EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4100404/2018

Heard in Glasgow on 18 and 19 June 2018 and 5 July 2018

Employment Judge: David Hoey (sitting alone)

Mr G Taylor	**Claimant** **Represented by:-** **Mr McLure** **Company Director**
Royal Mail Group Ltd	**Respondent** **Represented by:-** **Dr Gibson** **Solicitor**

JUDGMENT FOLLOWING HEARING

The Respondent did not dismiss the Claimant unfairly and so the claim is dismissed.

Introduction

1. In this case the Claimant claims unfair dismissal. The case was set down for 2 days with a further day needed to complete the evidence and allow time for submissions.

2. The Claimant was represented by Mr McLure, a company Director (who was not legally qualified) and the Respondent was represented by Dr Gibson, solicitor.

3. The Tribunal began the case by identifying what the issues to be determined to ensure that the case was focused. Mr McLure stated that the Claimant was not challenging the procedure that was followed but argued that the Respondent did not have a genuine belief in the Claimant's alleged guilt. The

Claimant's position was that the Respondent had closed its mind to anything other than dismissal.

4. The Tribunal noted that the Claimant had indicated in the Claim Form that reinstatement was sought and that the Respondent had made no reference to this within the Response Form. Dr Gibson stated that the Respondent's position was that such a remedy was not practicable.

5. By the time Mr McLure was giving his submissions, the Claimant had advised him that he no longer sought reinstatement and he was seeking compensation only.

6. The Tribunal noted that the Claimant had been a member of the Respondent's pension scheme and it was clear that neither the Claimant nor the Respondent had considered what the losses in this regard would be. Despite attempts to clarify the position, neither party was in a position to do so by the end of the Hearing. Pension loss would require to be considered separately, if needed.

7. An agreed bundle of 132 pages had been produced and during the Hearing some additional productions were added, with no objection being taken.

8. The Tribunal heard evidence from the Respondent first, comprising Mr Paterson (the investigator), Mr Downie (the dismissing officer) and Mr Rankin (the appeal officer). For the Claimant evidence was led from Mr McFarlane (trade union representative and colleague), Mr Dewar (trade union representative and colleague) and the Claimant himself.

9. The Tribunal noted the terms of the overriding objective as set out in the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 and explained the need to ensure that the matter was dealt with justly and proportionately and that the parties were on a level playing field. On occasion the Tribunal had to set out the legal test that it had to consider and the issues that were to be determined to ensure that no irrelevant evidence was led which would result in valuable time being taken up needlessly.

10. The Tribunal found that the witnesses each gave a truthful account of the position to the best of their abilities.

Issues to be determined

11. The issues to be determined were:

1. What was the reason for the dismissal and was this a potentially fair reason in terms of the Employment Rights Act 1996 (i.e. was the reason - the set of beliefs that caused the Respondent to dismiss - relating to the conduct of the Claimant)?

2. Did the Respondent genuinely believe in the guilt of the Claimant and was that belief held on reasonable grounds?

3. Was a reasonable investigation carried out that led to the belief?

4. Did the decision to dismiss (and procedure that led to the dismissal) fall within the range of reasonable responses i.e. would a reasonable employer in the circumstances have dismissed?

5. Was the procedure that the Respondent followed in dismissing the Claimant reasonable in all the circumstances?

6. What compensation, if any, should be awarded?

Findings in fact

12. The Tribunal makes the following findings in fact from the evidence that it heard and the productions to which it was directed. Although there was other evidence and issues arising, the findings below are limited to those which are necessary to determine the issues (which are determined on the balance of probabilities). Reference to page numbers are to the page numbers within the

agreed bundle of productions. The “Business standards - An employee’s guide” has its own page numbers.

13. The Respondent is a large well known organisation employing around 143,000 individuals across the country.

14. The Claimant was employed as a full time Operational Postal Higher Grade Postman and was based at the Respondent’s Saltcoats Delivery Office (which had around 50 staff).

15. His gross pay was £450 a week with net pay £355 a week. He was part of the Respondent’s final salary scheme.

16. The Claimant had over 25 years’ service with the Respondent.

17. The Respondent has a number of important policy documents which staff are required to read and sign to say that they have understood and will comply.

18. The Claimant signed a declaration confirming he understood the Duty of the Post Office (page 2) which states: “The first duty of the Post Office is to ensure that letters, parcels and all other communications or items entrusted to it reach the people for whom they are intended promptly and safely and that the information in them reaches no one not entitled to it”. Under the heading “safety of postal packets” it states: “Carelessness, negligence or other misconduct which endangers the safety of a mailbag or postal packet is likewise a punishable offence”.

19. The Claimant also signed "Team Saltcoats: Drivers Golden Rules” (page 70) which state at para 2 “I will complete a thorough vehicle check prior to leaving the yard”. At para 4 “I will adhere to speed limits and obey all road signs whilst on the public highway”.

20. The Royal Mail Conduct Policy is stated to be a “procedure to help and encourage all employees to achieve and maintain standards of conduct including behaviour” (page 118). While this was not signed by the Claimant both the Claimant and Respondent agreed that it was a document with which

the Claimant required to comply. The Conduct Policy sets out the guiding principles in relation to conduct and behaviour. One such guiding principle (at page 119) is that: “Cases will be handled as speedily as possible and where there is significant delay, the employee will be notified of the reason and when a decision is to be made.”

21. Under Employee Obligations (page 120) it states that “Employees charged with a criminal offence must notify Royal Mail as soon as possible. Employees are not required to let Royal Mail know about minor offences”. The Claimant had not been charged with a criminal offence.

22. Under “Fact finding" (page 120) the Policy states that the manager “will make a prompt and detailed investigation of the facts” and the procedure that would take place. The matter may require to be passed to another manager if the penalty required it.

23. Under “Precautionary suspension (page 121) it is stated that this should “only last as long as necessary” and “must be kept under review; initially after 48 hours and then on a weekly basis... It is important that all cases of precautionary suspension only last as long as necessary”.

24. Under the heading gross misconduct (page 122), examples are given of behaviour and conduct which may be judged to be gross misconduct, with such list not being definitive. The list includes “deliberate disregard of health, safety and security procedures or instructions”.

25. Available penalties are stated to be warning, serious warning, suspended dismissal, dismissal with notice or summary dismissal.

26. There is also a “Security of Customers’ Mail” Guide for employees (page 125) which outlines employees’ responsibilities in maintaining the security of mail. Again, although not specifically signed by the Claimant, both parties regarded this as binding upon the Claimant. This document emphasises the importance of ensuring the security of mail within the employee’s possession. That document stated that where mail is put at risk, action may be taken in terms of the Conduct Policy (page 126).

27. The Security Rules for Drivers (page 128) outlines rules for drivers. The Claimant signed confirming he understood and would comply with the rules for Drivers on 24 October 2016 (page 71).

28. Checks are carried out in relation to Driver Details and Driving Licences and had been done for the Claimant on 24 October 2016 (page 66). His driving licence had been checked on 21 April 2016 (page 63).

29. Training had been given to the Claimant in relation to vehicles and his duties and the Claimant signed confirming this on 21 April 2016 (page 69).

Investigation

30. Mr Paterson is a delivery officer manager and had worked in the Saltcoats office. He has been a delivery office manager for 26 years with 35 years' service. He has experience of dealing with disciplinary matters.

31. Mr Paterson was asked to investigate issues that had occurred on Saturday 10 June 2017. He met with the Claimant informally initially on Monday 12 June 2017 and discussed events of 10 June. The Claimant had said that he was not aware mail had fallen from his van *en route* to Kilmarnock having left the Saltcoats office. He said he had only learned of this when he received a call from Mr Butcher who told him mail had been handed into the Saltcoats office by a member of the public.

32. The bag of mail that had been handed into the Respondent's Saltcoats office had contained special delivery items, which were items customers had paid extra money and which either valuable or urgent.

