EMPLOYMENT TRIBUNALS

Claimant: **Mr S Patel**

Respondent: **Royal Mail Group plc**

Heard at: **East London Hearing Centre**

On: **21 September 2021**

Before: **Employment Judge Russell**

Representation
Claimant: **Ms D Gilbert (Counsel)**
Respondent: **Mr R Choudhry (Solicitor Advocate)**

JUDGMENT having been sent to the parties on 23 September 2021 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1 By a claim form presented on 24 March 2021, the Claimant brings a complaint of unfair dismissal arising from the termination of his employment on 12 February 2021. The Respondent resists the claims.

2 I heard evidence from the Claimant on his own behalf. For the Respondent, I heard evidence from Mr Ramesh Singh (Delivery Office Manager, Ilford) and Mr Steven Potter (Independent Case Work Manager). I was provided with an agreed bundle of documents and read those pages to which I was taken in evidence.

Findings of Fact

3 The Claimant was employed by the Respondent as an Operational Grade Postman from 17 October 2016 (for brevity, I shall refer throughout this Judgment to postmen although clearly there are postwomen as well). The Claimant was subject to contractual obligations which included adhering to the Respondent's business standards. Those business standards included following policies, using sound judgment and being personally responsible for safeguarding and protecting the delivery of the mail, including a timely, reliable and secure service.

4 Initially, the Claimant had a dedicated duty, that is a set postal round on which he delivered. The Claimant subsequently changed his pattern of work and began to cover different rounds as a relief postman. This is more challenging than working a dedicated duty as it requires specific planning for each round to work out the most efficient order in which the post will be delivered on a broadly circular route.

5 On 12 April 2019, the Claimant was issued with a two-year serious warning letter after being stopped by police for not wearing a seatbelt. The warning was issued immediately after a fact-finding meeting and without a disciplinary hearing or right of appeal. Procedurally, it was clearly fundamentally flawed.

6 On 3 May 2019, the Claimant was issued with a two-year suspended dismissal with compulsory transfer in respect of allegations that he had failed to safeguard mail. In brief, on 28 March 2019 he had left two recorded delivery items unattended on a customer's doorstep and had signed for them himself. There was a fact-finding investigation meeting at which the Claimant's trade union representative suggested that the same customer had previously asked the Claimant (and possibly another postman) to sign for an item and put it through her front door and that the Claimant believed that the customer had said that he should do so on this occasion. The allegations were considered by Mr Ramesh Singh at a disciplinary hearing. I accepted Mr Singh's evidence as truthful and reliable that he did not accept the Claimant's explanation. He considered it inherently implausible that the customer would have gone to the delivery depot to make the complaint is she had asked the Claimant to sign on her behalf and leave the packages. Mr Singh did not investigate the Claimant's case that the same request had been made by this customer to another postman. Nevertheless, I find that Mr Singh's decision to reject the Claimant's explanation and impose a disciplinary sanction was a reasonable, genuine decision and taken in good faith. The Claimant was advised of his right of appeal but signed a form to say that he did not intend to do so.

7 The Claimant's case is that following his return to work after a knee injury in 2018, he was subjected to a campaign of bullying and inappropriate treatment by Mr Singh, designed to secure his dismissal. This is inconsistent with the decision to suspend dismissal as part of the disciplinary sanction in respect of allegations which were sufficiently serious to warrant dismissal. I find as a fact that the two-year suspended dismissal with compulsory transfer was a sanction issued in good faith by Mr Singh based upon the evidence before him and that it was not part of some overarching campaign to remove the Claimant.

8 The Claimant continued to work for the Respondent without further incident until November 2020. On 27 November 2020, the Claimant was working a relief round with which he was unfamiliar. The ongoing effects of the Covid-19 pandemic, and the tightening of restrictions throughout the United Kingdom but particularly in London and the South East at the time, had a significant negative impact on the Respondent at managerial and operational level. The restrictions on the ability to meet and socialise with friends and family face to face and the increased use of online shopping caused a significant increase in the number of items sent through the post. I accept the Claimant's evidence that this consequently resulted in a significant increase in the number of items to be delivered on any particular round.

