EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100443/2021

Hearing heard by Cloud Video Platform (CVP) on 22, 23, 24 November & 14 December 2021

Employment Judge R Mackay

Mr G Harvey	**Represented by** **Ms Macara** **Solicitor**
Royal Mail Group Ltd	**Represented by** **Ms Meek** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Claimant was unfairly dismissed by the Respondent and the Respondent shall pay to the Claimant compensation of **£17,244.11**.

The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 ("**the Recoupment Regulations**") apply to this award. The prescribed element is £6,772.58 and relates to the period from 5 November 2020 to 22 November 2021. The monetary award exceeds the prescribed element by £10,471.53.

REASONS

Background

1 This is a claim for unfair dismissal. The Respondent's position was that the dismissal was fair by reason of conduct. Although the Claimant initially sought reinstatement, he confirmed at the commencement of the hearing that he wished to claim compensation only.

2 The parties produced a joint bundle of documents. For the Respondent, evidence was heard from Mr J Cree, Mr Christopher Barclay and Mr Simon Walker. The Claimant gave evidence on his own behalf.

Observations on Evidence

3 The Tribunal found the Claimant to be a credible and reliable witness. He gave his evidence in a candid manner, making concessions where appropriate. He expressed deep and genuine regret for the position in which he found himself.

4 In a number of key respects, the witnesses for the Respondent were less credible and reliable. Some of the areas where this was most apparent are set out in the *Findings in Fact* section which follows.

Findings in Fact

5 The activities of the Respondent are well known. The Claimant was employed as an Operational Postal Grade ("**OPG**"). The function of an OPG is to deliver mail to customers in a designated area. The Claimant was based at the Respondent's Prestonpans office. The route latterly operated by him was predominantly rural. He had over 25 years service with the Respondent at the time of his dismissal.

6 Prior to the disciplinary process which led to his dismissal, the Claimant had not been the subject of any disciplinary proceedings.

7 The Claimant latterly reported to Mr Jordan Cree, the Delivery Office Manager for the Prestonpans office.

8 On Friday 2 October 2020, Mr Cree was on leave. Another manager, Mr Chris Hanratty, was deputising for him. A customer visited the office to make a complaint about the Claimant. The complaint was that the Claimant had removed a piece of chewing gum from his mouth and placed it on a gate lantern at the property. The incident was captured on CCTV footage which was e-mailed to Mr Hanratty along with a photograph and a written version of the complaint. The customer's email described the conduct as *"disgusting*". He indicated that he (and his wife) did not wish to make a huge fuss about it.

9 On his return to work the following Monday, 5 October 2020, Mr Cree asked the Claimant to have a word in his office. Prior to doing so, he reviewed the CCTV footage. The footage was not presented to the Tribunal but parties were in agreement that it showed the Claimant removing a piece of chewing gum from his mouth and placing it on the lamp as alleged. It also showed the Claimant driving his vehicle without attaching a seatbelt and revealed items of mail on the front passenger seat.

10 Mr Cree gave evidence that he conducted the meeting in accordance with the "*informal discussion*" provisions of the Respondent's conduct policy which is agreed between the Respondent and their recognised trade unions. The relevant section of the policy reads as follows:

"Informal Resolution

Informal resolution can help to resolve many minor conduct or behaviour issues before they become more serious. The right word, at the right time and in the right way, may be all that is needed to resolve the situation. Sometimes the employee may not be aware that their conduct or behaviour is unsatisfactory. Where the right word at the right time has not resulted in an improvement in conduct or behaviour, the manager can arrange to meet with the employee for an informal discussion. The purpose of an informal

discussion is for the manager and the employee to resolve the issue without needing to use the formal process. If any documents are used in the informal discussion, they should be shared at the start of the meeting. If the employee wishes they can meet with their union representative before meeting with their manager.

The manager should make the employee aware of the reason for the concern, the standards required and identify any steps that the employee or company may take to produce an immediate and sustained improvement. Before dealing with an issue informally the manager must decide that the matter can be dealt with informally assuming no further information comes to light.

Exceptionally, if during an informal discussion, it becomes clear that there are more serious issues, for example the employee admits to a more serious incident, the manager must stop the informal discussion and arrange a fact finding meeting. They must make it clear to the employee that they have the right to be represented at the fact finding meeting."

11 During the course of the meeting, the Claimant was asked a number of questions. Mr Cree was unsure as to whether he had taken a note of the meeting although a note appeared in the bundle.

12 The Claimant admitted to driving without a seatbelt. He admitted to leaving items of mail on his passenger seat. He denied having placed chewing gum on the customer's premises. Mr Cree gave evidence that the Claimant went on to react angrily and referred to taking action against the customer. The Claimant admitted that he had lied. At a later stage in the process, his union representative stated that he "*panicked*" and lied. The Claimant denied having suggested that he wished to take action against the customer. The Tribunal preferred his account. He pointed out that there was no obvious recourse and nothing could be gained from someone in his position creating an issue with a customer.

