EMPLOYMENT TRIBUNALS

Claimant: Mr W Mortey

Respondent: DPD Group UK Ltd

Heard at: Croydon (by CVP video) **On:** 19 January 2022 and 1 February 2022

Before: Employment Judge Parkin

Representation
Claimant: Ms E Godwins, Employment Consultant
Respondent: Mr J Gidney, Counsel

RESERVED JUDGMENT

The Judgment of the Tribunal is that:

1. The claimant was unfairly dismissed by the respondent;

2. No reduction of compensation is made under the Polkey principle;

3. The claimant contributed towards his own dismissal to the extent of 70%;

4. It is just and equitable to increase the award of compensation to the claimant by 15% for non-compliance by the respondent with the ACAS Code of Practice pursuant to section 207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 ;

5. No reduction of compensation is made for non-compliance by the claimant with the ACAS Code of Practice pursuant to section 207A(3) of the Trade Union and Labour Relations (Consolidation) Act 1992; and

6. Determination of remedy is adjourned to 13 July 2022, to be held by video hearing.

REASONS

1. The claim and response

1.1 By his claim form dated 11 July 2019, the claimant claimed unfair dismissal from his position of depot operative with the respondent. Although he stated he was dismissed on 4 January 2019, that was the date of his suspension from work and his dismissal was effective on 21 or 25 March 2019. In a lengthy content in his

ET1 form, he maintained he had been unfairly suspended and then dismissed in circumstances where he was accused of theft for having taken food from a parcel not collected by the customer, which was a regular practice approved by a number of managers whom he named.

1.2 The respondent denied unfair dismissal in its ET3 response presented on 26 September 2019. It admitted summarily dismissing the claimant on 21 March 2019, which it contended was for gross misconduct in removing food items from its warehouse premises without permission in circumstances where he had received training on the proper process of disposal of uncollected food items. The respondent contended this approach was consistent with other cases, citing another employee being dismissed for the same reason on 17 May 2019.

2. The hearing

2.1 The hearing started late on 19 January 2022 through listing and administrative difficulties. The Tribunal was provided with an agreed bundle of documents (1-222), a short piece of CCTV footage to view, an agreed list of issues, the respondent's chronology and cast list and written skeleton arguments/submissions from both sides. Only the respondent's evidence, from its first witness Mr. Gary Burgess, General Manager for London South depot, was heard and the hearing was adjourned part-heard for a second day.

2.2 Ahead of the second day of hearing, there was additional disclosure of documents made by the respondent in connection with the eventual dismissal of the colleague BO (R1, R2, R3 and R4) and then by the claimant (C1-17) responding to and widening the disclosure of documents relating to the colleague. Although the claimant had initially contended that Mr. Burgess (who was not immediately available on the second day) should be recalled to deal with the content of the respondent's additional disclosure, the Tribunal directed that such matters could be dealt with in oral submissions. On the second day the appeal manager Mr. John Cameron, Regional Manager of a neighbouring region, and the claimant himself gave evidence.

2.3 The long delay between the incident which led to the claimant's dismissal, that dismissal, the commencement of proceedings and this hearing did not assist the Tribunal, notwithstanding the available documentary evidence. The Tribunal had no doubt that the passage of time meant that witnesses had misremembered or embellished their version of events when giving evidence and it did not find either Mr. Burgess or the claimant entirely reliable in their evidence. For instance, it could not accept that if Mr. Burgess (a hugely experienced manager in HR processes) had spoken with the Shift Managers RC and DL prior to reaching his decision to dismiss, he would not have questioned them formally or at least recorded fully their replies. In the claimant's case, notwithstanding the openness of his actions in front of the CCTV camera, there was an initial failure to mention and highlight the role of SO-E (seen with him on the CCTV footage), and his self-justification that others were doing what he did and his desire not to throw food to waste strongly suggested someone who knew he was doing wrong.

3. The Issues

The parties had agreed the following issues:

3.1 Was the claimant dismissed for a potentially fair reason within section 98(1) and (2) of the Employment Rights Act 1996?
3.2 Was a fair process followed when reaching the decision to dismiss the claimant.
3.3 Was the decision to dismiss within the range of reasonable responses.
3.4 Did the respondent follow the ACAS Code of Practice on Disciplinary and Grievance Procedures.
3.5 If the dismissal was unfair owing to procedural defects would the claimant have been dismissed fairly in any event had a proper process been followed (Polkey), and
3.6 If the dismissal was unfair, did the claimant's conduct contribute to his dismissal? If so, to what degree?

It was agreed the Tribunal would hear evidence and submissions relating to Polkey and contributory conduct as well as liability initially. On the second day, the Tribunal also agreed to deal with any question of reduction of compensation for the claimant for not having followed the ACAS Code, having reserved its initial judgment on all these matters at the end of the afternoon. A provisional date for determination of remedy was listed on 13 July 2022.

4. The facts

From the oral and documentary evidence the Tribunal made the following findings of fact on the balance of probabilities. The names of employees, other than the investigating and disciplinary managers and the claimant's representative, have been initialised.

4.1 The respondent is a major international and national parcel delivery company, with 12,000 employees in the UK and substantial HR support for its managers and workforce.

4.2 The claimant commenced employment with the respondent or its associated company on 5 September 1994 as a Shift Operations Manager. He was based at the London South depot with some 100 employees, where the respondent sorted and sent out parcels from. At some stage he was demoted to the role of depot operative; otherwise, by 2018, he had a completely clean disciplinary record as well as his long service in the business and worked the PM shift from 1pm to 9 or 10pm.

