THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant: Mr P Duffy
Respondent: Royal Mail Group Limited

Heard at: Newcastle Hearing Centre (by CVP) **On:** 6 and 20 October 2021

Before: Employment Judge Morris (sitting alone)

Representation:

Claimant: Mr A Mugliston of counsel
Respondent: Mr S Harte, solicitor

JUDGMENT

The Judgment of the Employment Tribunal is that the claimant's complaint under Section 111 of the Employment Rights Act 1996 that he was dismissed by the respondent (in that the contract under which he was employed was terminated by the respondent, as provided for in section 95(1)(a) of that Act) and that his dismissal was unfair contrary to Section 94 of that Act, by reference to Section 98 of that Act, is not well-founded.

REASONS

Representation and evidence

1. The claimant was represented by Mr A Mugliston of counsel who called the claimant to give evidence. The respondent was represented by Mr S Harte, solicitor who called two employees of the respondent to give evidence on its behalf: Mr T Carver, Delivery Office Manager and Mr S Walker, Independent Casework Manager.

2. This was a remote hearing, which had not been objected to by the parties. It was conducted by way of the Cloud Video Platform as it was not practicable to

convene a face-to-face hearing, no one had requested such a hearing and all the issues could be dealt with by video conference.

3. The evidence in chief of or on behalf of the parties was given by way of written witness statements. I also had before me a bundle of agreed documents comprising in excess of 257 pages.

The claimant's complaint

4. The claimant complained that his dismissal by the respondent was unfair being contrary to sections 94 and 98 of the Employment Rights Act 1996 ("the 1996 Act").

The issues

5. The issues in this case can be summarised as follows:

   5.1 Was the claimant dismissed? The respondent accepted that he had been.

   5.2 Has the respondent shown what was the reason for the claimant's dismissal? The respondent asserted conduct.

   5.3 Was that reason a potentially fair reason within sections 98(1) or (2) of the 1996 Act? Conduct, if established, is such a potentially fair reason.

   5.4 If the reason was a potentially fair reason for dismissal, did the respondent act reasonably or unreasonably in treating that reason as a sufficient reason for the dismissal of the claimant in accordance with section 98(4) of the 1996 Act? This would include whether (taking account of the Acas Code of Practice: Disciplinary and Grievance Procedures (2009) and the guidance in British Home Stores Limited v Burchell [1978] IRLR 379, as qualified in Boys and Girls Welfare Society v McDonald [1996] IRLR129) a reasonable procedure had been followed by the respondent in connection with the dismissal and whether (in accordance with the guidance in Iceland Frozen Foods Limited -v- Jones [1982] IRLR 439, Post Office v Foley [2000] IRLR 827) and Graham v The Secretary of State for Work and Pensions (Job Centre Plus) [2012] EWCA Civ 903) the decision to dismiss the claimant fell within the band of reasonable responses of a reasonable employer in such circumstances.

   5.5 In this respect, the Tribunal would, however, apply the guidance set out in Burchell having regard to the fact that the statutory 'test' of fairness, which is now found in section 98(4) of the 1996 Act, had been amended in 1980 such that neither party now has a burden of proof in that regard.

   5.6 With regard to the above questions, in accordance with the guidance in Burchell and Graham, I would consider whether at the stage at which the decision was made on behalf of the respondent to dismiss the claimant its managers who, respectively, made that decision and upheld that decision on appeal had in mind reasonable grounds, after as much investigation into the

matter as was reasonable in all the circumstances of the case, upon which to found a genuine belief that the claimant was guilty of misconduct.

Consideration and findings of fact

6. Having taken into consideration all the relevant evidence before the Tribunal (documentary and oral), the submissions made on behalf of the parties at the hearing and the relevant statutory and case law (notwithstanding the fact that, in the pursuit of some conciseness, every aspect might not be specifically mentioned below), I record the following facts either as agreed between the parties or found by me on the balance of probabilities. The principal issues between the parties were whether the claimant had been dishonest during the course of an investigation into an accident that he suffered while at work and, in relation to that accident, had displayed a disregard of his own health and safety. As such, although I have considered all of the relevant documents in this case, when setting out below excerpts from various documents my focus will be upon those issues.

6.1 The respondent is a well-known, extremely large employer with significant resources including a dedicated HR department.

6.2 The claimant was employed by the respondent as a Postman (Operational Postal Grade) from 26 March 2001 until his employment was terminated with immediate effect on 3 March 2021.

6.3 Disciplinary proceedings were taken against the claimant in 2019 in connection with alleged fraudulent overtime claims that he had made. From the record of the disciplinary interview that Mr Carver held with the claimant on 28 January 2019 (68) it is apparent that, in essence, without prior authorisation, the claimant had occasionally worked through his meal breaks and claimed overtime for having done so. It is also recorded that Mr Carver gave serious consideration to dismissing the claimant but took into consideration the serious personal issues the claimant and his family had had to deal with, that this may have led to the confusion to which the claimant had referred, his length of service and the absence of any history of any associated issues. As such, on 22 March 2019, Mr Carver gave the claimant a penalty provided for in the respondent's Conduct Policy (27) of a "2-year suspended dismissal" (72). It was explained at the hearing before me that the effect of such penalty is similar to a final written warning. Having received advice from his trade union representative, the claimant informed the respondent that he did not wish to appeal against the penalty (74).

6.4 On 10 October 2020, when the claimant entered the driveway of a property to which he was delivering mail, he tripped on the edge of the pathway and fell. It was subsequently discovered that he had fractured his shoulder. This incident was investigated by DL who, as the Work Area Manager in the Stockton Delivery Office, was the claimant's line manager. He completed an Accident & Incident Investigation Report on 16 October 2020 (77). Although he was on sick leave, the claimant agreed with Mr Carver that he would attend work to carry out light duties in the office. No action was taken against the claimant arising from this incident.

6.5 On 2 January 2021, the claimant suffered another fall while he was delivering mail. DL attended the scene of the incident and subsequently recorded brief details in an "Injuries Form" dated 4 January 2021 (91). In his summary of the events leading to the injury he recorded, so far as is relevant to the issues in these proceedings, that the claimant had delivered mail to a property and, as he turned to leave, he stood on a sledge, which caused him to fall. "The conditions were icy as it had been snowing, the drive had small patches of compact snow on it although the paving below was clearly visible. For whatever reason Mr Duffy has failed to see that sledge prior to walking down the drive". The claimant submitted an amended summary dated 19 January 2021 (95). He recorded, amongst other things, that after he had delivered the mail he turned and stood down from the step, "I had taken two steps and stood on a patch of snow. …. What I thought was a patch of snow was hiding a child's slide".

6.6 After the accident DL drove the claimant to a local hospital and, following x-rays, he was advised that he had sustained a broken knee and torn ligaments. He required surgery on 5 January 2021 following which he was issued with a medical certificate for a period of four weeks. Ultimately, the claimant's period of certified absence was extended until 26 February 2021, albeit latterly relating to "stress-related problem" (233).

6.7 DL commenced a formal investigation into this incident on 7 January 2021 and again produced an Accident & Incident Investigation Report (99). That Report includes that DL spoke to the claimant at the scene of the accident and also to the person to whose house the claimant had been delivering a parcel immediately before he fell (Mrs N). DL had spoken to Mr and Mrs N both at the scene of the accident and on 13 January as part of his ongoing investigation. Mrs N had actually seen the claimant fall and Mr N had returned home shortly afterwards. Key elements of that Report that are relevant to the issues in this case include the following:

6.7.1 The information provided by the claimant included that having handed the parcel to Mrs N, "Mr Duffy then turned to leave the property and make his way to his next call …. As Mr Duffy left the property he stood on a sledge which had been left on the drive causing him to slip and fall to the ground landing heavily on his right knee. The incident was witnessed by Mrs N …. Mr Duffy stated that he had not seen the sledge on the drive as it was covered in snow, he stated this at the scene of the incident and also reaffirmed this when we spoke on the telephone days later."

6.7.2 The information provided by Mr and Mrs N included that, "Mr Duffy handed over a parcel and turned to leave the property. …. As he turned to leave …. Mr Duffy was looking at the bundle of mail as if to see where he was going next. As he left the doorstep he took 2 steps and stood on a sledge which had been left on the drive. …. Mr Duffy stood on the sledge and slipped falling heavily. …. Mrs [*N*] stated that the sledge wasn't covered in snow as it hadn't been out all night and

had in fact just been put out from inside the house an hour earlier than when the incident occurred."

6.7.3 The "root cause" of the incident is recorded as being, "Likelihood is Mr Duffy was reading mail whilst walking and not paying attention".