13 Mr Cree was unclear as to whether he had shown the CCTV footage to the Claimant or not. Logically, however, the Claimant would not have been in a position to deny the third allegation if he had seen footage which plainly revealed the conduct.

14 A dispute arose as to whether the Claimant was offered the right to have a union representative with him. The Tribunal preferred the evidence of the Claimant that he was not. There was no union representative on site and the meeting was not notified to the Claimant in advance.

15 Mr Cree did not comply with the terms of the policy in a number of material respects, despite having taken advice from the Respondent's ER department. He did not advise the Claimant that the meeting was an "*informal discussion*" under the conduct agreement. The Claimant was not given an opportunity to consult with his union representative before the meeting. None of the documentation (the customer complaint, the photograph or the CCTV footage) was shared with the Claimant.

16 Despite the fact that no exceptional circumstances arose (as envisaged in the policy), Mr Cree suspended the Claimant at the end of the meeting and arranged a fact finding meeting.

17 In his letter of suspension (which was reviewed by him periodically thereafter) the reason for the investigation is stated to be "*further investigations into an alleged incident where you have defaced a customer's property*". In a report prepared by Mr Cree to justify the precautionary suspension, he indicated that there was a genuine risk to mail integrity and the good image of the Respondent if the employee remained at work and that the investigation may be hampered if he did so.

18 In his oral evidence, Mr Cree gave conflicting reasons for his decision to suspend. He advised that there were risks to the employee's safety and those of others as well as risks to the health of the customer. The basis of this was not clear.

19 By undated letter from Mr Cree to the Claimant, the Claimant was invited to a fact finding interview which took place on 9 October 2020. In the letter, the allegations extended beyond defacing property to include: breaching health & safety regulations by not wearing a seatbelt; failing to secure the vehicle while attending a delivery point; and failing to secure mail in the vehicle. Mr Cree could not provide an explanation as to why the allegations went beyond those in the suspension correspondence despite his having authored them. He suggested that he was initially focussed on the chewing gum incident and only after reviewing the footage did he look at the other things. That is inconsistent with the evidence that all of the issues were raised with the Claimant at the first meeting.

20 Prior to the fact finding meeting, the Claimant and his union representative were shown the CCTV footage.

21 During the course of the meeting, the Claimant admitted all of the allegations including the placing of chewing gum on the customer's property. He described it as a stupid decision. He advised that he had done it on two occasions at most. He offered to apologise to the customer.

22 In relation to the other allegations, he admitted having a small bundle of mail in the front of his vehicle in rural locations. He also admitted that in rural parts, he did not always wear a seatbelt.

23 The Tribunal accepted the Claimant's evidence that it was common practice for him and for many others over many years, if not decades, to drive without seatbelts in certain situations at certain locations. It also accepted his evidence that this was well known within the management of the Respondent.

24 Following the meeting, Mr Cree passed the matter to his superior, Mr Christopher Barclay, Delivery Performance Manager, East of Scotland. Mr Barclay had previously been the Claimant's line manager at the Prestonpans office.

25 During his time as line manager, Mr Barclay heard a grievance raised by the Claimant about alleged bullying and harassment by another employee. The grievance was not upheld. The Claimant questioned Mr Barclay's impartiality as he was considered friendly with the other employee. Mr Barclay asked the Claimant not to question his integrity. As a result of this interaction, the Claimant was unhappy for Mr Barclay to be disciplining manager. He was advised by his trade union representative, however, not to raise the issue.

26 On 16 October 2020, Mr Barclay interviewed Mr Cree who confirmed his role in the process to date.

27 The Claimant was invited to attend a formal conduct interview (disciplinary hearing) by an undated letter in October 2020. The (then) three allegations against him were:

(1) placing chewing gum on a customer's property on 28 September 2020;

(2) driving a vehicle without a seatbelt on 28 September 2020; and

(3) failing to secure mail in his vehicle on 28 September 2020.

28 The letter stated that the notifications were being considered as gross misconduct, potentially justifying dismissal.

29 In his evidence, Mr Barclay confirmed that the first allegation would not on its own amount to gross misconduct. He said that the second two taken together could do so.

30 The formal conduct interview took place on 21 October 2020. The Claimant was accompanied by his trade union representative. During the course of the meeting, the Claimant again admitted each of the three allegations.

31 In relation to the first, he said he could give no reasonable excuse and that it was a mistake on his part.

32 In relation to the second allegation, the Claimant admitted that he did not always wear a seatbelt when in rural parts. It had never been identified as a problem before. He stated that Mr Cree had seen him leave the office with no seatbelt on in the past.

