EMPLOYMENT TRIBUNALS

Claimant: Mr N Cunningham

Respondent: Royal Mail Group Limited

Heard at: Manchester (by CVP) **On:** 14, 15 and 16 December 2021

Before: Employment Judge Ganner

REPRESENTATION:

Claimant: In person
Respondent: Ms S Percival, Solicitor

JUDGMENT

The judgment of the Tribunal is that the claimant was fairly dismissed. The unfair dismissal complaint is dismissed.

REASONS

Introduction

1. By a claim form presented on 27th April 2020, Mr Neil Cunningham (the claimant) complained of unfair dismissal from Royal Mail Limited (the respondent). He had been employed as a postal worker since 26 September 2016.

2. By a response form of 13th May 2020, the respondent resisted the complaint. Their position was that the claimant had been fairly dismissed for gross misconduct for failure to deliver items on 27 July 2019.

The Issues

3. The issues to be determined by the Tribunal were agreed at the outset of the hearing. Since the reason for dismissal was not contested, the questions for the Tribunal were as follows:

(1) Did the respondent genuinely believe the claimant was guilty of the misconduct complained of?

(2) Did the respondent have reasonable grounds for that belief?

(3) Was that belief formed following a reasonable investigation?

(4) Did the respondent follow a reasonably fair procedure?

(5) Was the dismissal process including sanction within the band of reasonable responses?

4. As the claimant was unrepresented, I considered it appropriate to offer him assistance to ensure he correctly understood the issues to be decided. I informed him that it would not fall to me to substitute my own decision for that of his employer in the sense of determining (as they did) that he committed gross misconduct which justified summary dismissal but whether his dismissal was fair or unfair by reference to the questions set out above.

5. The claimant also wished to introduce some evidence based on new information that had not been placed before the disciplinary hearings and which had only emerged much later. I explained this would likely not be relevant as we were examining only the matters before them at that time.

6. I provided some help to the claimant in the formulation and presentation of questions. In the event he managed to do this perfectly well.

7. The claimant is a person who has type 1 diabetes and had to take blood sugar readings regularly during the day. Having regard to this and the ETBB guidance on this topic it was agreed he only had to ask when he wanted a break, and this would be allowed on top of the periodic breaks that would take place during the hearing.

8. The claimant had not prepared a formal witness statement and so it was agreed he would give his evidence orally. He confirmed the truth of all written documents he submitted to the Tribunal as well of those he had made to the respondent throughout the disciplinary process.

9. The respondent called two witnesses, Mr Gary Wright (disciplinary) and Mr Phil Hulme (appeal) and submitted a 142-page bundle which I likewise treated as incorporated into their evidence. Page numbers herein are references to that bundle.

10. The claimant sought an order excluding Mr Phil Hulme from the hearing whilst Mr Wright gave evidence. The basis of this request was not entirely clear although I sensed it was based on the assertion of a “management stich up” made at the conduct hearing in October 2019. I did not consider it was the interests of justice to make this order as the normal practice of the Employment Tribunals was to allow the witnesses to be present throughout each other’s testimony and no sufficient reason had been put forward for the exceptional course sought.

Relevant Legal Principles

11. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996.

12. The primary provision is section 98 which, so far as relevant, provides as follows:

> **"(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 sub-section (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 sub-section if it … relates to the conduct of the employee …**
>
> **(3) …**
>
> **(4) Where the employer has fulfilled the requirements of sub-section (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 fordismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case".**

13. In a misconduct case the correct approach under section 98(4) was helpfully summarised by Elias LJ in **Turner v East Midlands Trains Limited [2013] ICR 525** in paragraphs 16-22. Conduct dismissals can be analysed using the test which originated in **British Home Stores v Burchell [1980] ICR 303**, a decision of the Employment Appeal Tribunal which was subsequently approved in a number of decisions of the Court of Appeal. The "**Burchell** test" involves a consideration of three aspects of the employer's conduct. Firstly, 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? Thirdly, did the employer have reasonable grounds for that belief?

14. Since **Burchell** was decided the burden on the employer to show fairness hasbeen removed by legislation. There is now no burden on either party to prove fairness or unfairness respectively.

15. A fair investigation requires the employer to follow a reasonably fair procedure. By section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 Tribunals must take into account any relevant parts of the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.

16. If the three parts of the **Burchell** test are met, the Employment Tribunal must then go on to decide whether the decision to dismiss the employee was within the band of reasonable responses, or whether that band fell short of encompassing termination of employment.