9 The Respondent offers customers a special delivery service. It is a premium service where the customer pays a higher price but gains the promise of guaranteed delivery and the ability to track the item on its journey from posting to delivery by use of an individual security number. The Respondent has specific measures for the treatment of special items: on arrival at the delivery office, an employee puts a special item into a separate secure cage and signs to confirm that he or she has done so. Prior to starting their allocated round, the postman goes to the When an operational grade postman is due to undertake their work, they go to the secure cage and complete a form to sign out the special items to be delivered on their route. In signing out the special delivery item, the postman assumes responsibility for safeguarding and delivering that item of post. The postman will secure the special delivery items to avoid them becoming mixed with ordinary mail, either in a tray if delivering in a van or within a separate section of the trolley if on foot.

10 There are financial and reputational consequences to the Respondent if they fail to meet their special delivery obligations. Whilst OFCOM relaxed the regulatory penalties and consequences for failure to meet special delivery obligations in recognition of the effects of the pandemic, failure to deliver by the guaranteed date still carried genuine significant and financial risk for the Respondent as customers could lose faith in the reliability of the guaranteed service and could also face claims for refunds and compensation which is increased in the event of a failure to attempt delivery.

11 On 27 November 2020, the Claimant had seven special delivery items on his allocated round. It was a trolley round to be undertaken on foot and there were a lot of items. In accordance with standard practice, the Claimant split the mail into two batches with the second to be delivered to him by a driver at an agreed point on the round. The Claimant placed one of the special delivery items for which he was responsible into the batch of mail which he anticipated delivering on the second part of his round. I accept that when he did so, the Claimant genuinely anticipated that he would be able to complete the full round and that the special delivery item would be delivered. Regrettably, the Claimant was not able to complete the full round before his shift ended at 2pm and his undelivered mail was returned to the delivery office. That in itself would not lead to any performance or conduct issue. However, the Claimant had forgotten about the special delivery item which had become mixed up with the regular post. He did not notify a manager that there was an outstanding special delivery and the item was not delivered, putting the Respondent in breach of its obligations.

12 The Respondent became aware of the undelivered special delivery item some days later. The Claimant was not immediately suspended and continued to work as planned, albeit at a different depot. I infer from this that the Respondent still felt that it could trust the Claimant to deliver post and to undertake his duties in full even pending a disciplinary investigation.

13 A fact-finding meeting was conducted on 15 December 2020. The Claimant said that he had made a mistake: he believed that he had delivered all of the special items and that he had not given any special items to the driver as he had expected to deliver them all. The investigating manager decided that it was appropriate to refer the matter to Mr Singh as the Claimant There was an element of confusion in the Claimant's account and the manager in question, Mr Udofot, decided that it was

appropriate to pass the matter to Mr Singh as the potential penalty exceeded his level of authority.

14 The Claimant was invited to a formal conduct meeting, to be heard by Mr Singh, to consider allegations of potential gross misconduct, namely the failure to deliver a premium product and the failure to safeguard a premium product. The Claimant benefited from trade union representation. He can have been in no doubt given the content of this letter and the fact that he was subject to a live suspended dismissal sanction from May 2019 that the consequences of this disciplinary hearing could be very serious and result in the termination of his employment if the charges were proved. It is not credible or plausible that if, as the Claimant says now, he was subjected to bullying by Mr Singh and genuinely believed that Mr Singh was seeking to engineer his dismissal that he or his trade union representative would not have objected to the appointment of Mr Singh to conduct the disciplinary hearing. I find on balance that the Claimant did not object to the appointment of Mr Singh at the time because he had no concern that the hearing would be anything other than fair.

15 The disciplinary hearing took place on 19 January 2021. The Claimant was accompanied by his trade union representative. The Claimant was asked to explain what had happened and he said that it was due to the fact that the workload was very heavy. He suggested that the special item must have been in one of the bags of undelivered post returned to the depot by the driver. The Claimant maintained that he had kept the specials with him and could not explain how it them came to be in the bag of mail returned undelivered through his driver, other than to say that there had been problems communicating with his driver due to mobile phone difficulties. The Claimant accepted that it was his mistake. The Claimant provided a more detailed explanation in his oral evidence today. The round had a number of oversized parcels and the trolley had only limited space, as a result he mistakenly integrated the special delivery item with the ordinary mail as he had hoped to deliver it all. He candidly accepted that he had made a mistake in not segregating this special delivery item on the second part of the round and offered to pay damages to the Respondent and to the customer.