33. Because of the potential severity of the matter - a bag of mail had been handed into the office which appeared to have fallen from the Claimant's van - Mr Paterson decided to invoke formal procedures and undertake a formal fact finding exercise.

34. The Claimant's tasks on the day in question (10 June 2017) were to take mail from the counter and collections (including special deliveries) by road to Kilmarnock. Saltcoats is a hub office.

35. Mr Paterson met with the Claimant and his companion, Mr McFarlane, on 13 June 2017 and the Claimant was asked to explain what happened on 10 June. The minute of this meeting is found at page 30 to 31.

36. By this stage Mr Paterson was concerned about two issues. Firstly, it appeared that the Claimant had been in charge of a van from which a bag of mail had fallen. Secondly Mr Paterson had learned that the Claimant may have taken a sharp right turn which could have been part of the reason for the door in his van opening (which right turn was prohibited and unlawful). That right turn was illegal as there is a "no right turn" sign on the road in question.

37. The Claimant did not admit at the meeting that he had carried out an illegal manoeuvre by ignoring a no right turn sign. He subsequently admitted this and changed the minute to reflect this.

38. Within a few minutes of leaving the yard a member of the public behind the Claimant's van used her horn and lights to alert him to something being wrong. Upon stopping suddenly he heard the sound of the van's back doors closing and he was told that he had been driving with his van's rear door being open.

39. The Claimant spoke to the members of the public who were in the vehicle behind him for some of the distance he had travelled who said that they had not seen anything fall from his vehicle during the time they had been behind him.

40. The Claimant had a look in the back of his van. It did not look like anything had fallen out. He closed the doors and continued on his journey towards Kilmarnock.

41. A few minutes later the Claimant received a call from Mr Butcher advising him that bag of special delivery mail had been handed into the Saltcoats office by

a member of the public who had found it on the street around the point where the Claimant had made the prohibited right turn. The Claimant returned to the office to collect the bag and proceeded to Kilmarnock (and delivered all items within time).

42. The Claimant had placed that mail bag of special deliveries into his vehicle when he was loading his van (with others assisting him) (page 30).

43. The bag in question had been the same colour as the other bags (grey).

44. There was no manifest or list that would ensure the Claimant knew how many bags of mail he had in his van. There were a large number of bags in his van on the day in question.

45. The Claimant accepted that it was his sole responsibility to make sure his vehicle was secure before proceeding on his journey.

46. The Claimant could not recall (on 13 June 2017) whether he had been the last person to close the back doors of the van he was driving before he drove off. Others had been assisting in loading mail into the back of the van at the relevant time.

47. Mr Paterson advised the Claimant that he would require to speak with those who had been present.

48. Mr Paterson adjourned the meeting and sought advice from his HR team. He was concerned that the integrity of the mail had been brought into question and decided to suspend the Claimant as a precautionary measure. This was done by letter at page 27 (which is undated and does not have the designation of the letter's author at the signing section). Page 28 contains the reasoning for the suspension which was sent to the Claimant.

49. The minute of the meeting was prepared and sent to the Claimant - pages SO-31 - on which the Claimant made a handwritten adjustment.

50. An amended copy of the minute is at pages 34-35.

51. Mr Paterson had spoken with Mr McKinnon at 11am on 12 June 2017 (page 32). Mr McKinnon had been running late due to a puncture on the day in question. His job was to offload the mail in his van into the back of the Claimant's van.

52. The special delivery bag had been taken by the Claimant and placed in the back of the Claimant's van.

53. Mr McKinnon said that the Claimant had "closed the doors of his vehicle". Mr McKinnon exited the yard before the Claimant did.

54. The interview statement (which is unsigned) stated that "I [Mr Paterson] have checked the CCTV on the day in question and the footage confirms Mr McKinnons (sic) statement",

55. Mr Paterson typed up the statement after the meeting.

56. Mr Paterson had also spoken to Mr McKelvie on 12 June 2017 at 1015am. Mr McKelvie said that he had cleared the mail and loaded it into the back of the Claimant's van. He then said that he "advised Mr Taylor to lock the vehicle".

57. A letter was sent to the Claimant confirming the suspension (following a 48 hour review). The letter notes that the investigation was not complete (page 36) and would continue. This letter is undated and is from Mr Paterson.

58. Another letter was sent to the Claimant which is again undated but bears to be from Mr Paterson (page 40). This letter has some handwritten adjustment and says that the matter has been "passed up" to Mr Downie as Mr Paterson considered the potential penalty to be outside his level of authority.

59. Another letter was issued to the Claimant which is again undated, from Mr Paterson, which says that following the weekly review the precautionary suspension was to continue "pending further investigations into integrity of mail". That was acknowledged by the Claimant on 5 July 2017 (page 43).

60. No further correspondence was sent to the Claimant about his suspension or continued employment from 5 July 2017 until the disciplinary hearing invite letter on 26 August 2017 (page 44) and the Claimant remained suspended.

61. The reason for this delay was due to availability of personnel, annual leave and workload.

62. Mr Paterson continued his investigations and looked at the CCTV footage but this did not show whether or not the van doors at the back of the Claimant's van had been secured properly before he drove off.

63. Mr McFarlane spoke to Mr Paterson after the meeting and advised him that the Claimant's manager, Mr Maguire, had been bullying the Claimant. Mr Paterson advised Mr McFarlane to raise the matter through the formal processes as Mr Paterson was dealing with the events from 10 June 2017.

64. Mr Maguire played no role in the investigation or disciplinary hearing or appeal stages of the process.

65. The issue as to Mr Maguire having some input in the dismissal of the Claimant was not raised again.

Disciplinary Hearing

66. A letter was sent to the Claimant dated 26 August 2017 (page 44) referring to the fact finding meeting on 13 June 2017 and 10 June 2017 incident and invited the Claimant to a "formal conduct meeting" which was to take place on 31 August 2017. There are 2 allegations set out in that letter:

    1. Gross misconduct in that it is alleged that you breached the Royal Mail code of business standards (mails integrity) due to your actions in failing to secure mail entrusted to you whilst being the driver of a Royal Mail vehicle

2. Gross misconduct in that it is alleged that you breached the Royal Mail Code of business standards, while driving a Royal Mail vehicle, you made an illegal turn.

67. The letter was sent by Mr Downie, Operations Manager (who had previously been a delivery office manager). Mr Downie has 30 years' service, 20 of which have been in management roles. He has dealt with disciplinary matters before and has been trained in this area.

68. The letter states that it encloses details of the investigation and copies of relevant witness statements and other documents but does not detail precisely what documents are included.

69. The letter also states that Mr Downie would take into consideration the Claimant's conduct record.

70. The Claimant had an extant Serious Warning, which was not due to expire until 21 December 2018.

71. This was a warning that had been issued in December 2016 which was to last for 2 years. It was issued because the Claimant's conduct had led to delayed collection of mail.

72. Mr Downie said the reason for the delay in progressing matters was due to annual leave. The person who was originally scheduled to hear the matter had been changed. Mr Downie had learned of the matter mid-August 2017 (see page 52).

73. Other than the 48 hour suspension review letter and 2 weekly letters, no other correspondence was issued to the Claimant between the suspension letter in June 2017 and the invite letter of 28 August 2017 (page 52).

74. The notes of the meeting are found at page 48 - 50 with some handwritten adjustment by the Claimant and with some further handwritten adjustments at page 51 -53. Both are signed by the Claimant "confirming the interview notes are accurate".

75. The Claimant accepted that he was in charge of the vehicle and that he had signed the Security Rules for drivers. Page 130 is an excerpt from the Security Rules for Drivers which applied to the Claimant at the time in question which states: "(b) Load ALL mail into rear or side of vehicle and ensure the door is locked."