17. It is important that in carrying out this exercise the Tribunal must not substitute its own decision for that of the employer. The band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate: **Sainsburys Supermarkets Ltdv Hitt [2003] IRLR 23.** The focus must be on the fairness of the investigation, dismissal and appeal, and not on whether the employee has suffered an injustice. The Tribunal must not substitute its own decision for that of the employer but instead ask whether the employer's actions and decisions fell within that band.

18. In a case where an employer purports to dismiss for a first offence because it is gross misconduct, the Tribunal must decide whether the employer acted reasonably in characterising the misconduct as gross misconduct, and also whetherit acted reasonably in going on to decide that dismissal was the appropriate punishment. An assumption that gross misconduct must always mean dismissal is not appropriate as there may be mitigating factors: **Britobabapulle v Ealing Hospital NHS Trust [2013] IRLR 854** (paragraph 38).

Relevant Findings of Fact

19. The claimant worked as a postal worker at the Barrow in Furness delivery office between 26th September 2016 and 17th December 2019, when he was summarily dismissed for failure to deliver "door to door" (D2D) items on 27 July 2019.

20. Prior to the commencement of employment, the claimant was asked to read understand and then sign the provisions of a personal declaration to the respondent (24). This declaration included a passage regarding the obligations imposed on Royal Mail by Ofcom, the regulatory body, and refers to the importance of the need to deliver letters, parcels, door to door items and all other communications or items promptly and to the correct recipients.

21. The claimant went on to sign a statement of terms and conditions relating to his employment on the 22nd of September 2019(40) This provided he was subject to the Royal Mail Conduct Policy (33).

22. The Conduct Policy (41-60) sets out the procedure to help/encourage employees to achieve and maintain standards of conduct including behaviour. Under the heading "Gross Misconduct" the policy states that "Some types of behaviour are so serious and so unacceptable, if proved, as to warrant dismissal without notice. Intentional delay of mail is set out as one example that could fall within this definition (45).

23. The claimant understood intentional failure to deliver mail was a serious matter which could amount to a gross misconduct finding, dismissal and/or prosecution.

24. D2D items are unaddressed but paid for by customers and are scheduled to be delivered within a particular time frame, for example, the item may be promoting something for sale at a reduced price for a limited time period. The D2Ds are sent in boxes to the delivery offices ready for posting on a Monday. Workers are expected to deliver 20% of their D2D mail each day over the week and the deadline for completion was Saturday.

25. The D2D product provides an important income stream for Royal Mail and since 2013 it has been treated as “live mail” and the same practices and procedures apply as if stamped items were involved Employees are paid a delivery supplement each week for the preparation and delivery of D2D.

26. In practice, there could be flexibility between partners with one helping the other out with the D2D allocations (122-135) My finding is that there was (at Barrow) informal “sharing” of work between workers to an extent. This happened between the claimant and his colleague Stuart Metcalfe and with others. However, the responsibility to do the work was an individual one as the claimant knew. and it was his job to “mop up” any uncompleted work in respect of his round by the Saturday in any given week.

27. Prior to 27 July 2019, there had been complaints about D2Ds not having been delivered from Barrow. Someone had come forward and mentioned the claimant, so it was decided to monitor his round. Mr Rowarth (manager) spoke to the claimant explaining the D2Ds had to be done daily and a decision was made by that manager to physically mark the postal items for his duty (19) which he shared with his partner, Stuart Metcalfe the combined round being19/40 (122).

28. On Saturday 27 July 2019 Mr Metcalfe received a phone call from Mr Rowarth questioning him about a surplus of D2Ds that he had found in found in 19 duty’s draw (77) or under the frame fittings (Wright-evidence) These were the “marked” items and totalled 240 items(p102). They were taken by Mr Rowarth to his office. Mr Metcalfe stated they were not his but his partners Neil Cunningham. (77)

29. An investigation began with the claimant being asked to provide a brief initial explanation to Mr Rowarth on Monday 29 July. He maintained he **had** completed the D2DS on his 19/40 round on Saturday 27 July 2019. He was asked whether he signed the D2D confirmation sheet on that day and confirmed that he had done so. He was asked whether Stuart Metcalfe had asked about Saturdays D2D allocation and said that he had mentioned something, but the claimant want listening. He was asked whether he had said to Stuart Metcalfe that he would complete Saturdays D2Ds on Monday and replied that he had said something but couldn’t remember.

