EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107564/2020

Held in Edinburgh by Cloud Video Platform (CVP) on 8-10 November 2021

Employment Judge Murphy

Mr S Millan	**Claimant Represented by Ms C Borthwick - Friend**
Royal Mail Group Plc	**Respondent Represented by Ms L McKenna - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimant's claim of unfair dismissal does not succeed and is dismissed.

REASONS

Introduction

1. This final hearing took place remotely by video conferencing. The parties did not object to this format. A face-to-face hearing was not held because of the Covid 19 pandemic and issues were capable of determination by a remote hearing.

2. The claimant gave evidence on his own behalf and led evidence from Kevin Vaughan, Distribution Driver and witness to the conduct allegations and Colin Reekie, the claimant's trade union representative at the fact-finding interview. The respondent led evidence from Alan Veitch, Delivery

Manager and investigating officer; Malcolm Aien, Delivery Manager and dismissing officer; and Helen Worfell, Independent Casework Manager and appeal manager. Evidence was taken orally from the witnesses. A joint set of productions was lodged.

3. During the preliminaries, the claimant's representative confirmed that the claimant no longer seeks reinstatement but seeks compensation only should his claim succeed.

Issue to be determined

During the preliminary discussion on 8 November 2021, Ms Borthwick confirmed that the list of issues previously lodged by Ms McKenna was agreed. The agreed issues are as follows:

1) Was the dismissal of the claimant by the respondent for the potentially fair reason of conduct?

2) Was the dismissal of the claimant by the respondent for the potentially fair reason of conduct?

3) Did the respondent have a genuine belief that the claimant was guilty of the allegations which led to dismissal?

4) Did the respondent conduct a reasonable investigation?

5) Was the respondent's belief that the claimant had committed misconduct based on reasonable grounds?

6) Was the decision to dismiss within the band of reasonable responses?

7) Was dismissal of the claimant by the respondent procedurally fair?

If the ET finds that the dismissal was procedurally unfair:

8) Was there an appeal which was a complete re-hearing, which would rectify any procedural irregularities?

9) Would the claimant have been dismissed in any event had a fair procedure been followed?

10) Was the claimant guilty of blameworthy conduct prior to his dismissal?

11) To what basic award is the claimant entitled?

12) Did the claimant engage in conduct which would justify a reduction to the basic award?

13) What losses has the claimant suffered in consequence of the dismissal?

14) What compensatory award would be just and equitable in all the circumstances?

15) Did the claimant contribute to his dismissal?

16) Has the claimant taken responsible steps to mitigate his losses?

Findings in Fact

4. The following facts are found to be proved on the balance of probabilities.

Background

5. The respondent is a British public limited company which provides postal and courier services. It employs in the region of 140,000 people throughout the UK.

6. It is supported by a centralised Human Resources service which is physically located in Sheffield but which provides advice and support to managers throughout the UK in relation to staffing issues and HR policies and procedures.

7. A subset of the centralised HR resource in Sheffield is a team of approximately 25 Independent Casework Managers. They are independent of local management structures and their function it is to hear appeals by employees against certain sanctions including dismissals as well as complex grievances.

8. The respondent publishes a Conduct Policy which outlines the approach to be taken if an employee does not meet the expected standards of conduct. It is updated from time to time. The version in force at the material time had been updated in January 2018. It prescribes that the authority to give warnings and serious warning lies with ‘first and second line level’ managers. More serious penalties including dismissal should be given by

second level managers. The policy provides a list of examples of types of behaviour which, it says, 'in certain circumstances could be judged to be gross misconduct'. The list includes 'Deliberate disregard of health, safety and security procedures or instructions.'

9. The respondent operates in a regulated environment. Ofcom can impose penalties if it fails to meet its obligations. The respondent has an obligation as a regulated postal operator to protect the mail it handles and to make sure it is secure. The respondent publishes a document titled, 'Our business standards; An employee's guide.' The document refers to this regulatory obligation. It contains a section headed 'Security, privacy and trust' which includes the following text:

> *Maintaining our standards means:*
>
> *…….*
>
> - ***protecting company and customer property*** *and assets, making sure they are not stolen, abused, damaged, or taken for personal use;*
>
> *….*
> - ***reporting*** *anyone who* ***misuses company property*** *or goods entrusted to us;*
>
> *……*

10. The section on 'Security, privacy and trust' also includes bullets under the heading 'Operational security standards'. These include the following:

> - *Customers'* ***parcels and letters must not be left unattended*** *or unsecure at any time;*
> - *….*
> - ***All vehicles and equipment*** *used to carry customers' parcels and letters must be given the* ***appropriate level of security*** *at all times.*

11. The Business Standards document was sent out to all of the respondent's employees, including the claimant, approximately once a year by post to their home addresses.

12. The respondent publishes another document called the 'RMG Security Rules for drivers'. This document includes the following security rules:

- *When leaving vans unattended:*
  - *Always remove the ignition key and keep it on your person. The only exception is when health & safety arrangements exist at RMG or certain customer sites that require that van keys must be handed over to designated staff prior to loading / unloading of trailers*
  - *Close all windows fully, however, it is accepted that the drivers' window may be left partially open (no more than 2 cms) to allow for ventilation*
  - *Lock all doors and set alarms where fitted*

13. The RM Security Rules for Drivers were issued to drivers, including the claimant, approximately once a year. Drivers were asked to sign a sheet to acknowledge having received them.

14. The claimant was employed by the respondent from 5 May 1993. He was employed as a distribution driver during the vast majority of his service with the respondent. He was latterly contracted to work 39 hours per week.

15. The claimant most recently signed to confirm he had read and fully understood the Security Rules for Drivers on 8 May 2019. Although he routinely signed sheets to confirm having read the rules when asked by his manager to do so, he in fact rarely read the rules. When he received a copy of the security rules, he was also told verbally by his manager: 'don't leave your keys in the van'. Regardless of whether the claimant read the rules on every occasion when he signed off to say he had done so, he was familiar with the requirements of the rules when leaving his van unattended, set out at paragraph 12 above.