6.7.4 DL attached to the Report two photographs of the scene of the accident: the first taken when he visited some 40 to 60 minutes after the accident (119); the second taken on 13 January principally to show the position of the sledge at the time of the accident (118).

6.8 Mr Carver telephoned the claimant from time to time during his absence from work. On 8 January he asked the claimant to work from home to endorse letters that had accumulated from Christmas. In his witness statement the claimant states that he replied that he did not want to take mail home. In cross examination, however, after initially giving what I considered to be somewhat evasive answers he confirmed that he had agreed to do so and subsequently changed his mind. When, however, Mr Carver approached the claimant's wife (who also works for the respondent in the role of Operational Postal Grade) to take the mail home she refused. The claimant's evidence was that this was for two reasons: first, he had been signed unfit to work; secondly, he and his wife both understood that Royal Mail policy was that mail could not be taken to the private home of an employee. The claimant contacted Mr Carver on 12 January to confirm that it would not be possible for him to work from home due to his need to recover and the Royal Mail policy against having mail at home. In this connection, Mr Carver's oral evidence was that, in the context of the Covid-19 situation, that policy had been relaxed so as to allow mail to be taken into private homes, subject to appropriate authorisation.

6.9 Following a discussion with the claimant on 12 January, DL wrote to him to invite him to a fact finding meeting on 21 January 2021, the purpose of which he stated was "to establish the facts and to determine if any formal action under the conduct policy is required" (112). That meeting was postponed and took place on 22 January 2021 (115). In fact, with the agreement of the claimant and his trade union representative although DL and the representative were both in the delivery office the claimant attended 'virtually' over the telephone as he was unable to get to the office. At the meeting DL showed the representative the two photographs referred to above and told him that there was a witness statement but the representative advised him that he did not want to see it as it was above his training. During the meeting the claimant explained, "I turned to leave and stood down from the step, took a couple of steps between the parked cars and I stood on a patch of snow." He explained that it was only after he fell that he realised that he had "stood on a patch of snow and the sledge was underneath the snow." "There was snow all over". At this point the claimant's representative asked, "So you are saying it was inevitable as there was snow everywhere", to which the claimant replied, "Yes". DL asked the claimant if he was reading his mail while he was walking to which he replied, "No". At the conclusion of the

meeting the representative again asked, “There was a covering of snow all over it”, to which the claimant replied, “Yeah there was that’s right”.

6.10 When DL visited Mr and Mrs N on 13 January, Mr Carver followed him there in his own car so that he could see the site of the accident. He did not meet Mr and Mrs N but they knew that he was present outside. I consider that it was unwise of him to have made this visit with DL given that he was the investigating officer and Mr Carver was to be the decision-maker at the conduct meeting but I do not consider to be well-founded the claimant’s assertion that this and other things (such as Mr Carver having been the decision-maker at the conduct meeting in 2019 at which he was given what the claimant now states was not a fair and reasonable sanction of a 2-year suspended dismissal) indicate that the ultimate outcome to dismiss was biased and predetermined.

6.11 As noted above, DL spoke to Mr and Mrs N at the scene of the accident on 2 January 2021 and again on 13 January 2021. He then produced a witness statement recording those discussions (117). That statement reflects the information provided by Mr and Mrs N as DL had recorded in the Accident & Incident Investigation Report as set out above. DL visited Mr and Mrs N on 26 January, gave them a copy of the witness statement that he prepared, invited them to read it to ensure that they were content that it was accurate, make any amendments they considered were necessary and then sign it. Having taken some 10 minutes to read the statement Mr and Mrs N made amendments relating to calling an ambulance and then both signed the statement.

6.12 Having concluded his investigation, DL considered that the claimant was potentially guilty of misconduct that might require a penalty that was above his level of authority. He therefore passed the case on to Mr Carver and informed the claimant that he had done so (120), which the claimant states was on 26 January.

6.13 At about this time the claimant began to experience problems with his mental health and, following a telephone call with his doctor, was prescribed medication and given a fit note citing (as mentioned above) “stress-related problem” and suggesting an occupational health assessment in respect of his knee injury (233). The respondent referred the claimant to occupational health and he had a telephone session on 23 February 2021. The focus of the interim report (224) was from a psychological perspective rather than relating to his knee injury and it was said that his symptoms were likely to improve once he had been advised of the outcome of the conduct case. It was suggested that the claimant would benefit from up to four counselling sessions, which the respondent arranged for him during February and March 2021.

6.14 Having reviewed the evidence provided to him by DL, Mr Carver decided that there was a case to answer. By letter of 27 January 2021 (123) he invited the claimant to attend a formal conduct meeting on 3 February 2021 “to discuss

discrepancies within the accident investigation that you were involved in on 2nd January 2021". The conduct to be discussed was said to be:

> "1. Potential dishonesty.
> 2. Potential deliberate disregard to health and safety."

In his letter Mr Carver stated, "I enclose details of the investigation and copies of relevant witness statements and other documents that will be referred to during the formal conduct meeting. I have also enclosed a guide that explains what to expect at the meeting." Mr Carver informed the claimant that he would "take into consideration your conduct record which currently shows a 2-year suspended dismissal for dishonesty and fraudulent overtime claims" and that the allegations were "being considered as gross misconduct" and if "upheld, one outcome could be your dismissal without notice."

6.15 The claimant could not attend the meeting on the proposed date and it was therefore postponed to 10 February 2021, again it was conducted by telephone. The claimant was represented by his trade union representative. Mr Carver commenced the meeting by explaining why the interview was taking place and asked the claimant if he was happy to continue, which he confirmed he was.

6.16 The notes of the meeting were agreed by the claimant subject to amendments that he subsequently made, which are shown in red ink (129). Once more by reference to the principal issues in this case, the key points that I draw from these notes include the following:

6.16.1 The claimant explained, in one of the amendments he subsequently made, that as he was leaving the property, "I was looking straight ahead at where I was going".

6.16.2 It was put to the claimant that in the investigation he had stated that the sledge was covered in snow whereas the statement from Mrs N said that the sledge was not covered in snow. The claimant replied, "I stated that I stood on a patch of snow. I don't know if the sledge was fully covered in snow." He later restated this in two further amendments: eg "I don't know if the sledge was fully covered or not". The claimant confirmed that he did not know there was a sledge under the patch of snow otherwise he would not have stepped on it.

6.16.3 The claimant explained that he was not reading his mail and checked to see where his next call was before he started walking.

6.16.4 Mr Carver briefly explored with the claimant the accident that he had had in October 2020.

6.16.5 The claimant's representative queried how Mrs N had seen the claimant was looking at his mail if his back was towards her, suggested that it "looks like the customer could have gritted their driveway that's why there isn't much snow", asked why there was a

long gap between the accident investigation and the witness statement and suggested that if the claimant had undertaken work at home (referred to as “kill offs” or “adjusted duties”) while he was absent, as Mr Carver had asked him to, he did not believe that they would be in this position.

6.17 Having considered the circumstances of the case, Mr Carver invited the claimant to attend a telephone meeting with him on 3 March 2021 at which he would tell him of the decision that he had made (139). That decision was that this was a case of gross misconduct for which the appropriate penalty was dismissal. That was confirmed to the claimant by letter enclosed with which was a detailed record of Mr Carver’s Deliberations and Conclusions, which is dated 3 March 2021 (143).

6.18 With regard to the charge of potential dishonesty, amongst other things Mr Carver recorded his conclusion as to the following:

6.18.1 The claimant knew there were patches of snow on the drive and should have recognised the danger and walked around the snow but he had just walked through it instead of using the clear parts of the drive.

6.18.2 Based on the photographs and the creditable witness, the sledge would have been visible even if it had a small covering of snow on it as in the time between the sledge being left out and the accident there had not been enough snowfall to cover it.

6.18.3 The claimant had not given a straight answer to questions that had been asked and he believed that the claimant had “been dishonest when asked about the events of the day to hide the fact that he was not abiding by the standards required and was reading his mail and not paying attention to where he was walking which resulted in him incurring an accident”.

6.18.4 The sledge was not covered in snow and the claimant was not paying attention to where he was walking. Mrs N’s statement had detailed how she saw him reading his bundle of mail, which was clear and consistent and, although denied by the claimant, there was no reason for the witness to lie about what she had seen. The claimant had continued read his bundle of mail as he “stepped off the customers step and because of this has failed to see the sledge which was lying on the customers driveway. I do not believe that the sledge was covered in snow as claimed …”.

