EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110619/2019

Held in Glasgow on 3 – 5 March; and 14 – 15 September 2020

Employment Judge P O'Donnell

Mr S Shirley	**Claimant** **Represented by:** **Mr D Prentice -** **Lay Representative**
Royal Mail Group Limited	**Respondent** **Represented by:** **Ms K Sutherland -** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the Claimant was not unfairly dismissed.

REASONS

Introduction

1. The Claimant has brought a complaint of unfair dismissal. The Respondent resists this.

Preliminary issues

2. At the outset of the hearing, the Claimant's Representative sought to lodge additional documents relating to a disciplinary process and outcome for another employee of the Respondent.

3. The Respondent objected to this on the basis that there had been an Order for exchange of documents and these had not been produced as part of that. Further, these documents were not available to the appeal manager and the

Tribunal required to consider his decision on the basis of the information available to him at the time.

4. In response, the Claimant's representative explained that the Claimant had tried to show a comparison with this other employee and that this was rejected because it was said to have occurred 10 years ago. The documents show that the matter occurred 6.5 years ago. It was accepted that the documents were not produced at the appeal but it was submitted that this was an identical comparator.

5. The Tribunal decided that it would be in keeping with the overriding objective to allow the documents to be added. The Tribunal could not rule out the relevance of the documents until it had heard the evidence. The Respondent would not be precluded from raising any objection once the evidence was heard and they were free to make submissions on the weight to be attached to these documents.

Procedural history

6. The case was listed for 3 days on 3-5 March 2020 but it was not possible to hear all the evidence in that time and a continued hearing was listed for 21-23 April 2020.

7. However, due to the coronavirus pandemic, that continued hearing in person could not proceed given the government restrictions in place at the time. A telephone closed preliminary hearing was held on 21 April 2020 at which parties confirmed that their joint preference was to have any continued hearing held as a hearing in person.

8. A hearing in person held in compliance with social distancing measures was held on 14 and 15 September 2020 to finish hearing evidence and to hear submissions.

Evidence

9. The Tribunal heard evidence from the following witnesses:-

    a. The Claimant.

b. Kevin Bradford – an employee of the Respondent who took the customer complaint that lead to the disciplinary process which resulted in the Claimant's dismissal,

c. Tam Dewar – the trade union official who accompanied the Claimant at his appeal hearing.

d. Roddy Matheson – the manager of the delivery office where the Claimant worked and who carried out the initial fact-finding process.

e. Alan Mullen – the dismissing officer.

f. Alan Rankin – the appeal officer.

10. There was an agreed bundle of documents prepared by the parties. Any reference to page numbers below are a reference to the pages in the agreed bundle.

11. This was not a case where there were significant disputes of fact between the witnesses for the Tribunal to resolve and, subject to the comments below, the Tribunal found the witnesses to be credible and reliable.

12. The Tribunal did find the Claimant to be unreliable in one aspect of his evidence, that is, the question of whether he knew that what he had done was in breach of the Respondent's policies and procedures. Several matters were put to him in cross-examination which it was said would have given him the knowledge that what he was doing was wrong and the Tribunal found his answers to be evasive and an attempt to avoid admitting that he did know that he had acted in a manner which was a breach of the Respondent's rules.

13. In particular, he sought to say that it was a matter of opinion that his actions meant that he had failed in his duty to safely deliver the mail, that what had been done was to make the customer feel good, that he had told her that it was her responsibility if anything went missing, that his admission during the disciplinary hearing that management discussed "door-stepping" (p119) did not mean that he was present when such matters were discussed, that agreements with customers superseded any of the Respondent's procedures and sought to say that leaving items in a bin is not "door-stepping" because it was not leaving the

item on the actual door-step. The Tribunal found that these answers were an attempt by the Claimant to avoid accepting that he was aware that what he had done was against the Respondent's rules. They also contradicted some of the answers given by the Claimant in the disciplinary process when he was able to explain the correct process for dealing with mail which could only be within his knowledge if he had been given the relevant information from the Respondent.

14. Further, the Claimant gave evidence that, although he had signed an attendance sheet for the annual mail integrity briefing in January 2019 (p146), he had not attended this briefing as he had been given time off by Mr Matheson on that day and asked by Mr Matheson to sign the sheet before he left. This was raised for the first time in the Claimant's evidence and had not been put to Mr Matheson in cross-examination. It had also never been mentioned at either the disciplinary or appeal hearing, both of which involved discussion of the briefing in question. Indeed, what the Claimant said in evidence at the hearing contradicts the Claimant's supplementary note to the disciplinary interview (p122) where he said that he was at the briefing *"in body but not of mind"*.

15. For these reasons, the Tribunal did not find that the Claimant was a credible and reliable witness in relation to his knowledge and awareness of the Respondent's rules in relation to the conduct which led to his dismissal. The Tribunal preferred the evidence of the Respondent's witnesses and the documentary evidence that showed that the Claimant was briefed on the correct processes and knew about these.

16. Although the Tribunal considered that Mr Bradford and Mr Dewar were reliable and credible witnesses, it did not find that their evidence was particularly relevant to the issues to be determined.

17. Mr Bradford gave evidence about what was said by the customer who raised the complaint, in particular in relation to the question as to whether there was an agreement between the customer and the Claimant about what to do with certain items of mail if she was not at home (something which the customer denied to the Respondent when she was spoken to during the disciplinary process). However, the existence or not of such an agreement had no real bearing on the Respondent's decision. This was not a case where the Respondent would have

made a different decision based on there being such an agreement as it has been their clear position that such agreements are not permitted.

18. Mr Dewar's evidence, insofar as it related to his view on the severity of the penalty imposed by the Respondent on the Claimant or that the decision to dismiss had been prejudged, is a matter of opinion and not evidence of fact. The question for the Tribunal is whether dismissal was within the band of reasonable responses and the opinion of Mr Dewar on that issue is not relevant to the Tribunal's consideration.

Findings in fact

19. The Tribunal made the following relevant findings in fact.

20. The Claimant was employed by the Respondent as a postal delivery worker from 1993 until he was dismissed on 16 April 2019. At the time of his dismissal, the Claimant was working out of the G13/14 delivery office.

21. At the outset of their employment, the Respondent asks their employees to sign a personal declaration confirming that they have understood that the duty of the Post Office is to ensure that the mail reaches the people for whom it is intended promptly and safely as well as acknowledging certain legal obligations involved in the delivery of mail. The declaration signed by the Claimant in 1993 is at p99.

22. The Respondent has an annual mail integrity briefing delivered to staff each year. This reminds staff of the obligations of the Respondent and its staff in terms of delivering mail. A copy of the briefing dated November 2017 is at pp95-97 and a briefing in similar terms was delivered in 2018 and 2019. The briefing outlines certain matters:-

    a. The Respondent is obliged to take all reasonable steps to avoid loss, damage, theft or interference with the mail (p95).

    b. There are six security standards to which staff have to adhere and this includes not leaving letters and parcels unattended or unsecure (p95).

c. In relation to that standard, mail items must not be “door-stepped” (p96). If an item has a designated “safe place” (usually specified at the point of purchase with the sender) then it can be left in such a place.

23. The term “door-steeping” is used to refer to leaving items on doorsteps or in other locations rather than posting them through a letter box or handing the item to the recipient.

24. The Claimant signed an attendance sheet (p146) confirming that he attended the annual mail integrity briefing on 3 January 2019.