16. In July 2019, the claimant was issued with a two-year serious warning for making a rude gesture at a member of the public. This warning remained 'live' on his record in August 2020.

17. The claimant's line manager was Keith Jansen. As at August 2020, the claimant had raised a grievance against Mr Jansen which was ongoing.

Events of 12 August 2020

18. On 12 August 2020, the claimant began his overtime shift at 5 am. He was due to go to the Perth Delivery Office ("DO") but was unable to do so due to flooding on the route. Alan Veitch, Traffic Office Shift Manager, asked the claimant to go to Jedburgh, Kelso and Coldstream. The claimant set off around 6 am and went to Jedburgh first. He drove a security van known which was identified on the paintwork by the respondent as E41. The van trailer had a side door on the passenger side of the trailer and none on the driver's side. The van trailer also had a back door. After leaving Jedburgh, the trailer contained the email for Kelso and Coldstream. The trailer had been locked, using the van keys.

19. The claimant drove to the Kelso DO on Horsemarket, Kelso. He arrived shortly before 7.30 am. Adjacent to the DO is a lane which runs perpendicular to Horsemarket and which is wide enough only to accommodate one van's width. A Royal Mail van was already parked in the lane, attended by a driver the claimant recognised as Kevin Vaughan. As the claimant could not access the lane, he parked on Horsemarket on the opposite side of the road to the DO. He parked at an angle to the kerb to help him to reverse out. He left E41 and crossed the road to enter the lane and speak to Mr Vaughan.

20. Before doing so, he looked up and down the street. He couldn't see anyone around. He decided to leave his keys in the ignition. The claimant's window was half-way down because the front cab had got steamed up due to the wet weather. The claimant left the window half-way down. He closed the door but did not lock it, having elected to leave his keys in the ignition on the basis there was no one around.

21. The front cab, including the driver's door, was not visible to the claimant from where he stood talking to Kevin Vaughan in the lane. He could see part of the van trailer, including the backdoor. He could not see the side door on the trailer as only the driver's side of the trailer was visible, and this was on the passenger side.

22. The claimant did not see Gary Watson, a Performance Coach employed by the respondent, drive along Horsemarket and park in front of E41.

23. Mr Watson did not know it was the claimant's van. He did not know the claimant by name. Mr Watson got out of his vehicle. His attention was drawn to E41 because of how it was parked. He approached E41 to check if the door was locked. He found the driver's door unlocked and the keys in the ignition. He looked around to see if he could see the van's driver, but he could not. Mr Watson attempted to put the window up but did not manage this. He did not climb into the van cab due to a sore back. The claimant did not see any of this.

24. Mr Watson took the keys from the ignition and locked the vehicle. He crossed the road and walked past the claimant and Mr Vaughan to enter the DO. This was the first occasion when the claimant noticed Mr Watson. Mr Watson entered the DO where he looked for the Delivery Office Manager ("DOM"). In the absence of a DOM, he spoke to Gary Knox (Postman, Higher Grade) who was on duty as supervisor. He told Mr Knox what he had found and that he had the keys to E41. He pointed out the van in question through the window to Mr Knox.

25. The claimant returned to his van and spotted the keys were gone. He suspected Gary Watson had taken them because he had passed him. He entered the DO to look for Mr Watson. Mr Watson returned the keys to him. He told the claimant this must not happen again. The claimant apologised to Gary Watson. Mr Watson did not tell him he was not going to report the matter, or words to that effect.

26. Mr Watson soon after reported the incident on the phone to Keith Jansen, the claimant's manger. Mr Jansen called Alan Veitch and asked him to investigate the incident. Mr Veitch spoke to the claimant that day and asked him what had happened. The claimant confirmed he had left the

keys in the van and retrieved them from Gary Watson. Mr Veitch also spoke to Gary Watson that day and took Mr Watson's account of the incident. The claimant was sent home after the Coldstream run for what was described as a 24-hour 'cooling off' period.

Events on 13 – 20 August 2020: Suspension and Fact-Finding meeting

27. On Monday 13 April 2020, the claimant attended work. Colin Reekie asked Mr Veitch what was happening with the claimant. Mr Reekie was conscious his services as a trade union representative may be needed if there was to be further procedure. Mr Veitch made a phone call to Keith Jansen to discuss the matter. Mr Jansen confirmed to Mr Veitch he would be suspending the claimant. After the call, Mr Jansen told Mr Veitch it would, therefore, be helpful if Colin Reekie were present for the suspension. Mr Veitch did not say loudly that "Stuart Millan has no case to answer" during the call. Nor did he ask Mr Jansen the question: "So, there's no case to answer here?"

28. Later that day the claimant was suspended in the presence of his TU representative, Colin Reekie.

29. Gary Watson sent Mr Veitch an email at approximately 12pm on 13 August to confirm his account of the incident.

30. On 17 August 2020, Mr Veitch wrote to the claimant to invite him to a fact-finding meeting on 20th August. Mr Veitch did not enclose with his invitation a copy of Mr Watson's email dated 13 August.

31. The fact-finding meeting took place on Thursday, 20 August 2020. The claimant was accompanied by Colin Reekie. Alan Veitch conducted the meeting and took notes. He asked the claimant a series of pre-prepared questions. The claimant accepted he had left his van unattended with the window down, the door unlocked and the key in the ignition. He said it was a 'schoolboy error' and that at all times he could see the van. He confirmed that at the time there was mail in the vehicle for Kelso and Coldstream. He said he was gone about thirty seconds when he saw Gary Watson walking up. He said he performed a 'dynamic risk assessment' and that the street was empty. He was asked about briefs he had received on mail integrity

and said “Security, no mail left in the front seat of the van and all doors locked”. He acknowledged the briefs told him to lock his vehicle at all times and that he was responsible for getting mail to the delivery offices safely and securely.