6.18.5 He was of the firm belief that the claimant had been dishonest; not only because of the compelling evidence of the witness statement and photographs of the scene but also he believed the claimant had not told the true events of the accident he had in October 2020, which he considered linked the same behaviours “of not paying attention and reading whilst walking. I believe Mr Duffy decided to

claim that the sledge was under snow in a way to hide that again he was to blame for his own accident which has ultimately led to a case of dishonesty."

6.19 With regard to the charge of potential deliberate disregard to health and safety, amongst other things Mr Carver recorded his conclusion as to the following:

6.19.1 The claimant had recognised a patch of snow but failed to react to it and take the necessary steps to keep himself safe, and in accessing the particular property had taken the quicker route despite staff being encouraged to take the safest route possible; this clearly demonstrating that he had not learned from his mistake and lack of attention that gave rise to the accident in October 2020.

6.19.2 It was clear that in both incidents the claimant was distracted because he was reading whilst walking. He had failed to identify the sledge, which was a deliberate disregard to health and safety.

6.20 Mr Carver responded to the mitigation points that had been raised at the interview by the claimant's representative. In particular:

6.20.1 As he had not completed the accident investigation or attended the customer's property to obtain a witness statement he could not comment on why there was such a long gap between the accident investigation and the witness statement, "My response to this question is the timeline is irrelevant for my decision making". In this regard, while I accept that it might be strictly correct that Mr Carver had not attended the customer's property "to obtain a witness statement", I consider that he was being less than frank in stating that in circumstances where he had attended the customer's property on 13 January, albeit not to obtain a witness statement.

6.20.2 The question as to "kill offs" had no reflection on the case. "Had Mr Duffy completed kill offs or not this would have had no impact ….".

6.21 In his conclusions (149), Mr Carver considered that the claimant had been dishonest throughout as was demonstrated by his inconsistencies in his own version of events despite having been given multiple chances to give a true account and there was compelling evidence in both the witness statement and photographic evidence that the sledge was not covered in snow and, therefore, was clearly visible on the driveway. Mr Carver considered that the claimant had also demonstrated a deliberate disregard for health and safety: that in the context of the respondent's business standards that state, "everyone has a responsibility for their own safety and that of their colleagues and others" and "you must support a safe culture and behave responsibly, always taking account of your own safety and that of others". Additionally, Mr Carver considered that there was no substantial mitigation and, at the time, the claimant had a 2-year suspended dismissal on his conduct record for dishonesty.

6.22 He therefore considered the appropriate penalty. As he was satisfied that this was clearly a case of gross misconduct, he discounted warnings. He considered whether a suspended dismissal would be more appropriate but the claimant already had such a sanction on his record for dishonesty from which he had not learnt and had been dishonest again. Mr Carver was not convinced that if a lesser penalty was awarded such an incident would not occur again. Through the claimant's actions the bond of trust and confidence had been broken. Anything "less than dismissal would be sending a message that honesty and the health and safety of our employees is not being taken seriously by the business". As such, "The appropriate penalty is summarily dismissed" (150).

6.23 Drawing upon the above, in evidence Mr Carver pointed, in particular, to the following:

6.23.1 With regard to the matter of inconsistencies, compared with the information the claimant had provided at the investigation stage to the effect that he had not seen the sledge as it was covered in snow, at the formal conduct interview his "story changed slightly in that he said that he stood on a patch of snow but that he was unsure whether the sledge was fully covered in snow."

6.23.2 Mrs N stated that the sledge was not covered in snow as it had only been left outside for an hour.

6.23.3 The photograph that was taken on the day showed minimal snow on the ground. There were a few small patches but nothing deep enough to cover a sledge.

6.23.4 The claimant's statement that he was not reading his mail while walking away from the customer's property was contradictory to what she said.

6.23.5 Mr Carver believed that summary dismissal was the appropriate sanction, even for a first offence and if the claimant's conduct record had been clear at the time, as he believed that the proven allegations amounted to gross misconduct in their own right.

6.23.6 Indeed, if the only proven allegation had been dishonesty he would have still dismissed the claimant for gross misconduct in its own right. If, however, the only proven allegation had been disregard for health and safety he would have not considered that to be gross misconduct in its own right and would have issued a 2-year suspended dismissal but, given that the claimant already had such a sanction in place, that would have still have led to his dismissal, albeit with notice.

6.24 In evidence Mr Carver denied the claimant's assertion in his claim form (ET1) that his decision to dismiss him "was carried out as a vendetta" due to his refusing to accept mail into his home which, the claimant said, was against

Royal Mail policy (13). To the contrary, he had supported the claimant after his accident and, while he had been working at Stockton Delivery Office for the last three years, he had had a good working relationship with the claimant.

6.25 The claimant was offered an opportunity to appeal against his dismissal, which he exercised by completing the appropriate Reply Slip on 3 March 2021 upon which he noted that his reasons would be given at the appeal hearing (142).

6.26 The appeal hearing was conducted as a rehearing of the case, over the telephone, by Mr Walker on 17 March 2021 (153). The claimant was accompanied by his trade union representative. The claimant essentially restated what he had explained previously as to the cause of the accident: after handing a parcel to Mrs N he looked at his bundle of mail for his next delivery point; he turned around and started walking down the drive; he only took two strides when he stood on what he thought was a patch of snow but turned out to be the child's sledge and he fell. He expanded upon Mr Carver contacting him on 8 January to ask if he would be able to work from home doing 'kill offs' that had built up over Christmas, to which the claimant had said he was not sure that this was a reasonable request allowing mail to be placed at his home address. When Mr Carver approached the claimant's wife and told her about the suggestion she was very angry as it was not Royal Mail protocol to take mail home. On 11 January the claimant contacted Mr Carver to say he would not be able to work from home after which Mr Carver and his wife had had an argument and he had told her that if she was not prepared to take the mail home he would get a manager to do it. The claimant then asked a trade union representative to intervene. The claimant told Mr Walker that Mr and Mrs N were not particularly happy about being asked to sign a pre-written statement and felt pressured to sign it as two managers were waiting outside. For this reason they had provided a second statement. The claimant's representative raised concerns that after the claimant had told Mr Carver that he would not perform the adjusted duties on 22 January 2021 the case had turned from a health and safety matter to a conduct investigation. Mr Walker asked the claimant a number of questions including how large was the patch of snow on which he had stood to which he replied, "It was just a patch, about the size of a foot" and he could not say how deep it was, "it was just a patch" (156). Mr Walker sent a copy of the notes of the meeting to the claimant, which he returned showing some manuscript amendments (162).

6.27 The second statement provided by Mr and Mrs N is dated 21 March 2021 (159). In it they explained that the first statement contained a number of inaccuracies, which they were invited to amend, and did so, but they were aware that DL was waiting outside so they felt under pressure to do this relatively quickly. They continued that the statement was presented to them "as a formality 'for the record'" and it was not disclosed that it could be used to dismiss the claimant but was to cover Royal Mail in the event that the claimant took action against it. For this reason they wished to provide an account of events in their own words in support of the claimant.

6.28 Amongst other things, the statement explained that a sledge had been left on their drive that morning for approximately one hour. There was snow on the ground but they did not "believe it had snowed while the sledge was on the driveway". After delivering a parcel, the claimant "turned to leave and after taking a small number of steps down the driveway away from the house, slipped and fell to the ground". A short time afterwards, when DL took a photograph of the scene, "there was less snow on the driveway then there had been when Mr Duffy fell".

6.29 After the appeal hearing Mr Walker sought further information by submitting questions to Mr Carver (168) and DL (170), which they both answered.

6.29.1 One of the questions asked of Mr Carver related to the suggestion that he had asked DL to start a conduct investigation because the claimant would not perform adjusted duties in January 2021. Mr Carver replied that DL had explained that he believed there were inconsistencies in what the claimant was telling him and that he was being dishonest. Conduct was therefore progressed because of this (169).

6.29.2 One of the questions asked of DL related to the suggestion of the claimant that the photograph with the snow on the ground was taken after the snow had been cleared from outside the property. DL replied that it had been taken approximately one hour after the accident at which time it did not look as if it had just been cleared. Also, when he had spoken to Mr and Mrs N they did not say or suggest that the drive had been cleared after the accident. Indeed he was sure that they had said the drive was as it was at the time of the accident as when the photo was taken. He explained that the mention of the drive being cleared only materialised some three weeks later when he had been approached by a trade union representative who suggested that the drive had been cleared after the claimant had slipped. This had not been raised at the fact-finding meeting and came across "like an excuse that had just been concocted." (170).

