeting took place on 18 February 2020. The Claimant had a representative present.
45. On that date, the Claimant was dismissed summarily for gross misconduct. Miss Halliday set out her decision in a seven page document (in bundle from page 144).

46. The Claimant argued that Miss Halliday should not have been involved in making a decision in respect of his alleged misconduct as she was involved herself.
47. I am satisfied on the evidence provided that the Respondent was entitled to find that the customer was not told he was speaking directly to the driver about whom he had made a complaint, namely the Claimant. He referred to the driver as a third party, and he alleged that he had been abused and threatened by him. I find it unlikely that he would have engaged in an exchange if he had been told of the Claimant's identity. It was reasonable for the Respondent to reach this conclusion, in light of the evidence.
48. The Respondent argued that the complaints regarding previous bad driving were deemed relevant as they showed his reaction to those complaints. Their relevance was that on those two separate occasions the Claimant did not contact the customers directly, nor did he ask for their contact details. I find that it was reasonable for the Respondent to reach the conclusion that the Claimant had taken advantage of the inexperience of the acting manager and thereafter it was a deliberate act to contact him as he was "pissed off", and he wanted to prove to the Respondent that the customer was a liar.
49. The Claimant did not ask management prior to contacting the customer whether he could do so. I find that he did not do so as he knew that he was in fact not entitled to contact the maker of the complaint directly.
50. Whilst the Tribunal does not have to make findings in respect of all facts in dispute, the Claimant raised the issues in 2015 a number of times, both in the papers and at the hearing. In respect of those issues, the Claimant was told by the Respondent to deal with the issues himself, which he did by contacting the police. The situation in 2019 was completely different as it involved a complaint made by a customer about his bad driving. It was wholly inappropriate, and in breach of company regulations, to contact that customer himself.
51. In respect of any data protection breaches, the Claimant appeared to be reluctant to admit that his own actions related to an abuse of the information for his own benefit. He was, however, quick to highlight how others had used that information. Miss Halliday had received the information in the course of her business and had forwarded the email, quite properly and appropriately, in her role as line manager, for others to deal with the complaint.
52. Miss Halliday gave a clear rationale for her decision and considered the appropriate penalty. As the Claimant had not accepted that his actions were not proper, she stated that she could not act in any other way other than to dismiss the Claimant. She found, on the evidence including the emails and admissions made by the Claimant, that his actions amounted to gross misconduct (decision at page 150 of the bundle).

Appeal

53. The Claimant appealed. The appeal was originally set for 10<sup>th</sup> March 2020. However, the Claimant asked for a delay, to enable him to have a face to face meeting. Initially, this was agreed, however, when it became clear that lockdown was not going to ease at that time, the decision was made to hold either a virtual meeting or submit papers.
54. The Claimant declined a virtual meeting and he and his representative elected to provide written submissions (emails and letters between pages 151 and 165 of the bundle).
55. On 11 May 2020 the Claimant wrote to the appeal officer, Mrs Knight-Smith, agreeing to providing a written submission. He added that his union representative had suggested that once those documents were received, they have a telephone conference call if there was a need for any further information or to discuss the documents (page 165).
56. Mrs Knight-Smith responded on 12 May at 14.23 stating that she looked forward to receiving the submission and would be in touch if she needed any clarifications.
57. The Claimant sent a further email to the appeal officer, on 28 May 2020 at 15.30, stating that he had posted his written appeal “with all supporting documents”. He apologised for the delay adding that he “wanted to make sure” he had “covered all points” (page 164).
58. The appeal documents that he sent, which included various emails, which the Claimant had annotated, and submissions, are at pages 166 to 213 of the bundle.
59. I find that Mrs Knight-Smith conducted a full, thorough and independent appeal. Her letter to the Claimant and her report are at pages 217 to 226 of the bundle.
60. It is clear from that report that Mrs Knight-Smith had read the papers and submissions and had made her decisions based upon all of the evidence provided to her. She concluded that the Claimant had been treated fairly and reasonably and that the original decision of summary dismissal was appropriate.
61. She found that the two conduct notifications were proved and amounted to gross misconduct. In respect of the submission made by the Claimant that the situation could have been resolved informally, she noted that “what started as a relatively minor potential conduct issue was exacerbated by the actions that the Claimant had taken, and when the extent of those actions came to light it was “clearly not a matter that could be informally resolved” (page 223).



62. In her evidence Mrs Knight-Smith stated that she had not answered all the questions that the Claimant had posed, as she was not required to do so. She was clear in evidence that the conduct amounted to gross misconduct and that summary dismissal was the only appropriate option.
63. I am satisfied that the disciplinary process was thorough and fair. The proper procedures were followed, and the Claimant was represented throughout. Further, it was proper for Miss Halliday to act as the dismissal officer. Indeed, no complaint was made at the time regarding her involvement. The appeal process was fair and thorough. Mrs Knight-Smith explained to the Tribunal that it was perfectly clear that the Claimant had wanted a face to face meeting, and she delayed the proceedings to try to accommodate this.
64. In respect of the complaint made that Mrs Knight-Smith did not contact the Claimant to discuss the documents, she said that she did not need to. She had full, detailed submissions with accompanying evidence, and did not need any aspects clarified. I note that the Claimant said that his submissions were delayed as he had wanted to ensure that he had covered all points.
65. Mrs Knight-Smith was entitled to consider that she had all the relevant information. She had told the Claimant that she would only contact him if she had any issues that needed to be clarified. She therefore was able to complete her report and then provide it in writing to the Claimant, which she did on 8 June 2020.
66. The severity of the sanction was considered carefully by both decision makers. Each looked at misconduct and balanced that against the Claimant's previous good work record. Mrs Knight-Smith noted that the incident involving the Claimant "was most concerning and totally unacceptable behaviour". She found that a lesser penalty was not appropriate.