16 Mr Singh considered the explanations given by the Claimant but was not satisfied that they were sufficient or appropriate. By letter dated 6 February 2021, he informed the Claimant that he was to be dismissed for gross misconduct, albeit with notice. In his reasons, Mr Singh said that he had taken into account all of the information available and the mitigation put forward. He believed that the Claimant had the knowledge and ability to follow the required procedures but considered that there was no alternative to dismissal because of the conduct and the fact that there had been no evident improvement despite opportunities to correct his conduct in previous years. This was a reference to the live suspended dismissal imposed in 2019 for failures in relation to recorded delivery items.

17 The Claimant appealed against his dismissal. Mr Potter, who I accept was an independent and more senior manager, was assigned to hear the appeal.

18 The Claimant's last day at work was 12 February 2021. I do not need to make any findings of fact on the Claimant's conduct towards Mr Singh or delivery of his round on that day in order to decide this case as it is not conduct relied upon as giving rise to the dismissal. It is however relevant to note that Mr Singh raised with Mr Potter and

HR concerns about the Claimant's behaviour towards him, behaviour which the Claimant strongly disputes. I accept as honest and truthful Mr Potter's evidence that he decided that these matters were not relevant to the issues on appeal and genuinely and in good faith put them out of his mind. Whether or not it was wise of Mr Singh to make the allegations to the more senior manager due to hear the appeal, I am satisfied that it had no prejudicial effect upon the fairness of the hearing by Mr Potter.

19 The appeal hearing took place on 9 March 2021. The Claimant was again accompanied by a trade union representative. Again, the Claimant explained that his conduct had been a genuine mistake and not an act of gross misconduct. He suggested that dismissal was not an appropriate sanction in circumstances where he had continued to work throughout the disciplinary process, showing that trust and confidence had not been lost.

20 Following the hearing, Mr Potter conducted some further investigation including into the previous two disciplinary warnings. He sought information from the Claimant's immediate line manager and the Claimant himself. The Claimant said that he had not realised that he could appeal against the first disciplinary sanction. As for the second disciplinary sanction imposed by Mr Singh, it had all happened so quickly that he did not realise what was happening - the hearing and the decision were on the same day, he had just moved depot, he signed that he would not appeal and went back to work the following day when in hindsight he believed that he should have appealed given the speed of which the decision was made. I consider it significant that the Claimant did not raise with Mr Potter the allegations made in evidence to this Tribunal that he was not given a right of appeal or was forced to sign the piece of paper stating that he did not wish to appeal on trade union advice. I did not find his evidence either plausible or credible but, in any event, it was not information put before Mr Potter who was charged with deciding the appeal.

21 Having considered all of the evidence before him, Mr Potter concluded that the dismissal should not be overturned. By letter dated 29 March 2021, he set out the background to the dismissal, the procedural points raised by the Claimant and the grounds of appeal. He concluded that the Claimant had not dealt with the special delivery item appropriately, he did not deliver it as he should have and he had no idea of its whereabouts until it was discovered the following day. He accepted the Claimant's submissions with regard to suspension insofar as the Claimant should have been suspended and, as a result, he concluded that summary dismissal for the offence on 27 November 2020 alone would not have been appropriate. Mr Potter then considered the two previous disciplinary warnings. He concluded that the first warning was fundamentally flawed procedurally; whilst the warning itself was not taken into account, Mr Potter did regard it as relevant insofar as it demonstrated that the Claimant failed to adhere to company policies. As for the suspended dismissal, whilst the speed of the decision was unusual, the Claimant had chosen not to appeal and it showed that he knew of the correct delivery procedures yet had left the item unattended on the doorstep and falsified a customer's signature. In all of the circumstances, it was appropriate to dismiss the Claimant due to the combined effect of his conduct on 27 November 2020 and the live suspended dismissal. He concluded that the Claimant was unwilling or unable to follow the Respondent's policies and procedures and he had no confidence that the Claimant would do so going forward. He corrected the amount of money that the Claimant was owed by way of notice.