6.30 Mr Walker sent the above email correspondence with Mr Carver and DL to the claimant on Monday 12 April 2021 asking him to provide any comments within three working days (172). On Wednesday 14 April the claimant sent Mr Walker a Whatsapp photograph (119). The claimant then wrote to Mr Walker by letter dated 15 April (173), which he stated in evidence he posted by recorded delivery on Friday 16 April, enclosing his comments on each of the questions that Mr Walker had asked of DL and Mr Carver respectively.

6.31 By letter dated 16 April 2021 (and, therefore, before he had received the further information from the claimant) Mr Walker informed the claimant of his decision that his appeal was rejected and his dismissal stood (183). He enclosed a very detailed Conduct Appeal Decision Document setting out his Deliberations and Conclusions (184). Relevant matters recorded by Mr Walker included the following:

6.31.1 Having read both of the statements provided by Mr and Mrs N and considered the photograph he considered that the sledge was unlikely to have been covered with snow as the claimant had suggested as it had not snowed in the short period of time it had been left on the driveway and he believed that the claimant had "deliberately disregarded his safety responsibilities by reading whilst walking on the driveway".

6.31.2 Although Mrs N had stated that she believed that there was less snow on the driveway when the photograph was taken, she had repeated that she did not believe it had snowed while the sledge was on the driveway, thereby suggesting it was not covered by snow as the claimant had suggested.

6.31.3 He considered that Mr Carver approaching the claimant with the suggestion of home work was a reasonable approach although he also understood why the claimant chose not to take up the opportunity. Mr Walker thrice recorded that he had found no evidence and neither did he believe, that the claimant's decision not to work at home had had any material effect on this case.

6.31.4 As to the suspended dismissal on 22 March 2019, Mr Walker considered that the correct procedures had been followed and the decision had been reasonable, and it was therefore appropriate to include that penalty within the current case.

6.32 In his conclusions Mr Walker noted that he had given a good deal of consideration to the claimant's 19 years of employment but considered there was no acceptable explanation for any employee to behave as he believed the claimant had on 2 January 2021, which was compounded by his admission that it was in fact his way of working and his attempts to deceive the investigation by providing a false explanation for why he had failed to spot the sledge; indeed Mr Walker believed that the deceit continued throughout the case. The claimant had deliberately disregarded known health and safety safe ways of working by reading the mail while walking away from the door of the property, which was compounded by him providing DL with a false explanation. Mr Walker considered alternative penalties but had discounted warnings and dismissal on notice as this was a case of gross misconduct, and discounted issuing a suspended dismissal as the claimant already had such a sanction for dishonesty on his conduct record.

6.33 On 19 April 2021 Mr Walker wrote again to the claimant as he had received the further information he had submitted under cover of his letter of 15 April. There is an inconsistency in the evidence, which was not explored at the hearing, because, as mentioned above, the claimant said that he had posted his letter of 15 April by recorded delivery on 16 April whereas, in his response of 19 April Mr Walker stated that the claimant's letter "was received by me on Saturday, 16 April 2021"; Saturday was 17 April 21. In his letter Mr Walker explained that he had received a Whatsapp message from the claimant on 14 April and believed that that was the additional information he wished Mr

Walker to consider, and he had not suggested that he intended to submit further information. Mr Walker had therefore deliberated and concluded his case. Having received the claimant's further information, however, Mr Walker said he had reviewed it but did not believe there was any new/additional information that would lead him to amend his decision (194).

Submissions

7. After the evidence had been concluded the parties' representatives made comprehensive oral submissions, which addressed the issues set out above, all of which I have duly considered. It is not necessary for me to set out those submissions in detail here because they are a matter of record and the salient points will be obvious from my findings and conclusions below and comments that I have made above. Suffice it to say that I fully considered all the submissions made and the parties can be assured that they were all taken into account into coming to my decision. That said, the key points in the parties' submissions are set out below.

8. On behalf of the claimant, Mr Mugliston made submissions including the following:

    8.1 As to the first consideration in Burchell, there is ample evidence that there was no genuine belief.

        8.1.1 The claimant had suffered a comparable accident in 2020 and not only was he not dismissed, there is no evidence that it was dealt with as conduct.

        8.1.2 There was further inconsistency in that the claimant was found to have been dishonest in deliberately defrauding the respondent in 2019 but that had not resulted in his dismissal. Indeed it had not really been believed that the claimant had defrauded the respondent as Mr Carver's conclusions were that he had been confused about his working hours.

        8.1.3 The chronology bears out that the real reason for the claimant's dismissal was his refusal to work from home. The Injuries Form had been completed on 4 January after DL had spoken to the claimant and Mr and Mrs N and attended the scene and taken a photograph. It was not until 12 January that the claimant was first asked questions from a misconduct perspective; and that was after, on the same day, his trade union representative confirmed that he would not work from home. If the respondent genuinely believed that there was potential dishonesty or disregard for health and safety it begs the question why the claimant was allowed to remain working and take mail into his home. The very next day after the claimant's refusal to work from home was communicated to the respondent Mr Calvert and DL decided, for the first time, to take a statement from Mr and Mrs N. Mr Calvert said that the timeline was "irrelevant" to his decision making but it clearly was relevant. He also said in his witness statement that he first became aware of the case when it was passed up to him by

DL but that was not true because he was aware of it when he attended the property of Mr and Mrs N on 13 January.

8.2 There were no reasonable grounds upon which to believe any of the following: the sledge was not covered in snow; the claimant was looking at his mail while walking forwards at the time of the accident; there was a conflict of evidence between Mr and Mrs N and the claimant; the quality of Mrs N's evidence, which could have been mistaken; claimant was looking at his mail at the time of the October incident; the claimant was dishonest when he said he did not know if, had he entered the property using a direct route, he would have seen the sledge. Likewise there was no evidence to sustain the conclusion that there was not enough snow to cover a sledge or that the claimant could have avoided walking in the snow. In giving his initial account, the claimant had no reason to lie because there was no suggestion that the accident would be looked at from a conduct perspective and he had no reason to assume it was different to the October accident. There was no evidence that the claimant was looking at his mail when he fell: Mrs N had stated that the claimant was looking at his mail as he turned to leave then he took two steps and stood on the sledge, there was no hint that he was looking at the mail as he walked and the respondent did not consider that Mrs N could not see as the claimant had his back to her. If there was no evidence that the claimant was looking at the mail it inevitably flows that his dismissal was unfair.

8.3 The respondent had not carried out a reasonable investigation in a meaningful way. Mrs N had not been asked if she saw the claimant looking at the mail as he walked, if the snow was not covering the sledge or if the driveway had been gritted. Mr Carver had said that the timeline was irrelevant and when, at the appeal stage, Mr Walker asked DL why it took so long after the accident to hold the fact-finding interview and have Mr and Mrs N sign their statement, he dodged the question and failed to address the gap between the accident and the decision to progress matters on the same day as the claimant refused to work from home.

8.4 The suspended dismissal was inconsistent with Mr Carver's conclusion that the explanation was confusion on the part of the claimant; and, despite the size and resources of the respondent, Mr Carver had made no attempt to investigate matters as he had only spoken to some managers and not to the employees the claimant and put forward to demonstrate a common misunderstanding. The suspended dismissal does not advance matters, however, because Mr Carver stated that the claimant would have been dismissed for what occurred in January 2021 in any event. It must be outside the range of reasonable responses to allow an employer to depend upon the suspended dismissal when it is tied up with dishonesty without foundation.

8.5 There were a number of examples of procedural unfairness. Mr Carver had attended the home of Mr and Mrs N on 13 January, and him saying that he was not aware of the case until DL passed to him is disputed. He had said that he visited because it was on his way home but if that was so, why wait until 13 January? It was questioned that it was purely coincidence that he

attended there the day after the claimant refused to work from home. In any event to have the dismissing officer involved in discussions and attending the scene of the accident was unfair. That could potentially have been remedied by being open with the claimant but, instead, Mr Carver told an outright lie when he had said that he did not attend the customer's property to obtain a witness statement. Thus the claimant was actively misled and deprived of the opportunity to say it was inappropriate. The Tribunal can readily infer from this that the real reason for the claimant's dismissal was the dispute regarding working from home. Also, in the invitation to the formal conduct meeting, Mr Carver had failed to set out clearly the charges against the claimant. To say that he provided the claimant with a pack of documents is not enough; and he did not explain the relevance of the suspended penalty or that the October 2020 incident would form part of the matters being considered. Additionally, Mr and Mrs N were not made clear as to the consequences of their statement and how important it was that it must be accurate. Finally, after the appeal meeting the claimant was given an opportunity to provide further information, which he did but it was not taken into account by Mr Walker before making his decision. It may be suggested that Mr Walker's letter of 19 April shows that he did have regard to the claimant's information but it cannot be fair to give the claimant three days to respond and then proceed to make the decision.