33 In relation to the third allegation, whilst he accepted leaving his vehicle door open when delivering mail, the Claimant stated that he felt the nature of the location – a gated community with a small number of large houses – did not pose a risk. He stated that he was only two yards away from the vehicle at the time.

34 In relation to vehicle security, the Claimant advised Mr Barclay of an incident where his van window was defective and would not close. Mr Cree permitted him to continue making deliveries despite the risk to the security of mail.

35 The Claimant's trade union representative put forward a number of points of mitigation. These included the Claimant's clean conduct record, his impeccable sickness record, the impact the matter was having on his health and the corrective, not punitive, nature of the code of conduct.

36 At the end of the meeting, the Claimant handed a number of character references from customers setting out support for the Claimant and characterising him in an exceptionally positive light. Mr Barclay elected not to read these. The reason he gave for not doing so was that the "*case was closed*".

37 He did not conduct any further investigations. In particular, he did not investigate the defence that more latitude was available in rural areas in matters such as seatbelt wearing and securing vehicles, he did not investigate the Claimant's allegation that Mr Cree had previously seen him not wearing a seatbelt, and he did not investigate the allegation that Mr Cree had previously allowed the Claimant to drive in an insecure vehicle.

38 At some point prior to Mr Barclay making his decision, the complaining customer withdrew the complaint. Mr Cree was aware of this but did not inform Mr Barclay.

39 Following conclusion of the disciplinary meeting, the Claimant wrote to Mr Barclay making further allegations to the effect that the practices for which he was being disciplined in allegations 2 and 3 were common and that no action had been taken. Although the correspondence is referred to in Mr Barclay's report, it was not in the bundle. The Claimant's solicitor produced the document during the course of the hearing. Although Mr Barclay disputed the authenticity of the document, it was consistent with the summary contained within his own report and the Tribunal accepted it as being genuine and added it to the bundle.

40 In it, the Claimant stated that the charges relating to the seatbelt and mail security were daily occurrences with probably 50% of staff doing this on a daily basis. He stated that he had witnessed this walking around his locality whilst suspended. He also stated that delivery drivers routinely left the Prestonpans office with parcels loaded in the front seat of vans, with the knowledge of managers. Mr Barclay did not investigate any of these issues further; nor did he comment on his own knowledge of those matters.

41 Mr Barclay produced a report with his findings. He initially suggested that the report was issued a few day later. He later accepted that it was sent two weeks later. There was no meaningful reason given for the delay.

42 Mr Barclay upheld all three of the allegations. In relation to the first allegation, he concluded that the Claimant's behaviour had been premeditated. This was not put to the Claimant during the disciplinary hearing. He also stated that he did not consider the Claimant's remorse to be genuine and referred to his initial denial. Mr Barclay accepted in his evidence, however, that the Claimant might well have taken a different approach if he had been shown the CCTV footage in advance.

43 In relation to the second allegation, driving without a seatbelt on 28 September 2020, this was upheld and was extended to refer to the Claimant's admission of doing so more regularly.

44 It was put to Mr Barclay during his evidence that there was "*give and take*" in rural areas. Mr Barclay said that that was not his recollection and that anyone caught doing the same things would have been dealt with in the same way. He described the issue of not wearing a seatbelt as coming up a lot. He was not, however, aware of anyone else being dismissed for doing so.

45 It was significant for Mr Barclay that not only had the Claimant breached policy by not wearing a seatbelt, but he had also (as he saw it) broken the law. He was unaware of an exception in the Highway Code for delivery drivers driving less than 50 metres which was put to him in cross-examination.

46 Likewise, allegation 3 was upheld and again referred to the Claimant's admission that he admitted leaving a small amount of mail in the front of his vehicle more regularly.

47 In the decision section of his report, Mr Barclay stated that he believed each of conduct notifications 1, 2 and 3 amounted to gross misconduct. That was in conflict with his oral evidence outlined above. He also stated that the Claimant had denied all of the allegations in his initial conversation. That is incorrect.

48 The Claimant was dismissed without notice. Mr Barclay took into account the Claimant's long length of service. Rather than consider it as something to encourage greater leniency, Mr Barclay felt that the length of service meant that the Clamant should have been more aware of the rules. He did not contemplate any lesser sanction.

49 The Claimant was offered the right of appeal which he exercised.

50 The appeal was heard by Mr Simon Walker, Independent Case Manager. His sole function is the conduct of investigations and appeals as part of the

Respondent's internal processes. Over the course of the past 15 years, he has conducted around 700 appeals.

51 He described his initial task as collating the relevant papers from an HR database and if the paperwork was not complete, he would look for missing papers. He did not, however, see, or request, the additional correspondence referred to in Mr Jordan's report.

52 By letter of 18 November 2020, the Claimant was invited to an appeal to take place on 1 December 2020.

53 By letter dated 21 November 2020, the Claimant outlined the points he wished to have considered at the appeal. He described himself as "*beyond apologetic*" for placing the chewing gum on the customer's property. Whilst he accepted that it was wrong, he denied that there had been damage to property.