Law

22 The employer must show a potentially fair reason for dismissal within section 98 of the Employment Rights Act 1996. Conduct is a potentially fair reason.

23 The legal issues in a conduct unfair dismissal case are well established in the case of **BHS –v- Burchell** [1978] IRLR 379, namely:

> (1) did the employer genuinely believe that the employee had committed the act of misconduct?
> (2) was such a belief held on reasonable grounds? And
> (3) at the stage at which it formed the belief on those grounds, had the employer carried as much investigation as was reasonable in all the circumstances of the case?

24 Section 98(4) of the Employment Rights Act 1996 requires the Tribunal to determine whether the Respondent acted reasonably or unreasonably in treating any such misconduct as sufficient reason for dismissal in accordance with the equity and substantial merits of the case. This will include consideration of whether or not a fair procedure has been adopted as well as questions of sanction.

25 In an unfair dismissal case it is not for the tribunal to decide whether or not the claimant is guilty or innocent of the alleged misconduct. Even if another employer, or indeed the tribunal, may well have concluded that there had been no misconduct or that it would have imposed a different sanction, the dismissal will be fair as long as the **Burchell** test is satisfied, a fair procedure is followed and dismissal falls within the range of reasonable responses (although these should not be regarded as 'hurdles' to be passed or failed).

26 The range of reasonable responses test or, to put it another way, the need to apply the objective standards of a reasonable employer, applies as much to the adequacy of an investigation as it does to other procedural and substantive aspects of the decision to dismiss, see **Sainsbury's Supermarkets Limited v Hitt** [2002] IRLR 23, CA. The more serious the implications for the Claimant and the more challenge there is to the facts of the case then perhaps the greater the investigation required. An investigation is not limited to issues of guilt or innocence, it may also require further investigation to put misconduct into proper context including investigating points raised in mitigation but it is not necessary for the employer to investigate every point made by the employee in his defence.

27 The test for the range of reasonable responses is not one of perversity but is to be assessed by the objective standards of the reasonable employer rather than by reference to the tribunal's own subjective views, **Post Office –v- Foley, HSBC Bank Plc –v- Madden** [2000] IRLR 827, CA. There is often a range of disciplinary sanctions available to a reasonable employer. As long as dismissal falls within this range, the Tribunal must not substitute its own views for that of the employer, **London Ambulance Service NHS Trust v Small** [2009] IRLR 563. However, the band of reasonable responses is not infinitely wide and it is important not to overlook s.98(4)(b) the provisions of which indicate that Parliament did not intend the Tribunal's

consideration of a conduct case to be a matter of procedural box ticking and it is entitled to find that dismissal was outside of the band of reasonable responses without being accused of placing itself in the position of the employer, **Newbound –v- Thames Water Utilities Ltd** [2015] IRLR 734, CA.

28 A finding of gross misconduct does not inevitably mean that dismissal will fall within the range of reasonable responses, consideration must be given to mitigating factors which may be such that dismissal is not reasonable, **Brito-Babapulle v Ealing Hospitals NHS Trust** [2013] IRLR 854. The Tribunal must not abdicate or short its tasks in applying section 98(4) to the facts of this particular case.

29 Relevant factors in the overall assessment of reasonableness under s.98(4) include, amongst other matters going to the equity of the case overall:

29.1 the conduct of an employee in the course of a disciplinary process, including whether they admit wrongdoing and are contrite or whether they deny everything and go on the offensive.

29.2 disparity which may arise (i) where an employer has led an employee to believe that certain categories of conduct will either be overlooked or at least not be dealt with by the sanction of dismissal; (ii) where evidence about decisions made in relation to other cases supports an inference that the purported reason for dismissal is not the real or genuine reason; and/or (iii) decisions made by an employer in truly parallel circumstances may be sufficient to support an argument in a particular case that it was not reasonable to adopt the penalty of dismissal that some lesser penalty would have been appropriate in the circumstances, **Hadjioanou v Coral Casinos Ltd** [1981] IRLR 352.

29.3 mitigating factors, including length of service, disciplinary record and whether the employee believed or had reason to believe that what they did was permitted and, therefore, whether they were doing something wrong.

30 In deciding whether the dismissal was fair or unfair, the Tribunal must consider the whole of the disciplinary process. If it finds that an early stage of the process was defective, the tribunal should consider the appeal and whether the overall procedure adopted was fair, see **Taylor –v- OCS Group Limited** [2006] IRLR 613, CA.