4.3 He had a contractual Disciplinary Procedure contained in the respondent's 1 May 2014 collective agreement with Unite the Union (148-156). Examples of gross misconduct, for which it was said summary dismissal would follow, started with theft and attempted theft (153). Suspension without pay was also provided for in cases of alleged theft. In cases of dismissal (including summary dismissal), demotion and medical retirement, two stages of appeal were provided (155).

4.4 As well as the disciplinary procedure, managers were given detailed stage-by-stage guidance on the implementation of the Grievance and Disciplinary procedures, including about the initial investigation of an alleged disciplinary offence, the material to be provided to the employee before a disciplinary hearing, template letters etc., updated in May 2016 (157-222).

That guidance included:

> 7. Disciplinary action - the investigation process (168)
>
> 7.1 What is the purpose of the investigation?
> The investigation procedure is the key element of the disciplinary procedure. It is vital that the investigation is carried out quickly and thoroughly in order that the full facts of the alleged incident can be established…
>
> 7.2 What form should the investigation take?
> The nature and structure of the investigation will depend on the circumstances of the case and the nature of any alleged offence. The investigation may include (but is not limited to) any of the following:
> - interviews with witnesses and ALL parties who are involved with or witnesses of the alleged incident- including the individual under investigation- including the taking of (signed) statements
> - obtaining evidence from CCTV, photographic evidence etc…
>
> 7.4 Principles of a fair and thorough investigation
> … there are no specified time scales for different steps within the investigation or disciplinary procedure. However, the general rule is that there should be no undo delay. Statements should be taken from witnesses at the earliest opportunity…
>
> 7.5 Interviewing Witnesses and taking statements
>
> Employed witnesses
>
> "Wherever possible the Investigating Officer should arrange to meet personally with the witness(es) to the alleged incident. S/he should ask the witness to recount the detail and events in their own words in terms of what they personally witnessed or had involvement with. It is important that the investigating officer does not put words in the mouth of the witness
>
> The Individual(s) subject to investigation
>
> An investigation cannot be considered thorough if all parties have not been spoken to and all sides of the story have not been considered before a decision is taken whether to proceed to a disciplinary hearing…
>
> "7.6 Concluding the investigation
>
> "… copies of all evidence and any documentation that will form part of the case considered the hearing, including the Investigation Report should also be provided to the employee who will be subject to the hearing…"

4.5 From 25 January 2016, the respondent began to make fresh food deliveries for the first time. From small beginnings, this part of their business grew to be a substantial proportion of the daily deliveries with at least three food supply companies using them regularly. A proportion of the food parcels would not be delivered but returned to the depot, possibly to be collected by the customer later in the day.

4.6 On 19 January 2016, the claimant was trained on both RO-12 and HS12 procedures by his then Shift Manager, TJ. Although the RO-12 Food Account Parcels document (139-141B) was the Roll Out Summary brief for the Trainer, that was what the claimant was trained on. The training was expected to take 30 minutes; in his oral evidence and the claimant stated that he remembered this training. RO-12 included:

> "DPD will start to carry food consignments for selected customers from the 25 January 2016.
> Due to the nature of these parcels, they MUST be delivered or collected by the recipient on the first day or else be disposed of by the depot."

The training stressed that any food parcels which were not delivered on the first day must be segregated into a designated area of the depot ready for potential collection by the recipient on the same day or else disposed of by the depot. The parcel was to be retained at the depot in the designated area until after the depot's "customer collect" closing time, but then disposed of by removal from the designated area, being placed in a clear refuse bag then sealed and placed in the general waste skip (139-141B).

The claimant was not re-trained subsequently on RO-12 and there were no notices drawing attention to this bagging and disposal in the general waste skip procedure which was specific to food parcels with perishable contents. The customer collect closing time was 8.30 or 9pm, not long before the claimant finished work.

4.7 The RO-12 document cross-referred to HS12 - Control of suspect packages and spillages at depots. HS12 was a specific health and safety document which the claimant was retrained in on 22 March 2017 and then on 15 March 2018. Although the HS12 document was updated in December 2018, there is no evidence that the new fuller version was shared with the claimant and his colleagues or they were trained in it; the Tribunal finds on the balance of probabilities that the claimant was not trained in it. The earlier version (136-138) appears to deal only with spillages, including to food products. Only the later version, dated December 2018 (138A at 138C) includes disposal of undelivered items, in similar though not identical terms to RO-12: "All undelivered food parcels must be disposed of by placing whole parcel into a clear plastic bag, sealing it and putting it to designated food bin".

4.8 On 21 December 2018 at 9.38pm an incident involving the claimant was filmed on CCTV in the Goods on Hold (GOH) area at the depot. However, the footage was not viewed at the time.

4.9 The footage was viewed on 4 January 2019 and the claimant's involvement observed. He was swiftly suspended without pay pending investigation of an alleged theft; this was confirmed in writing on 8 January 2019 (60). His PM Shift Manager RC was notified about the suspension promptly and the AM Shift Manager DL would have know soon after.

4.10 The footage of 1 minute 39 seconds showed the claimant speaking with another worker, SO-E (the second in command to the Shift Operations Manager and senior to the claimant) who was seen for the first 21 seconds. The claimant

appeared to record details on a hand-held device handed to him by the other man, then to open fully a food parcel and take out some items, leave the area and then return with a supermarket carrier bag, which he put items into before leaving completely. These actions appeared to done openly in full view of the camera. Early in the footage, the claimant was standing in front of the food parcel in question close to SO-E with the food parcel apparently already partially opened up.