76. Mr Downie was concerned that the Claimant appeared to have left mail in his vehicle without ensuring the van doors were securely closed. He would have expected an experienced employee such as the Claimant to know about the importance of this.

77. At the outset of the meeting Mr Downie asked if the Claimant fully understood the allegations and potential outcomes which included dismissal with which the Claimant agreed. Mr Downie also stated that "the purpose of this interview was for him [the Claimant] to put forward reasons as to why he should not be dismissed concerning an incident that happened on 10 June 2017".

78. The Claimant set out what he believed had happened. The Claimant stated that he helped Mr McKinnon load the mail into the Claimant's van. The Clamant said he was not sure who had closed the doors and said it was probably him. He repeated the position as he said at the fact finding interview and that the member of the public in the vehicle behind had alerted him to his van doors being open. The member of the public had not seen anything fall out of the van "although it might have happened".

79. The Claimant had received a call from Mr Butcher indicating that a bag of special delivery items had fallen from the back of his van at Gasworks Brae and that he was to return to obtain them.

80. The Claimant stated that he returned to the depot to collect the mail bag, he apologised and then secured the van to take the mail to Kilmarnock.

81. The Claimant accepted he had performed an illegal driving manoeuvre as he was running late. He was aware of the rules.

82. Mr Dewar, the Claimant's companion, stated that Mr McKinnon had confirmed he saw the Claimant close the back door of his van. Mr Downie stated that Mr McKinnon's Statement did not confirm this.

83. The Claimant advised Mr Downie that the Serious Warning penalty was awarded as a result of leaving a full York container of mail behind missing dispatch.

84. Mr Dewar also noted that one of the Claimant's colleagues had carried out an illegal driving manoeuvre but no action was taken (page 52). Mr Downie stated that he was dealing with this particular case only.

85. At the end of the meeting Mr Dewar stated that the Claimant did not see any warning lights on the dashboard re the back door being open and blamed this on imperfect eyesight. Mr Dewar then produced a document from the Claimant's optician (page 60) stating that he had an eye sight issue which was now corrected. That letter (which is dated 7 July 2017) noted that there had been a significant change in prescription although it was "ok to continue driving" as the Claimant still met the driving standards with his current glasses.

86. The Claimant had never raised an issue with his eyesight prior to the disciplinary hearing.

87. The disciplinary meeting lasted 1 hour 15 minutes.

88. At no stage during the meeting:

(1) did the Claimant ever suggest that the mail bag in question had not fallen from his van or that someone had opened the van doors and taken the bag out. It was implicitly accepted that the bag had fallen from his van;

(2) was there any suggestion that the Claimant relied on automatic locking of van doors to secure the doors, which were only engaged at a certain speed and that this mechanism may have been disengaged;

(3) that the Claimant's manager had been bullying the Claimant and as a result that had somehow created the state of facts that led to the hearing.

89. Mr Downie did not take the information from the optician's letter (page 60) into account as he considered it a "red herring".

90. A minute of the meeting was prepared (pages 48-50). This contains some handwritten adjustment by the Claimant. An amended minute was issued (pages 51 to 53) which the Claimant signed as accurate (page 53). He made some handwritten adjustment at page 51.

91. Mr Downie considered matters and issued his decision by letter dated 26 October 2017 - page 54. He concluded that both allegations were upheld and that summary dismissal would take effect from 28 October 2017. A report was attached to the letter setting out the reasons - pages 57-59.

92. The report at page 57 states "Having interviewed Mr Taylor I find the reasons he put forward as to why I should not dismiss him unacceptable."

93. Mr Downie's conclusion was that the Claimant had clearly not secured the back door of his van properly. A member of the public found the mail, which was embarrassing. He stated that the mitigation of poor eyesight was not acceptable and that he was concerned the Claimant was driving a Royal Mail van with defective eyesight.

94. The Claimant had admitted to the illegal right turn which was against the law and his behaviour fell below the required standard.

95. Mr Downie took account of the Serious Warning.

96. The reason for the delay from the hearing on 31 August 2017 to the outcome letter (26 October 2017) was that the meeting notes of the meeting were amended, Mr Downie was on leave and operational issues arose. There was no communication with the Claimant in the intervening period.

97. Mr Downie's view was that either allegation was of sufficient seriousness to justify dismissal of the Claimant and that in any even the cumulative weight of both justified the outcome.

98. The Claimant appealed against the outcome. At page 56 he stated his grounds of appeal as follows "In my opinion the penalty awarded is too harsh".

Appeal process

99. By letter dated 3 November 2017 (page 78) the Claimant was advised that there would be an appeal meeting. The letter also enclosed a "bundle of documentation". The letter did not set out what the specific documents. The letter enclosed the productions that have separate typed numbering on the bottom right hand side of the pages of the productions lodged with the Tribunal. Thus production page 25 has type written number which continues to production page 77 which has typewritten number 54.

100. Mr Rankin is an independent case work manager which is experienced in managing disciplinary issues. He has over 28 years' experience in HR and is very familiar with the Respondent's Code.

101. Mr Rankin decided to have a full rehearing of the matter involving a full review of the facts and issues arising.

102. A minute of the meeting is found art pages 83-89 which is signed by the Claimant confirming the minute is "a true record of the interview".

103. The Claimant had confirmed that he has received a full copy of the 54 page bundle of documents and that the meeting would proceed as a full rehearing of the matter (page 83) which meant the matter would be considered afresh together with anything the Claimant wished to expand upon or any new evidence introduced.

104. A summary of the facts and dates is found at page 85.

105. Page 86 contains the appeal submissions from Mr Dewar on the Claimant's behalf. Mr Dewar stated the penalty was too severe and he appealed against the reason for dismissal. Mr Dewar stated that Mr McKinnon had seen the Claimant close the door of his vehicle which contradicts Mr Downie's conclusions.

106. Mr Dewar's position was that the door must have been closed when the Claimant left and that the door must have opened "accidentally". The Claimant should not therefore be blamed for the door opening.

107. Mr Dewar also stated that the Clamant had been honest at the fact finding meeting and had corrected the minutes to show he had accepted he made the manoeuvre at the meeting. It was not even a reportable incident far less gross misconduct. He also noted that another employee had been charged and fined for the same incident and yet he had not been charged by Royal Mail in any way despite police involvement in that case.

108. Mr Dewar also stated that the Claimant had introduced the optician evidence as this may have been a reason he may not have noticed the warning light on the dashboard being on (if a warning light had been on).

109. Mr Rankin asked the Claimant why he had not checked his vehicle was secure before driving off. He said he thought "you just had to shut the door over and that the vehicle automatically locked itself'.

110. Mr Rankin asked why the Claimant had not retraced his steps to ensure no mail had fallen out or why he had not called his manger he said he was under time constraints. The Claimant said that he did not think he had to report that the doors had opened in transit.

111. The Claimant accepted that the vehicle he had used on the day in question was his regular vehicle which he had driven before. There had been no previous examples of the van doors opening. No faults had been found in relation to the doors.

112. During the hearing the Claimant accepted that he was in charge of the vehicle in question; he was responsible for securing the back door; he had not retraced his steps to see if anything had fallen out; he had made an illegal turn and he failed to report the breach until his manager telephoned him.

113. It was never suggested during the appeal hearing that someone else could have accessed the van when the Claimant was driving it or that the autolocking mechanism could have been deactivated.

114. Mr Dewar advised Mr Rankin that another named employee had carried out the same illegal manoeuvre as the Claimant and the Respondent had taken no action. Mr Rankin did not investigate this matter.

115. Mr Rankin decided to undertake further investigations in relation to the first allegation.

116. He spoke with Mr Paterson who advised Mr Rankin that the CCTV (which was no longer available) did not show the door being securely closed.

117. Mr Rankin sent Mr Paterson questions by email on page 103 which Mr Paterson answered. Mr Paterson said that he never confirmed the Claimant had shut the door. Rather that he had observed via the CCTV the Claimant closing the door.