32. During the meeting, Mr Reekie said that he’d approached Mr Veitch on 13th August to find out what was happening with the claimant and that Mr Veitch had not known what Mr Reekie was referring to. Mr Reekie asserted that Mr Veitch had then made a phone call on the 13th, during which he was overhead by Mr Reekie, saying, “Stuart Millan has no case to answer”. Mr Veitch denied all knowledge of saying this when it was put to him in the fact finding meeting.

33. At the end of the interview, Mr Veitch told the claimant that he would send out the notes the following day or the next day (Friday 21st or Sat 22nd August). Mr Reekie asked Mr Veitch why he was not following process in that respect. He asserted the notes should be prepared ‘immediately’. Mr Veitch answered that the notes would be sent out as soon as possible.

34. The notes were sent to the claimant who responded with a number of handwritten amendments. Mr Veitch incorporated the requested amendments and issued an updated version.

35. On receiving the updated notes, the claimant asked for further amendments which he set out in a typewritten document. A new addition, not previously sought, was a request to record in the notes the exchange in the fact-finding meeting where Mr Reekie had alleged he’d previously overhead Mr Veitch say on a phone call that “Stuart Millan has no case to answer”. This exchange had not been included by Mr Veitch in the notes he’d prepared.

36. Mr Veitch declined to update the notes a second time to include the further amendments. This refusal was based on advice he received from HR that employees should only be given one opportunity to propose all amendments considered necessary to the notes. It was not disputed by Mr Veitch that the exchange the claimant wished recorded took place in the fact-finding meeting. What was firmly disputed by Mr Veitch was that

he had made the remark about the claimant having 'no case to answer' in his phone call on 13th August.

37. On 26th August 2020, Mr Veitch wrote to the claimant to tell him the matter had been referred to a senior line manager because it may require consideration of a penalty beyond Mr Veitch's level of authority. Mr Veitch was a first line level manager and did not have authority to deal with cases where dismissal was a potential sanction. Mr Veitch knew that Mr Jansen was conflicted by a grievance the claimant had raised against him so he passed the claimant's case to another manager named Michael McLeod who, in turn, allocated the case to Malcolm Aien, a Delivery Office Manager based in Boness. Mr Aien had been trained in dealing with conduct issues. He had been trained as a first line level manager in 2013 and had received training as a second line level manager in or about January 2020. In August 2020, Mr Aien was working as a Delivery Office Manager, though he had previously performed a more senior role in distribution in Stirling where he had been responsible for 132 members of staff.

38. Mr Aien read the papers he had received from Mr Veitch. On 4 September he emailed Gary Watson and Gary Knox (separately) and asked them a series of questions. Both replied by email, Gary Watson on 4th September and Gary Knox on 7th September 2020. In Mr Watson's response he estimated that he had returned the keys to the claimant approximately 7-8 minutes after taking them. In Mr Knox's response he estimated it was probably 5 minutes or so between Gary Watson speaking to him about the incident on 12 August and him handing the keys back to the claimant.

39. On 7 September, Mr Aien wrote to the claimant and invited him to attend a formal conduct meeting. He told him the meeting was being convened to consider 'conduct notifications' as follows:

    1. *Gross misconduct in that you failed to secure your vehicle by leaving the keys in the ignition, leave [sic] the window open and the driver's door unlocked whilst there was mail in the vehicle for Kelso and Coldstream delivery offices. All whilst the vehicle was unattended on Wednesday 12th August 2020.*

2. *Gross misconduct in that you failed to follow mail's integrity guidelines in that you failed to safe guard [sic] the mail and Royal Mail property in that you left your vehicle unattended and not secured.*

40. The claimant was informed of his right to be accompanied and that the notification was being considered as gross misconduct such that one outcome could be dismissal without notice. The claimant was also informed in the letter that Mr Aien would take into account his unexpired two-year serious warning.

41. Enclosed with the letter were the following documents: latest notes of the fact finding interview of 20 August; Mail's integrity brief sign off showing the claimant's signature; Security Rules for Drivers sign off showing the claimant's signature; Email from Gary Watson to Alan Veitch dated 13 August 2020 (requested by the claimant at the meeting on 20 August); email exchange between Mr Aien and Gary Watson dated 4 September 2020; and email exchange between Mr Aien and Mr Knox dated 4 and 7 September 2020.

Events 11 September – 9 October 2020: Conduct Meeting, Further Investigation and Dismissal

42. The formal conduct meeting took place on 11 September 2020. Mr Aien conducted the meeting and took notes. The claimant was accompanied by Jimmy Glancy, Area CWU representative. Mr Aien read out the 'conduct notifications'. He explained the potential sanctions including dismissal. The claimant confirmed he had received all of the enclosures listed in the letter of 7 September though he noted that his most recent typewritten amendments had not been incorporated by Mr Veitch into the notes of the fact-finding meeting.

43. Mr Aien asked the claimant a series of questions he'd prepared in advance. The claimant again acknowledged he had left the van unattended with the keys in the ignition. He said he believed the vehicle was unattended for about 5 minutes and thirty seconds in total. He mentioned that the Trimble data recorded by a device on his dashboard said the time from parking the van to the ignition being turned on it was 4

minutes. He offered Mr Aien permission to check the Trimble data. He told Mr Aien that, from where he was in the lane, he could see the side door and the back door of the van.

44. The claimant provided Mr Aien with Google maps images of the Kelso DO and the street where he parked. He indicated on the print outs where he said he'd parked.

45. The claimant was asked if he received training or briefs telling him to ensure the mail was kept secure and he replied, 'Yes, we do get them. They are standard Royal Mail things'. He told Mr Aien that he had not received the brief of Security Rules for Drivers in 2020 but that he had done so in 2019. He said it was 10 pages and that managers did not go through it with him. Nevertheless, he confirmed he was aware that the rules indicated a requirement to lock his vehicle at all times.