30. Statements were taken from several co-workers.

31. Mr Metcalfe stated (77) that the undelivered D2Ds for 27 July were those of Neil Cunningham. He said he had that he had told the claimant the work needed doing the day before and he said he would do them on the Saturday. However on the Saturday the claimant now said he would do them on the Monday (29th). The duty sheets (p142-3) indicated the claimant was not working on that Monday Mr Metcalfe stated" this was not the first time this had happened " and "every time I come back off my day off there is always loads of DTDs [sic] left". He stated that "to be fair I don't think he is the only one doing it. It is just he is consistent [sic] at doing it, hope he doesn't lose his job".

32. Angela Shields (76) stated she had overheard part of the conversation with Mr Metcalfe specifically Mr Metcalfe requesting the claimant to complete his D2Ds with the claimant replying these might be done on Monday. She recalled telling the claimant that he should do the work.

33. The remaining statements included generalised complaints about Mr. Cunningham not performing the relevant duty, for example, Mr Kite (72) and Mr. Doran (73) The latter stated he had challenged the claimant many times about failure to deliver

34. A fact-finding interview took place on 6 August 2019 (80-83) and was conducted by a manager, Mr Quinn. The claimant chose not to be accompanied by a union representative. The interview was intended to give a clear picture of all the events before a decision was taken on the conduct action that might follow if appropriate. The claimant, whilst admitting he was on the relevant duty on Saturday 27th July, stated that as far as he was aware, there were **no** D2Ds on that day and therefore had **not** carried out the required procedure as there was **nothing for him to do**. He spoke of acrimony between himself and the manager Dan Rowarth and asked why he had been singled out when other people had left D2Ds, and no action had been taken against them.

35. The claimant was told that due to the seriousness of the allegations, he would be placed on precautionary suspension until further notice.

36. On 8 August 2019 Mr Metcalfe was formally interviewed. He confirmed (84-86) his previous account, adding that on the Friday 26 July he had reminded the claimant about his door to door-to-door section for that day, but he said he would do them on the Saturday. He had again reminded the claimant to do them on the Saturday and he said not to worry he would do them on the Monday. He said Angela Shields was stood there and heard the conversation. He said during that week the claimant, had been reluctant to do the work despite Mr Metcalfe saying he told him to do so "daily." He added "all D2Ds were complete on 40 duties but Neil's section on 19 duty was not done".

37. By way of an undated letter probably written about 18 October 2019 (as the claimant signed and an acknowledgement of receipt on 19th), the claimant was informed he was being charged with gross misconduct in that he failed to deliver the D2D items for 27 July 2019.

38. The claimant was invited to attend a formal interview with Mr Gary Wright to answer the charge on 31 October 2019 at Barrow delivery office. He was informed of his right to be accompanied by trade union representative or by work colleague from the business. He was informed he would be given every opportunity to fully explain his actions and present any evidence or points of mitigation in relation to his case before a decision was made.

39. The claimant was provided with a summary of the findings of the investigation and copies of relevant witness statements and other documents that were to be used at the interview. He was made aware of the fact that the outcome could be one of dismissal.

40. The interview (94-99) covered the entire the entire spectrum of the allegations that had been gathered during the investigation, but the focus was on the circumstances of 27th July 2019.

41. Regarding the specific allegation of failure to carry out duty on the 27th the claimant reiterated there was "**no D2Ds to do on this duty on a Saturday**". **He** disputed that it would be possible for Mr Metcalfe to know he had not done the work and that he never put D2Ds in frames as stated by Mr Metcalfe.

42. The claimant said that Angela Shields, whom he did not even know, was speaking "absolute rubbish". He said there were many workers who could confirm he did his job properly. He felt that management were trying to stitch him up. He specifically raised concerns over the inaccuracy of dates on some of the statements insofar as some were dated before the fact finding and others before the seek explanation. He raised the issue of the D2Ds being "marked" by Mr Rowarth and stated he was prepared to knock on doors to check if the items had been received and his representative asked whether management could have done that. He maintained the duty in question had no specific plan, that the surplus of D2Ds that were left were "partly S Metcalfe's and not mine". His representative commented "I don't feel this is a fair case. I feel the managers have been looking for a verdict rather than using the conduct code properly.

43. Following this interview Mr Wright undertook telephone interviews with Messrs Rowarth and Metcalfe to deal with these and other matters raised by the claimant and his representative (101-104).

44. Mr Rowarth stated it was not, in his view necessary to interview customers to show the D2Ds for that specific day had not been done. He was confident they had not been done because the amount of excess D2Ds on the claimant's round totalled 240 items, 3 contracts and 80 attendance calls which was "way above" the approximate number of excess items on a normal week (102). Regarding non production (to the disciplinary hearing) of the leaflets marked, he said this was missed but they were still (as of 13/12/19) still available to view in Barrow (103).