25. On 29 March 2019, the G13/14 delivery office manager, Roddy Matheson (RM), was made aware of a complaint from a customer who attended at the office. She spoke to Kevin Bradford who had escalated this to Ros Wilson (line manager) who asked Mr Bradford to speak to RM.

26. The complaint was that the customer had received a note through her door saying that two items had been left in her bin, one of which had been signed for on her behalf by the postman as it required a signature. However, she had not retrieved the items from the bin before it was emptied and these items had been lost.

27. RM identified that it was the Claimant who was the postman on that delivery route. He considered that this might be a serious matter as it involved an item that had been signed for. He contacted a more senior manager, Barry Culbert, who advised him to speak to HR Support & Advice.

28. RM did so and was advised that he should speak to the Claimant to find out what had happened as this could be gross misconduct. This matter would be beyond RM’s level in terms of dealing with it as a disciplinary matter. He confirmed this advice to Mr Culbert who emailed Alan Mullen (AM) regarding AM being the case manager in this case.

29. When the Claimant returned from his delivery route on 29 March 2019, RM asked him to attend a fact-finding interview the next day.

30. The fact-finding interview was held on 30 March 2019 with RM and the Claimant in attendance. A note of the interview is at pp101-102:-

a. RM confirmed with the Claimant that he had done "walk 1402" on 26 March 2019 and that no-one had assisted him.

b. He also confirmed with the Claimant that he had logged into his PDA on that date and that he had not lent this to anyone else.

c. The Claimant confirmed that he recalled two items of mail for the address of the complainer and explained that he had put the items in the blue bin next to the house. He considered that the items would be safe as the bins were not emptied until the next day. He put a note through the door explaining that there were items in the bin.

d. The Claimant stated that he had a long-standing agreement with the householder that this is what he would do with any parcels he could not get through the door.

e. It was also confirmed by the Claimant that he had signed for one of the items putting the customer's name.

31. At the end of the interview, RM informed the Claimant that he considered that there was a case to answer and that the Claimant would be suspended with pay as a precaution. The Claimant's suspension was confirmed by a letter dated 30 March 2019 (p103). A report confirming the reasons for the suspension was included with the letter (p105).

32. By letter dated 4 April 2019 (p107), RM confirmed to the Claimant that the case had been passed to AM to consider further action.

33. By letter dated 5 April 2019 (p108), AM invited the Claimant to a formal conduct meeting to be held on 9 April 2019. The letter stated that the conduct being considered related to two incidences of gross misconduct; signing for an item in the complainer's name and leaving items in the blue bin. Both were said to be a breach of Royal Mail Standards.

34. In advance of the conduct meeting, AM conducted a number of interviews on 8 April 2019 with Barry Culbert, RM and Rosalind Wilson. AM took what are described as statements from each of these individuals which were signed by them and are produced at pp111-113 respectively.

a. Barry Culbert confirmed that RM spoke to him about the matter on 29 March and that he told RM to speak to Advice & Support. He confirmed what RM was told by Advice & Support and set out the circumstances in which AM was appointed to deal with the case.

b. RM confirmed the discussions with Mr Culbert and Advice & Support. He stated that he was told the matter was serious and deemed as gross misconduct. He explained the steps he took to investigate the matter including searching the Respondent's systems and confirming GPS data as well as speaking to the Claimant. He was asked if he had ever discussed door-stepping and signing for items with staff which he confirmed he had, telling them not to do so. He stated that the Claimant was present at such discussions and at the Annual Mail Integrity briefing.

c. Rosalind Wilson set out how the customer complaint came to her attention and how this was escalated to RM.

35. The conduct interview took place on 9 April 2019. The Claimant attended along with his trade union representatives, Mr Prentice and Mr Lafferty. A note of the meeting is at pp115-123 and consists of typewritten pages prepared by AM interspersed with pages of the Claimant's handwritten amendments or clarifications:-

a. The Claimant and his representatives were provided with the statements taken on 8 April and given time to read them.

b. AM confirmed with the Claimant how long he had worked with the Respondent and that he had a regular delivery walk which included the address of the complainer.

c. AM asked the Claimant if he had "huddles/start-ups" each day and the Claimant replied that this was not every day.

d. The Claimant did confirm that he received Work Time Listening and Learning Sessions.

e. The Claimant confirmed that he knew the customer at the relevant address but clarified in a subsequent note that he did not know her

surname. The Claimant suggested that there were two women at the address; one with whom he had an agreement regarding the mail and the person who complained; he suggested they were mother and daughter.

f. It was confirmed that he did have an arrangement for about 2.5 years with someone at the relevant address that he would put any packages in the blue bin if there was no-one at home. He stated that he explained to the customer that if anything happened to them then it would not be his fault. This was the only customer with whom he had such an arrangement.

g. He could not recall ever making RM aware of this arrangement and when asked why not, he stated that he (the Claimant) had made passing comment at Work Time Listening and Learning about customers asking for parcels to be left.

h. The Claimant was asked if the Respondent had a procedure for signing for customer's items and he confirmed they did not. When asked why he did this, he replied it was because the customer asked him to do so.

i. AM asked if management in the delivery office had ever told staff not to sign for customer items and the Claimant replied that he had never heard this said but he had not been to all meetings.

j. AM asked the Claimant to explain the process for delivering an item that required a signature and he replied that he would scan the item, put the name in and if the customer did not come to the door then he would "P739 it" (this was a reference to the card which would be left explaining that a delivery had been attempted). When asked why he did not follow this procedure in this instance, the Claimant stated that the customer had asked him to sign for items in the past and he had told her that he should not do it but would do it as a favour to her.

k. The Claimant stated that he had left the items in the bin because the customer had asked him to do so, that the Respondent allows this and it was acceptable to do so when the customer asked for this.

l. The Claimant confirmed that management did discuss door-stepping items and that he now realised that doing this and signing for items was damaging to the Respondent.

m. In his supplementary note, the Claimant commented on the fact that the customer had not collected the items from the bins on the day the items were left.

n. The Claimant was asked about why he breached procedures in this instance when he had signed the Annual Mail Integrity briefing on 3 January. He stated that he was doing the customer a favour and felt obliged to help her. In his supplementary note, the Claimant commented that 3 January was the second anniversary of his mother's death and that he *"might have been there in body but not of mind"*.

o. The Claimant added that following the correct procedures *"might"* have been the right thing to do but it was difficult and pressure was put on postmen by customers. He added that he had been off sick due to depression and was still on medication.

p. Additional comments were made by the union officials present; Mr Prentice questioned the integrity of the customer in question and commented that there some items such as telegrams which can be signed for; he also said there were contradictory briefs from management and that the Claimant would not do this again; he suggested that Mr Bradford be interviewed. Mr Lafferty highlighted the Claimant's length of service and unblemished record. He also commented on confusion about where Tracked items could be left.

36. A copy of AM's typewritten note was sent to the Claimant by letter dated 10 April 2019 (p124) and he returned a signed copy with his handwritten comments.

37. AM considered that he required to carry out some further investigation to look into matters raised by the Claimant in the interview.

38. He spoke directly to the customer at her home and she produced a handwritten note (p114) which stated that she came home on Tuesday and looked at her mail

but did not see the "red card" until Thursday night. She stated that she had no arrangement for the Claimant to sign on her behalf and could not recall if she had told him to leave items in the bin as there were different couriers in the area. She did recall items being left in her shed in the past by the Claimant. She confirmed that there were no other females in the house.