9. On behalf of the respondent, Mr Harte made submissions including the following:

9.1 The respondent had demonstrated that the reason for the claimant's dismissal was misconduct, which is a potentially fair reason for dismissal. The main focus should therefore be on section 98(4) and whether the respondent acted reasonably or unreasonably.

9.2 The investigation was within the band of reasonable responses open to the respondent. DL had information from Mrs N on the day of the accident; he prepared a statement on the basis of what she said; she was given an opportunity to amend it, which she did; if she felt any time pressure she did not raise it; it was a short one-page statement which, if it was incorrect, would have been amended. The photograph was taken on the day within about 40 minutes of the accident, any melting would have been minimal given the cold conditions and there was no evidence of the snow been cleared or gritted, which Mrs N would have said. It was made clear to the claimant before and at the fact-finding meeting that the incident was being progressed under the respondent's Conduct Policy, and he was accompanied by his trade union representative. There is no requirement to be forewarned of evidence before a fact-finding meeting and while the claimant did not see the photograph or the statement of Mr and Mrs N, they were provided to him before the conduct meeting.

9.3 Mr Carver attending Mr and Mrs N's home on 13 January was not ideal but he had explained why and his limited role, and there was no prejudice to the claimant.

9.4 All necessary procedural steps had been taken in relation to the disciplinary interview and although the invitation letter could have been clearer regarding the allegation of dishonesty it was sufficiently clear when read in conjunction with the notes of the fact-finding meeting, the photograph and the statement of Mr and Mrs N particularly that the sledge was not covered. Their statement was consistent with the photograph taken on the day and even if there was less snow, the sledge would be clearly visible.

9.5 The only logical conclusion for Mr Carver was that the claimant was reading his mail and not looking when he slipped on the sledge. On this basis he was entitled to conclude that the claimant was dishonest; and during cross examination the claimant accepted that he could understand why Mr Carver came to the conclusion that the sledge was not under snow. For the same reasons, Mr Carver was entitled to conclude that the claimant had no regard for health and safety. There was no vendetta against the claimant: that was a diversion tactic. Mr Carver's version regarding his request for the claimant to work at home is to be preferred. He had said that the claimant told him on 8 January that he was fit and able to work from home and willing to do so. It was only when Mr Carver approached the claimant's wife that he found out that he had changed his mind. Only under cross examination had the claimant confirmed that he had changed his mind and had initially said that he would work from home.

9.6 The claimant had made much of the timing but the accident occurred on 2 January and DL returned to Mr and Mrs N on 13 January, and Mr Carver confirmed that between those times the health and safety investigation was carried out with reports being completed. There was nothing odd about the timing and no vendetta by Mr Carver.

9.7 It had been suggested that because Mr Carver found the claimant to have been dishonest in 2019 he would not give an unbiased decision in 2021 but even if a different manager had conducted the later case he would still have been aware of the suspended dismissal and that it involved dishonesty. There is no requirement to conduct hearings in a vacuum and pretend the past never happened: Airbus UK Ltd v Webb [2008] EWCA Civ 49. Even if spent, warnings can be relevant but the suspended dismissal was live. Mr Carver was entitled to conclude that the claimant had been guilty of gross misconduct on the basis of dishonesty during a formal investigation and his disregard for health and safety.

9.8 The appeal was a complete rehearing at which the claimant was fully aware of the allegations and had the opportunity to present his grounds of appeal. Mr Walker then carried out further investigations before coming to his decision. After the decision he considered the further information he had received from the claimant and informed him that he had not altered his decision. If there were any failures at the disciplinary stage they were remedied at the appeal (Taylor v OCS Group Ltd) and there was no suggestion that Mr Walker had a vendetta against the claimant. The two statements from Mr and Mrs N and the photograph provided sufficient information for Mr Walker to reach his conclusion that the sledge was not

under snow and the reason claimant did not see it was because he was reading the mail and not looking.

9.9 The claimant's dishonesty during the investigation was sufficient for a finding of gross misconduct and summary dismissal was within the band of reasonable responses. If the Tribunal considers there was no dishonesty but there was a disregard of health and safety the claimant would still have been dismissed, albeit with notice, due to totting up with the suspended dismissal. The claimant had not appealed against that sanction and, in the decision in Davies v Sandwell Metropolitan Borough Council [2013] IRLR 374 CA the Court of Appeal held that where there was no appeal against a final warning there would need to be exceptional circumstances for a tribunal to reopen the final warning, and there were no exceptional circumstances in this case.

10. I asked Mr Mugliston whether he wished to make further submissions on any point of law raised by Mr Harte. He responded that with regard to the decision in Sandwell, the claimant said that there were exceptional circumstances so the Tribunal could go beyond the previous sanction notwithstanding the absence of any appeal because of the inherent contradiction in the outcome letter in which Mr Carver accepted confusion on the part of the claimant but also considered that he was guilty of a deliberate attempt to defraud the respondent.

The Law

11. The principal statutory provisions that are relevant to the issues in this case are to be found in the 1996 Act and are as follows:

"94 The right.

(1) An employee has the right not to be unfairly dismissed by his employer."

"98 General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it —

……

(b) relates to the conduct of the employee,

……

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

Application of the facts and the law to determine the issues

12. The above are the salient facts relevant to and upon which I based my judgment. I considered those facts and the submissions made in the light of the relevant law and the case precedents in this area of law.

13. In that regard while bringing into my consideration the decision of the EAT in Burchell (which has obviously stood the test of time for over forty years and was relied upon by both representatives) I also took into account more recent decisions of the Court of Appeal, which reviewed and indorsed the relevant authorities: ie. Fuller v The London Borough of Brent [2011] EWCA Civ 267, Tayeh v Barchester Healthcare Limited [2013] EWCA Civ 29 and Graham, particularly at paragraphs 35 and 36 where Aikens L.J. stated as follows:

> *"In Orr v Milton Keynes Council [2011] ICR 704, all three members of this court concluded that, on the construction given to section 98(4) and its statutory predecessors in many cases in the Court of Appeal, section 98(4)(b) did not permit any second consideration by an ET in addition to the exercise that it had to perform under section 98(4)(a). In that case I attempted to summarise the present state of the law applicable in a case where an employer alleges that an employee had engaged in misconduct and has dismissed the employee as a result. I said that once it is established that employer's reason for dismissing the employee was a "valid" reason within the statute, the ET has to consider three aspects of the employer's conduct. First, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; secondly, did the employer believe that the employee was guilty of the misconduct complained of and, thirdly, did the employer have reasonable grounds for that belief.*
>
> *If the answer to each of those questions is "yes", the ET must then decide on the reasonableness of the response by the employer. In performing the latter exercise, the ET must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to the ET's own subjective views, whether the employer has acted within a "band or range of reasonable responses" to the particular misconduct found of the particular employee. If the employer has so acted, then the employer's decision to dismiss will be reasonable. However, this is not the same thing as saying that a decision of an employer to dismiss will only be regarded as*

> *unreasonable if it is shown to be perverse. The ET must not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The ET must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which "a reasonable employer might have adopted". An ET must focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any internal appeal process) and not on whether in fact the employee has suffered an injustice. An appeal from the ET to the EAT lies only in respect of a question of law arising from the ET's decision: see section 21(1) of the Employment Tribunals Act 1996."*

14. Unfair dismissal as a concept was first introduced into the UK legislation in 1972. Some might have expected a tribunal to focus on whether it was fair that the employee had been dismissed. As indicated in the excerpt above, the higher courts have consistently said, however, that that is not the correct approach; rather a tribunal should "focus its attention on the conduct of the employer": W Devis & Sons Ltd v Atkins [1977] IRLR 314. That being so, the issues arising from the statutory and case law referred to above that are relevant to the determination of this case are summarised at paragraph 5 of these reasons. They fall into two principal parts, which I shall address in turn.

What was the reason for the dismissal and was it a potentially fair reason?

15. The first questions for me to consider are what was the reason for the dismissal of the claimant and was that a potentially fair reason within section 98(1) of the 1996 Act? It is for the respondent to show the reason for the dismissal and that that reason is a potentially fair reason for dismissal. By reference to the long-established guidance in Abernethy v Mott Hay and Anderson [1974] IRLR 213, the reason is the facts and beliefs known to and held by the respondent at the time of its dismissal of the claimant.