4.11 On 8 January 2019, the respondent sent the claimant a letter confirming his suspension for alleged theft and calling him to an investigation interview on 11 January.

4.12 The interview on 11 January was with Reg Barzey, the depot Quality Manager. It lasted an hour, with Mr Barzey's record at (61-64). The claimant was shown the CCTV footage and immediately acknowledged that he had taken the items away from the depot, asking to see "the DPD Policy Return Food Items". Mr Barzey showed the claimant a copy of the HS12 policy online and later printed a copy off for the claimant. The claimant did not deny taking food, but immediately claimed to have been given permission by TJ (ie his original training manager), RC his current Shift Manager and to be doing it with RC and done with knowledge of DL (another Shift Manager) who had also shared food from parcels and he identified other colleagues who had done so. He named KT (supervisor), BO and M (other operatives) as other employees who had "helped themselves" and said drivers who worked weekends reported to him it was happening then. He stated that he was given permission by his shift managers on a regular basis. He fully accepted that he had taken the food off site, but did not see it as theft because RC had given him permission previously. When it was put to him that the food belonged to the customer not the respondent, he disputed this saying the customer had said they didn't want it.

4.13 Mr Barzey did not question the claimant about nor did he interview SO-E, the second-in-command seen in the CCTV footage. Instead, he had put to the claimant inaccurately when challenging him about taking food from a customer's parcel and removing it off site "We have been doing that occasionally", the point: "We? There is only one person in this video? Yes?" (63). Although on Mr Barzey's record of interview, the claimant replied "Yes" to this, this was not an accurate reply since SO-E was there for the first 21 seconds.

4.14 The claimant recorded the investigatory interview with permission from Mr Barzey and later disputed the accuracy of the notes Mr Barzey provided.

4.15 Mr Barzey followed up the interview with the claimant with brief emails to the managers RC and DL, headed William Mortey - Investigation. He did not seek face-to-face interviews with these shift managers. RC had been notified at once about the claimant's suspension and both managers would have been fully aware of the fact and circumstances of it. On 14 January, he wrote to RC (65):

> "Good afternoon R, as you are aware William is currently on suspension for tampering with and removing goods from a food parcel. During the investigation meeting held Friday last William categorically stated that he was given permission to do so, not on this occasion but on previous occasions and this practise is considered the norm on the pm shift.

> With this in mind I need to ask you: have you ever given William Mortey permission to take food from any food parcels that have not been delivered? Your answer will form part of the ongoing investigation so a prompt response is needed as we cannot progress without your comments..."

RC replied by email:

> "I feel that he is not happy about the situation he is currently in and is trying to bring more people down with. The food parcel process has always been to dispose of in the bins. I have not given William permission on this or any other occasion to take food parcel contents home. My staff are aware of the procedure regarding food parcels and are instructed to dispose of." (65)

4.16 Mr Barzey sent the same email to DL, receiving a short email in reply:

> "Hi Reg I have never given William permission to take any food from any food parcel while managing the PM shift" (66).

4.17 On 15 January 2019 (67-69) Mr Barzey finalised his Investigation Report which he had started to compile on 11 January. The Summary of Findings, accompanying his recommendation to proceed to disciplinary hearing was:

> William has admitted to opening the food parcel and taking the food off site although on each time that he was challenged he emphasised that this was done with permission. William does admit that no permission was sought on the occasion in question.
> The persons mentioned who have supposedly given their permission for this to happen will have to be spoken to before any progress is made towards the next stage. Email sent to RC Present SM and DL (Previous SM) and their responses will be included in this investigation,
> William seemed more intent on incriminating his colleagues rather than defending himself as he named a number of staff who had either given him permission or had partaken in similar activity. Persons mentioned will have to be interviewed but those interviews will not form part of this investigation.
> William has also been signed off on our HS12 which clearly states that food parcels must be destroyed if not delivered so he is aware of the company stance.
> In my opinion William is aware that his actions are contrary to company policy and is happy to defend this with the fact that he "has been given permission" and that certain other individuals are "doing it too".

However, it was not the case that HS12 clearly stated that food parcels must be destroyed. The version of HS12 the claimant had been trained in did not include this detail (which was only added in December 2018).

4.18 On 16 January 2019 Mr Barzey wrote to the claimant enclosing his set of notes from the interview. He did not spell out that the claimant had the opportunity of amending the notes:

> "…Before we can progress this matter I need you to read and agree the attached meeting notes. Once read and signed please return to Gary Burgess at London South… Once you have returned your signed copy of the notes I will write you again to confirm the next stage (70).

4.19 On 22 January 2019, the claimant replied but refused to sign Mr Barzey's notes of the meeting as he challenged their accuracy (71)

4.20 The claimant was called to a disciplinary meeting by letter dated 28 January 2019 from Mr. Burgess, in connection with an alleged incident of theft. The letter stated that copies of all evidence to be considered during the hearing were enclosed, listing only the investigation interview minute (which, Mr. Burgess wrote, were unsigned on account of the claimant not accepting their content). It was made clear that sanction up to and including summary dismissal might result. (72)

4.21 On 4 February 2019, the claimant attended the disciplinary interview with Gary Burgess, accompanied by his trade union representative Karl Williams. Barry Kingsland from the respondent's HR team took notes (77-80). Although a hugely experienced manager especially in HR matters including disciplinary hearings, Mr Burgess was relatively new as the depot's General Manager, having then only been with the respondent about 6 months. At this stage, no one other than the claimant had been interviewed; TJ (the original Shift and Training Manager) had the business, as had M.