31 The Tribunal must have regard to the ACAS Code of Practice which sets out basic principles of fairness to be adopted in disciplinary situations, promoting fairness and transparency for example in use of clear rules and procedures.

32 In **Wincanton Group plc v Stone and Gregory** UKEAT/0011/12/LA, Langstaff J (as he then was) analysed the law relating to previous disciplinary warnings with a helpful summary at paragraph 37 as follows:

> "**A Tribunal must always begin by remembering that it is considering a question of dismissal to which section 98, and in particular section 98(4), applies. Thus the focus, as we have indicated, is upon the reasonableness or otherwise of the employer's act in treating conduct as a reason for the dismissal. If a Tribunal is not satisfied that the first warning was issued for an oblique motive or was manifestly inappropriate or,**

put another way, was not issued in good faith nor with prima facie grounds for making it, then the earlier warning will be valid. If it is so satisfied, the earlier warning will not be valid and cannot and should not be relied upon subsequently. Where the earlier warning is valid, then:

(1) The Tribunal should take into account the fact of that warning.

(2) A Tribunal should take into account the fact of any proceedings that may affect the validity of that warning. That will usually be an internal appeal. This case is one in which the internal appeal procedures were exhausted, but an Employment Tribunal was to consider the underlying principles appropriate to the warning. An employer aware of the fact that the validity of a warning is being challenged in other proceedings may be expected to take account of that fact too, and a Tribunal is entitled to give that such weight as it sees appropriate.

(3) It will be going behind a warning to hold that it should not have been issued or issued, for instance, as a final written warning where some lesser category of warning would have been appropriate, unless the Tribunal is satisfied as to the invalidity of the warning.

(4) It is not to go behind a warning to take into account the factual circumstances giving rise to the warning. There may be a considerable difference between the circumstances giving rise to the first warning and those now being considered. Just as a degree of similarity will tend in favour of a more severe penalty, so a degree of dissimilarity may, in appropriate circumstances, tend the other way. There may be some particular feature related to the conduct or to the individual that may contextualise the earlier warning. An employer, and therefore Tribunal should be alert to give proper value to all those matters.

(5) Nor is it wrong for a Tribunal to take account of the employers' treatment of similar matters relating to others in the employer's employment, since the treatment of the employees concerned may show that a more serious or a less serious view has been taken by the employer since the warning was given of circumstances of the sort giving rise to the warning, providing, of course, that was taken prior to the dismissal that falls for consideration.

(6) A Tribunal must always remember that it is the employer's act that is to be considered in the light of section 98(4) and that a final written warning always implies, subject only to the individual terms of a contract, that any misconduct of whatever nature will often and usually be met with dismissal, and it is likely to be by way of exception that that will not occur."

Conclusions

33 Based upon my findings of fact, I conclude that Respondent has shown that conduct was the genuine reason for dismissal. Both Mr Singh and Mr Potter believed that the Claimant had committed an act of misconduct and the Claimant accepted that there had been misconduct in his handling of the special item whereby he failed to safeguard and failed to deliver it. Ms Gilbert made some powerful points with regard to the definition of gross misconduct, in particular the need for there to be deliberate and

intentional misconduct. These may be relevant when considering s.98(4) but not in deciding the reason for dismissal where it is sufficient that there be a genuine belief in misconduct.

34 In concluding that the belief was both reasonable and based upon reasonable investigation, I took into account the fact that the Claimant admitted the act of misconduct. The facts were not in dispute when considered by Mr Singh and Mr Potter: a special delivery item was signed out by the Claimant to be delivered on his round, he failed to deliver it, he failed to ensure that it was segregated from ordinary mail and failed to notify a manager that there was an undelivered special delivery item with the consequence that it was not delivered on time. Even if through genuine mistake or forgetfulness, there was sufficient evidence for Mr Singh and Mr Potter reasonably to believe that this was an act of misconduct.