46. At the end of the meeting Mr Aien gave the claimant and his representative the opportunity to add anything they wished. They raised the fact that suspension letters were being issued by Keith Jansen. Mr Aien confirmed he had asked Mr Jansen to maintain the weekly suspension of the claimant. Mr Glancy queried various other matters including why Kevin Vaughan had not been interviewed. He raised what he saw as inconsistencies in the timescales in the accounts given by Mr Watson and Mr Knox.

47. On 14 September 2020, Mr Aien sent the claimant typewritten notes of the meeting with him and gave him the opportunity to agree these or propose amendments. The claimant returned the sign off slip, duly signed, the following day but did not indicate whether he agreed or disagreed with the notes. He did not, however, enclose any proposed amendments.

48. On 15 September, Mr Aien went to Kelso DO and took photographs of the street where the claimant parked his van and the lane where Kevin Vaughan's vehicle was parked. On 18 September 2020, he conducted a telephone interview with Kevin Vaughan. Mr Vaughan estimated that his conversation with the claimant on 12 August by the Kelso DO lasted between thirty seconds and a minute. He noted the street was not overly busy that morning. On the same day, Mr Aien inspected van E41 with

Jimmy Glancy present and took photos. Mr Aien also went to the Kelso DO and took photographs of the street and the lane.

49. On 21 September, Mr Aien emailed follow up questions to Mr Watson and separately to Mr Knox arising from queries raised by the claimant and Mr Glancy at the conduct meeting. Mr Watson and Mr Knox both responded by email on 23 September 2020. On 24 September, Mr Aien wrote to the claimant apologising for the delay in the matter. He advised he would be on annual leave returning on 5 October 2020. Before his departure, on 25 September, he sent the claimant copies of all the new evidence he had obtained through his follow up investigations. The claimant's comments were requested within three days. The claimant did not respond.

50. On his return from annual leave on 5 October, Mr Aien considered the claimant's case and prepared a report setting out his decision and reasoning. He considered all the evidence listed. Although he viewed the Trimble data, as he had been invited to do, he disregarded this evidence. His reason was that the data gave an approximate but not an exact location of where the van was parked. Although it recorded the ignition being switched on and off, it was not possible to conclude from this data whether the key had been turned by Mr Watson, when he tried to put up the window, or by the claimant. In any event, Mr Aien did not reach a conclusion on the exact number of minutes the vehicle was left unattended in total. He concluded that it was unattended sufficiently long for Mr Watson to arrive on the street, park his vehicle, check the claimant's van, try to shut the window, lock the van, and cross the street, enter the DO and tell Mr Knox what had happened (none of which was disputed by the claimant).

51. Mr Aien concluded the claimant was guilty of both conduct notifications and decided to dismiss him for this reason without notice or payment in lieu.

52. The claimant attended a decision meeting on 9 October 2020 when he was informed of this outcome. On that date, the claimant confirmed he wished to appeal against the dismissal. The grounds given were:

"Failure to follow interview procedures
Contradiction of statements from witnesses
Failure to sign statements from Mr Knox and Mr Watson"

Events 16-28 October 2020: Appeal process

53. Helen Worfell, Independent Casework Manager, was allocated to hear the claimant's appeal. She wrote to him on 16 October and invited him to attend an appeal hearing. This took place by conference call on 28 October 2020. The claimant was accompanied by Kenny Logan, Divisional CWU representative.

54. At the appeal, Mr Logan complained that Mr Veitch had not given reasons why the case was progressed or why he believed the penalty may be above his grade. He complained that the claimant had not received appropriate written suspension notifications or letters. He complained that Mr Watson's email of 13th August to Alan Veitch had not been shared with the claimant before the fact-finding meeting. The claimant suggested he had not seen this email at all until the appeal papers were sent to him. Mr Logan asserted that Mr Jansen should have dealt with the claimant's case rather than Mr Aien. He suggested a hard copy of the email interviews could have been sent to Mr Watson and Mr Knox for signature. He queried the timings and length of the incident as reported by Mr Watson. He queried whether Mr Watson was actually on duty on 12 August and suggested that, if he were not, he ought not to have involved himself. Mr Logan also suggested that Mr Aien had concluded that there were no side doors on the van in question and asserted that in fact there were side doors to the trailer on both sides.

55. At the conclusion of the appeal meeting, Ms Worfell gave the claimant and Mr Logan the opportunity to add anything else they wished to raise. On 29 October 2020, she sent a copy of the typewritten notes of the meeting to the claimant and his representative and gave them the opportunity to propose amendments. The claimant did not propose any amendments.

56. Ms Worfell conducted further investigations. She obtained copies of all letters issued by Mr Jansen in connection with the claimant's suspension. She noted that these were in accordance with the respondent's policy. She

asked Mr Veitch to take photographs of the van in question to satisfy herself on the question of side doors. She noted that there was one side door on the passenger side. She conducted interviews with Alan Veitch, Gary Watson and Malcolm Aien where she followed up on points raised at the appeal hearing by the claimant and Mr Logan.

57. On 11 November, Ms Worfell sent all new evidence she had obtained to the claimant and gave him the opportunity to comment. Ms Worfell received some comments from Mr Logan. She wrote to the claimant on 20 November 2020 and informed him that his appeal was rejected and that the dismissal stood. She enclosed a report detailing her reasoning. In that report she addressed the various points which had been made at the appeal hearing as well as Mr Logan's subsequent comments.

58. At the time he was dismissed, the claimant had 27 complete years of service with the respondent. He was 59 years old when his employment ended. His average net weekly pay was £409. The respondent's weekly pension contribution for him was approximately £63.38.

The claimant's post-termination losses

59. Following the termination of his employment, the claimant lived on savings until he secured employment as a plasterer on or about 3 March 2021. He did not receive state benefits.