118. Mr McKelvie had not seen the Claimant close the door.

119. Mr Rankin met with Mr McKinnon and a statement is found at page 101-102. The meeting took place on 30 November 2017. Mr McKinnon could not say for definite that the Claimant closed the doors. He stated that he had left the office before the Claimant did.

120. Mr Rankin asked Mr McKinnon how he approaches closure of the van doors and he replied that “I always close my door and then check my vehicle before setting off. Also my dash board light would tell me if a door was open”.

121. Mr Rankin also met with Mr Duncan on 30 November 2017 and took a written statement found at page 96-98. Mr Duncan had experience of driving the exact vehicle used by the Claimant on the day in question. The vehicle had never had any issue with regard to the doors or the locking mechanism. Mr Duncan had also viewed the CCTV footage which showed the Claimant closing the door with his foot. It was not clear enough to see whether the door was properly secured.

122. Mr Rankin asked Mr Duncan about the autolock facility and Mr Duncan said this is only engaged when the back door is closed securely. There is then an audible click when you drive and a light in the cab lets you know the doors are locked.

123. Mr Rankin and Mr Duncan then reconstructed the situation by using the same van the Claimant had driven and driving it using different scenarios. They drove leaving the doors open a little and drove forward. The doors did not lock. When the door was properly locked the autolocking click sounded within a few seconds of driving forward with the doors being secured.

124. Mr Rankin asked Mr Duncan how he locks the doors and was told that he closed the door firmly and locked the van with the fob. He then drove off and heard the click thereby knowing the doors are secure.

125. Mr Rankin spoke with Mr Muir and obtained a statement - pages 94-95. Mr Muir has driven the vehicle since 10 June 2017. No faults had been noted and there are no issues with the back doors locking. Mr Muir closes the doors firmly before driving and checks there are no warning lights.

126. There was no evidence before the Respondent that the Claimant had properly secured the doors before leaving on the day in question: he closed it over with his foot.

127. No faults had been found with the relevant vehicle up to the point the Claimant drove the vehicle (or up to the point of appeal).

128. On 4 December 2017 Mr Rankin sent the Claimant the new evidence he had obtained, including interview notes with Mr Muir, Mr Duncan, Mr McKelvie, Mr McKinnon and Mr Paterson's email. He also provided information about the reconstruction. The Claimant's comments were sought. (Page 91)

129. The Claimant responds by email dated 8 December 2017 - page 90. He notes the statements in the main confirm the Claimant did close the back door. He said he never contested it could not have been locked. He accepts he may have used his foot to close the door. He also states: *"I have been open and honest about events on that day and accept full responsibility for the secured bag of specials falling from the van"*

130. He said that he had been advised by a passing motorist that nothing had fallen from the van.

131. He accepts that he should have retraced his steps but ensured the mail was delivered without delay.

132. He said that 7 *am deeply regretful that my standards slipped on that day."* (page 90).

133. By letter dated 27 December 2917 Mr Rankin outlined his reasons for refusing the appeal. The document is found at pages 105-115.

134. The letter summarises the background at page 107-109.

135. Mr Rankin fully considers the matters afresh including the issues raised by Mr Dewar.

136. Mr Rankin states at page 109 *"This leaves me with some concern that the door was even properly secured before Mr Taylor set off".* There was no evidence of any fault with the vehicle. The optician's letter did not detract from the issues giving rise to the allegations, the mail having fallen from the Claimant's van and the Claimant having admitted to performing an illegal manoeuvre.

137. Mr Rankins's conclusions are found at page 113. He concludes that the Clamant was responsible for the security of his vehicle. He concluded that the Claimant did not close the doors properly and failed to check the doors before leaving the office.

138. The decision is found at pages 114 and 115.

139. Mr Rankin decided that the Claimant's loss of potentially high value items through deliberate disregard of security procedures is a case of gross misconduct. Mr Rankin believed that the Claimant was negligent in carrying out his duty in not securing his vehicle and in ignoring traffic signs.

140. Mr Rankin would have dismissed for the first allegation alone. In relation to the illegal road manoeuvre he would have given a "major penalty" which may have been dismissal but he considered that allegation to be less severe than the first allegation (the loss of mail).

141. Mr Rankin would have expected an employee facing the situation the Claimant faced to have retracted their steps or to have alerted their manager given the seriousness of the issue.

142. At no stage during the appeal was there any mention of the involvement of the Claimant's manager and alleged bullying.

Mitigation

143. Following his dismissal the Claimant applied for a number of jobs. He enrolled in training courses. He was invited to a number of interviews.

144. The Claimant has secured a role which is subject to references and PVG checks. He does not anticipate any issues with this and estimates his starting date as a few week's time.

145. His earnings would be considerably below what he earned with the Respondent, around £17,000 per annum.

146. The Claimant obtained unemployment benefit of £140 a fortnight. To date he has received £2631 of benefits which will continue until he secures alternative employment.

Observations on evidence

147. One of the conflicts in the evidence that the Tribunal required to resolve was to determine whether or not the Claimant had disclosed that he had performed an illegal manoeuvre during the course of the fact finding meeting. His position was that he had been honest at the meeting and admitted his conduct, despite his union representative seeking to alter the position. The Respondent's position was that the Claimant did not accept the position at the meeting but instead changed his position when the minute was issued.

148. This was not an easy issue to determine given the conflict in evidence and given each of the witnesses appeared to the Tribunal candid and honest. Mr McFarlane maintained that the Claimant had been up front and honest and admitted the position. It is impossible to recreate what actually happened and what was said. The Tribunal has to resolve this conflict in evidence and has concluded that, on the balance of probabilities, the Claimant did not admit that he had carried out an illegal manoeuvre during this meeting. The Tribunal has reached this conclusion on the following basis. Mr Paterson was clear that the Claimant did not state the position at the time. This accords with the minute that was prepared and issued. While the Claimant and his union representative maintained that the Claimant had disclosed the illegality, the Tribunal has preferred the evidence of Mr Paterson and the written minute.

149. There was a large number of other facts that were raised during the course of the Hearing upon which no findings of fact have been made. As indicated above the findings in fact that are set out above are in relation to the main issues that require to be determined. For example the Tribunal has made no findings in fact about the advice given to the Claimant by his trade union.

150. While Dr Gibson made submissions in relation to the irrelevant issues, in the course of the hearing little opportunity, if any, was taken by Dr Gibson to object to the evidence being led. Notwithstanding that, the Tribunal sought to keep a focus on the relevancy of the issues arising by directing matters accordingly.

151. Much was made of the issue as to whether a traffic infringement requires to be self-reported. This is seen at page 120 under "Employee obligations". This issue is not relevant to the matter that required to be determined by the Tribunal since the Claimant accepted that he had carried out an illegal manoeuvre and indeed he knew that one of his colleagues had previously been charged and fined for the same act. The clause in question talks about those who have been charged of offences. The Claimant had not been charged with anything.

152. The Claimant argued that normal practice within Saltcoats was to rely upon the autolocking mechanism (which appeared to run contrary to the written policy which required doors to be locked). The Tribunal was unable to make any findings of fact in relation to this point as there was no clear evidence as to the approach in Saltcoats and those who dealt with the disciplinary process were not aware as to the "standard" procedure in Saltcoats. Dr Gibson's view was that the Saltcoats procedure was irrelevant since the first allegation had at its core the Claimant's alleged failure to secure the van doors. The Claimant had not done that (and clearly had not even complied with the alleged Saltcoats procedure since the Respondent was entitled to conclude that the doors were not locked). The Tribunal agrees with that observation.

Law

Unfair dismissal

153. By section 94(1) of Employment Rights Act 1996, an employee has the right not to be unfairly dismissed by his employer.