54 He provided more information about the fault he said arose with the window of his van. He also repeated the suggestion that others within his depot left vans unattended without retribution. He criticised Mr Barclay's involvement in the case.

55 He attached to his letter a number of further character references from customers and a series of photographs of Royal Mail vehicles with packages visible on the front seats and a number showing unattended vehicles with doors left open, some on public streets.

56 An appeal hearing took place on 1 December 2020. The Claimant was again represented by a trade union representative.

57 Although Mr Walker described the appeal as a "re-hearing", the minutes reflect a more conventional approach whereby the Claimant's union representative set out the grounds of appeal and a number of questions were then posed by Mr Walker. During the course of the hearing, the Claimant's representative broadly reiterated the points previously raised. He also

pointed to the case of a colleague, Mr Fraser, who it was alleged left his van running with the door open without any disciplinary action being taken. During the course of the appeal, reference was made to the exemption in the Highway Code for delivery drivers.

58 Following the meeting, Mr Walker emailed a number of those involved in the earlier process posing questions relating to their involvement.

59 He asked Mr Cree to comment on the allegation that he had instructed the Claimant to use an insecure vehicle for a number of weeks. Mr Cree responded to the effect that the gap in the window was no more than one inch and that he had arranged to have the vehicle repaired. He stated that the fault existed for two days only.

60 Mr Walker conducted a telephone interview with the vehicle technician who had dealt with the fault. His account supported that of the Claimant in that it was the Claimant who approached him regarding the fault and that the window fell down substantially and would not go back up. He advised that the Claimant told him that it had been a problem for a while and that whenever he went over a bump the window would drop open.

61 In response to a question about the photographs produced by the Claimant, Mr Cree responded that he was completely unaware of any employees under his supervision working in that manner. In response to a question and inviting him to give his account of the issue concerning the Claimant's colleague, Mr Fraser, Mr Cree confirmed that he was made aware of the incident following a routine observation by Mr Hanratty. He had stated that to his recollection, Mr Fraser had left the van idling and had stepped out of the driver's seat to extract a parcel from the side door of the van and that he had never actually left the vehicle unattended.

62 In response to a question posed to Mr Hanratty on the incident concerning Mr Fraser, he stated that he had found the employee at the back door of his vehicle looking for a parcel with the keys still in the ignition. This had

happened during a routine inspection carried out by an inspector employed by the Respondent to check compliance with standards. Mr Fraser admitted that he had left the keys in the van with the doors unlocked. He confirmed that no formal action was taken and that he reported the findings to Mr Cree.

63 In response to a question as to the number of times the customer complained chewing gum had been placed on the lamp, Mr Hanratty responded that he could not recollect mention of a specific number of times other than it being alluded to as being more than once.

64 The further information gathered by Mr Walker was sent to the Claimant for his comments. By letter of 15 December 2020, he did so. Amongst other things, he disputed Mr Cree's account relating to the window defect. He referred to reserve drivers who had also required to drive the vehicle on his days off. He described highlighting the issue to Mr Cree on a number of occasions.

65 In relation to Mr Cree's statement that he was unaware of employees having parcels on the front seat of vans, he referred to other drivers who routinely loaded parcels in the front of their vehicles at the depot and drove off with Mr Cree's knowledge.

66 In relation to the doubt as to the genuineness of his remorse, the Claimant stated that he felt that that was an attack on his character. He described suffering with his mental health, having seen his doctor multiple times and having been prescribed medication.

67 By letter of 4 January 2021, Mr Walker confirmed to the Claimant that his appeal had been rejected and that his dismissal stood. He attached a report setting out his reasons.

68 Mr Walker commented on the initial discussion between the Claimant and Mr Cree and stated that he found it to be "*totally in accordance*" with the

approach to follow as set out in the conduct agreement. For the reasons outlined above, that is demonstrably not the case.

69 He found that there had been no disadvantage to the Claimant in presenting his case. How that accords with a failure to provide the key evidence to the Claimant before questioning him, is difficult to reconcile.

70 Unlike Mr Barclay, who relied heavily on the Claimant's initial denial as weighing heavily in his reason to dismiss, however, Mr Walker found that not to be material.

71 He stated a belief that the chewing gum issue was a "*deliberate act on [the Claimant's] part to cause anxiety and distress*". There is nothing in the paperwork to support any such conclusion, and the point was not raised with the Claimant.

72 In relation to the failure to wear a seatbelt, Mr Walker discounted the exemption in the Highway Code and discounted the possibility of a more relaxed approach being allowed in rural areas. He went on to find that the Claimant was putting himself at greater risk in a rural route as he would "*likely be travelling at higher speeds and for longer distances*". None of the allegations related to the Claimant travelling at higher speeds or for longer distances and the suggestion was never put to the Claimant.