16. In ASLEF v Brady [2006] IRLR 576 it was said,

> "*Dismissal may be for an unfair reason even when misconduct has been committed. The question is whether the misconduct was the real reason for dismissal and it is for the employer to prove that ….*
>
> *It does not follow, therefore, that whenever there is misconduct which could justify dismissal a tribunal is bound to find that that was indeed the operative reason, even a potentially fair reason. For example if the employer makes the misconduct an excuse to dismiss an employee in circumstances where he would not have treated others in a similar way, then the reason for the dismissal – the operative cause – would not be the misconduct at all, since that is not what brought about dismissal, even if the misconduct merited dismissal.*
>
> *Accordingly, once the employee has put in issue with proper evidence a basis for contending that the employer dismissed out of pique or antagonism,*

it is for the employer to rebut this by showing that the principal reason is a statutory reason. If the tribunal is left in doubt, it will not have done so."

The above excerpt is particularly relevant in this case as the claimant contends that his dismissal did indeed arise "out of pique or antagonism" on the part of Mr Carver who was annoyed at the claimant's refusal to work from home during his sickness absence. Mr Mugliston submitted that the claimant's contention is borne out by the chronology in that it was only after the claimant informed Mr Carver that he refused to work from home that he was contacted by DL that same day, 12 January 2021, who asked him further questions about the accident. Thus, it is suggested, the case moved from being a health and safety concern to become a conduct matter: indeed this was the point made by the claimant's trade union representative to Mr Carver at the conduct meeting on 10 February 2021 (where he suggested that if the claimant had undertaken the "kill offs" while he was absent, he did not believe that they would be in this position) and was put to Mr Walker by the claimant's representative at the appeal meeting on 17 March 2021.

17. The respondent's witnesses denied this assertion. The facts and beliefs of the respondent, as personified by those persons who took the decision to dismiss the claimant and reject his appeal (Mr Carver and Mr Walker respectively) are clearly set out in their respective contemporaneous decision letters from which I have summarised as above. Simply put, in giving his explanation of the accident that befell him on 2 January 2021 the claimant had been dishonest, and the way in which he had the accident (which he had sought to conceal by his dishonesty) revealed that in the course of carrying out his responsibilities he had shown a disregard for health and safety.

18. As set out in the above excerpt from Brady, it is for the respondent to rebut the claimant's contention "by showing that the principal reason is a statutory reason". The evidence before Mr Carver and Mr Walker (which referring back to the decision in Abernethy, comprised "the facts and beliefs known to and held by" them) included the following:

    18.1 The information Mr and Mrs N provided to DL on the day of the accident, which he subsequently used to prepare their first statement, included that,

        18.1.1 as the claimant "turned to leave the property" he "was looking at the bundle of mail …. As he left the doorstep he took 2 steps and stood on a sledge"; and

        18.1.2 "the sledge wasn't covered in snow as it hadn't been out all night and had in fact just been put out from inside the house an hour earlier".

    18.2 The photograph taken on the day, albeit approximately one hour after the accident, showed some evidence of snow in places on the drive but not sufficient to conceal the sledge. The photograph was consistent with DL's summary of events in the Injuries Form, "The conditions were icy as it had been snowing, the drive had small patches of compact snow on it although the paving below was clearly visible." In this regard in neither of the

statements produced by Mr and Mrs N is it stated that they cleared or gritted the drive at any time, whether before or after the accident.

18.3 In the second statement of Mr and Mrs N in which they explained that they wished "to provide an account of events in our own words", they stated that there was snow on the ground but they did not "believe it had snowed while the sledge was on the driveway".

18.4 It might have been, as Mr and Mrs N said in that second statement, that when DL took the photograph there was "less snow on the driveway than there had been when Mr Duffy fell" but, as Mr Carver answered in cross examination, he regarded that as being irrelevant as there was no snow on the sledge.

18.5 To an extent, the claimant gave a consistent account as to the quantity of snow on the day in question but there were subtle changes, which were identified by Mr Carver in his Deliberations and Conclusions. In the Accident & Incident Investigation Report, DL recorded that he had spoken to the claimant who told him that he had not seen the sledge "as it was covered in snow". In his statement amending DL's summary in the Injuries Form the claimant explained that he had "stood on a patch of snow" that "was hiding a child's slide". At the fact-finding meeting the claimant continued that he had stood on a patch of snow but added that there was snow all over and, in answer to a question from his representative, agreed that it was inevitable as there was snow everywhere. At the conduct interview the claimant continued to explain that he stepped onto a patch of snow and when Mr Carver explored with him that at the investigation stage he had said the sledge was covered in snow he answered (and repeated several times including after Mr Carver had explored with him that the photograph showed minimal snow on the ground, and in the amendments the claimant made to the notes of the conduct interview) that he did not know if the sledge was covered in snow or not. In answer to questions during cross examination Mr Carver explained that he considered that the claimant had changed his account: he had originally said that the sledge was covered then that there were patches of snow on the sledge and then that he was not sure if the sledge was covered. I consider that it was reasonable for Mr Carver to make this assessment that the claimant had changed his account slightly. Also in this regard, I repeat that at the appeal meeting, in answer to one of Mr Walker's questions he explained that the patch was "about the size of a foot" (which, from the photograph of the sledge, I am satisfied would neither have covered nor concealed it) and he could not say how deep it was.

19. In this connection I acknowledge the submission made by Mr Mugliston, which reflected questions he asked of the respondent's witnesses that the chronology of the events demonstrates that the real reason for the claimant's dismissal was his refusal to work from home. I accept that the claimant was first made aware on 12 January 2021 that there was a possibility of formal action being taken under the respondent's conduct policy and that that was the date upon which the claimant informed Mr Carver that he had changed his mind about working from home. I am not satisfied, however, that that coincidence is sufficient. On the contrary, I accept

that DL's investigation took time. The accident happened on 2 January, which was a Saturday, the Injuries Form is dated 4 January, the Investigation Date is shown on the Accident & Incident Investigation Report as being 7 January, which is a Thursday (although there is no indication of when that Report was concluded) and DL spoke to the claimant on the following Tuesday, 12 January 2021 as is set out in his invitation he sent to the claimant to attend a fact-finding meeting in which he clearly stated that its purpose was to determine whether any formal action under the conduct policy was required. On the evidence available to me I am not satisfied that that chronology supports the contention that the investigation had moved from being one related to health and safety to one related to conduct. There is nothing in the Accident & Incident Investigation Report that supports that contention; indeed, in that Report DL identified the root cause as being a likelihood that the claimant was reading mail whilst walking and not paying attention. In these circumstances, I do not accept the assertion in the claimant's claim form that Mr Carver's decision to dismiss him "was carried out as a vendetta" as a result of his refusal to work from home during his sickness absence. Any such vendetta would have required a conspiracy between DL and Mr Carver or, at the very least, DL being complicit in Mr Carver's plans. Although I am alert to the possibility of such activities between managers one of whom is senior to the other and, in appropriate circumstances, would be very willing to draw inferences, I do not find any evidence of such bad faith in this case either directly or of sufficient weight to enable me to draw adverse inferences.

20. In light of the above, and stepping back and considering all the evidence presented to me at this hearing in the round, I am satisfied that the respondent has discharged the burden of proof upon it to show that the reason for the claimant's dismissal was related to his conduct, that being a potentially fair reason in accordance with section 98(1) of the 1996 Act.

In all the circumstances (including the size and administrative resources of the respondent's undertaking) and considering equity and the substantial merits of the case, did the respondent act reasonably or unreasonably in treating the reason for the dismissal of the claimant as a sufficient reason for dismissing the claimant?

21. I now turn to consider the question of whether (there being no burden of proof on either party) the respondent acted reasonably as is required by section 98(4) of the 1996 Act. That is a convenient phrase but the section itself contains three overlapping elements, each of which a Tribunal must take into account:

    21.1 first, whether, in the circumstances, the employer acted reasonably or unreasonably;

    21.2 secondly, the size and administrative resources of the respondent (which Mr Mugliston stressed in submissions was of some significance in this case);

    21.3 thirdly, the question "shall be determined in accordance with equity and the substantive merits of the case".

22. In addressing 'the section 98(4) question', I am alert to two preliminary points. First, I must not substitute my own view for that of the respondent. In UCATT v Brain [1981] IRLR 224 it was put thus:

> "*Indeed this approach of Tribunals, putting themselves in the position of the employer, informing themselves of what the employer knew at the moment, imagining themselves in that position and then asking the question, "Would a reasonable employer in those circumstances dismiss", seems to me a very sensible approach – subject to one qualification alone, that they must not fall into the error of asking themselves the question "Would we dismiss", because you sometimes have a situation in which one reasonable employer would and one would not*."