154. By section 95(1)(a), for the purposes of the unfair dismissal provisions an employee is dismissed by his employer if the contract under which he is employed is terminated by the employer (with or without notice).

155. By section 98(1) and (2), it is for the employer to show the reason (or if more than one, the principal reason) for the dismissal, and in the context of this case that it related to the conduct of the employee. That is the reason relied upon by the respondent. In *Abernethy v Mott, Hay and Anderson* 1974 IRLR 213, CA, it was held that the reason for a dismissal is a set of facts known to the employer or believed by him that caused him to dismiss the employee.

156. By section 98(4), where the employer has shown the reason for dismissal, the determination of the question whether the dismissal is fair or unfair having regard to that reason;

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

b) Shall be determined in accordance with equity and the substantial merits of the case.

157. The law to be applied to the reasonable band of responses test is well known. The Tribunal's task is to assess whether the dismissal falls within the band of reasonable responses of an employer. If the dismissal falls within the band, then the dismissal is fair. If the dismissal falls outside the band, it is unfair. The Tribunal has considered the well-known case law in this area, namely: ***Iceland Frozen Foods Limited v Jones*** **1982 IRLR 439 EAT; and** ***Foley v Post Office; HSBC Bank pic v Madden*** **2000 IRLR 827, CA.**

158. The band of reasonable responses test applies equally to the procedural aspects of the dismissal, such as the investigation, as it does to the substantive decision to dismiss - see ***Sainsbury's Supermarkets Limited v Hitt*** **2003 IRLR 23, CA.**

159. In so far as the investigation is concerned, and the formation of the reasonable belief of the employer about the behaviour, conduct or actions of the employee concerned, there the Tribunal applies the well-known case of ***British Home Stores Ltd v Burchell*** **1978 ICR 303, EAT.** Did the Respondent have a reasonable belief in the Claimant's conduct, formed on reasonable grounds, after such investigation as was reasonable and appropriate in the circumstances?

160. In ***Taylor v OCS Group Limited*** **2006 ICR 1602, CA,** it was held that if an early stage of a disciplinary process is defective and unfair in some way, then it does not matter whether or not an internal appeal is technically a re-hearing or a review, only whether the disciplinary process as a whole is fair. After identifying a defect, the Tribunal will want to examine any subsequent proceeding with particular care. The purpose in so doing would be to determine, whether, due to the fairness or unfairness of the procedure adopted, the thoroughness or lack of it in the process and the open mindedness (or not) of the decision maker, the overall process was fair, notwithstanding any deficiencies at an earlier stage.

161. The compensation provisions of the Employment Rights Act 1996 are from section 118 to section 124A. The Claimant no longer seeks an order for re-instatement or re-engagement and seeks compensation only. In the event of a successful claim, compensation would include a basic award (section 119) which would be analogous to a statutory redundancy payment and a compensatory award (section 123) such amount as is just and equitable having regard to the losses sustained by the Claimant.

162. Section 122(2) provides that where the Tribunal considers that any conduct of the Claimant before the dismissal (or, whether dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly.

163. Section 123(1) provides that the amount of the compensatory award shall be such amount as the Tribunal considers it just and equitable in the circumstances having regard to the losses sustained by the Claimant in consequence of the dismissal insofar as that loss is attributable to action taken by the Respondent.

164. Section123(6) provides that where the Tribunal finds that the dismissal was to any extent caused or contributed by any action of the Claimant, it shall reduce the amount of the compensatory award by such proportion as it finds just and equitable having regard to that finding.

165. Section 124(1) limits the amount of the compensatory award or caps it at lower of the sum of 52 multiplied by a weeks' pay of the person concerned or the statutory cap (which exceeded the Claimant's annual salary).

166. Section 124A provides that where an award of compensation for unfair dismissal falls to be reduced or increased (by up to 25%) under section 207A of Trade Union and Labour Relations (Consolidation) Act 1992 (effective failure to comply with the ACAS Code of Practice), the adjustment shall be in the compensatory award and shall be applied immediately before any reduction for section 123(6).

167. In ***Polkey v AE Dayton Services Limited*** **1987 IRLR 503, HL,** it was held that in considering whether an employee could still have been dismissed if a fair procedure had been followed, there is no need for an all or nothing decision. If the Tribunal thinks there is a doubt whether or not the employee would have been dismissed this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have left his employment.

168. In ***Nelson v BBC (No 2)*** **1979 IRLR 346, CA,** it was held that in determining whether to reduce an employee's unfair dismissal compensation on grounds of his fault, an Employment Tribunal must make three findings. First, there must be a finding that there was conduct on the part of the employee in connection with his unfair dismissal which was culpable or blameworthy.

Second, there must be a finding that the matters to which the complaint relates were caused or contributed to, to some extent, by action that was culpable or blameworthy. Third, there must be a finding that it is just and equitable to reduce the assessment of the Claimant's loss to a specified extent

Submissions

169. Mr Gibson had prepared a written submission which he provided to the Tribunal and the Claimant's agent He identified 6 main issues.

170. Firstly, was the dismissal for a potentially fair reason. He submitted this was obviously relating to conduct. The belief, he said, did not need to be correct or justified provided there is a belief (***Trust House Forte v Aquilar*** **1976 IRLR 251 and** ***Maintenance Co Ltd v Dormer*** **1982 IRLR 491).**

171. Secondly did the Respondent have a genuine belief. There was never any suggestion the belief was not genuine.

172. Thirdly was a reasonable investigation carried out. The Court of Appeal in ***Shrestha v Genesis*** **2015 EWCA Civ 94** made it clear, said Dr Gibson, that there was no requirement upon a reasonable employer to investigate very line of inquiry. The question is whether what was done was reasonable or not.

173. Dr Gibson noted that a large part of evidence that had been led related to material which had not been before the dismissing or appeal officer and that this evidence ought to be ignored since otherwise the Tribunal would be substituting its view in respect of evidence that was not before the Respondent. This includes evidence about the locking system and its alleged deactivation and the speed controls.

174. Dr Gibson argued that there was no evidence that the Claimant followed the accepted procedure. The written policies make the position clear - The Claimant requires to ensure his van is secured before leaving. Even if he did not, he proceeded to drive when he had not heard the click that indicates the doors locked.

175. Dr Gibson's position was that the Respondent carried out a reasonable investigation. Indeed, Mr Rankin recreated the circumstances and ensured the Claimant was given all the information.

176. Dr Gibson submitted that the fact mail fell out of the Claimant's vehicle pointed strongly to fault on the Claimant's part, absent any fault with the vehicle,

177. Fourthly Dr Gibson said the Tribunal required to be satisfied there were reasonable grounds for sustaining the reasonable belief in the Claimant's guilt. The facts were clear he said - the loss of the bag was not in dispute, The CCTV footage and witnesses showed the Claimant using his foot to close the door but no one could say it was closed properly. The rules of the road require all drivers to take responsibility for their vehicles. It was only luck that prevented a serious accident. The Claimant admitted to taking an illegal right turn. The Claimant had 25 years' experience and should have known better.

178. Fifthly was the decision to dismiss within the band of reasonable responses. Dr Gibson emphasised how serious this was given the Royal Mail's core business is the safe delivery of mail. But for the honesty of a member of the public special delivery items could have been imperilled. The illegal driving manoeuvre showed a casual attitude to his duties.

179. Further the Claimant did not have a clean record. His previous serious warning was something that was reasonable to take into account. A previous corrective measure had been effected.

180. Finally, was the dismissal procedurally fair (although Dr Gibson noted that the Claimant had stated that it was not challenging the "procedure"). Dr Gibson submitted the ACAS Code and the Respondent's Code were followed. Dr Gibson candidly notes that a delay of 4 months from incident to outcome letter is "not ideal". He points to the fact that the Claimant was given the opportunity of putting his position forward days after the incident and his position had not changed.