73 In giving evidence, Mr Walker stated that he was aware of disciplinary cases involving employees who had not worn a seatbelt whilst on duty. He gave no evidence, and no other evidence was presented, that a breach of that nature had led to dismissal. He did nothing to investigate the Claimant's allegation that Mr Cree himself had seen him driving without a seatbelt but had taken no action at all.

74 In relation to the allegation of failure to secure mail, having considered the additional information submitted by the Claimant, Mr Walker concluded that there had been a wider failure to ensure adherence to the standards. He

recommended that the rules be communicated to all employees in the offices in question. He did not recommend any disciplinary action against the employees or Mr Cree for condoning the breaches. No disciplinary action was in fact taken.

75 He effectively discounted the third allegation in his deliberations about the Claimant. On being questioned as to whether the Claimant might also be right about relaxations of the rules about seatbelt driving, Mr Walker stated that he would have expected the Claimant to produce similar photographic evidence if it was available. When it was put to him that the Claimant might not wish to implicate colleagues, Mr Walker responded to the effect that he had done so in the other photographs. On reviewing them, however, it was clear that the Claimant had not taken photographs which identified any individual employee. Mr Walker did nothing to investigate that issue himself. He did not question Mr Cree; nor did he question Mr Barclay in relation to his time managing the Claimant's depot.

76 He pointed to "*massive*" reputational damage to the Respondent's organisation arising from the CCTV being placed on social media. No evidence was placed before the Tribunal of any outside party other than the customers themselves having access to the CCTV footage. The point was made by the Claimant that access to the footage required either a pin or a link. There was no evidence at all of any wider dissemination of the material or of any reputational damage. The character references suggested the contrary.

77 Mr Walker stated that he had given consideration to what he described as the "*glowing*" character references and the Claimant's length of service and clean conduct record. He concluded however that he had lost trust and confidence in the Claimant. He discounted lesser penalties.

78 In seeking to justify the difference in treatment between the Claimant and Mr Fraser, Mr Walker stated that the facts were different. In his evidence, Mr

Barclay stated that the position of Mr Fraser was less serious in that he was at the driver's side door of his vehicle when the keys were left in the ignition. That is not what was reported to him by Mr Hanratty, who said that he had been at the back of the vehicle with the keys left in the ignition. Mr Walker did not address that discrepancy. Even if the facts were different, Mr Fraser was in clear breach of the rules regarding vehicle and mail security, but the approach of the Respondent was to take no disciplinary action at all – an approach markedly different from that taken in relation to the Claimant.

79 Mr Walker did not look into the issues raised regarding the involvement of Mr Barclay. In cross-examination, he merely stated that it had been a substantial time ago.

80 Findings as they relate to remedy are set out in the *Remedy* section which follows.

Applicable Law

81 The law relating to unfair dismissal is set out in the Employment Rights Act 1996 ("**ERA**"). Section 98(1) states:

"*In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show -*

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

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

82 Section 98(2) sets out that a reason falls within this subsection if (inter alia) it-

(b) relates to the conduct of the employee

83 Section 98(4) states:

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

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

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

84 This determination includes a consideration of the procedure carried out prior to the dismissal and an assessment as to whether or not that procedure was fair.

85 In circumstances where the reason for dismissal is conduct in terms of Section 98(2)(b), what has to be assessed is whether the employer acted reasonably in treating the misconduct that he believed to have taken place as a reason for dismissal.

86 ***British Home Stores v Burchell [1978] IRLR 379***, sets out the questions to be addressed by the Tribunal when considering reasonableness as follows:

i. whether the respondent genuinely believed the individual to be guilty of misconduct;

ii. whether the respondent had reasonable grounds for believing the individual was guilty of that misconduct; and

iii. whether, when it formed that belief on those grounds, it had carried out as much investigation as was reasonable in the circumstances.

87 Tribunals must not substitute their own view for the view of the employer (***Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23*** and ***London Ambulance Service NHS Trust v Small [2009] IRLR 563***) and must not consider an employer to have acted unreasonably merely because the Tribunal would not have acted in the same way.

88 Following ***Iceland Frozen Foods Ltd v Jones 1983 ICR 17*** the Tribunal should consider the "band of reasonable responses" to a situation and consider whether the Respondent's decision to dismiss, including any procedure prior to the dismissal, falls within the band of reasonable responses for an employer to make. The importance of the band of reasonable responses was emphasised in ***Post Office v Foley [2000] IRLR 827***.

Submissions

89 Ms Meek and Ms Macara helpfully produced written submissions. Both set out proposed findings in fact. Both agreed with the broad legal principles to be applied.

90 On behalf of the Respondent, Ms Meek invited the Tribunal to find that the reason for dismissal was conduct in accordance with s98 of ERA.