#### Law relating to unfair dismissal

67. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that she was dismissed by the Respondent under section 95, but in this case the respondent admits that it dismissed the Claimant (within section 95(1)(a) of the 1996 Act) on 14<sup>th</sup> January 2019.
68. Section 98 of the 1996 Act deals with the fairness of dismissals.
69. Section 98(4) provides:
- "... the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) 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 shall be determined in accordance with equity and the substantial merits of the case".

70. In respect of misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions in British Home Stores v Burchill 1978 IRLR 379 and Post Office v Foley 2000 IRLR 827. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt.
71. The Tribunal must then decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation.
72. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band of reasonable responses open to an employer in the circumstances.

### Conclusions

73. The first issue is what was the principal reason for dismissal. I find that the Respondent genuinely dismissed the Claimant for the reason of misconduct based on the Claimant's unauthorised use of a customer's personal details. The Respondent found evidence showing that, having obtained those details, the Claimant then contacted the customer directly, under the guise of an independent reviewer. This was dishonest and in breach of the Respondent's policies.
74. In closing submissions, the Respondent argued that the principle reason was in fact the Claimant's behaviour in refusing to answer questions as to why she had not been at work on the relevant dates. I reject that argument. It is clear from the documents provided and the evidence heard that the principle reason was the unauthorised leave. That was the reason for the informal meeting to discuss misconduct as drafted in the text prior to the Claimant's refusal to answer questions at that meeting.
75. The next question is the three stages in the BHS v Burchell case. First, did the Respondent genuinely believe that the Claimant committed the misconduct alleged. I find that there was a genuine belief. The complaint was made about the Claimant in writing, was given in error to the Claimant, who then admitted contacting the customer directly to resolve the complaint informally.
76. Further, the emails sent by the customer referred to the driver, which tends to show that the customer did not know he was emailing the Claimant directly. The Respondent was entitled to find that he acted dishonestly.

77. Second, was that belief held on reasonable grounds? The burden of proof in respect of this overall question of fairness is neutral. I must consider the reasonableness of the Respondent's conduct, not the injustice to the Claimant.
78. I find that the belief was held on reasonable grounds. The emails provided were clear. The issue as to alteration of any emails does not need to be resolved, as the key message referred to above (where the customer wrote driver, rather than you) was agreed to be accurate.
79. Third, was there a fair and reasonable investigation? I find that there was. The investigator contacted the customer and obtained further information from him as to the contact he had had with the Claimant.
80. There was an initial fact-finding meeting with the Claimant in which he gave his account. There was then a conduct meeting, at which the Claimant had union representation, was given the appropriate notice and was given the opportunity to make representations.
81. After the decision had been made to summarily dismiss the Claimant, he was given the opportunity to appeal the decision, which he did. The appeals officer tried to accommodate his request for a face to face meeting, but she was unable to do so due to the lockdown.
82. The Claimant, following discussions with his union representative, chose to make written submissions. Those were made in detail. They were considered in detail, and his appeal was not upheld.
83. As regards procedure generally, I find that the procedure followed was reasonable as set out above.
84. Finally, the question is whether the dismissal was a fair sanction. Could a reasonable employer have decided to dismiss for the Claimant for acting in the way the Claimant did in this case? I find that they could.
85. I make it clear, that it is immaterial how the Tribunal would have handled the events or what decision it would have made. I do not, nor am I entitled to, substitute my own view for that of the reasonable employer.
86. It is accepted that summary dismissal is the most serious outcome for an employee. However, I find that it is clearly within the range of reasonable responses in this case.
87. The Claimant was found to have obtained a customer's details, without authority. The gravity of that action was that the customer was one with whom there had been a dispute and who had made a formal complaint against the Claimant.
88. Having obtained those details, he contacted the customer directly after his shift had ended. He did so by email and later by telephone. Having found

that he did so, not as the driver himself but as an independent reviewer, the Claimant acted dishonestly.

89. He further exacerbated the situation by resolving the complaint against him.
90. At no stage did the Claimant accept that he had breached the relevant policies to a degree that would amount to misconduct. He has tried to place the blame on others who he alleged misused the data.
91. In those circumstances I find that a reasonable employer could have dismissed the Claimant for the misconduct found.
92. I find, therefore that the Claimant was fairly dismissed by the Respondent within section 98 of the Employment Rights Act 1996.

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Employment Judge Beckett  
Date: 18 July 2021

Sent to the parties on  
Date: 11 August 2021

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