60. Between October 2020 and March 2021, the claimant's efforts to seek new employment were limited to registering with recruitment site, Indeed, and asking around 8 of his friends if they had any work available. These were friends who had their own businesses. None of them had any work to offer. No opportunities were forthcoming through his registration with Indeed until after Christmas 2020. The claimant did not apply for any vacancies notified to him on Indeed. He did not apply for jobs in the period following his dismissal outside of the enquiries he made of friends.

61. From on or about 3 March 2021, the claimant began working for David Fisher & Sons, a firm of plasterers. With this firm, the claimant's net average weekly pay in the 12 weeks to the hearing date was £362. David

Fisher's weekly pension contribution on the claimant's behalf was approximately £14.48.

62. Since obtaining employment with David Fisher & Sons, the claimant has not continued to seek any alternative higher paid employment.

Observations on the evidence

63. I found the respondent's witnesses to be credible and reliable. Their evidence to the Tribunal was consistent with the contemporaneous notes and other documents which were produced. I found the claimant to be less reliable. There were differences between the evidence which he gave at the hearing and the position which he took at the meetings he attended during the respondent's process.

64. An example is his position with respect to his receipt of briefs from the respondent on their security rules for drivers. Despite having signed a sheet to confirm having read these, he told the Tribunal he had not been given the relevant brief. This differed from his position during the disciplinary process when he referred to having received a 10-page document.

65. The claimant's evidence was also vague. The impression was not necessarily that he was seeking to mislead the Tribunal but that his recollection was poor and that his own grasp of the respondent's process even at the time had been weak. This may have been because he had placed heavy reliance upon his trade union representatives at the time, limiting his own engagement with the detail of the process.

66. Mr Reekie, who accompanied the claimant at the first fact-finding meeting, gave evidence. He spoke to the conversation he said he overheard Alan Veitch have on the phone on 13th August. He alleged he'd heard Mr Veitch ask the person on the phone, 'Am I right in saying Stuart Millan has no case to answer for?' Mr Veitch also gave evidence and denied saying these words or words to the same effect. On 13th August, Mr Veitch had not yet carried out a full fact-finding meeting with the claimant.

67. I preferred Mr Veitch's evidence on this issue. It appeared inherently unlikely that Mr Veitch would comment that there was no case to answer

in circumstances where the claimant had already admitted conduct to him the previous day which broke the drivers' security rules. Additionally, Mr Reekie's evidence to the tribunal was not consistent with the documentation. After the fact-finding notes were issued, the claimant and Mr Reekie sought an amendment. The requested amendment asserted Mr Reekie overheard Mr Veitch's words as he walked towards him and spoke loudly. In his evidence to the Tribunal, Mr Reekie said Mr Veitch began the call and conducted the phone conversation with one hand on Mr Reekie's shoulder. In the produced amendment, Mr Reekie stated Mr Veitch made the statement: 'Stuart Millan had no case to answer'. However, he repeatedly told the Tribunal, that it was a question he overheard: 'Am I right in thinking Stuart Millan's got no case to answer for?'

Relevant Law

Unfair Dismissal

68. Section 94 of ERA provides that an employee has the right not to be unfairly dismissed. It is for the employer to show the reason or the principal reason (if more than one) for the dismissal (s98(1)(a) ERA). A reason that relates to the conduct of the employee is one of the 'potentially fair reasons' listed (s98(2)(b) ERA). Where, as here, the employer relies upon a reason related to conduct, it does not have to prove that conduct actually did justify the dismissal; the Tribunal will later assess the question of reasonableness for the purposes of section 98(4).

69. At this stage, the burden on the respondent is not a heavy one. A "reason for dismissal" has been described as a "*set of facts known to the employer or it may be of beliefs held by him which cause him to dismiss the employee*." (**Abernethy v Mott Hay and Anderson** [1974] ICR 323).

70. Once a potentially fair reason for dismissal is shown, the Tribunal must be satisfied that in all the circumstances the employer acted fairly in dismissing for that reason (Section 98(4) of ERA). There is no burden of proof on either party when it comes to the application of section 98(4).

71. The Tribunal must not substitute its own decision for that of the employer in this respect. Rather, I must decide whether the respondent's response

fell within the range of reasonable responses open to a reasonable employer in the circumstances of the case (**Iceland Frozen Foods Limited v Jones** [1982] IRLR 439). In a given set of circumstances one employer may reasonably decide to dismiss, while another in the same circumstances may reasonably decide to impose a less severe sanction. Both decisions may fall within the band of reasonable responses. The test of reasonableness is an objective one.

72. In a case concerned with conduct, regard should be had to the test set out by the EAT in **British Home Stores v Burchell** [1978] IRLR 379 in considering section 98(4) of ERA:

> *What the Tribunal have to decide …. whether the employer … entertained a reasonable suspicion amounting to a belief in guilt of the employee of that misconduct at that time … First of all there must be established by the employer the fact of that belief, that the employers did believe it. Secondly that the employer had in his mind reasonable grounds upon which to sustain that belief. Thirdly, we think that the employer at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.*

73. This well-established guidance was endorsed and summarized by Mummery LJ in **London Ambulance Service NHS Trust v Small** [2009] IRLR 536 where he said the essential enquiry for Employment Tribunals in such cases is whether, in all the circumstances, the employer carried out a reasonable investigation and at the time of dismissal genuinely believed on reasonable grounds that employee is guilty of misconduct. If satisfied in those respects, the Tribunal then must decide whether dismissal lay in the range of reasonable responses.

74. Both the ACAS Code of Practice on disciplinary and grievance procedures ("the ACAS Code") as well as an employer's own internal policies and procedures should be considered by a Tribunal in assessing the reasonableness of a dismissal. In making an assessment of the

reasonableness of the procedure, Tribunals should apply the range of reasonable responses test (**J Sainsbury's Plc v Hitt** [2003] ICR 111).