39. On 11 April 2019, AM spoke to RM and a note of this was produced at p125. RM confirmed that he was unaware of any arrangement that the Claimant had with the customer. He was not aware of the Claimant ever raising issues about signing for customers, door-stepping or having concerns about being under pressure from customers. RM stated that he would brief staff regularly about not signing for customers and that the Claimant would be present at such briefings if he was working. He stated that at one briefing when he had given an example of package having a note to "leave [a package] under boat" and that he (RM) would not do so because it was not a safe location, the Claimant said that this was "ridiculous". Finally, he confirmed that the Claimant did not raise any issues prior to his delivery on the day in question.

40. On 13 April 2019, AM spoke to Rosalind Wilson and a note of this was produced at p127. Ms Wilson confirmed that she was not aware of any arrangement that the Claimant had with the customer. She was also not aware of any issues being raised by the Claimant about signing for items, door-stepping or pressure from customers. She stated that the Claimant did not raise any issues prior to his delivery on the day in question.

41. AM concluded that the Claimant as guilty of gross misconduct and that he would be dismissed without notice. This was confirmed to the Claimant by letter (p128).

42. As part of the process, AM prepared a report on the investigation and his conclusion dated 14 April 2019. A copy of the report is at pp131-144. It sets out what was said at the various interviews conducted by AM in bullet point lists.

43. The report addresses the points raised by the union representatives at the conduct interview at pp135-136.

44. AM noted that the Claimant admitted that he signed for a customer's item inputting her name into his PDA which was a considered a breach of the Respondent's standards. He noted that the Claimant signed to confirm his attendance at the Annual Mail Integrity briefing in January 2019 and that, at the conduct interview, the Claimant confirmed the correct procedure for dealing with mail which required a signature when the householder was not present but did not follow this on the day in question. In these circumstances, AM found this allegation of misconduct as substantiated.

45. AM also noted that the Claimant admitted putting the two items in the blue bin and this was considered a breach of standards. AM set out the Claimant's responses at the conduct interview regarding whether the Respondent allowed delivery to be done in this way and whether doing so was acceptable. He indicated that he was deeply concerned by the Claimant's answers.

46. The report goes on to set out the Respondent's obligations in delivering mail and ensuring that the risk of loss, theft and damage is minimised. AM considered that signing for the customer is a breach of procedure and came to the view that the correct procedure had been communicated to the Claimant on multiple occasions. He concluded that the Claimant did not follow Royal Mail procedures.

47. AM did take account of the arrangement with the customer but considered that the Claimant had received re-training on the correct procedures since he first made the arrangement 2.5 years previously and had continued with an arrangement which disregarded the Respondent's procedure.

48. AM felt that some of the comments made by the Claimant after the conduct interview was an attempt by the Claimant to turn the matter on the customer.

49. He stated that if it had only been the issue of signing for the customer but the item had been safely delivered then AM might have considered a less severe penalty such as suspended dismissal. However, the fact that the Claimant had also failed to safeguard the mail warranted a more severe penalty.

50. AM noted the Claimant's clear record and length of service. He also took account that the Respondent's conduct process was intended to be corrective but noted that he was of the view that there was no lack of knowledge on the

Claimant's part as to the standards which he had to meet. He considered that the Claimant had had the opportunity to correct his conduct but had not done so.

51. In these circumstances, AM concluded that trust and confidence had irretrievably broken down and that dismissal was the only penalty appropriate to this case.

52. The Claimant appealed his dismissal by returning a completed pro-forma slip accompanying his letter of dismissal. The ground of appeal was that the penalty was too harsh.

53. Alan Rankin (AR) was appointed to hear the appeal. He sent a letter dated 26 April 2019 (pp153-154) to the Claimant inviting him to attend an appeal hearing on 8 May 2019.

54. The appeal hearing went ahead on 8 May 2019 with the Claimant being accompanied by his union representative, Tam Dewar. A note of the hearing was prepared by AR and appears at pp158-166 of the bundle. A copy of this note was sent to the Claimant by email dated 8 May 2019 (p156) and the Claimant provided amendments and further comments by email dated 10 May 2019 (pp167-168).

55. AR commenced the hearing by setting out how it will proceed and what was involved in the process. In particular, he set out the following matters:-

    a. He explained to the Claimant that the appeal would be a re-hearing of this case and that he should present all reasons and evidence even those already presented at the conduct hearing (p158).

    b. He set out his powers which included setting aside the decision, reducing the penalty or deciding it should stand (p159).

    c. He encouraged the Claimant to be open and honest and explained that if he is deliberately misled then it will be difficult for him to be sympathetic to the Claimant (p159).

    d. The Claimant confirmed that he understood the process and did not require clarification (p159).

56. A chronology of the events in the case were set out in the note at pp160-161.

57. The appeal submissions were then made by Mr Dewar on the Claimant's behalf (pp161-162):-

    a. Mr Dewar confirmed that the appeal was based on the severity of the penalty.

    b. He submitted that the Claimant had not had a fair hearing and made reference to a document from Mr Culbert (p111) which confirmed that AM was appointed to hear the case before the fact-finding had been done. Mr Dewar considered that this showed that Mr Culbert had pre-determined the outcome.

    c. Mr Dewar submitted that the Claimant had been open and honest, admitting to putting the items in the blue bin. It was admitted this was poor judgment but to be dismissed for this after 26 years' service was harsh compared to other cases.

    d. There were four other cases referred to by Mr Dewar to support this submission:-

        i. The first involved Rosalind Wilson who had also left a parcel in a blue bin which was not received by the customer but this was resolved informally with no disciplinary action.

        ii. The second involved Alistair MacKay who had signed for two Special Delivery items which went missing. He was given a two year serious warning by a manager named Paul Turner. Mr Dewar could not recall the date of this but stated that it was several years ago as Mr Turner had left the Respondent some years ago.

        iii. The third case involved an unnamed person at a different delivery office who signed for a Special Delivery item which the customer denied receiving. This matter was resolved informally.

        iv. The final case involved another unnamed person at yet another delivery office who had signed for a Special Delivery item and this was resolved informally.

e. AR asked Mr Dewar to supply the names of those involved and the dates so that he could investigate these further.

f. Mr Dewar went on to say that there was confusion as to who the actual customer was said to be as different surnames were involved. He confirmed that the Claimant did have an arrangement with a woman at the relevant address and that he had advised her not to complain if anything went missing as he should not be doing what was being agreed.

g. Given the confusion over the names, it was submitted that the Claimant be given the benefit of the doubt when it came to the agreement with the customer. In particular, it was submitted that the customer admitted to Kevin Bradford that she had an agreement with the Claimant when she first made her complaint.

58. AR confirmed with the Claimant certain matters that were not in dispute (p162):-

a. He had forged the customer's signature on his PDA.

b. He had breached Royal Mail Standards by putting the customer's name on his PDA.

c. He knew the correct procedure for dealing with mail when the customer was not at home to sign for them.

d. He had placed the items in the customer's blue bin.

e. He knew the procedure for dealing with items which could not be put through the letterbox when the customer was not home.