91 In terms of Section 98(4) of ERA she submitted that the Respondent had a genuine belief, that its grounds for that belief were reasonable and that the investigation conducted was reasonable. She referred to ***Sainsbury's Supermarket Ltd*** as a reminder that the band of reasonable responses test applies to the conduct of investigations. She pointed to what she described as a fresh and independent appeal helping to ensure neutrality.

92 She referred to ***Shrestha v Genesis Housing Association Ltd [2015] EWCA Civ 94*** in support of the proposition that an employer is not required to extensively investigate each line of defence advanced by an employee.

93 She went on to submit that the dismissal fell within the band of reasonable responses citing well known authorities.

94 She argued that the conduct of the Claimant amounted to gross misconduct and that what she described as a deliberate disregard of health & safety procedures was a grave offence in accordance with the Respondent's procedures.

95 So far as consistency was concerned, Ms Meek submitted that the incident regarding Mr Fraser was not truly parallel and as such not relevant for consideration.

96 In terms of proportionality, she submitted that the length of service of the employee, whilst long, was not untypical in the Respondent's business.

97 In terms of procedural fairness, Ms Meek submitted that the procedure followed was one which was compliant both with the Respondent's conduct policy and the ACAS Code of Practice. In the event that any defects did exist, she submitted that the appeal was sufficient to cure those (***Taylor v OCS Group Ltd [2006] IRLR 613***).

98 On behalf of the Claimant, Ms Macara did not suggest that the dismissal was other than for conduct. She submitted, however, that there were no reasonable grounds on which the Respondent could base a reasonable belief that the Claimant was guilty of misconduct. She pointed to what she submitted were deficiencies in the investigation, highlighting Mr Cree's initial investigation as tainting the whole process.

99 In terms of the band of reasonable responses, Ms Macara submitted that the decision to dismiss fell outwith that band. As part of her analysis, she submitted that the conduct on behalf of the Claimant could not be described as gross misconduct justifying dismissal. She referred to the terms of the Respondent's conduct policy in the absence of any express reference to any of the specific acts in this case. She pointed to the custom and practice

relating to the wearing of seatbelts and a range of inconsistencies in the Respondent's findings. She submitted that, in light of Mr Walker's appeal, the allegation of leaving the vehicle insecure effectively fell away.

100 In relation to length of service, Ms Macara submitted that the managers involved did not properly consider this or the Claimant's clean record contrary to the requirement to do so (***Trust House Forte (Catering) Ltd v Adonis [1984] IRLR 382*** and the ACAS Code of Practice). She submitted that there were other failures to consider relevant matters including the character references submitted by the Claimant.

101 Ms Macara referred to a number of authorities which deal with the question as to whether a single breach will amount to a fair dismissal. In this regard, she appeared to accept that the placing of the chewing gum on the customer's property was misconduct (albeit not gross misconduct) and relied on the authorities to argue that that single breach could not amount to a fair dismissal.

102 Ms Macara also submitted that the involvement of Mr Barclay in the process gave rise to bias. She referred to well known authorities in this context. For an organisation the size of the Respondent, she argued it would have been appropriate to appoint another manager. She submitted that the appeal was not sufficient to overcome that. She criticised the references to bringing the Respondent into disrepute in circumstances where that had not actually happened.

103 In terms of procedural fairness, she submitted that there were procedural flaws in both the fact finding and conduct hearing stages which were not cured by the appeal.

Decision

104 In terms of the reason for the Claimant's dismissal, the Tribunal was satisfied that the reason was conduct in accordance with Section 98(2)(b) of ERA. This was not disputed.

105 Turning to the question of fairness in accordance with Section 98(4), the Tribunal first considered whether in respect of the allegations, the Respondent had a reasonable belief based upon reasonable grounds of the guilt of the Claimant of the misconduct.

106 Leaving aside the question as to whether the allegations amounted to misconduct (or misconduct such as to justify dismissal), it is clear that in respect of each of the allegations, there was clear evidence in the form of CCTV imagery and in respect of all allegations, there was an admission from the Claimant - from an early stage in relation to the first and from the outset in relation to the remaining two.

107 The reasonableness of the grounds is, however, tarnished by the way in which the matter was investigated and the procedures adopted. The Tribunal found the Respondent's investigation to be materially inadequate in a number of respects.

108 The initial investigation by Mr Cree, aside from being materially in breach of the Respondent's own policy (as outlined above), was instigated at a level within the Respondent's conduct policy which suggests an informal resolution unless material evidence comes to light. No new material evidence came to light yet the case moved to the formal fact finding procedure. The suspension letters prepared by Mr Cree referred only to the first allegation. The Tribunal found this to be strongly indicative of his view that the other two allegations were not sufficiently serious to warrant formal disciplinary proceedings. That was in effect the finding at the appeal stage in relation to the third allegation – not arising from the investigations of the Respondent but the material

produced by the Claimant – showing breaches of vehicle and mail security similar to and in some respects worse than his own.