45. Mr Metcalfe (104) confirmed his account stating that he had explained to the claimant on the 27th that the D2D had to be put in his loop…and that he replied that he does not do D2Ds. He reiterated this had been overheard by Angela Shields.

46. On 14 December 2019 Mr Wright provided a decision under cover of a letter dated 14 December (105) and a document dated that same day (107-111) entitled Conduct Code Conclusions which set out his reasoning as does his witness statement of 15 December 2020.

47. He reviewed the evidence principally of Metcalfe and Shields, issues raised by the claimant and the outcome of enquiries he had made with the witnesses He decided the charge of gross misconduct should be upheld.

48. As to penalty, he did consider a lesser penalty but felt the lack of regard in delivering customer mail was significant enough to warrant dismissal as a stand-alone charge. He found the claimant was aware his behaviour would have resulted in failed deliveries with the customer not receiving the mail they had paid for. The consequences for the respondent could have involved loss of contracts and that a corrective penalty would not have the desired effect. He felt that the evidence warranted a concern that this was not an isolated incident and that there were issues of him taking a blasé attitude to this type of work. He took into account the claimant's length of service and conduct history but felt the serious nature of the behaviour justified summary dismissal.

49. The claimant was notified of this outcome by a letter dated 14 December 2019 which also informed him of his entitlement to appeal (105).

50. On 17 December 2019 (106) the claimant gave notice of his intention to appeal against the decision and an appeal by way of rehearing of the matter took place before Mr Phil Hulme on 31 January 2020. The claimant was sent a bundle of documentation and informed of this right to be accompanied as before (112-113).

51. Mr Hulme's witness statement dated 15 December 2020 and the notes of the Appeal hearing, (115-118) (in which the claimant was accompanied by his union representative) deal with the entire process.

52. A large number of matters were raised and are set out in the notes. They included a complaint the fact finding did not detail how many items had been delayed, what they were, how many contracts were involved, the address range and what happened to the surplus.

53. It was said the exact dates had not been established as the claimant had been presented with a series of issues from a range of people.

54. It was surprising that there was no hard evidence in terms of photographs of the delayed items.

55. It was complained it was not clear what was delayed and when, especially on 27 July, and there was a discrepancy about what should have been delivered on the Saturday it being the claimant's position that he had worked with Stuart Metcalfe all week and the approach that had been taken was the he, Mr Metcalfe, would prepare the D2D and the claimant would then tie up the duty and deliver

them. Complaint was made that any falling behind of the work was a consequence of it not being done by Mr Metcalfe.

56. The alleged conversation with Stuart Metcalfe and Angela Shields was disputed with the claimant stating that Mr Metcalfe and himself did not get on as when they worked together Metcalfe did not get overtime and that Angela Shields had heard nothing and got the matter second hand form Mr Metcalfe.

57. It was complained than Mr Rowarth had said he had marked the items and the claimant had asked if he could see them. The claimant maintained that if Rowarth and Metcalfe were setting him up and the items were available [they were not at the appeal hearing p136] he would pay to have them checked as his fingerprints would not be on them.

58. Mr Hulme carried out further investigations in which he presented all material points made by or on behalf of the claimant at his appeal interview.

59. Firstly, he interviewed Angela Shields (119) She gave this account:

> "I was indoors on rehab duties and on the Friday had been asked to put some D2Ds together on 2 walks. When I came in on Saturday, I went round and told Stuart that the D2D had been put together and he started putting them in. There were some others on the frame, and I was stood there when Stuart and Neil were talking, and Neil said he wasn't doing the D2Ds until the Monday. I said it wasn't fair as Stuart was the full timer and it would be him who would be challenged. However, Neil just walked off and started speaking to someone else. Also, it's not the first time that I've spoken to Neil about D2Ds as he's pulled them out of the frame when I've put them in and he would just turn around and say, it's none of your business, however, I don't think it's right as it is stitching other people up".

60. Secondly, he interviewed Stuart Metcalfe. He put eight matters of contention to this witness (p120-121). Mr Metcalfe was asked to respond to the suggestion made by the claimant that he had worked with him all week and suggested the approach would be that he, Mr Metcalfe, would prepare the D2Ds and that Neil Cunningham would then tie them up, tie up the duty and deliver them.

> "I would usually prep the D2D if I could. However, that week I couldn't as it was busy. Besides, Neil Cunningham always comes in early, so he would usually do them and tie them up. On the Friday, I told him not to forget the D2D and his reply was that he do them the next day. On the Saturday I took them from the drawer and placed them on the frame as a reminder and told there they are. He said he'd do them on the Monday to which I replied he couldn't do that as they needed to be done that week. He obviously left them as I got a call from Dan Rowarth about the items being left and I told him they weren't mine."