75. With regard to investigations, the Code states that:

> *It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases, this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.*

76. Informing the employee of the basis of the problem and giving them an opportunity to put their case in response is one of the basic elements of fairness within the ACAS Code. The Code provides:

> *If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.*

77. The ACAS Code includes the right of appeal as one of the basic elements. Paragraph 26 of the ACAS Code states:

> *Where an employee feels that disciplinary action taken against them is wrong or unjust they should appeal against the decision. Appeals should be heard without unreasonable delay and ideally at an agreed time and place…*

78. Paragraph 27 of the Code provides:

The appeal should be dealt with impartially and wherever possible, by a manager who has not previously been involved in the case.

79. Single breaches of a company rule may found a fair dismissal (e.g., **The Post Office t/a Royal Mail v Gallagher** EAT/21/99). Exactly what type of behaviour amounts to gross misconduct will depend on the facts of the individual case. However, it is generally accepted that it must be an act which fundamentally undermines the contract of employment (i.e., it must be repudiatory conduct by the employee going to the root of the contract – **Wilson v Racher** 1974 ICR 428, CA). Moreover, the conduct must be a deliberate and willful contradiction of the contractual terms or amount to gross negligence (**Sandwell and West Birmingham Hospitals NHS Trust v Westwood** EAT 0032/009). Even if an employee has admitted to committing the acts of which he is accused, it may not always be the case that he acted willfully or in a way that was grossly negligent (e.g., **Burdett v Aviva Employment Services Ltd** EAT 0439/13).

Compensation

Submissions

Respondent's submissions

80. Ms McKenna spoke to a written submission on behalf of the respondent. A copy of the written submission was provided to Ms Borthwick the evening before submissions were given. The following is a summary of her submission which is incorporated by reference.

81. Ms McKenna invited me to make various findings in fact and submitted that the evidence of the respondent's witnesses should be preferred over the claimant's in cases of conflict.

82. She went on to address me on how the law applied to the facts in this case. The evidence supported a finding that the decision-makers genuinely believed in the claimant's guilt of the charges listed, she said. There were reasonable grounds for such a belief, according to Ms McKenna, in circumstances where the claimant had admitted the charges.

83. She said the investigation carried out by the respondent was full, thorough and reasonable. She noted that, in addition to the initial fact-finding process conducted by Mr Veitch, both Mr Aien and Ms Worfell conducted further investigations at their respective stages of the process.

84. The decision to dismiss, in Ms McKenna's submission, fell within the range of reasonable responses. She referred to the fact the conduct was admitted; the nature of the respondent's business and the importance of 'mail integrity'. She relied upon the classification in the respondent's Conduct Policy of deliberate breaches of security procedures as 'gross misconduct'. The managers concerned acknowledged the mitigation points put forward and the claimant's length of service, but Ms McKenna said these were insufficient to excuse the claimant's actions. Their decision in this regard, she argued, fell well within the range of reasonable responses.

85. She asserted the dismissal had been procedurally fair and referred me to various elements of the procedure followed which she said complied with the ACAS Code of Practice on Disciplinary and Grievance Procedures. None of the alleged flaws founded upon by the claimant related to the main principles of procedural fairness, in Ms McKenna's submission. These minor flaws, she said, did not impact upon the decision to dismiss. The claimant was not denied an opportunity of showing that the reason for his dismissal was an insufficient reason. If the Tribunal were to find the dismissal procedure unfair, she said it was corrected by the appeal which took the form of a full rehearing. Alternatively, if the dismissal were found unfair, a **Polkey** reduction of 100% should be applied.

86. Additionally / alternatively, Ms McKenna invited me to reduce any award on the basis of the claimant's own conduct in leaving the vehicle unlocked and unattended with his keys in the ignition and mail in the van.

87. She helpfully provided calculations of the claimant's basic award and net weekly wage and pension loss. She submitted that the claimant had failed to mitigate his losses and ought reasonably to have gained new employment within three months of his dismissal. Any compensatory award should be restricted on that basis. She argued.

Claimant's submissions

88. Ms Borthwick made oral submissions on behalf of the claimant. Again, these are summarised.

89. She acknowledged that the claimant had acepted he had left the keys in the vehicle but noted that the mail was secured in the back of the van and said there was no risk to the mail as a result. She pointed out that the claimant had been permitted to continue his duties on the morning of the 12th August and had done his run to Coldstream before he was placed on a 'cooling off' period. This, she submitted, indicated that the respondent viewed the risk he posed as minimal.

90. Ms Borhwick challenged whether Malcolm Aien was an appropriate employee to conduct the claimant's conduct hearing. He was only a level 1 manager at the time of the process, she said, and lacked sufficient experience to deal with a case relating to distribution.

91. Mr Borthwick also relied upon the fact that the claimant was not provided with an email which Gary Watson had sent to Alan Veitch on 13 August 2020 before the claimant attended his fact finding meeting with Mr Veitch on 20 August.

92. She confirmed the claimant founds upon an alleged meeting which he alleges took place between Alan Veitch and Keith Jansen on the morning of 12th August after the incident. The Tribunal heard little evidence of this meeting. Mr Reekie inferred a meeting would have taken place in line with the managers' usual practice. Ms Borthwick invited me to conclude that there had been agreement at this meeting that there was no case for the claimant to answer but that this decision was subsequently reversed during the call between Alan Veitch and another manager which Colin Reekie claimed to have overheard.

93. Ms Borthwick also refered to an excerpt from a version of the Conduct Policy dated 1 April 2017 which the claimant had produced. She acknowledged this document was not current. It contained a requirement that a manager should "write up the notes immediately after the meeting". It is understood that the claimant 's position is that Alan Veitch did not

comply with this requirement in issuing the notes of the fact finding interview a day or two later.

94. Ms Borthwick submitted the claimant also relied upon Ms Worfell's decision at the appeal stage not to interview Kevin Vaughan and Jim Glancy. She pointed out that the claimant's witnesses were not interviewed as it was said that to do so would not impact upon the decision but that she deemed it necessary to interview the respondent's own witnesses.

Discussion and Decision

Was the dismissal of the claimant by the respondent for the potentially fair reason of conduct?