181. Dr Gibson notes the procedure that was followed and the opportunities the Clamant was given to set out his position. He notes the appeal hearing was a rehearing with further investigation having been considered.

182. With regard to remedy Dr Gibson argues for 100% contribution as the Claimant (he says) accepted that in numerous ways his conduct was negligent.

183. With regard to future loss, Dr Gibson maintains this would be limited to six months.

184. It was agreed that his gross pay was £450 a week and net pay £355 a week. A basic award would be £9900. Dr Gibson argued that six months; loss would be 26 x £355.

185. A sub around £450 would be added for loss of statutory rights.

186. Pension loss would require to be considered at a separate hearing.

187. Mr McClure had also prepared a written submission to which he spoke. The Tribunal focusses on the main and relevant issues arising from that submission.

188. Mr McClure argued that there had been considerable failures in terms of systems and procedures and that the culture in which the Claimant worked led to him working *"under constant threat of dismissal".*

189. The time that was taken to conclude the matter was unacceptable and impeded a fair investigation.

190. The approach adopted at the Saltcoats office was poor.

191. Mr McClure argued the investigation was inadequate. The fact Mr Paterson had sought HR advice showed, said Mr McLure, that the outcome had been predetermined. He said that because the Respondent had been unable to confirm when the mail was lost, where by whom and when, it was reasonable to conclude that the bag had never been lost at all.

192. The failure by Mr Paterson to explain that he had already met other witnesses during the fact finding process meant that the ACSA Code was breached.

193. Mr McLure said that the fact the Claimant's serious warning was taken into account at face value was unreasonable as was the fact that others had breached the rules as to the illegal right turn.

194. Mr McLure's position was that the optician's letter showed that there would have been a reason for the Claimant to have missed any warning light on the dashboard.

195. There were three witnesses who observed the Claimant closing the van door and yet Mr Downie concluded that the door was not closed. He had no basis for concluding the door was not properly shut.

196. It was reasonable for the Claimant not to retrace his steps given the pressure on getting mail delivered on time.

197. Mr Rankin had failed to check the disabling of the self-locking mechanism. He relied on CCTV to confirm the Claimant had closed the door but was unable to say for sure it was closed properly. Mr Rankin also insisted on the Claimant retracing his steps and yet there was no way for the Claimant to be sure anything had fallen out. He also failed to look behind the serious warning which he took into account.

198. Mr Rankin also concluded that the Claimant deliberately disregarded security procedures with evidence allowing this. There was no deliberate intent by the Claimant. The Claimant was honest at all stages.

199. There was no reasonable investigation. It was never established that a bag was lost. There were many practice and procedure failures amidst a difficult workplace culture.

200. Mr McClure's principal submission was in effect that the Respondent had closed its mind to any alternative to dismissal or that there were any other

explanations for what had happened. They assumed facts and had decided to dismiss the Claimant at the outset.

201. Ultimately Mr McClure said the dismissal was unfair and compensation should be awarded.

Discussion and Decision

Reason for Dismissal

202. The first question the Tribunal requires to determine is whether the reason for the dismissal was a potentially fair reason. The Tribunal is satisfied that the reason for dismissal in this case was a reason which relates to the conduct of the employee. The Respondent was of the view that he had left his base in a company vehicle without ensuring the doors were properly secure such that mail had fallen from his van and that the Claimant had performed an illegal manoeuvre in his company van while on company business. That reason clearly "relates to the conduct of the Claimant'' and it is therefore a potentially fair reason.

Genuine belief in the conduct of the Claimant

203. It is common ground that the Tribunal then requires to be satisfied that the Respondent genuinely believed in the Claimant's guilt and that such a belief was honestly held and sustained after as much investigation as was reasonable.

204. The Claimant argued that the Respondent had in essence closed its mind during the disciplinary process and had failed to properly consider all alternatives. The Tribunal has carefully considered the evidence provided by each of the witnesses and the documents to which reference is made. The Tribunal is satisfied that the Respondent did genuinely believe in the guilt of the Claimant and that this was a belief that was honestly held.

205. The Claimant argues that his line manager had bullied him. While that was mentioned "off the record" during the investigation stage, the argument that the Claimant's line manager somehow engineered the Claimant's dismissal was not progressed during the disciplinary or appeal hearing. It was accepted that the Claimant's manager was not part of the formal process at all.

A reasonable investigation?

206. The fairness of this dismissal turns on whether the Respondent carried out a reasonable investigation in all the circumstances. The majority of the Claimant's challenges to each of the Respondent's witnesses was in relation to aspects of the investigation. Regrettably, however, the Claimant was seeking to raise matters during the course of the Hearing that had not been raised during the internal dismissal process. It is not for this Tribunal to decide the matter afresh.

207. For example, the Claimant in cross examination was asked whether he disputed that the bag that had been handed in had fallen from his van. He said that there was no 100% proof that the bag was his. There was no suggestion at all during the internal process that the Claimant disputed the bag had fallen from his van. That is perhaps not surprising given the bag was discovered shortly following the Claimant leaving his base, on the Claimant's route and at a junction where he had just performed an illegal right turn. It was submitted that it was possible the bag had never left the office and was "never lost". This was never suggested to the Respondent during the disciplinary process and while a perfect employer may have decided to consider this, even although the Claimant had accepted the bag fell from his van, perfection is not the test.

208. It is also relevant to note that the Claimant accepted full responsibility for the bag falling from the van. At page 90 he states in an email to Mr Rankin that he "accepts full responsibility for the secured bag of specials falling from the van." There was no evidence before the Respondent to suggest that the bag had never fallen from the Claimant's van.

209. The Claimant led evidence at the Hearing as to an autolocking facility and the engagement and deactivation of this. The evidence was from a consumer forum that related to a different type of vehicle to that used by the Claimant on the day in question. This was not an issue that had been raised at all during the internal process.

210. It is important that the Respondent fairly investigate the matter given the Claimant's livelihood was at stake.

211. The fact finding exercise comprised Mr Paterson speaking to the Claimant on an informal basis. He then spoke with two potential witnesses and then formally met the Claimant. These actions all took place within days of the incident in question. The formal fact finding meeting took place 3 days after the day in question.

212. The Claimant alleges that Mr Paterson was not appropriately trained to carry out the investigation. The Tribunal heard no evidence to justify that submission and rejects it. He may well have sought advice from HR and may well have spoken to witnesses prior to formally speaking with the Claimant. He was entitled to do this and he ensured that the relevant information was given to the Claimant and the Claimant was fairly given the chance to explain what happened and fully comment on each witness statement.

213. The Claimant accepted that it was his responsibility to make sure his vehicle was secure before leaving. He also eventually accepted that he had carried out an illegal manoeuvre in his van.

214. There was no definitive evidence before the Respondent that clearly showed the Claimant securing his van before leaving. The witnesses suggested that the Claimant had closed his van door, as did the Claimant. The Claimant accepted that he did not lock the doors but maintained that he had closed the door, perhaps with his foot. It was open to the Respondent to conclude from the evidence before it that the doors had not been secured properly.

215. The specific allegations the Claimant faced (page 44) were that he had breached the Respondent's Code of Business Standards by failing to secure mail entrusted to him while being the driver of a Royal Mail vehicle. The crux of the issue was the failure to ensure mail did not fall from his van. In short he was required to ensure the door to the van was secured and mail could not fall out. The second allegation was that he had broken the law by ignoring a no right turn road sign and thereby breached the Code of Business Standards. The Claimant had admitted he did so.

216. In relation to the second allegation it was reasonable not to undertake further inquiry as the Claimant accepted he broke the law and turned right (when he knew it was prohibited).

217. In relation to the first allegation, the Claimant did not challenge the fact the mail bag fell from his vehicle. The Respondent was not under an obligation to look for alternative explanations when none was offered by the Claimant at the time and the natural interpretation of what had happened pointed to the bag falling from the Claimant's vehicle.