4.22 At the start of the hearing the claimant offered to play his recording of the investigatory meeting to establish where the notes provided by Mr Barzey were inaccurate. Mr. Burgess declined this saying it was up to the claimant to point to where the notes were inaccurate and he sought to do so at the disciplinary hearing, taking Mr Burgess to his notes of additions made from his own recordings such as that RC was doing it when TJ was manager and when boxes were taken to DL's office they came back open and lighter, with the contents tampered with. The claimant said he told RC that day which customers wanted their food parcels. he said that they could handle one, two or four food parcels on a busy day. In answer to the question: "How many would you open and take the contents off or is this a one off?", he replied "It depends, sometimes we open it sometimes we don't", explaining that we meant RC and DL. The claimant expressly said to Mr. Burgess that he did not see taking the food as theft. He distinguished between a phone delivery and delivery of food which was perishable and maintained he had telephoned the customer who said she did not want the food. When Mr Burgess put it to him that he had not told Mr Barzey this, the claimant disputed this, saying it was in the recording. Mr Burgess explained that the two shift managers had denied by email having given permission. The claimant maintained that there was a culture and questioned why he would do it when being watched and with CCTV if it was not the regular culture. He asked whether BO and KT would be interviewed. Mr. Burgess confirmed he would speak to BO but explained that KT was currently off work sick. Mr. Williams suggested that managers would stick together for fear of getting into trouble with senior management. He contended it sounded like a culture and the items would have ended up on the skip as they were not destined for the customer.

4.23 At the hearing, there was no reference to RO-12, only to HS12. The claimant's representative Mr Williams pointed out there were different versions of HS12 and provided a copy of HS12 (in a version which did not deal with undelivered/uncollected food parcels) (136-138) and made clear the 15 December 2018 version had not been signed for at the depot. At the end of the hearing, Mr. Burgess explained that he would seek to expedite the case without compromising on the thoroughness of the investigation.

4.24 When Mr. Burgess provided the claimant with a set of notes from the hearing, the claimant again challenged the content of those notes based upon his recording pointing out a series of omissions especially in respect of Karl Williams referring to different versions of the HS12 policy.

4.25 On 7 February 2019, Gary Burgess interviewed BO (94) and (95). The notes of interview were not in the same format as other interview statements. Nor do the typed notes replicate exactly the content of Mr Burgess's handwritten notes. BO said he had taken food in the past but could not recall times and dates, stating this had first started in 2016 when TJ was shift manager and the food contract first came in. The practice of taking food was happening as late as 21 December 2018 and management had given permission to take food, although he could not quantify what and when. Nobody had taken food without authorisation and it was not only on the PM shift. DL was not keen on doing it but had sometimes allowed it, RC had also given permission and had taken food parcels before.

4.26 On 20 February 2019, the claimant wrote a long email to the respondent's Head of HR, Sharon Hughes, complaining about unfair treatment and process and lack of investigation of the people involved, citing in particular a failure to interview a key witness identified in the video footage, whom the claimant did not name (97). The response was that it would be inappropriate for Sharon Hughes to reply since she may be requested to be party to any potential appeal (99).

4.27 On 11 March 2019, over two months after the claimant had been suspended, Mr Burgess interviewed SO-E, the second-in-command seen at the start of the CCTV footage. The inference must be drawn that he did so because of the claimant's letter dated 20 February 2019 since there is no suggestion earlier that Mr. Burgess wished to interview SO-E. The outcome was a very formal signed interview record (103-104). There was no questioning of SO-E about the 21 December 2018 incident and the CCTV footage (such as what was the nature of his conversation with the claimant, who had opened the food parcel etc.) Mr. Burgess said he did not think to show SO-E the footage and ask these questions. The questions he asked and the answers given were:

> GB:"Stephen, I need to ask about food parcels and what you understand? Firstly did you ever work with DL?" SO-E: "For 1 week"
> GB: "In that time did D ever say to you to take food from the food parcels for personal consumption?" SO-E: "No"
> GB: "Did you ever see him do it?" SO-E: "No"
> GB: "How about RC?" SO-E: "No"
> "So no manager has ever said it's OK to take food?" SO-E: "No"
> GB: "What do you do with food parcels?" SO-E: "When it came to food parcels I did not know what to do with them but the label tells you to dispose of it."
> GB:"Talk me through the process?" SO-E: "The drivers bring it back and I go on the system to cheque it, the label says dispose of it so I packed them up and throw them away. "
> GB: "So to be clear you have never taken any food?" SO-E: "No"
> GB: "And never seen a manager taking food?" SO-E: "No"

4.28 On 13 March 2019, Mr. Burgess interviewed KT who had been off sick for a lengthy period. Again, the format was a signed interview record and she also denied having permission from managers (105).

> GB: "… We have some allegations that you on the PM shift have been given express permission to open food parcels and take food for your own consumption." KT: "I know you are not allowed to take food, you want to dispose of it on the gun and then put it in the skip. I've seen DL and RC putting it in the skip."
> GB: "So they have never given you permission to take food?" KT: "No"
> GB: "I've also been told that DL would allegedly bring food parcels into the office. Open them up and let you all help yourself? Is that true?" KT: "Not to my knowledge as I know he is not allowed to do that. I don't know why people are saying that".