95. I accept that the respondent dismissed the claimant for a reason relating to his conduct for the purposes of s.98(2)(b) of ERA. There was no dispute that was the reason for dismissal and no other reason was put forward by the claimant. A finding in fact has been made that Mr Aien concluded the claimant was guilty of both conduct notifications and dismissed him for this reason.

Did the respondent have a genuine belief that the claimant was guilty of the allegations which led to dismissal?

96. I accept that Mr Aien's belief in the claimant's guilt of the allegations was genuine. The claimant had admitted the conduct.

Did the respondent conduct a reasonable investigation?

97. The question for the Tribunal turns, then to the application of section 98(4), and whether, in all the circumstances of the case, the respondent acted unreasonably in treating the conduct relied upon as a sufficient reason to dismiss the claimant. I remind myself that I must avoid substituting my own view of the matter for that of the respondent, and of the need to assess objectively whether the respondent's approach fell within the range of reasonable responses.

98. The ACAS Code states that "It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case." The amount of investigation that is reasonable will depend on all of the facts and circumstances of the case. In a case such as this one, where the conduct in question was admitted, the extent of the investigation reasonably required is likely to be less than in a case where allegations are denied or substantially disputed. Notwithstanding the claimant's admissions, the respondent carried out a meticulous investigation at all stages of the process. The claimant was given ample opportunity to provide his account of the matter and to comment on evidence gathered from other sources. Extensive enquiries were made of other witnesses, not only by Mr Veitch who led the investigation, but by both Mr Aien and Ms Worfell.

99. I do not accept the reasonableness of the investigation was undermined by the fact that the respondent failed to obtain signed statements from Mr Watson and Mr Knox. The statements in question were obtained in writing via email and it was manifest from the email print outs that they had come from Mr Watson and Mr Knox's respective work email addresses. It was not suggested by the claimant either to the Tribunal or during the respondent's internal process that Mr Watson or Mr Knox were not the true authors of the statements produced.

100. In his ET1, the claimant asserted that witnesses were not interviewed who were in favour of his case. I asked him to clarify who he said ought to have been interviewed and he explained that he considered Colin Reekie, Kevin Vaughan and Jimmy Glancy ought to have been interviewed by the respondent.

101. Mr Reekie was not a witness to the alleged misconduct but was the claimant's trade union representative at the fact-finding meeting. Neither the claimant nor Mr Glancy suggested to Malcolm Aien that they considered he ought to interview Mr Reekie before coming to a decision when they attended the conduct meeting with him on 11 September 2020. They were given ample opportunity to do so. Mr Glancy did suggest to Mr Aien that Kevin Vaughan ought to be interviewed (which Mr Aien followed up), but no mention was made of Mr Reekie. At the appeal stage,

neither the claimant nor Mr Logan suggested to Ms Worfell that she should interview Mr Reekie.

102. Ms Borthwick sought to rely upon evidence Mr Reekie gave to the Tribunal regarding a management meeting which he did not witness but inferred had taken place between Mr Veitch, Mr Jansen and another manager. During his evidence, Mr Reekie speculated that it had been agreed at this meeting that the claimant had no case to answer but that in a subsequent phone call between Mr Veitch and another individual which he said he overheard, that decision had been overturned. Neither the claimant nor Mr Glancy nor Mr Logan alleged such a meeting had taken place or that such an agreement had been made to Mr Aien or Ms Worfell at the respective meetings with these managers. In the circumstances, the omission to investigate this allegation or to interview Mr Reekie was objectively reasonable.

103. Mr Vaughan was interviewed by Malcolm Aien on 18 September 2020 and the claimant was given an opportunity to comment on the resulting notes, before Mr Aien took his decision. The notes of his interview were passed to Ms Worfell to consider at the appeal stage. After the appeal hearing, when given the opportunity to comment on the notes, Mr Logan suggested to Ms Worfell that she should interview Mr Vaughan again. No reason was given as to why she should do so, other than an allusion to the mitigation put forward by the claimant. Ms Worfell already had the benefit of the original notes of Mr Aien's interview with Mr Vaughan and neither the claimant nor his representative had indicated that they disputed any aspect of Mr Vaughan's account to Mr Aien.

104. Ms Worfell accepted the claimant's evidence about the rainy conditions on the day in question and about his eagerness to deliver the Kelso and Coldstream mail within the prescribed timescales. In the circumstances, it was objectively reasonable for Ms Worfell to conclude that it was unnecessary to obtain further evidence from Mr Vaughan and her decision in this regard did not undermine the fairness of the investigation process or of the original dismissal.

105. After the appeal hearing, when given the opportunity to comment on the notes, Mr Logan suggested to Ms Worfell that she should interview Mr Glancy. Again, no reason was given as to why she should do so, other than an allusion to the mitigation put forward by the claimant. Mr Glancy was not a witness to the claimant's alleged misconduct but was his TU representative at the conduct meeting. In the absence of adequate information about the matters to which Mr Glancy could speak, it was objectively reasonable for Ms Worfell to decide against interviewing him as part of the appeal process. Ms Worfell already had the benefit of the notes of the conduct meeting which Mr Glancy had attended as the claimant's representative and which notes were not the subject of amendment by Mr Glancy.

106. I find that the respondent's investigation was objectively reasonable.

Was the respondent's belief that the claimant had committed misconduct based on reasonable grounds?

107. There were reasonable grounds for the respondent's belief that the claimant had committed the conduct set out in the conduct notifications. He admitted the conduct. He admitted having awareness of the security rules breached and having received briefs on these rules. He admitted having taken an active decision to leave the keys in ignition, after performing a 'dynamic risk assessment'.

Was the decision to dismiss within the band of reasonable responses?

108. What must be determined is whether dismissal lay within the range of reasonable responses open to an employer of the respondent's scale and nature. It is not relevant whether I would have imposed a lesser sanction in the circumstances.