59. AR then went on to discuss certain aspects of the case with the Claimant (pp163-165):-

a. The Claimant clarified that his agreement with the customer was originally only to leave items in the blue bin if she was not in but was then expanded to included signing for items which he said he would only do once.

b. AR asked the Claimant if he knew that the bin was to be emptied the next day and whether he recognised the risk of putting mail in it. The Claimant confirmed that he did know it was emptied the next day but was of the view that the customer should have checked the bin when she received the card through the door. The Claimant accepted that he had no way to know that the customer would return home in time before the bins were emptied.

c. When asked if he considered it acceptable to forge the customer's signature, the Claimant replied that she had told him he could sign on her behalf.

d. The Claimant confirmed that he did not do this for anyone else. He only did it for this customer because she had asked him to do so.

e. Similarly, the Claimant confirmed that he did not leave items in other customers' bins. AR indicated that he found it hard to believe the Claimant had not done this for others and the Claimant responded that there were only 5 or 6 customers that he could this for and none of them had asked him to do so.

f. When asked, the Claimant stated that it was not acceptable to deliver mail to bins.

g. The Claimant denied ever having briefings or being told not to door-step items or leave them unsecured. He accepted that he had signed the "security book" (this was a reference to the Annual Mail Integrity briefing) in the office in the past but not every year.

h. AR asked the Claimant why he had signed for the item on the day in question but not for a Special Delivery item on 29 March 2019 when he put a card through the door and returned the item to the office. The Claimant stated that, when he made the agreement 14 months ago, he had told the customer that he would only do this once and that was the first occasion when the customer was not at home for an item requiring a signature.

i. AR expressed a view that it was hard to believe that in 14 months there had been no items requiring a signature and then two items in four days.

j. The Claimant was asked why he would not sign for a Special Delivery item and he stated that he had told the customer that he would not sign for such an item. He was asked to clarify why he saw a difference in these items and he replied that he saw no difference and it was poor judgment on his part. Mr Dewar interjected to point out that the Claimant was personally responsible for Special Delivery items having signed for these at the delivery office which was not the case for other items which required a signature.

60. The Claimant was asked if he had anything further to add and he stated that the job had changed over the years; he was trying to satisfy customers and meet their needs which was what he was doing on the day in question, not finish early.

61. AR concluded the hearing at that point and informed the Claimant that he would send out a copy of the notes and the Claimant would have the opportunity to make amendments.

62. The Claimant did provide further comments by email as noted above:-

a. He clarified that he did not say to the customer that she had better not go up to the office but that she should not complain if anything went wrong.

b. He suggested that the statement that he had forged the customer's signature implied that he had not signed for the item which was not the case.

c. He challenged any assumption that if other customers had asked him to do the same things then he would do so.

d. He stated that if he was reinstated then he would not behave in this way again given the financial penalties he has faced since being dismissed.

63. AR carried out further investigations in relation to various issues raised at the appeal.

64. He visited the customer at her home and confirmed with her that she was the only adult female at the property. An updated version of her handwritten statement was produced at p169. At the same time, he also looked at the houses nearby on the delivery walk to see how many had bins in an accessible place.

65. AR also spoke to Barry Culbert who stated that, when he spoke to AM on the day that he had discussed the case with RM, he did so in order to confirm whether AM had the capacity to take on the case.

66. AR also investigated the four comparator cases raised by Mr Dewar which involved speaking to RM, Barry Culbert, Stewart Davidson and Rosalind Wilson as well as looking for information about these cases in the Respondent's records.

67. AR concluded that the decision to dismiss was appropriate in this case and did not uphold the appeal. This was communicated to the Claimant by letter dated 22 June 2019 (p174).

68. AR prepared a report headed "Appeal Decision Document" dated 22 June 2019 setting out the process followed by him and the reasons for his decision. This document appears in the bundle at pp175-190.

69. The document starts by setting out the background of the case and a chronology of the process. It is noted at p178 that there was a delay in the process due to AR having annual leave, jury service and several days at an Employment Tribunal hearing.

70. The report then goes on to deal with the issues raised by the Claimant or on his behalf at the appeal hearing:-

    a. In relation to the question of the case having been pre-determined by Barry Culbert having appointed AM before the fact-finding had been done, AR noted that Mr Culbert had no involvement in the fact-finding or decision-making process.

    b. AR felt that the Claimant had not been open and honest in his answers during the process as he had changed his position on whether or not he had received briefings on door-stepping and on signing for items. He

also considered that the number of houses with bins that could be accessed was more than the Claimant had said.

c. In relation to the four comparator cases raised by Mr Dewar, AR concluded that none of these were truly comparable:-

   i. He had confirmed that the matter involving Rosalind Wilson had occurred over 4 or 5 years ago as it was dealt with by Paul Turner who had left the organisation some time ago. The case involved a Tracked item which had the bin noted on it as a safe place and this was why it had been left in that location. There had been no breach of procedure and bins were no longer listed as safe places.

   ii. In relation to the case of Alistair MacKay, AR noted that, again, this was dealt with by Paul Turner who was not available to discuss the case. AR spoke to RM who believed that the incident occurred about 10 years previously and did not involve any items being put in bins. AR looked at the Respondent's People System Portal and could find no trace of any warning for Mr MacKay; AR took the view that this would accord with RM's recollection of the case being 10 years old as the records only went back to 2011.

   iii. In relation to the third case, no name was provided by Mr Dewar and none of the people with whom AR spoke (Barry Culbert and Stewart Davidson) could recollect this.

   iv. In relation to the fourth case, this was one which involved a postman signing for an item but securely delivering it through the letterbox. It resulted in a 2 year suspended dismissal for the employee which is the most serious penalty short of dismissal.

d. In relation to any confusion over the identity of the customer, AR noted that he had confirmed that there was only one adult woman at the property and that mail would come in both her maiden and married names.

e. AR also noted that the customer denied any arrangement for items to be signed for or put into the bin but that items had been left in her shed.

f. AR took the view that the Claimant's comments that he told the customer that he should not be leaving items in the bin or signing for them indicated that the Claimant knew that this was against policy.

g. AR did come to the view that there was no agreement for the Claimant to sign for this customer; the customer denied this and said that she had had to attend the delivery office on other occasions to collect items which required a signature; AR considered that it was unlikely that this was the first time that the circumstances arose that the customer was absent when an item which required a signature was being delivered.

h. In AR's view, the Claimant's comments about the customer not checking her bin indicated a lack of remorse and was an attempt to shift blame to the customer. He considered that the Claimant had attended the Mail Integrity Briefing and chose not to follow the proper process.

i. AR also considered that even if there was an agreement for the Claimant to sign for the customer then this was not in accord with the Respondent's standards and that the Claimant was aware that he should not do so.

j. Based on his observations of the houses on the delivery walk, AR considered that the Claimant had been less than truthful when he said that there were only 5 or 6 houses where the bins were accessible as he had seen a greater number of houses with bins near their front doors.

k. AR came to the view that the Claimant's actions were more likely to assist him in finishing early on the day in question rather than because he was acting in line with the customer's instructions.

l. AR also came to the view that the Claimant had not been honest when he had said that he had not been briefed about door-stepping; this was contrary to what was said by RM and the Claimant had also signed to confirm his attendance at the Annual Mail Integrity briefing where such

matters were discussed. AR considered that the Claimant had attempted to mislead him on this point demonstrating a lack of integrity and casting doubt on anything which he said at the hearing.

m. AR did note that it was the Claimant who raised the issue of finishing early which had not been mentioned previously and considered that this was a more likely explanation for the Claimant's actions.