4.29 On 21 March 2019 Mr. Burgess sent the claimant his letter explaining the claimant's summary dismissal (106-109).

1. You admit to removing items from a parcel for personal consumption. You confirmed that the CCTV footage of you removing food items, placing them in a Sainsbury's bag and leaving the premises with them was correct.
2. Both RC and DL have denied providing you with permission to open and take food items from our customers parcels. This is further backed up by other members of the pm shift who when questioned denied being given authorisation to take food or seeing either manager taking food themselves.
3. One witness stated that they themselves took food and had witnessed others doing so but when questioned as to the specifics or even rough time scales was unable to provide any information that would enable further investigation
4. The fact that other members of staff had admitted to taking food is not in any way mitigation or a defence for yourself undo instead highlights a far wider issue that will be investigated and acted upon.
5. Your training records show that on 19 January 2016 at 1602 you signed off your Academy training record to reflect that you had been trained on RO-12 Food Account parcels.
6. Taking your training into consideration the fact that you're aware that we are entrusted by a customer to deliver their parcels, alongside the fact that the business has put in place waste disposal facilities and operating procedures for the disposal of these parts should indicate to you that we are not permitted as (the) service provider to open and consume their parcels.
7. Likewise as a business we do not publish that food items can be consumed if returned and when considering the clear policy of disposal and shelf life why would we as a business condone any act that could place your health at risk.

His letter ended: "Finally, as per your request I interviewed those put forward by yourself in addition to the shift managers of which you have you already have copies of their emails and the additional minutes from these are enclosed". The Tribunal found this final sentence equivocal as to whether Mr. Burgess had himself spoken to the shift managers after the disciplinary hearing; it does not state clearly that Mr. Burgess had himself interviewed the shift managers. On the balance of probabilities, the Tribunal concluded he had not spoken to them since it could not

accept that such an experienced manager would fail to record in brief notes a deliberate questioning of the shift managers to check the accuracy or otherwise of their earlier emails to Mr Barzey (in the event that he was not interviewing them formally). Nonetheless, Mr. Burgess expressly concluded that the claimant took the food knowing that he should not have done so. He considered it implicit from the RO-12 training that uncollected food items were not to be taken by the employee but disposed of into the general waste, without the need for further instruction.

4.30 The claimant received the letter of dismissal on 24 or 25 March 2019 and appealed his dismissal on 25 March, setting out very detailed grounds of appeal on 2 April 2019 (110-111). In particular, he questioned the delay in interviewing SO-E and KT, the fact that DL and RC had not been interviewed but only emailed, the different policy procedure documents relied upon, the support for his version from his colleague BO and challenged the content of SO-E's statement.

4.31 On 8 April 2019, the claimant's appeal hearing was held before John Cameron, a very experienced disciplinary manager at both disciplinary hearing and appeal stages, who had no involvement at London South depot (120-128). As before the claimant was accompanied by his trade union representative Karl Williams; the respondent's HR Business Partner, Morveline Banks, was in attendance. Mr Cameron's impression was that the claimant acknowledged it was wrong to take food and specifically told him he was aware of the policy on disposal of food, although the claimant was relying upon an accepted practice by many at the depot including the managers who gave authorisation.

4.32 The claimant and Mr. Williams also raised the involvement of SO-E, as second in command, who was not questioned for many weeks and asked to see the full documents relating to the disciplinary proceedings in the case of his colleague BO. Mr Cameron was not prepared to consider the case of BO or the evidence relating to that case; he saw that as an entirely separate case but acknowledged that BO too was contending that managers gave permission to take food since. Mr. Cameron took the view that he could not inquire into other cases and was firmly of the view, which he expressed, that: "Two wrongs don't make a right" in terms of the involvement of others. Whilst he listened to the claimant's points of appeal, Mr Cameron did not carry out any further investigation himself but worked with the papers provided to him which related solely to the claimant's case. In particular, he did not speak with or interview the two shift managers, RC and DL, or the second in charge, SO-E.

4.33 Mr Cameron sent his appeal outcome letter dismissing the appeal on 11 April 2019 (129-130). He summarised the claimant's appeal points as being

1. that the decision was completely unfair and against the principle of natural justice,
2. that vital witnesses were interviewed far too long after the event and only once requested by him,
3. that the statement from the key witness BO was missing from the documentation provided him,
4. that shift managers were emailed with a request for a statement rather than formally interviewed,
5. that there were many versions of the policy for handling of food which raised the question which was correct,

6. that other individuals were also guilty of theft from employer and also took food from parcels that did not belong to them,
7. that shift managers had authorised the practice of taking food not belonging to individuals' homes, and
8. that his length of service should go in his favour and the decision to dismiss was harsh

4.34 Mr Cameron acknowledged the claimant had made some points "worthy of further investigation", especially in regard to individuals he alleged were also guilty of theft from the employer and said that those matters would be taken seriously as DPD had a very set process in regards to the disposal of food that did not include allowances for staff (taking) this home. However, he concluded that none of the reasons presented in the appeal vindicated the act of taking food from the workplace which he considered was theft from the employer and as such an act of gross misconduct. That other employees did the same act did not make this acceptable and each individual must take responsibility for their own actions. Accordingly, he upheld the original decision to dismiss the claimant.

4.35 The claimant was offered, but did not take up, a second stage of appeal to the respondent's Director of HR.

4.36 The respondent's policies or rules, whether RO-12 or HS12 after revision in December 2018, do not expressly state that personal removal or consumption by employee of undelivered and uncollected food products is not allowed. That is implicit from the direction to put the food parcel in a sealed plastic bag into the general waste skip. Failure to deal properly with uncollected food items imperils the respondent's terms of trading with the food delivery company in respect of items which could not be delivered and then are not collected by the eventual customer since the respondent needs to record the failed delivery and non-collection by the eventual customer and account to the food delivery company.

4.37 There was no evidence of any dismissal or disciplinary sanction against employees in similar circumstances who had been found to have taken food from uncollected food parcels prior to the dismissal of the claimant.