This approach has been maintained over the years in many decisions including Iceland Frozen Foods (re-confirmed in Midland Bank v Madden [2000] IRLR 288) and Sainsburys v Hitt [2003] IRLR 23.

23. Secondly, I am to apply what has been referred to as the 'band' or 'range' of reasonable responses approach. In respect each of these two preliminary points, reference is again made to the excerpt from Graham above.

24. In this context, I now turn to consider the basic question of fairness as more fully set out in the three elements in Burchell and Graham. In that regard it is important to note that in the first of those decisions it is recorded that the Tribunal has to decide whether the employer "entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time". That reflects one of the answers given by Mr Carver in cross examination that his conclusion on a particular matter was "not a certainty but was a reasonable belief".

25. The first element in Burchell is that "there must be established by the employer the fact of that belief [*in the employee's misconduct*]; that the employer did believe it". For the reasons set out more fully above, I am satisfied that Mr Carver and Mr Walker both believed that the claimant was guilty of misconduct. That is clear from the evidence recorded above and was clear from their oral evidence before me. As such, this first element in Burchell, the fact of belief of misconduct, is satisfied.

26. The second element in Burchell is that "the employer had in his mind reasonable grounds upon which to sustain that belief".

27. In this regard, I first refer to and rely upon the findings I have set out above relating to the respondent having shown that the principal reason for the claimant's dismissal was the statutory reason of conduct. Not wishing to become repetitious I simply record that I find that it was within the range of reasonable responses of the respondent's managers, on the evidence available to them, to reject claimant's explanation that he fell as a result of having stood on a patch of snow that concealed a child's slide; and that in repeatedly proffering that explanation, despite the evidence to the contrary, the claimant was being dishonest. The question of whether the claimant was looking at the mail that he was carrying rather than at where he was putting his feet is, perhaps, less clear-cut and Mr Mugliston

submitted that there was no evidence that the claimant was looking at his mail when he fell but only that he was looking at his mail as he turned to leave. I acknowledge that that might be strictly accurate but that submission seeks to separate out the elements of the statement from Mr and Mrs N that I have summarised above being that as the claimant "turned to leave the property" he "was looking at the bundle of mail …. As he left the doorstep he took 2 steps and stood on a sledge". I consider that separation to be somewhat artificial and I am satisfied that the respondent's managers acted within the range of reasonable responses in reading that account as more of a continuum. As Mr Carver said in oral evidence, his "interpretation of the witness statement was that the claimant was looking at the mail as he stepped away from the property, which is why he slipped". I am similarly satisfied that the managers acted within the range of reasonable responses in deciding that there was no other logical explanation for the claimant not seeing the sledge than that he was reading the mail. For all the above reasons therefore I consider that the respondent did have reasonable grounds upon which to sustain the belief in the claimant's misconduct.

28. The third element in Burchell is that at the stage that Mr Carver formed that belief on those grounds and Mr Walker maintained that belief, the respondent "had carried out as much investigation into the matter as was reasonable in all the circumstances of the case."

29. The starting point of the investigation was DL's attendance at the site of the accident on 2 January 2021. On that day he obtained information from the claimant and from Mr and Mrs N. He subsequently prepared a written statement of what Mr and Mrs N had told him and gave them an opportunity to read it, in private, and make any amendments they wished to make, which they did. It is a fairly short statement and I am satisfied that the 10 minutes or so they took to read it was sufficient. DL also took a photograph of the scene of the accident on the driveway and I am satisfied that it was reasonable for Mr Carver and Mr Walker to conclude that the photograph showed conditions similar to those that had existed at the time of the accident approximately one hour earlier; especially given that Mr and Mrs N had told DL that the sledge was not covered in snow, and in their second statement stated that they did not believe it had snowed while the sledge was on the drive. DL also completed the standard paperwork used by the respondent in such circumstances including the Injuries Form (in respect of which the claimant submitted a fairly detailed amending statement) and the Accident & Incident Investigation Report. DL then invited the claimant to attend a fact-finding meeting, making it clear (as the claimant accepted in evidence) both in the invitation and at the commencement of the meeting that its purpose was to determine if any formal action was required under the respondent's conduct policy. He informed the claimant that he was entitled to be represented at the meeting, which he was. That meeting was then conducted appropriately with the principal focus being upon how the claimant came to fall and whether he was reading the mail while he was walking. I acknowledge that the claimant did not see the photographs or the statement from Mr and Mrs N at the fact-finding meeting but his representative was shown the photographs and was offered the statement but declined to read it. On this basis I am satisfied that the investigation thus far was within the band of reasonable responses open to the respondent.

30. On the basis of his investigation, DL considered that the potential penalty was outside his level of authority and, therefore, referred the case to Mr Carver. He invited the claimant to a formal conduct meeting and clearly set out the allegations that were to be considered. As Mr Harte conceded, the letter could have been clearer in providing more precise detail of the allegations but I accept that (in the context of the claimant having read the Injuries Form and submitted a fairly lengthy amending statement on 19 January, and having discussed all relevant issues with DL at the fact-finding meeting) when he received, with the invitation letter, the notes of the fact-finding meeting, the photographs and the statement of Mr and Mrs N, the allegations that he had to address would have been sufficiently clear to him and his representative. My finding in this respect is supported by the fact that the claimant did not suggest that prior to or at the commencement of the meeting either he or his trade union representative raised the point that they were unaware of the purpose of the meeting or the nature of the allegations. Indeed the note of the meeting records that Mr Carver "began by explaining the reason why this interview was taking place and asked Paul if he was happy to continue which he confirmed he was." Neither did the claimant or his representative take any issue at the time with the fact that it was Mr Carver who had conduct of the formal meeting notwithstanding the fact that he had previously issued the claimant with a sanction of a suspended dismissal. The claimant now suggests that this dual involvement of Mr Carver was unfair. In this regard, I accept the evidence of Mr Carver that it was open to the claimant to ask for alternative manager to deal with the conduct interview but he did not. Moreover, given the local management structure of the respondent's Stockton Delivery Office I do not consider that it was outwith the range of reasonable responses for DL to pass the case up to Mr Carver and for him to consider the allegations against the claimant in the conduct meeting even though he had imposed the sanction of a suspended dismissal on the claimant early in 2019.

31. I am satisfied that the notes of the conduct meeting, which the claimant was invited to and did amend, demonstrate that relevant issues were explored and that the claimant and his representative were given every opportunity to explain the circumstances of the accident from the claimant's perspective. Indeed at the end of the meeting Mr Carver rightly asked the claimant, "is there anything further you want to add?" On the basis of the key points arising at the meeting, which I have summarised in my findings above, I am satisfied that Mr Carver had a reasonable basis upon which to draw the conclusions, which I have also summarised in my findings above. On those same bases, I am satisfied that Mr Carver's decision that this was a case of gross misconduct for which the appropriate penalty was dismissal was a decision that it was within the range of reasonable responses for him to make. In particular, with reference to the two specific allegations against the claimant I consider that it was reasonable for Mr Carver to conclude:

    31.1 that the sledge was not covered in snow as the claimant had asserted and that he had "been dishonest when asked about the events of the day to hide the fact that he was not abiding by the standards required and was reading his mail and not paying attention to where he was walking which resulted in him incurring an accident"; and

31.2 he had deliberately disregarded his health and safety by failing to identify the sledge upon which he had stood causing him to fall and sustain injury.

32. The claimant's evidence was that as Mr Carver gave him his decision by way of a Whatsapp call on 3 March 2021 and he received the outcome letter the same day it was "clear that Tom Carver had determined that I had been dishonest before ever discussing the matters in the disciplinary". This demonstrates a misunderstanding on the claimant's part. The conduct meeting took place on 17 February and, as the claimant states himself in his witness statement, the call on 3 March 2021 was only for him "to hear the outcome of the formal conduct meeting".

33. As set out above, I am satisfied that it was reasonable for Mr Carver to conclude that the circumstances of this case amounted to gross misconduct on the part of the claimant for which dismissal was the appropriate penalty. I accept his evidence as to why he did not consider that warnings would have been appropriate and why he rejected imposing a further sanction of a two-year suspended dismissal. I accept that it was reasonable for Mr Carver to decide, as was his evidence in his witness statement, "that summary dismissal was the appropriate sanction, even for a first offence and if Paul's conduct record had been clear at that time", and similarly, "If Paul had a clean disciplinary record, I would still have summarily dismissed him, as I considered the proven allegations to amount to gross misconduct in their own right."