61. Mr Metcalfe went on to reiterate that he would prepare the mail, but that the claimant was supposed to do the D2D. He would do his number 40 duty and the

claimant would be responsible for his number 19.

62. In relation to the conversation with which Angela Shields had heard, he reiterated “Angela was stood right at the side when I was talking to Neil. Angela then asked him why he wasn’t doing them? And his response had been that he doesn't do D2D. Angela then queried why not because he got paid. And Neil turned away and walked off”.

63. Thirdly, he interviewed Dan Rowarth putting 14 matters to this witness (122-4). He further pursued the earlier inquiry made by Mr Wright concerning the whereabouts of the undelivered items “marked” and retained by Mr Rowarth on 27 July 2019. Mr Rowarth stated:

> “The items were kept in the manager's office for some time after and in not hearing anything further were sent back to Preston. Gary Wright was certainly aware of them when handling the case”.

64. Mr Rowarth repeated the point made to Gary Wright that “there was hard evidence of the delayed items because the items were available [in the office]. Gary Wright had also queried how many there had been left and I explained there were 3 contracts comprising 240 items”.

65. He was asked about the claimant’s assertion that he had asked to see the items which had been marked and Mr Rowarth stated that he had only spoken to the claimant at the seeking of the explanation stage, and he never asked him to see the items in question.

66. He emphasised the decision to do the D2Ds was an individual one, and that although Stuart Metcalfe might have prepared mail and if he had time may do some D2D, in practice the responsibility would be on the individual who did the walk, and the claimant knew it was his responsibility.

67. Fourthly he had a discussion with Marc Quinn (125-127) Mr. Quinn dealt with matters raised by the claimant concerning the fact-finding stage of the investigation. He said there were no issues into the way in which that was handled and also confirmed the consistency of the accounts given by Stuart Metcalfe and Angela Shields during his early involvement in the investigation.

68. Fifthly, Mr Hulme had a discussion with Gary Wright (p128-129) Mr Wright was presented with the claimant’s allegations of delay at the outset of the investigation. He was asked about the “marked items” and related points raised by the by the claimant at his appeal interview. Mr Wright stated that after the conduct interview, he had personally gone to the manager's office and Dan Rowarth pointed out the missing items to him in a box, explaining that he had marked them.

69. Mr. Wright did not consider it necessary to investigate this aspect of the matter any further his reasoning being that “the duty usually had little if any excess and it hadn’t been in question that there were a number of items that hadn’t been delivered”.

70. Mr Wright stated that the decision to restrict the disciplinary charge to the one day of 27 July 2019 was based on the fact they had evidence of non-delivery as well as the conversations between the claimant and the witnesses Metcalfe and Shields. It was the blatant disregard of delivery procedures that warranted the sanction of dismissal.

71. The witnesses Shields and Metcalfe confirmed their interview notes were an accurate reflection of their interviews (130) and a summary of responses from Rowarth, Quinn and Wright were sent to those witnesses to ensure their position was understood correctly.

72. Having completed the rehearing of the case and above investigations, Mr Hulme decided to uphold the findings of gross misconduct and the sanction of dismissal without notice (letter 131).

73. His reasoning is set out in a decision document (132-140). He considered the points made above and concluded that:

(1) The evidence clearly established there had been a conversation in which the claimant told Stuart Metcalfe he would not be taking his D2D items on the Saturday and that whilst the claimant had said he did not get on with Stuart Metcalfe there was no such issue with Angela Shields. Having interviewed both witnesses he found them credible and, on balance, preferred their accounts.

(2) Whilst accepting there was a difference of opinion as to responsibility for preparing D2D items, and appreciating that partners can work differently in this regard, he accepted Mr Rowarth's explanation that the responsibility for this lay with the person on the individual duty which would have been the claimant and he accepted Stuart Metcalfe's evidence that it was the claimant who prepared the items. Regardless of that, he believed that the claimant had told Mr Metcalfe that he was not taking the items and therefore was fully aware of the need to do so and it was his responsibility.

(3) Although the "marked" items had not been available at the appeal, he concluded that both Metcalfe and Shields saw them when the claimant had said he was not taking them, Rowarth had marked and discovered the items which were then stored in the manager's office and subsequently seen by Gary Wright. He regarded the claimant's allegation of a set up as "highly implausible."