5. Since these matters were included in oral and documentary evidence, the Tribunal records the following findings on matters which mainly took place subsequent to the claimant's dismissal and the rejection of his appeal. The Tribunal has to determine the reason for dismissal and reasonableness of that dismissal as at the date of dismissal such that the relevance of these findings is limited and goes only to consideration of the reasonableness of the procedure and investigation followed by the respondent in the claimant's case.
5.1 BO was suspended without pay on 28 February 2019. BO's disciplinary process was delayed but he was dismissed for theft (removing items from returned/undelivered food parcels) on 21 May 2019 following a disciplinary hearing on 3 May 2019 before a different manager, Brian Stockley. BO had claimed to have permission to take food from managers TJ, RC and DL and also named KT as having taken food.

5.2 AS (a second-in-charge) was dismissed for theft - stealing items from undelivered/returned food parcels) on 14 June 2019, following a disciplinary hearing on 3 June 2019 before Mr Stockley. AS had claimed to have seen other

colleagues being given food items from food parcels, to have seen his shift manager take items and to have been given items from undelivered/returned food parcels by the Operations Manager.

6. The parties' submissions

6.1 Both parties amplified their written submissions orally. The claimant relied upon Lock v Cardiff Railway 1998 IRLR 358 for the principle that employees must be given due warning of what offences can lead to summary dismissal, in accordance with the ACAS Code of Practice and John Lewis Plc v Coyne UKEAT/581/99 that there should be no ambiguity about rules in the case of dishonesty, which involves both objective and subjective elements. There was ambiguity here with the allegation of theft since not everyone saw the taking of food to be put in the waste bin as theft. The ACAS Code set out that rules and procedures should be in writing, specific and clear and drawn up with the involvement of employees and employee representatives. RO-12 was only a training document with no evidence the claimant was given it or trained specifically in it. It was not referred to in the investigatory and disciplinary meetings, whereas the version of the HS12 document the claimant was trained in did not state that undelivered and uncollected food must be put in the bin. The employer should have spelled out clearly the consequences of taking waste food home - that it was seen as gross misconduct leading to dismissal. Contrary to the guidance, there was no face-to-face interview with RC and DL and Mr Barzey had made his mind up before the emails to them. BO had been suspended without pay on 28 February 2019, so it was clear by the very late stage when SO-E and KT were interviewed that anyone admitting taking food would be suspended without pay. In reaching the decision to dismiss, Mr. Burgess chose to ignore the respondent's lack of clear policy and never came back to the claimant about the RO-12 document. The absence of evidence of further interviews by him with RC and DL undermined his credibility; he was fully aware of the importance of record-keeping. His evidence that he gave account to the claimant's length of service could not be accepted. The decision to dismiss was unfair. Throughout the appeal before Mr Cameron, the claimant said he was authorised to take the food and he questioned the policy being operated, showing he lacked a clear understanding of what the policy was. Accordingly, in circumstances where no clear policy was established and there was a practice of managers taking food and authorising staff taking food seen as waste it would be unfair to say the claimant contributed towards his own dismissal. There was nothing in the ACAS Code which required the claimant to take up the opportunity of a second appeal.

6.2 The respondent contended it had fully established misconduct as its potentially fair reason for dismissing the claimant and moreover it held a genuine belief he was guilty of gross misconduct, namely theft. The real remaining issue was the reasonableness of its belief based upon its investigation, other than reasonableness of sanction. As to belief in his guilt, what happened was clear from the CCTV and the claimant's acceptance that he took food to keep for himself despite his training. In his Investigation Report, Mr Barzey recorded that he acknowledged taking it, believing that he could because managers allowed it and they and others were doing it and the food would otherwise be thrown away. That was his justification but there was a health and safety aspect that food cannot be held to be safe when still in the depot at the end of the first day. The claimant accepted in oral evidence and to Mr Cameron that he was aware of the policy and

was trained in RO-12, which could not be plainer – see page 140 and the appeal hearing notes at 122-123. The respondent investigated to see if others were doing it. RC and DL responded to the email enquiry; the Tribunal is concerned with the reasonable employer not best possible practice in applying disciplinary procedures and should conclude that they would have given the same replies if spoken to face-to-face. That the claimant said their replies were an effort to save their jobs indicated he knew it was wrong. In any event, it was reasonable for Mr. Burgess to accept the account of RC and DL, i.e. for senior management to accept what middle management were saying and conclude that this was 2 rogue employees, not a culture of taking food. Any failure by Mr. Burgess to note his conversations with RC and DL was not a matter of credibility, just not best practice - a Polkey point at most. The disciplinary procedure made clear that theft was gross misconduct; it did not need to list every type of theft. This respondent took a zero-tolerance approach to theft of client property in its delivery business, the food in the parcels was not the claimant's property when he took them. It had a genuine belief that he was guilty of theft after investigating his principal "mitigation" that others were doing it and management was condoning it. It acted consistently with others who stole food. At the appeal hearing the fact of his knowledge of the rules and his breaches were established; the dismissal was fair. As to contributory fault, he took the food knowing it was not his and it was wrong, even if others were doing it; that is why he said they were trying to save their jobs. Contributory fault should be as high as 90% since he knew it was wrong. As to Polkey, even if there had been a tighter procedure and more interviews, it is likely that no culture condoned by management would have been established so no more than a couple of weeks' delay in process and compensation would be appropriate. The claimant failed to take up his right to a second appeal and follow the respondent's internal processes; any compensation should be reduced by 15% for his non-compliance with the ACAS Code.