71. The report then goes on the set out AR's conclusions at pp185-187:-

a. He considered that the Claimant was an experienced employee and so was satisfied that the Claimant would be aware of his responsibilities.

b. He concluded that the Claimant had attempted to mislead him by stating that he had never been briefed on door-stepping and delivery standards.

c. AR concluded that none of the four comparator cases were direct comparisons involving facts similar to the Claimant's case.

d. He found the customer to be genuine and honest, being sympathetic to the situation the Claimant found himself in. On the other hand, he considered that the Claimant had attempted to mislead him in relation to the briefings, the number of households with accessible bins and that the customer gave permission for him to sign her name.

e. In these circumstances, AR concluded that the Claimant, having a number of options open to him, chose to act in a manner which was in breach of the Respondent's standards and was potentially damaging to them.

f. He, therefore, concluded that the conduct was substantiated especially given that the Claimant admitted to it.

g. In considering the penalty, AR noted the Claimant's length of service and clear record. He considered that if this had been a case where a mistake had been made then these would have relevant but that they did not mitigate what AR considered to be deliberate actions.

h. AR also took into account the fact that he did not consider that the Claimant had been honest with him and this was relevant to trust and integrity.

i. In these circumstances, AR concluded that the Claimant had not meet the standards required of him in his role and had been deceptive about his actions.

72. Finally, AR set out his decision at pp187-189:-

a. He noted that Respondent's Code of Business Standards states that a serious breach of those standards could result in dismissal.

b. He considered that the Claimant's action were a breach of the standards in the Code and were deliberate.

c. He came to the view that he had lost trust and confidence in the Claimant and had concerns that the Claimant would continue to operate in the same way given his lack of remorse for the customer.

d. In these circumstances, having considered all the possible sanctions, he came to the view that dismissal was appropriate.

Respondent's submissions

73. The Respondent's agent produced written submissions and supplemented these orally.

74. The written submissions set out the background to the case and the issues to be determined. It was submitted that this was a case where the reason for dismissal was the conduct of the Claimant. They go on to set out the findings in fact which the Respondent invites the Tribunal to make.

75. It was submitted that this was a case where the Claimant had failed to follow security procedures and instructions which amounted to gross misconduct. The Claimant admitted to having an arrangement with the customer in the full knowledge that such arrangements should not be reached where they breach the Respondent's procedures.

76. Ms Sutherland highlighted certain matters which she said undermined the Claimant's credibility:-

    a. The Claimant was aware that there was no procedure whereby he could sign for mail on behalf of customers but took the position that this was okay if he had an agreement. This contradicts what was said at p118 and he later admitted that it is not a common practice.

    b. It was put to the Claimant that he had attended the Mail Integrity Briefing in January 2019; he initially said he had and then said he did not, giving evidence that he had been given time off work that day. This contradicts the Claimants notes to the disciplinary hearing note where he said that was there in body but not in mind. This assertion was not put to any of the Respondent's witnesses.

    c. The briefing was an annual briefing but the Claimant said he was unaware of the content.

    d. The Claimant said that he was not told about door-stepping which is contradicted by other evidence.

    e. The Claimant said he was not aware of the risk involved in putting items in the bin but this contradict what is said at pp116 & 162.

    f. The Claimant sought to suggest that it was not wrong to reach the type of agreement he had with the customer which is contradicted by p162.

77. Ms Sutherland highlighted certain matters which arose in the Claimant's evidence that had not been put to the Respondent's witnesses:-

    a. It was suggested by the Claimant that RM felt obliged to say he had lost trust with the Claimant in order to support the Respondent but this was not put to him.

    b. The Claimant said that AR had asked him if he wanted AR to record his depression as mitigation when the Claimant said that he raised it in the appeal hearing. This was not put to AR.

c. The issue of the Claimant signing the attendance sheet but not actually attending the January briefing was not raised in the internal process and not put to any of the Respondent's witnesses.

78. On the other hand, it was submitted that the Respondent's witnesses were credible and Ms Sutherland addressed the following points in relation to the comparator case of MacKay:-

a. There was no reason to doubt that AR had taken steps to check the detail of this case.

b. RM had explained that this was not his case and so it was not surprising that he had not remembered that it was from 2013 and thought it was older.

c. The question of whether the case occurred 10 years previously or in 2013 was immaterial given the evidence of the changes over time with security of mail moving to the top of the agenda.

79. The written submissions set out the relevant statutory provisions and the test for conduct cases in *British Home Stores v Burchell*.

80. Ms Sutherland then went on to address the questions the Tribunal has to determine in such a case.

81. In relation to the question of whether there was a genuine belief of misconduct by the Respondent, it was pointed out that the Claimant admitted to doing the acts that were described in the conduct notification sent to him as part of the disciplinary process and there was no evidence that either AM or AR lacked a genuine belief that the Claimant had done these acts.

82. Further, the evidence of the Respondent's witnesses confirmed that what the Claimant had done was not permitted by the Respondent and that he had been made aware of the correct procedures to follow.

83. Turning to the issue of whether that belief was based on reasonable grounds, Ms Sutherland submitted that it was taking into account the following factors:-

a. The Claimant did not deny the acts.

b. The annual mail integrity briefing states that items must not be left unsecure and should not be door-stepped.

c. The Claimant had signed the attendance sheet for the briefing held in January 2019. However, this would not be the first time that the Claimant would have been briefed on these matters and the Claimant admitted to AM that he attended these briefings.

d. The Claimant had also admitted to AM that management had discussed door-stepping with staff.

e. He was able to describe to AM the correct procedure for dealing with items when the customer was not in and also admitted to AM that the Respondent does not have a procedure for signing on customers' behalf.

f. The evidence gathered by AM confirmed that staff were briefed regularly that they should not doorstep items or sign for them.

84. On the question of whether the investigation was reasonable, the Tribunal's attention was drawn to the case of ***Sainsbury's Supermarket v Hitt*** **[2003] IRLR 30** as authority for the proposition that the band of reasonable responses test applies to conduct of the investigation.

85. It was submitted that the investigation was reasonable and the following points were highlighted:-

a. RM carried out a reasonable initial investigation once he became aware of the complaint; he looked at the relevant records such as the PDA and Track & Trace; he interviewed the Claimant who admitted to putting the items in the bin and signing for one of them.

b. AM took statements from RM, Barry Culbert and Rosalind Wilson. He interviewed the Claimant and carried out further investigations into issues raised by the Claimant at the disciplinary interview.

c. AR undertook a full re-hearing of the case which included an interview with the Claimant and subsequent interviews and investigations into matters raised at the appeal hearing.

86. In relation to the suggestion put to AR that he had simply believed the customer over the Claimant, it was submitted that AR had interviewed the customer and had taken into account other matters which he believed cast doubt on the Claimant's honesty and not just what the customer said. In any event, the position of AR and AM was that the Claimant should not have had the arrangement with the customer and was aware of this.

87. It had been suggested to witnesses that Kevin Bradford should have been interviewed as he could have spoken to what the customer had said about having an agreement with the Claimant when she made the complaint. It was submitted that neither AM or AR had been asked to interview Mr Bradford and, in any event, it was their position that there should have been no arrangement with the customer.

88. The submissions turned to the question of whether dismissal was within the band of reasonable responses and made reference to case of *Iceland Frozen Foods Ltd v Jones* which sets out the relevant test.