(4) He concluded and accepted there had been some delay. There were a number of reasons for this (including pandemic related ones and the sickness of a witness including at the appeal stage) but he did not consider these matters were of sufficient weight to amount to unfairness nor to merit the decision to dismiss being overturned.

(5) Dealing with the suggestion the claimant was a fast worker who was prepared to help colleagues out he paid regard to evidence given by the manager Mr Quinn that he would help out but that there were problems with him rushing and there being mail left to clear. Rowarth said that the claimant deserved credit for those times he helped his colleagues out, but this did not detract from him not completing his own duty and failing to deliver the D2D.

74. Mr Hulme did not consider there was anything in the above that would mitigate the claimant's failure to deliver the D2Ds.

75. The decision was that Mr Hulme believed the claimant had failed to deliver the D2D items on 27 July 2019.He considered that the claimants actions constituted gross misconduct, which warranted dismissal even for a first offence and referred to the Conduct Code Agreement as to this being a type of behaviour that was so serious and unacceptable, that if proved, warranted dismissal without notice .He had considered all the evidence in the case, i.e. including that before Mr Wright. He took into account the claimants clean record and length of service that the necessary trust and confidence required of him had been fundamentally undermined and that any action short of dismissal would not have the required corrective impact. It was the first duty of the claimant to ensure items promptly and safely reached the recipients and he had deliberately failed to do this.

76. In his ET1 the claimant stated that it was not until his work appeal that he was made fully aware of the charge. I find he knew from the short interview on 29 July 2019 that it was about a D2D problem on 27 July and to do with a conversation with Stuart Metcalfe which the claimant seemed to recall (78) and the same applies to his interview with Mr Quinn a week later. Prior to the formal interview in October 2019 the disciplinary charge had been formulated, the claimant had been given a summary of findings of the investigation and copied of relevant witness statement I find he clearly and specifically knew what the case was about then as well.

77. In his ET1 dated 27 April 2020 Mr Cunningham stated he had agreed with Royal Mail to show him his fingerprints were all over the items and, "I would cover the costs if need be". In his email statement dated December 2020 he stated, "I have said from **day 1** that I would pay myself for the marked D2Ds to be checked as I know my fingerprints will not be on them". At his appeal hearing in January 2020 (116) the claimant maintained he had asked Mr Rowarth if he had marked the items "which he had" and "whether I could see them". As set out above, Mr Rowarth denied this. Additionally, there is nothing documented in the records of the 29 July 2019 conversation with Mr Rowarth, the 7 August fact finding interview with Quinn nor the formal conduct interview on 31 October with Mr Wright to support the claimant's assertion to that effect. The first time this request is documented was at his appeal hearing when the items were no longer available for inspection. I therefore find he did not request to have the items examined until January 2020.

78. I accept the claimant's evidence that he was usually a hard worker and that

there were fellow colleagues he would assist and who wanted to speak on his behalf. I read and accepted the positive character assessments made by a number of them.

79. I accept and find that the claimant did experience some health problems. He told me he had type 1 diabetes since 1988 and was on four injections a day. During his cross examination, a blood sugar alarm went off and we took a break in spite of the claimant wishing to "soldier on". It was documented (Wright witness statement) that some adjustments were made to the claimant's duty whereby he would work with a partner on a van share rather than by himself. There were no issues documented in respect of him being unable to complete his work due to a disability.

80. The claimant put it to Mr Wright in cross examination (and thereafter gave evidence to the effect) that he was in work on the day he was suspended, Monday 29 July 2019 contrary to the respondent's case that he was not shown as working on the duty chart. He said he had received a telephone call requesting he came in due to a colleague having been involved in a traffic accident. The claimant suggested that Mr Hulme was aware he had gone into work on that Monday (denied by Mr Hulme). I am satisfied this matter was only raised before the Tribunal and that neither Wright nor Hulme ever had the opportunity to investigate this point.

81. The claimant acknowledged in evidence that he had sometimes made errors and been back late although he "normally" completed D2D on time. He stated he had not "intentionally" delayed the mail and that some of the things he was meant to have said to Shields and Metcalfe may have been taken out of context."

Submissions

Respondent's Submissions

82. The respondent prepared written submissions. It was said that a fair dismissal had taken place insofar as (i) the respondent had a genuine belief that he claimant had committed an act of gross misconduct (ii) it had reasonable grounds to sustain that belief, (iii) it had conducted a reasonable investigation, and (iv) it had acted within the band of reasonable responses available both in terms of investigation, procedure, decision sanction and appeal.