7. The Law

7.1 The main statutory provisions on Unfair Dismissal are at Section 98 of the Employment Rights Act 1996. By sub-section 98(1) ERA:

> "In determining for the purposes of this part whether the dismissal of an employee is fair or unfair, it is for the employer to show - (a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."

Then by sub-section (2):

> "A reason falls within this sub-section if it -... (b) relates to the conduct of the employee..."

Then by sub-section (4):

> "Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertakings) 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."

7.2 In considering this alleged misconduct case, the tribunal applied the long-established guidance of the EAT in British Home Stores v Burchell [1980] ICR 303. Thus, firstly did the employer hold the genuine belief that the employee was guilty of an act of misconduct; secondly, did the employer have reasonable grounds upon which to sustain that belief and thirdly, at the final stage at which the employer formed that belief on those grounds, had it carried out as much investigation into the matter as was reasonable in all the circumstances. The burden of proof in establishing a potentially fair reason within Section 98(1) and (2) rests on the respondent but there is no burden either way under Section 98(4).

7.3 The Tribunal reminded itself that its role in respect of Section 98(4) was to focus upon what the respondent employer had done and decided and not to substitute its own decision for that of the employer at each stage including the appeals stage and the ultimate sanction of dismissal; it should stand back and take a broad view of the case in procedural and substantive terms. In many cases of conduct dismissals where the employer has established the potentially fair reason relating to the employee's conduct, it is appropriate to have regard to the "range of reasonable responses" open to a reasonable employer. Finally, the Tribunal also had regard to the statutory ACAS Code of Practice 1 on Disciplinary and Grievance Procedures (2015) and applied sections 207 and 207A of the Trade Union & Labour Relations (Consolidation) Act 1992. The guiding principles in the Code of Practice found at paragraph 4 of the Introduction can be summarised as dealing with issues promptly, acting consistently, carrying out necessary investigations, informing employees of the basis of the problem and giving them an opportunity to put their case before any decisions are made, with a right of accompaniment and of appeal against any formal decision.

7.4 Polkey reduction and contributory fault, if unfair dismissal

Remedies for unfair dismissal are dealt with at sections 111 to 124A, ERA 1996, with Basic Awards provided for at sections 119-122 and Compensatory Awards at section 123-124A. The Tribunal needed to determine whether any percentage reduction should be applied to the compensatory award to reflect the chance that this respondent may have dismissed the claimant fairly in any event, if it had not dismissed him unfairly, following the House of Lords judgment in Polkey v AE Dayton Services Ltd [1987] 3 All ER 974. Also by section 122(2) ERA:

> "Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the 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."

And by section 123(6):

> "Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

For a reduction of the compensatory award under 123(6), the conduct needs to have been culpable or blameworthy in the sense that it was foolish, perverse or unreasonable. For the basic award, section 122(2) lays down a slightly different test: whether any of the claimant's conduct prior to his dismissal makes it just and equitable to reduce the basic award, even if that conduct did not necessarily cause or contribute to the dismissal.

8. Conclusions

8.1 The respondent readily proved that its reason for dismissing the claimant related to his conduct, a potentially fair reason, the taking of food from a food parcel. It had a genuine belief he was guilty of theft, an act of gross misconduct. However, as its representative submitted, the Tribunal's main consideration was of the section 98(4) issues of reasonableness of process and investigation and the ultimate decision to dismiss. Save in relation to delay and the extent of its investigation, the Tribunal found no significant non-compliance by the respondent with the ACAS Code of Practice, which provides only broad principles of good practice for dealing with disciplinary situations and grievances in the workplace. It had a sound contractual Disciplinary Procedure, which was supported by helpful detailed guidance for managers using the procedure. The procedure clearly established that theft was an example, amongst several, of gross misconduct liable to lead to the summary dismissal of an employee found guilty of it.

8.2 Whilst of course the approach to "investigation" in Burchell terms includes the disciplinary manager's role in investigating and decision-making, the respondent's policy anticipates two clear stages of an investigation by the investigating officer and a disciplinary hearing before the disciplinary officer. The Tribunal found the initial investigation by Mr Barzey was limited and partial, in particular wholly failing to consider the position of SO-E. Whilst Mr. Burgess did interview BO, KT and SO-E, the latter interviews were very long after the incident by which time there was a very real risk of them denying any involvement to protect themselves. From the outset, once the CCTV footage was viewed and the claimant was promptly suspended on 4 January 2019, there was delay on the respondent's part coupled with a disinclination to investigate more widely, Although the claimant was interviewed a week later, the emails to and responses from the shift managers were not until 14 and 15 January. Those email enquiries with the only ones made by Mr Barzey; his investigation did not include any other employees named as having taken from food parcels and, in particular, he did not include SO-E who was plainly visible at the start of the incident on CCTV and was in a supervisory capacity over the claimant. However, his comment: "Persons mentioned will have to be interviewed but those interviews will not form part of this investigation" shows he recognised the seriousness of the claimant's allegations - that he was only carrying out a practice which had been authorised and encouraged by managers and which other employees were similarly doing. The approach of separating off the claimant and seeking responses only from the two current shift managers named implies he was already concerned by the suggestion of a culture which was commonplace with management support or condonation. Moreover, the content of his report ("…their responses will be included in this investigation"), suggests that Mr Barzey

had already prepared his findings on 11 January 2019 before receiving the email replies from RC and DL. Whilst his task was only to investigate and recommend disciplinary action (or not), it seems he had made his own mind up about the claimant's guilt before putting his email questions to RC and DL and receiving their replies.