109 Mr Cree was not able to give an explanation as to why the allegations changed to include the second and third. For him to conduct that investigation, however, in circumstances where he knew of and condoned the behaviour in question, and had not in the past treated the behaviour as requiring any disciplinary penalty, was deeply prejudicial to the Claimant.

110 Mr Cree also behaved in a wholly unreasonable manner in failing to show the available evidence to the Claimant before questioning him, failing to alert him to the fact that he was being questioned in an informal disciplinary context, and in failing to disclose to the Respondent's decision makers that the customer complaint had been withdrawn.

111 It was clear from Mr Cree's evidence (and the evidence of Mr Barclay) that the first allegation would not of itself amount to gross misconduct or justify dismissal. For Mr Cree to nonetheless determine that he should pass the matter to a manager with the authority to dismiss, involving the second and third allegations in these circumstances, demonstrates a significant lack of consistency or objectivity on his part.

112 Material inadequacies in the investigation continued during the disciplinary hearing stage of the process. In his defence to allegations 2 and 3, the Claimant repeated and elaborated upon his position that the acts in question were in fact common practice, were known to management, and had been practiced by him and many other for years if not decades. That Mr Barclay chose not to investigate those allegations (or recognise them from his own knowlede) was a material omission. Having previously managed the Claimant and his colleagues, Mr Barclay ought also to have been in a position to know that what the Claimant said was true. Instead, he failed to address the issue at all.

113 Mr Barclay also failed to take account of the exceptionally positive references produced by the Claimant. His position that the matter was closed immediately following the conduct hearing shows either a closed mind or a misunderstanding as to the ongoing investigatory nature of a disciplinary process.

114 Even if Mr Barclay had not been himself aware of the practices alleged by the Claimant, his failure to investigate them significantly undermined the process. Had he done so, he would at least have identified that the practice in allegation 3 was widespread. In relation to allegation 2, the Claimant specifically stated that Mr Cree had seen him driving without a seatbelt and had done nothing. He stated that it was and had been common practice for many postal workers and had been for many years. Had Mr Barclay investigated that point, the Tribunal is satisfied that the Claimant's account would, again, have been established as correct, meaning that a reasonable employer would have required to treat allegation 2 in the same way as allegation 3 and discount it.

115 The inadequacy of the investigations that related to the second and third allegations is particularly relevant given Mr Barclay's evidence that he would not have dismissed on the basis of allegation 1 alone and that only allegations 2 and 3 brought the matter into the territory of gross misconduct potentially justifying dismissal.

116 Turning to the appeal, the Respondent has in place a mechanism for expertly qualified individuals, removed from the individuals concerned, to try to ensure impartiality. In this case, however, the material deficiencies in the investigation extended to the involvement of Mr Walker as well.

117 In fairness to him, he did conduct some further investigations prior to reaching his decision, but his approach, in sending questions by email and receiving written responses was, at best cursory. This is particularly so in relation to his communications with Mr Cree about his knowledge of the matters in

allegations 2 and 3 being common practice. Mr Walker appeared to accept Mr Cree's broad denial even in circumstances where evidence to the contrary was produced by the Claimant. The Tribunal would have expected a senior manager in his position to thank the Claimant for bringing such an issue to his attention. Instead, it led to his somewhat grudging discounting of the third allegation. In relation to the second, Mr Walker took no steps to ascertain whether the Claimant was correct about a relaxed approach to this issue. He did not appear to identify the potential conflict between Mr Cree and Mr Barclay who had allowed the practices to continue unchallenged.

118 His suggestion that it would have been for the Claimant to produce photographic evidence of colleagues not wearing seatbelts was an extraordinary approach for a professionally qualified investigator to take. The Respondent employs inspectors to check on such matters.

119 Moreover, no evidence whatsoever was presented that any other employee of the Respondent has been dismissed simply for a failure to wear a seatbelt. Given that all witnesses accepted that it was something which came up regularly, that is noteworthy.

120 Mr Walker did little to investigate the Claimant's suggestion that there had previously been bad blood between him and Mr Barclay following his raising of a grievance. In light of the further material which came to light, a reasonable employer might have been expected to explore the question of potential impartiality more thoroughly.

121 The failures in the investigation process are in themselves sufficient to render the dismissal unfair. They also call into question the reasonableness of the grounds upon which the Respondent was able to sustain a belief that, in relation to allegations 2 and 3, there was guilt at all. An employer who puts in place rules but chooses, with management approval, not to apply them over lengthy periods of time, cannot at the same time reasonably believe that a breach of those rules constitutes guilt of misconduct.