218. Some employers may well have gone further to make sure there were no other explanations, including the mail having been taken from the office or someone opening the van door, but equally an employer in the circumstances facing the Respondent would not be acting unreasonably by concluding as Mr Downie did.

219. The issue as to the Claimant's eyesight and the optician's letter did not detract from the key issue which was why the bag fell from the vehicle in the first place. It may well explain why the Claimant failed to see a warning as to the door being opened but it does not alter the fact that the Claimant did not ensure his vehicle was secure before leaving.

220. If there were any defects in the investigation, these are dealt with when Mr Rankin at the appeal stage not only embarks upon a rehearing of the matter but also carries out a reconstruction involving the vehicle in question. He ensured that the Respondent had before it the full facts - no one is able to say

for certain the van doors were properly secure when the Claimant left, no one has said that the bag in question did not fall from the Claimant's van, the van had no defects either at the time of the incident or subsequently, the autolocking of the van was engaged when the vehicle moved forward and would engage only if the doors were properly closed.

221. Mr Rankin concluded that the only natural explanation from the facts was that the Claimant had not secured his van doors. Had he done so, mail would not have fallen from his van. That was a reasonable position to adopt.

222. In all the circumstances therefore the investigation that was carried out by the Respondent was reasonable. It was not perfect but that is not the required standard.

Did the decision to dismiss fall within the range of reasonable responses?

223. The Tribunal requires to decide whether the decision to dismiss fell within the range of responses open to a reasonable employer facing the facts in this case. The Tribunal has decided that the decision did fall within this range of reasonable responses.

224. The Respondent had carried out a reasonable investigation and reasonably concluded that the Claimant had not secured the doors properly and this was the cause of the mail falling from his van. The Claimant had also performed an illegal manoeuvre in his van whilst on Respondent business.

225. Mr Downie concluded that the Claimant's conduct in relation to both matters amounted to gross misconduct and justified his summary dismissal both cumulatively and individually. Mr Rankin was of the view that the second allegation was less serious but he still considered that to be gross misconduct. Both allegations were therefore upheld by the Respondent as gross misconduct.

226. The Claimant had an extant Serious Warning. While the Claimant argued this should not be accepted on face value, the Claimant had chosen not to appeal

against it. The warning remained on his record and the Respondent acted reasonably in taking it into account, even although the decision that was taken was that the acts in question would have justified dismissal themselves, even without the warning.

227. The Claimant argued that Mr Rankin acted unreasonably in concluding the Claimant had not properly secured the doors. The Claimant points to the fact that the CCTV "confirmed that Mr Taylor closed the door". The witnesses for the Respondent were asked why they did not give the Claimant the benefit of the doubt given there was evidence that showed the door being closed by the Claimant, perhaps with his foot, but no clear evidence that the door was secure. The Respondent concluded that had the door been locked mail would not have fallen from the vehicle. Absent any other reasonable explanation for this occurrence, they concluded while the Claimant had closed the van door over, the door had not been secure. That was not an unreasonable conclusion to reach in the circumstances from the evidence and from the factual matrix before the Respondent. The argument that the autolocking mechanism may not have been active did not assist the Claimant as he ought to have ensured the van was secure - either by locking the door, ensuring it was otherwise secure or by listening for the autolocking mechanism. It was his responsibility to secure the van, a responsibility that he accepted.

228. The Claimant also argued that the Claimant's actions were not deliberate (at least in relation to the loss of mail). Mr Rankin concluded that the loss of the items arose through "deliberate disregard of security procedures" (page 114). He then clarifies what he means in this regard by saying "I formed the view that Mr Taylor was negligent in carrying out his duty by not securing his vehicle and ignoring traffic signs". Given the Respondent had reasonably concluded that the Claimant had driven off with his van doors open and given the Claimant had admitted to ignoring the traffic sign, that conclusion is not unreasonable. It was not unreasonable to conclude that the Claimant was guilty of gross misconduct in relation to this allegation.

229. The allegations did not give rise to any challenge to the Claimant's honesty (which was not challenged by the Respondent). The issue was whether the Claimant had failed to secure his door and whether he had ignored a traffic sign.

230. The Claimant argued that the lack of training as to how to operate the van was a relevant factor that should be considered in determining the fairness of the dismissal. The Claimant understood how to secure his van. Mr McClure was unable to say what further training was needed that would have avoided the issues arising in this case.

231. The Respondent did consider alternative sanctions other than dismissal but concluded that summary dismissal was an appropriate outcome. That again was not unreasonable given the allegations in question and factual matrix.

232. This Tribunal is not permitted to substitute its view for that of the employer. The Claimant submits that the Respondent treated him "harshly". That may be so, but this Tribunal must decide whether in all the circumstances the decision to dismiss the Claimant fell within the range of responses open to a reasonable employer. Some employers may well have chosen a corrective penalty and issued a warning. Other employers may have chosen to dismiss. The question is whether the decision to dismiss was reasonable.

233. The Respondent took the Claimant's long service into account. The Respondent did also, permissibly, take account of the extant Serious Warning. The Respondent took into account all the surrounding facts in reaching its decision to dismiss the Claimant.

234. The Claimant argued that the Respondent ought to have issued a penalty that was corrective and not punitive. This had already been done given a Serious Warning had been issued. The Claimant had already been given the opportunity to improve his behaviour and conduct and had done so in some respect (such as his creating the checklist at page 73). Given there were 2 allegations facing the Claimant and in particular given the seriousness of the first allegation regarding the integrity of the mail, it was not unreasonable for

the Respondent to conclude that the Claimant was guilty of gross misconduct and that summary dismissal was an appropriate outcome.

235. A further issue that arose was the Claimant's actions upon discovering that the door in his van had been open. Both Mr Downie and Mr Rankin were of the view that the Claimant acted unreasonably in not retracing his steps or at the very least telephoning the office to alert his line manager as to the issue. The Claimant was concerned to ensure that mail was not delayed. He maintained that he planned on letting a manager know when he arrived at his destination. He did not think that any mail had left his van but he knew there was a risk of this having occurred, not least because he knew that the members of the public who alerted the claimant to his doors being open had not been behind him for the entire duration of his journey from the office (see page 51 confirming that it (ie mail falling from his van) *"might have happened").*

236. The Tribunal is satisfied that it was reasonable for the Respondent to have expected the Claimant to have taken some steps with some urgency to alert them to a risk given the seriousness with which the integrity of the mail is taken. That failure was not, however, a major part in the reasoning relied upon by the Respondent in dismissing him since the focus was on his having allowed mail to drop from his van rather than the immediate aftermath, albeit his conduct thereafter was relevant in showing his approach to dealing with the issue.

237. The Tribunal is satisfied that the decision to dismiss the Claimant in light of the information available to those making the decision was reasonable.

Was the procedure followed reasonable?

238. The Tribunal requires finally to assess whether or not the procedure that was followed by the Respondent in dismissing the Claimant was reasonable, in other words could a reasonable employer have adopted the procedure that was adopted in this case.

239. The Tribunal has found this a difficult question to determine and it was finely balanced. This would have been the type of issue that members and their views would have been invaluable. In the absence of members, the Tribunal requires to assess whether what was done was reasonable in all the circumstances.

240. The key issue in terms of the procedure was whether or not the time that it took to complete the procedure was reasonable or not. There were a significant number of delays. The incident occurred on 10 June 2017. The disciplinary hearing invite letter was dated 26 August 2017. The hearing took place on 31 August 2017. The outcome letter is dated 26 October 2017. The appeal hearing was on 10 November 2017 and outcome letter was dated 27 December 2017. The Respondent explained that the delays were due to the availability of the relevant personnel, annual leave and workload.

241. The Claimant was given the chance of setting out his response 3 days after the incident at the formal fact finding meeting and he did not raise anything new at the later meetings, nor suggest that anything would have been different had the procedure been expedited.