89. It was submitted that this was a case where dismissal was within the band of reasonable responses and the following points were highlighted:-

    a. The Respondent's conduct code states that deliberate disregard of security procedures and instructions is an example of gross misconduct.

    b. It was not disputed by the Claimant that he did what he was said to have done and his evidence was that he did this because of the arrangement with the customer.

    c. The evidence of AM and AR was that no such agreement should have been made as what was involved in it was a breach of the Respondent's security standards.

    d. Both of them were satisfied that the Claimant knew that he should not leave items in bins or sign for them.

    e. The Claimant did not suggest during the disciplinary process that he was confused what he should do and that there is evidence that he knew what he had done was wrong.

f. Both AM and AR considered the Claimant's length of service and clear record when reaching their decision but neither of them considered that this mitigated the penalty they should award. AM believed that trust had irretrievably broken down and AR was of the view that the Claimant would continue to behave in the same way based on his view of the Claimant's honesty in relation to a matters such as whether he had been briefed about door-stepping on which he gave contradictory evidence.

g. AM did take into account that the Claimant had been suffering from depression at the time of dismissal but noted that the agreement had been reached some time ago.

h. Both AM and AR noted the importance of safeguarding the mail and the potentially serious consequences of the Claimant's action. They both gave evidence as to why they considered that the Claimant could no longer be trusted.

90. In relation to the issue of disparity of treatment, attention was drawn to the case of ***Hadjioannou v Coral Casinos Ltd*** **[1981] IRLR 352** which sets out guidance in addressing such matters and the subsequent cases which approved and applied that guidance.

91. It was submitted that the explanation given by AR of the differences between the four comparator cases and the present case was sufficient to explain why these cases were not true comparator cases and that none of them would have led the Claimant to believe that he would not be dismissed for doing what he did.

92. In relation to the MacKay case and the documents presented in evidence, it was pointed out that none of these documents were presented to AR and that there was no material difference in relation to how long ago this case occurred. The evidence was that there had been changes within the Respondent whether the MacKay was 10 years ago or only 6-7 years ago.

93. Ms Sutherland also highlighted the fact that in the MacKay case and one of the other comparator cases, disciplinary action was taken and serious penalties were applied.

94. It was submitted that in circumstances where the Claimant knew what he was doing was wrong dismissal was not outwith the band of reasonable responses.

95. Turning to the issue of procedural fairness, Ms Sutherland made reference to the ACAS Code of Practice and highlighted the following points which it was submitted indicated that the Code had been met and the procedure fair:-

    a. The facts of the case were established by RM in the fact-finding process.

    b. The Claimant was invited to a disciplinary meeting, was informed of the charges against him and told he could face dismissal

    c. He was provided with the statements taken by AM.

    d. He was given the opportunity to discuss the incident and make representations, being accompanied by his trade union representatives.

    e. AM provided the Claimant with a copy of his further investigations.

    f. A right of appeal was provided and the Claimant was given all relevant documentation in advance of the appeal.

    g. An appeal hearing was held at which the Claimant was again accompanied by a trade union representative.

96. In relation to the suggestion that the outcome was pre-judged, it was submitted that the evidence of RM was that he had been told that the conduct could potentially amount to gross misconduct and not that it was such. In any event. RM was not the decision-maker.

97. It was submitted that if there had been any procedural defects in the earlier stages of the process then these were cured by Mr Rankin who conducted a full re-hearing of the case including his own investigations. Reference was made to ***Taylor v OCS Group Ltd*** **[2006] IRLR 613**.

98. For all these reasons, it was submitted that the Claimant's dismissal was fair.

99. In rebuttal, Ms Sutherland addressed the point raised in the Claimant's submissions about the Claimant being allowed to go out on his delivery on 29 March 2019. She pointed out that there was no evidence as to when RM

became aware of the complaint and so it could not be said that he knew about it in time to stop the Claimant. He did know it was serious and acted quickly to deal with it once he was aware.

Claimant's submissions

100. The Claimant's representative made the following submissions.

101. When the Claimant went to work on 29 March 2019 this was just an ordinary day but events on that day would bring his whole world crashing down just for doing his job.

102. The customer complained to Mr Bradford and then spoke to RM. The complaint was loss or theft of items. It was submitted that the Claimant was still in the office preparing for delivery. The Respondent did not follow their own procedure and send him home. He was only informed after he did his duty and then sent home.

103. On that morning, RM spoke to Barry Culbert, HR and AM with it being decided that the Claimant is charged with gross misconduct before fact-finding had been done.

104. The Claimant had been open and honest; he never denied putting items in the blue bin and signing for one item. The customer did not read the card until the day after the bins were emptied.

105. Mr Bradford was not asked to confirm that the customer said that she had an arrangement with the Claimant. Mr Bradford gave evidence that she said there was an arrangement.

106. It was questioned whether the Respondent would always take the word of customer over staff. AR had said this might not always be the case.

107. The appeal was made on the severity of the penalty and the following points were made by Mr Prentice:-

    a. There were comparison cases and, in particular, the case of Mr MacKay who signed for a special delivery items and was given a two year written warning.

b. It was submitted that it was strange that AR could find no record of this case.

c. RM had said it had taken place 10 years ago but was actually in 2013. He had signed the paperwork relating to the case but could not recall it.

108. AR had rejected his appeal and attacked the Claimant's character. If the Claimant was likely to operate in the same way then he would have faced disciplinary action before now.

109. It was submitted that this has had a devastating effect on the Claimant.

110. The Respondent had put pressure on posties to achieve customer service and customers put pressure on posties as well.

111. The effect on the Claimant has been massive including on his mental health.

112. The evidence of Mr Dewar was highlighted in relation to the conduct code was designed to be corrective.

Relevant Law

113. The test for unfair dismissal can be found in s98 of the Employment Rights Act 1996 (ERA).

114. The initial burden of proof in such a claim is placed on the respondent under s98(1) to show that there is a potentially fair reason for dismissal. There are 5 reasons listed in s98 and, for the purposes of this claim, the relevant reason is conduct.

115. The test then turns to the requirements of s98(4) for the Tribunal to consider whether dismissal was fair in all the circumstances of the case. There is a neutral burden of proof in relation to this part of the test.

116. The test for whether a dismissal on the grounds of conduct (or misconduct) is set out in the well-known case of ***British Home Stores Ltd v Burchell*** **[1978] IRLR 379**.

117. The test effectively comprises 3 elements:-

a. A genuine belief by the employer in the fact of the misconduct

b. Reasonable grounds for that belief

c. A reasonable investigation

118. It is important to note that, due to changes in the burden of proof since *Burchell*, the employer only has the burden of proving the first element as this falls within the scope of s98(1) with the second and third elements falling within the scope of s98(4).

119. In order for there to be a reasonable belief, especially where there is a dispute as to whether or not the employee committed the misconduct in question, the employer must have some form of objective evidence on which to base their conclusion.

120. Delay in carrying out an investigation is capable of rendering the dismissal unfair (on the basis that the investigation is then not reasonable) even with no evidence of actual prejudice cause by the delay (***RSPCA v Cruden* [1986] IRLR 83 and *A v B* [2003] IRLR 405*, EAT***).

121. If the Tribunal is satisfied that the requirements of *Burchell* are met then they still need to consider whether dismissal was a fair sanction applying the "band of reasonable responses" test. The Tribunal must not substitute its own decision as to what sanction it would have applied and, rather, it must assess whether the sanction applied by the employer fell within a reasonable band of options available to the employer (***Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439**).

Decision

Was there a potentially fair reason for dismissal?

122. The Tribunal held that the Respondent had shown that they had dismissed the Claimant for reasons which would fall within "conduct" for the purposes of s98(1) ERA and that there was, therefore, a potentially fair reason for dismissal.

123. The Claimant had not sought to argue that the reason for his dismissal could not fall within the description of "conduct" and the Tribunal was of the view that the

reason given by the employer clearly fell within that category of potentially fair reason.

Did the respondent have a genuine belief in that the claimant had committed the misconduct in question?

124. Again, the Claimant did not seek to advance an argument that there was not a genuine belief by the Respondent or that there was some other reason for his dismissal.