34. That evidence, which I accept, is relevant in the context of the sanction of the two-year suspended dismissal that was extant at the time of the claimant's accident on 2 January 2021. In submissions Mr Mugliston was critical of Mr Carver's imposition of that earlier sanction, in relation to which, he said, Mr Carver's investigation had been wanting and his decision that the claimant had been guilty of a deliberate attempt to defraud the respondent was inconsistent with his conclusions in which he accepted confusion on the part of the claimant. He suggested that it would be outside the range of reasonable responses to allow the respondent to depend upon that previous sanction, which was tied up with dishonesty.

35. The issue of whether a tribunal should 'look behind' an earlier sanction has recently been considered in the case of Fallahi v TWI Ltd (Unfair Dismissal) [2021] UKEAT 0110_19_1708 in which the EAT reviewed earlier authorities including Davies, Wincanton Group v Stone [2013] IRLR 178 and Bandara v British Broadcasting Corporation UKEAT/0335/15/JOJ. I have carefully considered each of these authorities (along with the decision of the Court of Appeal in Way v Spectrum Property Care Ltd [2015] IRLR 657 CA) all of which stress that the language of section 98(4) of the 1996 Act remains the test that a tribunal should apply although it may be appropriate in relevant cases to consider whether an earlier warning was "manifestly inappropriate", was not issued in good faith or without prima facie grounds for giving it. In this case I am not satisfied, on the fairly limited evidence available to me, that the two-year suspended dismissal that was previously given to the claimant was manifestly inappropriate, and in this regard I note that, on advice from his trade union representative, the claimant did not appeal against that sanction. In the circumstances I am satisfied that it remains a valid consideration in these proceedings. That said, as Mr Mugliston observed in submissions, the suspended dismissal does not particularly advance matters given

that I am satisfied, as set out above, that it was within the band of reasonable responses for Mr Carver to conclude that the allegations amounted to gross misconduct in their own right regardless of the extant sanction of a suspended dismissal.

36. The final stage of the process was the appeal that was conducted by Mr Walker. I am satisfied that, as with the conduct meeting, the arrangements that Mr Walker put in place were reasonable (including as to the information available to the claimant and his being accompanied by his trade union representative) and I note that the appeal was conducted as a rehearing of the case. By this time, there was also available to Mr Walker the second statement that Mr and Mrs N had produced in their own words but, importantly, the position remained that they did not "believe it had snowed while the sledge was on the driveway". That was significant given the claimant's initial account that the sledge had been covered with snow, albeit at the appeal hearing he explained that it was just a patch "about the size of a foot". I am similarly satisfied from the notes of the appeal (which the claimant was again given the opportunity to and did amend) that Mr Walker took time to consider the claimant's grounds of appeal, gave him every opportunity to explain his position and asked him pertinent questions. Mr Walker then sought further information from Mr Carver and DL, the answers to which he provided for the claimant to comment upon and brought into account in coming to his decision. He then sent his decision to the claimant enclosing a comprehensive Conduct Appeal Decision Document setting out his Deliberations and Conclusions. I am satisfied that on the basis of the matters that I have drawn from that Document and summarised above that it was within the range of reasonable responses for Mr Walker to decide that the claimant had been dishonest in providing a false explanation and had deliberately disregarded known health and safety safe ways of working, to discount alternative sanctions and, therefore, reject the claimant's appeal.

37. It is obviously unfortunate that Mr Walker came to his decision and issued it to the claimant in advance of receiving from the claimant the further information he had submitted under cover of his letter of 15 April but I accept Mr Walker's explanation that having received a Whatsapp message from the claimant on 14 April he believed that that was the additional information he wished Mr Walker to consider, especially as he had not suggested that he intended to submit further information. I can think of no reason why Mr Walker would have rushed out his decision if he thought that the claimant intended to provide further information. Nevertheless, Mr Walker did review the information when he did receive it from the claimant and I accept that it was not unreasonable for him to conclude that it did not contain anything that would lead him to amend his decision.

38. In submissions Mr Mugliston pointed to what he described as being a number of examples of procedural unfairness. I have addressed above his submissions relating to the real reason for the claimant's dismissal being the dispute over working from home, Mr Carver failing to set out clearly the charges against the claimant in the invitation to the conduct meeting and Mr Walker making his decision before receipt of the further information from the claimant. There remains the issue of Mr Carver attending Mr and Mrs N's home on 13 January. As Mr Harte accepted, that was not ideal and I have already found above that Mr Carver was less than frank in stating that he had not attended the customer's property to

obtain a witness statement. That said, I accept Mr Carver's oral evidence that he did not attend the property "as part of the investigation or to obtain a witness statement" but had only done so following DL asking him if he "wanted to go to see where the accident occurred" and he "had no part in the witness statement". In similar vein Mr Mugliston rightly pointed out that the evidence in Mr Carver's witness statement that he "first became aware of this case when it was passed up to me by" DL was inaccurate given that, as he accepted in oral evidence, he must have been aware of the case when he attended the scene of the accident on 13 January. Although I have found above that it was unwise for Mr Carver to have visited the scene with DL as he was the investigating officer and Mr Carver was to be the decision-maker, and it cannot be right that Mr Carver first became aware of this case when it was passed to him by DL, I am not satisfied that these flaws, which I regard as being relatively minor, render unreasonable the respondent's decision to dismiss the claimant.

39. Stepping back and considering all the evidence before me in the round, I am satisfied on the basis of the evidence available to me that the respondent acted reasonably and in accordance with the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) in relation to the process that was followed leading to the dismissal of the claimant (including in relation to the investigation, the conduct meeting and the appeal meeting) and, in accordance with the third element in Burchell, "carried out as much investigation into the matter as was reasonable in all the circumstances of the case".

40. In summary, by reference to the three elements in Burchell, on the evidence available to me and on the basis of the findings of fact set out above, I accept that:

    40.1 Mr Carver and Mr Walker "did believe" that the claimant was guilty of misconduct;

    40.2 they had in their minds reasonable grounds upon which to sustain their respective beliefs that the claimant was guilty of misconduct; and

    40.3 at the stage at which they formed those beliefs on those grounds the respondent had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

41. The final issue, given the above, is the reasonableness or otherwise of the sanction of dismissal: ie the question of whether dismissal was within the range of reasonable responses of a reasonable employer. Referring to established case law such as Iceland Frozen Foods (again as indorsed in Graham) there is, in many cases, a range or band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another view. In this regard, I can do no better than quote Lord Denning MR sitting in the Court of Appeal in the case of British Leyland UK Limited v Swift [1981] IRLR 91. There he said as follows:

> "*The correct test is: was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases*

there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view".

42. It is quite possible therefore that another employer in these circumstances might have shown greater sympathy and understanding, and a willingness to accept that it was somewhat harsh to dismiss an employee after he had suffered what appears to have been quite a serious accident at work. My function, however, is to determine in the circumstances of this case whether the decision of this respondent fell within the band of reasonable responses that a reasonable employer might have adopted. In light of my findings that it was within the range of reasonable responses for the respondent's managers to conclude that the claimant had been dishonest and had failed to have regard to his own health and safety, I am unable to say that no reasonable employer would have dismissed the claimant. Indeed I am quite satisfied that in the circumstances known to Mr Carver and then Mr Walker as a result of the respondent's investigation (including the claimant's input at the fact-finding, disciplinary and appeal stages), the dismissal of the claimant was a decision that fell within the range of reasonable responses of a reasonable employer in these circumstances. I am satisfied that it was within the range of reasonable responses for the respondent to dismiss the claimant.

43. In summary, therefore, I am satisfied that, as is required of me by section 98(4) of the 1996 Act, the respondent acted reasonably in treating the reason for the dismissal of the claimant as a sufficient reason for dismissing him.

Conclusion

44. In conclusion, my judgment is that the reason for dismissal of the claimant was conduct, which is a potentially fair reason under section 98(1) of the 1996 Act and that the respondent did act reasonably in accordance with section 98(4) of that Act. I have to be satisfied that there was a sufficient investigation, reasonable grounds and a reasonable belief allowing the managers, on the evidence available to them, to form a decision which fell within the range of reasonable responses. I am so satisfied.

45. For the above reasons the claimant's complaint under section 111 of the 1996 Act that his dismissal by the respondent was unfair, contrary to section 94 of that Act, is not well-founded and is dismissed.

EMPLOYMENT JUDGE MORRIS

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON: 3 November 2021