122 The processes adopted by the Respondent also give rise to procedural unfairness as set out in the findings in fact. The initial meeting with the Claimant breached several elements of the Respondent's own policy. The withholding of information and the failure to consider highly relevant material also strike at procedural unfairness, as does and the failure to consider the approach taken in comparable cases/circumstances. The Tribunal was also concerned about (largely unexplained) delays in the process in circumstances where the Claimant gave evidence that his mental health was suffering as a result of the suspension.

123 These are not the actions of a reasonable employer in the circumstances, particularly one with the administrative resources of the Respondent.

124 It follows that the Tribunal found dismissal to have been outside the range of reasonable responses. It was accepted that the first allegation would not justify dismissal. The third was effectively abandoned and the second, had it been reasonably investigated, would require similarly to have been abandoned.

125 Even if there had been sufficient material to consider dismissal as an option, the Respondent took a quite capricious approach to the length of service of the Claimant. Mr Cree and Mr Barclay gave evidence to the effect that the Claimant should be treated more harshly given that with his length of service he should have known the rules.

126 Leaving aside the conclusion that the rules as applied were quite different from those written, to dismiss, for a first offence, an employee with a clean record and 25 years service, should not have been approached with that mind-set.

127 The Tribunal considered whether the appeal "cured" any earlier procedural failings. On the contrary, for the reasons outlined, the appeal stage entrenched and added to the procedural unfairness rather than correcting it.

This is particularly so in the broadening of the allegations to include driving without a seatbelt at high speeds and the question of reputational damage.

128 In all the circumstances, the Tribunal found the dismissal to be unfair.

Remedy

129 Ms Meek and Ms Macara made submissions on remedy. The underlying figures in the schedule of loss were helpfully agreed by them.

130 Ms Meek argued that the Claimant had produced inadequate evidence to show mitigation of loss. In particular, he accepted another job which was not of a commensurate salary. She also invited the Tribunal to make reductions in respect of ***Polkey*** and contributory conduct.

131 For the Claimant, Ms Macara urged the Tribunal not make any reductions in respect of ***Polkey*** or contribution and argued that the Claimant had, given his age and circumstances, made sufficient efforts to mitigate his loss. She also sought uplift for what she presented as breaches of the ACAS Code of Practice.

Basic Award

132 The Claimant was 59 at the date of dismissal. He had 25 years continuous service. His gross weekly pay was £481.45. His basic award is accordingly £13,962.05.

Compensatory Award

133 The Claimant's net pay was £343.65. He received weekly pension contributions of £7.33 and received an annual Christmas bonus of £100 as well as another £100 bonus.

134 The Claimant's loss of earnings from the date of dismissal to the first day of the hearing was £18,900.75.

135 He commenced new employment on 2 March 2021. The net weekly wage in his new role is £270.10. He also secured extra income of £510. Taking into account loss of pension contributions, loss of bonus and loss of statutory rights (£300), the actual loss of earnings amount to £9,030.10.

136 The Claimant sought future losses for a further 30 weeks amounting to £2,426.40.

137 In considering whether there had been sufficient efforts to mitigate loss, the Clamant was quite candid in his evidence that having started his new job, the nature of the work and the working pattern suit him and he has no intention of seeking a higher paid role. It was put to him that he ought to have applied for other delivery jobs (of which there were many at the time). The Tribunal had some sympathy with his response that his health had suffered and he wished to move in a different direction. The Tribunal was, therefore, satisfied that loss of earnings should be awarded to the date of the hearing but declined to award any future earnings on the basis that the Claimant has elected not to pursue higher paid work in circumstances where some time has passed since his dismissal from the Respondent.

138 The Tribunal was not satisfied that any ***Polkey*** reduction should be applied. The dismissal in this case was unfair for very much more than simply procedural reasons.

139 In terms of contribution, it is clear that the Claimant did wrong, by his own admission, and he was quite candid that he would have accepted some disciplinary sanction short of dismissal for allegation 1. On the other hand, the position of the Respondent was that that allegation would not justify dismissal. Given the findings on allegations 2 and 3, any reduction must, therefore, be at the lower end and the Tribunal considered a reduction of 25% to be appropriate. As such the basic award is reduced to £10,471.53 and the compensatory award is reduced to £6,772.58.

140 There being no breach of the ACAS code, no uplift is awarded.

141 The Claimant having received Jobseeker's Allowance, the Recoupment Regulations apply to the compensatory award. The monetary award exceeds the prescribed element by £10,471.53 and this sum is payable immediately. The Respondent is referred to the Annex to this Judgment regarding the operation of the Recoupment Regulations.

142 In conclusion, the Tribunal would like to thank the parties' solicitors for their assistance and the diligence with which they presented the cases of their respective clients.

Employment Judge: Ronald Mackay
Date of Judgment: 23 February 2022
Entered in register: 28 February 2022
and copied to parties