125. The Tribunal heard evidence from the decision-makers, Mr Mullen and Mr Rankin, as to the reason why they decided to dismiss the Claimant and the Tribunal had no reason to doubt the reliability or credibility of their evidence on this point.

126. In these circumstances, there being no evidence to suggest some other reason for the Claimant's dismissal, the Tribunal concluded that there was a genuine belief by the Respondent.

Had there been a reasonable investigation?

127. In assessing this issue, the Tribunal bore in mind that, as confirmed in the case of ***Hitt*** referred to above in the Respondent's submissions, the question is not whether the Tribunal would have carried out the investigation in another way but whether what was done by the Respondent was within the band of reasonable responses.

128. The Tribunal also considered that the question of whether there had been a reasonable investigation was not confined to the fact-finding process undertaken by Mr Matheson or even to the disciplinary process conducted by Mr Mullen. Rather, the Tribunal should take into account the whole process including the appeal given that the appeal itself was a re-hearing and that various steps to carry out further investigations were taken throughout the various stages.

129. The Tribunal also bore in mind that this was a case where the Claimant admitted the conduct in question and so there was a relatively low hurdle for the Respondent to overcome in terms of investigating whether the Claimant did what he was alleged to have done. Once that admission was made then, in terms of

this case, the only other matters that required investigation was the extent of the Claimant's knowledge of whether his actions were wrong and any issues of mitigation.

130. It was quite clear to the Tribunal that the Respondent took steps to fully investigate the matter; the Claimant was given three opportunities to give his version of events throughout the whole process (including any mitigation and an explanation of his understanding of the Respondent's procedures); various other members of staff were interviewed in relation to matters which arose at each stage; the customer who made the complaint was spoken to on two separate occasion by different decision-makers; steps were taken to look into anything that was raised to support the Claimant such as the comparison cases raised by Mr Dewar at the appeal.

131. In these circumstances, the Tribunal considers that, on the face of it, there had been a full and reasonable investigation into the alleged conduct by the Claimant.

132. The Claimant made one complaint about the investigation which he believed showed it was not reasonable (he does raise other procedural issues which will be addressed below); he complains that Kevin Bradford was not interviewed about what the customer said about having an agreement with the Claimant.

133. The evidence of Mr Bradford was only relevant to the question of whether there was an agreement or not and it is quite clear from the evidence which the Tribunal heard that this was not a significant issue in the decision to dismiss the Claimant.

134. Mr Mullen, when making the original decision to dismiss, does not take an express view as to whether an agreement existed or not. Indeed, the Tribunal infers from what is said in his report at p143 that he proceeded on the basis that there was an agreement and he took account of that but that the Claimant was in breach of the Respondent's procedures by proceeding to do what had been agreed.

135. In such circumstances, the Tribunal fails to see the relevance of anything which Mr Bradford could have said which would have had any bearing on Mr Mullen's decision.

136. There is a slightly different position in relation to Mr Rankin who does come to a view that there was no agreement in relation to the Claimant signing for mail although he does not conclude that there was no agreement for mail to be left in the bin. In any event, he takes a similar position to Mr Mullen that any agreement should not have been made where it results in a breach of the Respondent's procedures.

137. Again, it is difficult to see what effect Mr Bradford's evidence would have had on Mr Rankin's decision especially given that he considered that any agreement would not excuse what the Claimant had done.

138. In these circumstances, although the Respondent could have spoken to Mr Bradford for the sake of completeness, the Tribunal does not consider that this is sufficient for it to be said that the investigation was not reasonable.

139. The Tribunal, therefore, concludes that the investigation was reasonable.

Did the respondent have a reasonable belief?

140. In considering whether the Respondent held a reasonable belief that the Claimant had committed the misconduct in question, the Tribunal bore in mind that it was not a question of whether or not the Tribunal believed that he had done so.

141. The question for the Tribunal was whether there was objective evidence from which the Respondent could come to the view which they had. In this regard, the Tribunal noted that the facts of the case as they relate to the Claimant's actions were not significantly in dispute; there was no question (and the Claimant did not dispute) that he placed items in the customer's bin and signed for an item in the customer's name. In these circumstances, the Tribunal has little difficulty in finding that the Respondent held a reasonable belief that the Claimant had done what he admitted to doing.

142. However, that is not the end of the matter and the Tribunal also has to consider whether the Respondent had a reasonable belief that the Claimant knew that what he had done was not allowed by the Respondent.

143. In this regard, the Tribunal noted that there was evidence available to both decision-makers from Mr Matheson and Ms Wilson that there were discussions by management about door-stepping (including the instruction that items should not be left unsecured) and that staff should not sign for mail on behalf of customers. Further, the Claimant had signed the attendance sheet for the annual mail integrity briefing held only a few months before the events in question and that such matters were discussed at that briefing and in previous briefings.

144. There was also evidence from the Claimant that he was aware that he should not be leaving items or signing for mail although his position was not always consistent. However, the Tribunal considers that the decision-makers did have evidence from the Claimant that he did know the correct procedures. For example, he confirmed to Mr Mullen that the Respondent did not have a procedure for signing for customers (p115), he described the correct process to Mr Mullen for dealing with an item that required a signature when no-one was at home (p115) and confirmed that he knew the correct procedure to Mr Rankin (p162), he stated to Mr Mullen that he told the customer that he should not do what she was asking him to do (p116), he accepted that management discussed door-stepping (p119), he confirmed to Mr Rankin that he knew the correct procedure for items which were too large to go through the letterbox (p162) and when asked by Mr Rankin if it was acceptable to deliver mail to a bin he answered that it was not (p164).

145. In these circumstances, the Tribunal concluded that the Respondent did form a reasonable belief in relation to both the acts of conduct in question and the Claimant's knowledge as to whether this conduct was in keeping with the Respondent's procedures.

Was the dismissal procedurally fair?

146. The Tribunal has already addressed the conduct of the investigation above and, for the reasons set out previously as to why the investigation was reasonable, we have concluded that there was no procedural unfairness in that element of the process.

147. In relation to the broader process, the Claimant makes a number of criticisms of the procedure that was followed.

148. First, it was suggested that Mr Matheson allowing the Claimant to go on his delivery on 29 March rather than sending him home was a breach of procedure.

149. The Claimant led no evidence to suggest that Mr Matheson was aware of the complaint before the Claimant went on his delivery and this was not put to him in cross-examination. The only evidence which the Tribunal heard about when Mr Matheson was aware the complaint (from both Mr Matheson and Mr Bradford) was that this occurred at some point on 29 March 2019.

150. The Tribunal, therefore, has no evidential basis to conclude that Mr Matheson did know about the complaint before the Claimant left the office on his delivery round. In any event, the Tribunal cannot see any basis on which it could be said that, had Mr Matheson allowed the Claimant to go out on delivery in the knowledge of the complaint, this rendered the dismissal unfair as it did not cause any prejudice to the Claimant in advancing his case in the disciplinary process or had any apparent impact on the decisions made by Mr Mullen and Mr Rankin.

151. Second, there is an assertion that the decision was pre-determined arising from two matters; the contact made by Mr Culbert with Mr Mullen on 29 March 2019 to appoint him as the case manager; the assertion that HR had told Mr Matheson that the Claimant's actions were gross misconduct.

152. In relation to the first of those matters, Mr Culbert was re-interviewed by Mr Rankin on this point and clarified that he was merely seeking to check if Mr Mullen had capacity to take the case on if needed. The wording of Mr Culbert's original statement at p111 does suggest that he did more than simply check Mr Mullen's availability although the wording is ambiguous.