35 The real issue in the case is whether the Respondent reasonably believed that the misconduct was sufficient reason for dismissal in all of the circumstances of the case. As set out above, Ms Gilbert focused on whether or not the Claimant's mistake could be regarded as gross misconduct if it lacked a deliberate or intentional quality. I accept that if the Claimant had been dismissed for a single act of misconduct on 27 November 2020 with a clean disciplinary record and without the Respondent turning its mind to intention, then dismissal may well have fallen outside of range of reasonable responses. Indeed, Mr Potter candidly accepted that the summary dismissal for this offence alone would not have been appropriate. This is consistent with the failure of the Respondent to suspend the Claimant during the disciplinary process.

36 However, reasonableness must be considered having regard to the equity and substantial merits of the case. This will include relevant factors which may mitigate or aggravate the conduct in all of the circumstances. Here, in mitigation, the Claimant admitted his misconduct from the outset. Set against that is the fact that at the time of the misconduct, he was subject to a live suspended dismissal sanction and had received an earlier warning for misconduct.

37 Ms Gilbert submits that neither earlier disciplinary sanction could be relied upon as they were not valid, saying that both were issued for an oblique motive, were manifestly inappropriate and/or not issued in good faith or with prima facie grounds. Having regard to the circumstances of the first disciplinary warning, I agree that the fundamental procedural flaws render it invalid. Whilst there was prima facie evidence of misconduct, the imposition of a disciplinary sanction without anything more than a fact finding investigation meeting and with no right of appeal offered is manifestly inappropriate.

38 The same is not true of the suspended dismissal imposed in May 2019. I do not accept that the failure to investigate whether or not another postman had been invited by the customer to sign for a recorded delivery item and put it through her front door was such a significant procedural flaw as to render the sanction manifestly inappropriate. Mr Singh concluded that the Claimant's assertion that the customer had asked him to do this for as inherently implausible. In other words, he did not accept as a matter of fact that the customer had made the request asserted by the Claimant. I have found that his decision to reject the Claimant's explanation was reasonable, genuine and taken in good faith and there was prima facie evidence of misconduct.

Moreover, I have rejected the Claimant's case that he was subjected to a campaign of bullying by Mr Singh from 2018 or that Mr Singh was trying to secure his dismissal. Applying **Wincanton**, the sanction of suspended dismissal was issued in good faith and with prima facie grounds for doing so, it was a valid prior disciplinary sanction upon which the Respondent was entitled to rely when considering the November 2020 misconduct.

39 Having concluded that the suspended dismissal sanction was valid, the fact of the sanction should be taken into account. Despite the care and tenacity with which Ms Gilbert made her submissions, it appeared that she was inviting me to go behind the suspended dismissal sanction and to consider whether it had been fairly imposed by raising detailed factual and procedural challenges. These are challenges that could have been raised at the time on appeal by the Claimant but, on my findings, he chose not to do so. If the sanction had been issued in bad faith, as the Claimant now submits, it is not plausible or credible that he would have failed to appeal to a more senior manager. As set out in my findings of fact, I rejected as neither plausible or credible the Claimant's evidence to this Tribunal (not raised with Mr Potter during the internal appeal) that he was not given a right of appeal or had been forced to sign the piece of paper stating that he did not wish to appeal on trade union advice. I conclude that in the circumstances of this case, it is not permissible for the Tribunal to consider whether some lesser category of warning would have been more appropriate.

40 The suspended dismissal was imposed because the Claimant had failed to safeguard to recorded delivery items of mail. The failure to safeguard mail and the Claimant's handling of special items were central to the disciplinary procedure which led to his dismissal in February 2021. Applying **Wincanton**, the degree of similarity between the two incidents of misconduct tends in favour of a more serious sanction.

41 For those reasons therefore, I am satisfied that the suspended dismissal was a valid warning which it was appropriate for both Mr Singh and for Mr Potter to take into account as a significant aggravating feature which rendered the November 2020 misconduct sufficient to warrant dismissal, particularly given the underlying similarity of the misconduct and as evidence of the Claimant's failure to adhere to policies about safeguarding mail. There is nothing exceptional in this case which would render it unfair for dismissal to follow in the event of further, similar misconduct after the imposition of the suspended dismissal. I conclude that this was a decision which fell well within the range of reasonable responses in all of the circumstances of the case.

42 The claim of unfair dismissal fails and is dismissed.

Employment Judge Russell
Date: 2 March 2022