83. In oral submissions, it was said:

(1) This was not a disability discrimination claim and it would not have been reasonable, in terms of unfair dismissal to expect the respondent to investigate issues relating to the claimant's type 1 diabetes and mental well-being when they had not been raised in the first place. Further, no medical evidence had been presented.

(2) The respondent argued that the claimant had not during three interviews asked to examine the marked items to carry out a fingerprint test. The respondent questioned whether the absence of a fingerprint would in any event have shown anything in terms of failure to deliver items.

(3) The respondent further submitted that even if, as per the claimant's evidence, some of his allocation had been done by others earlier in the week, the claimant still knew it was his duty to complete it.

Claimant's Submissions

84. The claimant made oral submission. He asked me to look at all the matters he had raised which he said made the decision to summarily dismiss him unfair. He argued matters had not been investigated properly from the outset. There was, he said, an injustice in finding he had committed an act of gross misconduct without proper proof the items had in fact not been delivered especially when the delivery round in question was shared with a colleague. He thought that customers could have easily been interviewed by Royal Mail to see if the packages on his round had been received or not.

85. The claimant strenuously argued that the D2D items were never in his frame and there was nothing for him to do on the 27 July 2019. He had certainly not deliberately failed to deliver items.

86. Further, if the items had been put in his frame, he would have **had** to touch them to move them to the location at which they were found by management. He would have been willing to pay for a fingerprint examination of all 240 items and he was confident his prints would not be found, and this might well have established his innocence. He had been deprived of that opportunity at his appeal because by that stage, the item's had items were no longer available.

87. The claimant argued that the respondent **was** aware of his medical condition various adjustments had been made for him. He had argued in an email of 20 December 2020 sent to the respondent and copied to the Tribunal that if there were concerns about his failings to deliver items these should have been picked up by Royal Mail under their wellbeing policy. He said in any event these factors should have been taken into account at least by way of mitigation.

Discussion and Conclusions

88. In this case, it was not in dispute (and would have been my finding in any event) that the respondent dismissed the claimant because it believed he was guilty of misconduct. This is a potentially fair reason for dismissal under Section 98 of the Employment Rights Act 1996.

89. In these circumstances, the only issue for me to decide is whether the dismissal was fair or unfair in accordance with the provisions of Section 98 (4) of the Employment Rights Act 1996 set out above.

90. The questions were as identified at the outset of the proceedings and can be answered as follows:

Did the respondent have a genuine belief the claimant was guilty of misconduct?

91. Yes. It genuinely believed the claimant deliberately failed to deliver unaddressed advertisement material or door to door (D2D) allocated to him on 27 July 2019.

Was that belief based on reasonable grounds?

92. Yes. Based on the facts found above and in particular:

(1) The respondent had statements from Stuart Metcalfe and Angela Shields who gave detailed accounts of the claimant stating on Saturday 27 July he would/might complete his allocation on the following Monday. Saturday was the last day of the week a D2D delivery takes place.

(2) The statements of Metcalfe and Shields also alleged this was not the first time he had failed to carry out this duty and the respondent had statements from other workers who corroborated this by alleging other recent failures to deliver on the claimant's part.

(3) The respondent had a record of a conversation with Dan Rowarth and the claimant on 29 July 2019 in which the latter confirmed he **had** undertaken his D2D work on 27 July and signed a control sheet confirming the work had been done. This was inconsistent with his later accounts that there was no work to do on that day and provided further grounds to believe the witnesses above the claimant.

(4) Mr Wright had reasonable grounds for the belief that Mr Rowarth had marked the items for the claimant's duty for 27 July. Mr Rowarth told Mr Wright he had identified 240 of these items as undelivered when he found them underneath the claimant's frame. The physical items were later seen by Mr Wright in the delivery office where Rowarth said they had been. Mr Wright conveyed this information to Mr Hulme when the latter was investigating the matter following the appeal interview with the claimant. Mr Hulme therefore also had reasonable grounds for believing the undelivered goods existed despite not being available at the appeal hearing on January 31, 2020.

(5) The claimant denied he had failed to carry out his duty, but the respondent was entitled to discount that in view of the strength of the evidence to the contrary.

Was that belief formed following a reasonable investigation?

93. The answer to this question depends upon whether the investigation was full and fair, hearing what the claimant and his representatives wished to say in explanation or mitigation and pursuing reasonable lines of inquiry whether pointing towards or away from guilt.