153. However, at worst, all that can be said is that Mr Culbert jumped the gun in assigning the case to Mr Mullen and there is no evidence from which the Tribunal could conclude that this influenced any of the subsequent decisions made by Mr Matheson, Mr Mullen or Mr Rankin. Further, there was no evidence that the Claimant was in any prejudiced in the disciplinary process by the appointment of Mr Mullen on 29 March as opposed to a day later on 30 March.

154. The issue of the comments from HR arise from the wording of the statements of Mr Culbert at p111 and Mr Matheson at p112 where both say that HR had told Mr Matheson that the *"incidents were deemed gross misconduct"*. Again, this wording is ambiguous but the Tribunal heard direct evidence from Mr Matheson that HR had told him that the matters *"could"* be gross misconduct and advised him to investigate further.

155. In these circumstances, the Tribunal is not prepared to find that HR had pre-judged the matter on the basis of the evidence which it heard. The Claimant led no evidence to suggest that anything said by HR to Mr Matheson at the outset had any influence on the decisions made by Mr Mullen or Mr Rankin.

156. The Tribunal does not, therefore, consider that there is any basis on which it can conclude that the process was pre-judged.

157. Finally, the third procedural issue raised by the Claimant relates to the timing of the process. In particular, he makes the contradictory arguments that his dismissal was unfair because the decision to dismiss was made too rapidly (within about 2 weeks of the original complaint) and that the decision on the appeal took too long (taking about 6 weeks from the appeal hearing).

158. The Tribunal notes the evidence from Mr Rankin that he had a number of commitments during this time including annual leave, jury service and appearing as a witness in another Employment Tribunal hearing which delayed his decision.

159. The Tribunal considered that the process of a whole was not delayed to such a degree as to be unreasonable (particularly taking account of the reasons for any delay) and render the dismissal unfair. Similarly, the Tribunal did not consider that there was anything unreasonable in the time taken by Mr Mullen especially given that this was not a factually complex case and that the Claimant had admitted the conduct in question narrowing the issues which he had to address.

160. Overall, the Respondent conducted what the Tribunal found to be a fair procedure, giving the Claimant every opportunity to answer the allegations and there was nothing in what had happened which the Tribunal considered to be unfair.

Was dismissal in the band of reasonable responses?

161. The Tribunal considered that this issue was the real crux of this case and it was clearly the basis on which the internal appeal was pursued.

162. The Tribunal reminded itself that it was not a question of whether the Tribunal would have reached a different decision on the sanction to be applied but, rather, whether what the Respondent decided was something which fell within the band of reasonable responses to the misconduct that was established. No matter how much sympathy the Tribunal may have with the Claimant, it was not for the Tribunal to substitute its own decision.

163. It was quite clear from the evidence before the Tribunal that the Respondent takes issues around the security of the mail, trust and integrity very seriously.

164. Indeed, there was no real suggestion from the Claimant that this was not a serious matter and that it did not warrant some form of disciplinary action; it was his case that the sanction of dismissal was too harsh, not that no sanction should have been applied at all.

165. The Tribunal noted that the Respondent's conduct code does specify that deliberate disregard of security procedures amounts to gross misconduct which can result in dismissal (p92). Further, it was made clear to the Claimant in the letter inviting him to the disciplinary hearing that he was alleged to have committed acts of gross misconduct and that he could be dismissed (pp108-109).

166. There was, therefore, a clear indication by the Respondent as to the seriousness of the Claimant's conduct.

167. Both Mr Mullen and Mr Rankin clearly applied their minds to the question of sanction and weighed up a range of factors including the Claimant's length of service, his clean record and what he said at the hearings in relation to his understanding of what he had done.

168. In relation to the issue of length of service and disciplinary record, the Tribunal is of the view that these are not factors which are determinative in considering the band of reasonable responses and they are carry even less weight in cases of gross misconduct given that such conduct is considered to be very serious.

169. Mr Mullen addressed the issue of other sanctions and did consider that a lesser sanction might have been appropriate if it had only been a case of the Claimant signing for an item but otherwise securely delivering the mail. He clearly was conscious of the possibility of other sanctions and did not jump straight to dismissal. Mr Rankin also took account of the potential for other sanctions.

170. Mr Rankin addressed the issue of the comparator cases (which had only arisen at the appeal) and set out his reasons why he did not consider these to be true comparators. The issue of comparison is not determinative of the question before the Tribunal and is simply one factor that the Tribunal needs to weigh up in considering the band of reasonable responses test.

171. The focus of the comparison argument before the Tribunal was the case of Alistair MacKay. The Tribunal does note that the documents produced by the Claimant at the outset of the hearing in relation to this case were not available to Mr Rankin when he made his decision and so little, if any weight, can be placed on these.

172. In any event, the Tribunal considered that a decision made by a different manager 6-7 years previously in relation to a different set of facts provides no basis on which it could be said that the Respondent condones the type of behaviour which led to the Claimant's dismissal. The Tribunal certainly drew no adverse inference from the fact that Mr Matheson did not accurately recall when the case occurred; it is entirely unsurprising that he had only a vague recollection of a case from so long ago in which he was not involved other than to "pp" some of the correspondence.

173. Indeed, the evidence about the comparison cases does show that the Respondent takes these matters seriously as disciplinary action was taken in two of the three cases about which there was information with serious penalties being imposed in those cases.

174. The Tribunal does not consider that the evidence about other cases was sufficient for it to conclude that the Respondent condoned actions such as the Claimant's actions and certainly is not sufficient evidence for the Tribunal to say that dismissal was outwith the band of reasonable responses.

175. It was clear to the Tribunal that the most significant factor in both Mr Mullen and Mr Rankin's consideration of the sanction was their view on whether the Claimant had shown any insight into what he had done wrong and could be trusted not to do this again.

176. In the Tribunal's view, there was an evidential basis for them to conclude that they could not trust the Claimant. It is quite clear from the notes of the disciplinary and appeal hearings that the Claimant gave inconsistent answers about his knowledge of the Respondent's procedures, at times accepting that door-stepping and signing for mail had been discussed and at other times denying that he had been told that this should not be done. In particular, there were answers from the Claimant which showed he knew the correct procedures but had not followed these.

177. Further, there was also a basis on which both Mr Mullen and Mr Rankin were entitled to conclude that the Claimant did not accept the blame for what had happened; there were attempts to shift blame to the customer for not checking the bins in time and attack her integrity. The Claimant also stuck to the position that his agreement with the customer excused his actions without ever really accepting that he should never have made this in the first place.

178. The Tribunal considered that it was reasonable for both Mr Mullen and Mr Rankin to conclude that the Claimant, if he had continued in employment, could not have been trusted to not do the same thing again.

179. Taking account of all of these factors and the fact that the relevant decision-makers had not made an arbitrary decision but, rather, had weighed these factors in coming to their conclusions, the Tribunal concluded that dismissal was within the band of reasonable responses.

Conclusion

180. In these circumstances, the Tribunal has determined that the Claimant's dismissal was not unfair, there being a potentially fair reason for dismissal which the Respondent was entitled to rely on having come to a genuine and reasonable belief, after a reasonable investigation, as to the claimant having committed the misconduct in question. Dismissal was clearly within the band of reasonable

responses in all the circumstances of the case and there was no procedural unfairness.

Employment Judge: Peter O'Donnell
Date of Judgment: 23 September 2020
Entered in register: 07 October 2020
and copied to parties