109. The circumstances were that the claimant's conduct was admitted. The respondent operates in a regulated environment. Ofcom can impose penalties if it fails to meet its obligations, one of which is to protect the mail it handles and to make sure it is secure. To this end, the respondent publishes standards expected of its employees and it is not disputed the claimant was aware of these standards or that he breached them. As well

as failing to protect an asset of the respondent (i.e. the van), the respondent believed that he failed to protect the customer's mail stored in the trailer. This belief was patently reasonable. Throughout the respondent's internal process and in his evidence to the Tribunal, the claimant was reluctant to acknowledge the risk posed to the mail locked in the rear of the van. He suggested the mail was not at risk because the van trailer doors were locked, and he could always see the back of the van. It was reasonable for Mr Aien and Ms Worfell to conclude that the claimant could not see the side door of the trailer which was on the far side of the van from where he stood (the passenger side). In any event, it was reasonable for them to conclude that he could not and did not see Mr Watson enter the van and take the keys - which keys could unlock the trailer doors.

110. There was no dispute that the claimant's action on 12 August 2020 was a deliberate and wilful act. It infringed the respondent's standards. The respondent's published Conduct Policy cited a deliberate disregard of security procedures or instructions as an example of behaviour which could be judged to be gross misconduct. The claimant had seen security rules for drivers which included the requirement to lock the vehicle and to always keep the key on the driver's person.

111. Ms Borthwick submitted that the fact the claimant had been permitted to deliver mail to Coldstream after the incident implied that he was not viewed as a serious risk. I do not consider that his continued duties for a brief period changes the character of the conduct of which he was ultimately found guilty or implies a leniency or tolerance on the respondent's part towards such conduct. At that stage the fact-finding investigation had not yet been carried out and the respondent had not yet given its full consideration to the circumstances and evidence.

112. Mr Aien's evidence was that he considered all mitigation put forward including the claimant's long service but concluded that the claimant's guilt of the two conduct notifications warranted dismissal. He gave evidence that he would have reached this conclusion whether or not the claimant had been subject to a live warning. As it happened, the claimant was subject to such a warning for conduct, issued in July 2019.

113. The decision to dismiss in response to the conduct of which the respondent found the claimant guilty fell within the band of reasonable responses open to the respondent.

Was dismissal of the claimant by the respondent procedurally fair?

114. Ms Borthwick relied upon the conversation Colin Reekie alleged he overheard Mr Veitch conduct on the phone and in particular, the suggestion that Mr Veitch said there was no case to answer but that this decision was overridden by the manager with whom he was speaking. As noted above, this allegation was not raised with either the dismissing officer or the appeal manager so their omission to investigate it was reasonable. I have accepted Mr Veitch's evidence that he did not state the claimant had no case to answer and so do not accept that the procedure was flawed by any such alleged pre-judgment.

115. Ms Borthwick also raised Mr Veitch's failure to provide the claimant with Gary Watson's email of 13 August 2020 in advance of the fact finding meeting on 20th August 2020. I accept that this email was not supplied to the claimant before the fact-finding meeting.

116. The ACAS Code says this about an employer's notification of the disciplinary case to be answered.

> *This notification should contain sufficient information about the alleged misconduct … to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.*

117. The email in question was supplied to the claimant before the conduct meeting with Malcolm Aien. It was sent with Mr Aien's letter of 7 September. The conduct meeting did not take place until 9 October 2020. The claimant had ample opportunity to consider this evidence in order to prepare to answer the case against him at the conduct meeting. While it may have been preferable that this was supplied at an earlier stage, the claimant suffered no prejudice as result of its provision to him at

the time when he received it. The earlier omission did not render the overall process objectively unreasonable.

118. Ms Borthwick placed reliance upon a version of the respondent's Conduct Policy, a one-page extract from which was produced by the claimant. The excerpt indicated a requirement that notes following a conduct meeting should be written up "immediately after the meeting". The claimant and his representative, Mr Reekie, had taken issue with Mr Veitch's indication that he would not get the notes out of the fact-finding meeting until the following day. Regarding the provenance of the document he produced, the claimant's evidence was that he was provided with it by his trade union representative during the process. The version was dated 1 April 2017. It predated the version current at the time of the process which had been updated on 2 January 2018 (also produced). The later version made no reference to a requirement to write up the notes of a fact-finding meeting "immediately after the meeting".

119. I do not accept, therefore, that the respondent breached their own procedure in failing to issue the typewritten notes that same day. Nor did this approach run contrary to the requirements of the ACAS Code. The requirement in the Code is for employers to deal with issues promptly and not unreasonably to delay meetings, decisions or confirmation of those decisions. There was no unreasonable delay in the issue of the typewritten notes of the fact finding and the claimant suffered no prejudice as result of the timescale within which Mr Veitch turned these around.

120. Ms Borthwick questioned whether Mr Aien was an appropriate manager to consider the claimant's conduct hearing. I have found that Mr Aien had the relevant level of authority and training to undertake hearings with the potential to result in dismissal. As it happened, he also had prior experience on the distribution side of the operation. In the circumstances, the appointment of Malcolm Aien to hear the claimant's case was not unreasonable. The respondent acted reasonably in appointing an independent manager who was not the claimant's line manager, given the grievance against Mr Jansen. Mr Aien had no prior knowledge of the claimant and there was no evidence of any bias or apparent bias in relation to the way in which he discharged his responsibilities.

121. The procedure followed by the respondent was both fair and compliant with the ACAS Code of Conduct on Disciplinary and Grievance Procedures. Any flaws were minor in nature and did not undermine the key principles of fairness as set out in the Code.

Conclusion

122. The respondent dismissed the claimant for a potentially fair reason relating to his conduct. Applying section 98(4), in all the circumstances of the case, it acted reasonably in treating that conduct as a sufficient reason to dismiss the claimant. The claimant was not unfairly dismissed.

Employment Judge: Lesley Murphy
Date of Judgment: 17 November 2021
Entered in register: 19 November 2021
and copied to parties