94. I need here to examine whether there were any defects/shortcomings in the investigation.

95. The claimant said there was no proof the items of the 27th were **not** delivered. It is true that the investigators did not visit properties on the claimant's rounds for that day and it seems to me there was nothing to have prevented them from doing so. Is this unfair? In my judgment it **could** have been done but the fact it was not has to be considered in the light of all the other evidence the respondent had. The claimant's position was there was no deliveries for him to do on the 27th. I conclude it was reasonable not to pursue this line of inquiry.

96. Regarding the "marked" items the claimant says he has been deprived of an opportunity to have them examined by a fingerprint expert and thereby prove his innocence. They should, he argues, have been kept to one side until the end of the disciplinary process.

97. However, the material **was** available for inspection from 29 July 2019 to at least mid-December 2019 when they were still in the manager's office at Barrow.

98. I am prepared to assume that from some time in January 2020 the claimant lost the opportunity to investigate the existence of material that **might** have assisted his case but on the evidence, I conclude it is unlikely he was going to have them inspected at all.

99. It is also difficult to see how the absence of fingerprints could have positively exonerated the claimant or refuted the allegation of non-delivery or caused the respondent to doubt the evidence of the witnesses Metcalfe and Shields.

100. Although it is regrettable the items were not kept, I find the claimant had a reasonable opportunity to have them examined. He chose not to do so. A fair investigation continued after the material was no longer available.

101. It would have been helpful (and easy) for the exact location of the undelivered items to have been photographed *in situ* but that does not render the investigation unfair.

102. The respondent investigated the attendance rota for 29 July 2020 and discovered that the claimant was not on duty that day. This was relevant and important evidence to show he had no intention of delivering the items at all, as opposed to delivering them late.

103. In cross examination of Mr Wright and in evidence to the Tribunal the claimant stated he **was** in work on 29 July. I had previously explained to the claimant that I could not take account of evidence which was not before the respondent at the time of dismissal and appeal respectively and that remains the position now.

104. The belief was formed after an investigation that whilst not perfect, was thorough and fair

Did the respondent/employer follow a reasonably fair procedure?

105. Yes. In terms of procedural fairness, the claimant was properly notified in advance of the allegation against him, he was represented at the disciplinary hearing, provided with the evidence and key documents relied upon and given an opportunity to submit further evidence and given a right to appeal by way of a re hearing.

106. The claimant did appeal, and a similar procedure was adopted with Mr Hulme undertaking extensive further investigations to ensure all points raised by the claimant were considered before a decision was made.

107. The claimant argued in these proceedings that under a Royal Mail Health and Wellbeing protocol Mr Rowarth should have taken his health/disability into account when looking at why he had not delivered items. Whilst the respondent submitted that the claimant had never raised this issue, I find he had done so to an extent. Mr Wright was aware (his witness statement) that the claimant felt consideration had not been given to his disability. Adjustments had been made to his duty, so he was working in a van share rather than by himself.

108. It was reasonable for both Mr Wright and Mr Hulme to conclude this had no bearing on the findings of deliberate misconduct nor the sanction imposed.

109. There was delay in the process due to a multiplicity of reason including pandemic related ones and the sickness of one witness. The essential evidence (from Mr Metcalfe and Ms Shields) was gathered at or near the outset of the process. Whilst the claimant had an anxious time awaiting the outcome of the proceedings, I do not believe the delays rendered the process or outcome unfair.

Did the decision to dismiss the claimant rather than impose some lesser disciplinary punishment fall within the band of reasonable responses?

110. As I explained to the claimant on several occasions the question is whether a reasonable employer could have dismissed him for the reason they found, and it is completely immaterial how I would have handled it if I had been the decision maker at the time.

111. Likewise, I cannot now substitute my own view for that of the reasonable employer.

112. Accepting that summary dismissal is the most serious outcome for an employee I find the decision made was within the permitted band of reasonable responses.

Reasons:

(1) This was gross misconduct as set out in the respondent's conduct policy.

(2) D2D mail is of critical importance to the Royal Mail's business given full market competition and failing to undertake this work risks breach of contractual and regulatory obligations and can cause reputational damage.

(3) It is the most fundamental obligation of a postal worker to promptly and safely deliver the mail.

(4) The failure to deliver was intentional/deliberate.

113. The claimant's three-year service, clean conduct record, and good standing with a wide range of colleagues were considered. However, these mitigating factors were outweighed by the gravity of the conduct. Further, the evidence suggested that this was not an isolated incident. It was considered that action short of dismissal would not have had the required corrective impact.

Conclusion

114. For the reasons given above, I find the claimant was fairly dismissed.

Employment Judge Ganner
Date: 12 January 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON
24 January 2022

FOR THE TRIBUNAL OFFICE