242. There was little by way of communication to the Claimant informing him of the position and timing. The Claimant had not been told what was happening and the delay was lamentable. Other than the correspondence referred to above (which runs to around 3 letters) no other update was given to the Claimant, who remained suspended during the process awaiting information as to what was happening. Given his livelihood was in the balance, this was a serious matter. This was particularly serious given the size and resources available to the Respondent.

243. The delays and lack of communication are serious failures by the Respondent which the Tribunal requires to take into account in deciding whether, on balance, the procedure that was followed was fair.

244. The Claimant argued that the meeting of the witnesses prior to the fact finding meeting rendered the investigation unreasonable. Mr Paterson explained that

he typed up the meeting notes later. The Claimant suffered no prejudice since he received copies of the statements and was able to fully respond. The outcome would have been the same had the Claimant been advised that the meetings had already taken place. The Tribunal does not consider this to be a procedure failing.

245. In relation to the second allegation the Claimant advised the Respondent at various junctures that one other employee had made the illegal manoeuvre and the employee had been charged by the police and fined. The Claimant argued that this was known to the Respondent. The Claimant argued that no action was taken by the Respondent in that case and yet it was part of the reason that led to his dismissal. There was no evidence from which the Tribunal could make a finding in fact that the Respondent knew that a Respondent employee had carried out the same manoeuvre as the Claimant (and been fined for it). While Mr Rankin was given the name of a colleague who had allegedly performed the same manoeuvre at the same point there was no evidence this was something of which the Respondent was aware. Nevertheless the Respondent had at least known during the disciplinary process that this was the Claimant's contention. This issue was not followed up by either Mr Downie or Mr Rankin who considered it irrelevant as they believed they were dealing with the Claimant's conduct and therefore the conduct of a colleague (and the Respondent's treatment) was irrelevant. This Tribunal disagrees. The fact that a colleague appeared to have done the same was relevant. Clearly if the matter was not known to the Respondent at the time that would have explained the difference in treatment but no investigation was carried out in this regard. A reasonable employer would act consistently and treat employees who act in the same way similarly. The failure to investigate this matter was a procedure failing.

246. The fact that the first allegation was undoubtedly more serious and by itself would have justified dismissal does not alter the fact that the procedure undertaken in dismissing the Claimant had procedural failures.

247. The Tribunal has to be careful to avoid making its own decision as to whether it would have adopted the procedure that was adopted in this case. The question is whether on balance the Respondent acted fairly and reasonably overall with regard to the procedure that led to the Claimant's dismissal (taking the entire factual matrix intro account) taking account of the size, resources, equity and substantial merits of the case.

248. This has not been an easy task. The Tribunal must not apply a counsel of perfection since no employer is perfect. Equally, however, there must come a point at which the procedure would become such that no reasonable employer would have followed it. The Tribunal having carefully balanced all the facts in this case and applying the legal test, has decided that on balance the procedure that was followed in leading to the Claimant's dismissal was not unfair. It could not be said that no reasonable employer would have allowed the delays that occurred in this case to happen with no communication to the Claimant and/or that no reasonable employer would have failed to consider the consistency point. This has been a difficult case and the Tribunal has concluded that the procedure that was undertaken in this case given the size and resources of the Respondent was just within the range of reasonable responses. The failings in this case, in particular with regard to delay and failure to communicate were on the edge of the band of reasonableness.

249. The Tribunal has taken into account of the ACAS Code of Practice in reaching this decision. At paragraph 3 the Code reminds Tribunals to take account of the size and resources available to the Respondent. At paragraph 4 the Code reminds Tribunals (and employers) that issues should be dealt with promptly, without unreasonable delay and act consistently.

250. The Tribunal has concluded that the procedure that was adopted in dismissing the Claimant in light of the foregoing was not a procedure that no reasonable employer would have followed. The Tribunal considers that the time taken to carry out the process and the communications with the Claimant were procedural failings but not such as to render the procedure unfair. Nevertheless the failures were at the extreme end of the band of reasonable

responses with regard to a fair procedure. The failure to investigate the allegation of inconsistent treatment was also a failure.

In summary

251. In summary the Tribunal has concluded that the dismissal was not unfair. The Claimant was dismissed for a reason related to his conduct and the Respondent in dismissing the Claimant for that reason did acted fairly and reasonably in all the circumstances taking account of its size, resources, equity and the merits of the case.

Compensation

252. Given the Tribunal has concluded that the dismissal is fair the Tribunal does not require to determine what, if any, compensation should be awarded.

253. Had the Tribunal found the dismissal to be unfair, the unfairness would have been solely on account of the failures in procedure, namely the delay (and failure to communicate the position with the Claimant) and the lack of investigation in relation to consistency and the Respondent's knowledge which relate to allegation 2.

254. The Tribunal accepts the evidence of both the Respondent's witnesses that the Claimant's conduct that led to the upholding of allegation 1 was such as to amount to gross misconduct which would by itself have justified the dismissal. The Tribunal accepts that the Claimant would have been dismissed as a result of his conduct. The Claimant also did admit that the right turn was an illegal manoeuvre.

255. The Tribunal would therefore have found that there was conduct on the part of the Claimant which was culpable and blameworthy: his actions in failing to secure his van doors when leaving the office and his taking an illegal right turn (itself a criminal offence). These actions led to the Claimant's dismissal. The Tribunal would have decided that it was just and equitable to reduce the compensation in respect of both the basic and compensatory award to nil. The

failings of the Respondent were procedural in nature only. The first allegation by itself would have justified the Claimant's dismissal. His dismissal was inevitable.

256. The Claimant's conduct therefore contributed to his dismissal by 100%.

257. The Claimant accepted that he carried out an illegal manoeuvre. The Claimant accepted full responsibility for the secured bag of specials falling from his van (page 90).

258. The Tribunal has considered the terms of section 124A of the Employment Rights Act and section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 and the ACAS Code of Practice. However, given the facts of this case and the conduct of the Claimant that led to his dismissal, the Tribunal would have concluded that it was not just and equitable to award any compensation.

259. The Claimant's conduct caused his dismissal and would not have been just and equitable to award any compensation.

Observations

260. As indicated above and during the course of the Hearing there were a number of issues arising in this case that caused the Tribunal some concern.

261. On a number of occasions the Respondent had issued correspondence which was undated, did not clear state the author and failed to state precisely what documents were included. That was unhelpful. The Respondent was also unable to provide a copy of the Serious Warning that had been issued to the Claimant, albeit notes of the fact finding, conduct interview and conclusion notes were provided. Given the seriousness of the matter, the Tribunal would have expected this document to have been located.

262. The failure to obtain proper copies of correspondence, such as the letter at page 27 did not help. Similar issues arose with regard to establishing the

details around the Claimant's pension provision. While proving loss was a matter for the Claimant, it was not unreasonable to expect the Respondent to assist in providing the necessary information.

263. It was noted during the course of evidence (and a finding in fact was made) that there is no manifest of the actual number of bags in the van. It may well assist the Respondent to consider some adjustment to its procedure to identify some way of quickly identifying what is conveyed in each van to assist drivers if they quickly need to check if all items are included.

264. Finally, the procedural failings in this case were not insignificant and as indicated above the Tribunal required to carefully consider whether the procedural failures resulted in the dismissal being (procedurally) unfair. Applying the legal test the Tribunal concluded that this was finely balanced but it could not be said that no reasonable employer would have taken the time that was taken in this case or failed to have communicate and/or failed to investigate the issues that had been raised. It was for that reason that the Tribunal concluded that the dismissal was fair. Nonetheless these are procedural failures that ought to be avoided given the issues at stake and the impact upon employees of a disciplinary process.

Employment Judge: **D Hoey**
Date of Judgment: **17 July 2018**
Entered in register: **31 July 2018**
and copied to parties