8.3 There was no evidence of a consistent approach to treating removal of food as theft prior to the incident concerning the claimant. Whilst making no finding of fact to this effect, the Tribunal concluded that there may well have been a practice in operation whereby shift managers encouraged or condoned the taking of food from food parcels, possibly dating back as far as 2016 and even under the same shift manager TJ who had trained the claimant in policy RO-12. At the very least, a deeper, more expedited and focussed investigation might have found this to be the case. For instance, if Mr Barzey had immediately interviewed other employees named by the claimant as having also taking food from food parcels and had especially questioned SO-E promptly about the CCTV footage before news travelled about the claimant's suspension, he might have gained a different feel of whether there was such a culture. Had he interviewed properly the two managers (who were very aware that the claimant had been suspended without pay on suspicion of having committed gross misconduct) instead of his light touch email to each, he might have gained a very different impression of their involvement or knowledge. Whilst framed in terms of those witnessing an incident or event, the respondent's own guidance recommends taking statements (and Mr Cameron acknowledged in his evidence that it was far from ideal for Mr Barzey only to email the managers). There was much too great a readiness to accept RC and DL's brief email responses at face value.

8.4 At the next stage, the respondent's own guidance was not followed by Mr Burgess in failing to provide Mr Barzey's Investigation Report to the claimant with the letter inviting him to disciplinary hearing. However, the overall delay and lack of direction on the respondent's part was much more fundamental than these aspects of procedural non-compliance with the respondent's own guidance. In interviewing others such as BO and SO-E, Mr. Burgess was clearly seeking to make good belatedly the inadequate and partial investigation by Mr Barzey, having been prompted by the claimant and his representative to do so. Neither Mr Barzey nor Mr Burgess at their hearings with the claimant referred to the correct RO-12 policy but only to the health and safety policy HS12 (which did not include the directions to bag up and dispose in the waste bin of uncollected food parcels when the claimant was trained in it). Mr Burgess only referred to the correct RO-12 procedure in his dismissal letter. Whilst the claimant and his representative were fully entitled to question the policy which was being relied upon, had the respondent from the outset correctly identified the RO-12 policy in which the claimant was trained on 19 January 2016 (as the claimant later acknowledged), this whole confusion and unfairness to the claimant would have been avoided.

8.5 Before he reached his decision to dismiss, much of Mr. Burgess's input followed after the disciplinary hearing on 4 February 2019 although there was still massive delay until that decision was sent out by him on 21 March 2019. He had interviewed BO on 7 February 2019 and therefore knew there was some corroboration for the claimant's version, but still kept the claimant's case separate. As set out above, the Tribunal did not accept that he spoke to each of RC and DL who confirmed the content of their emails; it found it inconceivable that a senior

manager so hugely experienced in HR matters would have failed to get or record written confirmation of their denials in circumstances where it was apparent that the claimant was reporting a widespread management culture encouraging him to take uncollected food. The significance of this is that it supports the Tribunal's conclusion that the investigation was flawed with a rush to guilty judgement by Mr Barzey, which Mr. Burgess then adopted without full scrutiny, in circumstances where the alternative of management involvement in theft was hugely unpalatable and was therefore scarcely investigated. The contrast between this rush to judgement and the overall progress of the investigation and decision-making as to dismissal was stark: in terms of the respondent's own guidance at paragraphs 7.1 and 7.4, the respondent's investigation was anything but quick and thorough with statements simply not taken at the earliest opportunity.

8.6 At this stage the Tribunal stood back to review the position within section 98(4), ever mindful that it must not substitute its own decision for that of the employer. Having done so, it inferred there was no real desire on the part of the investigating and disciplinary managers to grapple with the claimant's strongly asserted case of a longstanding culture of shift managers and supervisors encouraging and permitting staff to take home uncollected food from undelivered food parcels. Although senior managers were fully entitled to treat removal of food just as seriously as if their operative had taken a non-perishable item from a parcel delivery for their own use and to look to stamp it out, they did not carry out a reasonable investigation into the circumstances in which the claimant was seen on the CCTV footage rooting through the food parcel and removing items, acting in full view and knowing the camera was there, within moments of talking with the second-in-command SO-E apparently about the already opened parcel. When questioning SO-E two months after the claimant had himself been questioned by Mr Barzey, Mr Burgess "did not think" to question SO-E about what was going on and what was said in the CCTV footage. The Tribunal concluded firmly that the respondent did not carry out all necessary investigations and did not follow a fair process when reaching the decision to dismiss the claimant and that no reasonable employer could have acted as this employer did; notwithstanding his belief in the claimant's guilt, the decision to dismiss was not within the range of reasonable responses because of the defective investigation which had led to it. The appeal, in the form of a review by Mr Cameron looking very specifically at the claimant's case and no wider, could not remove this over-arching unfairness. Accordingly, the respondent acted outside the range of reasonable responses open to a reasonable employer and the dismissal was unfair. For the avoidance of doubt, had the Tribunal not concluded that the procedure and investigation followed by the respondent were unreasonable, it would not have concluded that the sanction of dismissal, even summary dismissal, fell outside the range of reasonable responses open to a reasonable employer which had just found a long-serving employee guilty of theft from its parcels.

9.1 Polkey

The procedure adopted by the respondent did not accord with its own careful guidance to managers. The Tribunal could not conclude that, had the procedure not been flawed as it was, the claimant would have been fairly dismissed at the same time or a little later in any event. The position would have been different had the unfairness been limited to minor procedural breaches such as Mr Barzey making his mind up to recommend disciplinary action precipitately or Mr. Burgess

failing to include a copy of the Investigation Report with the letter calling the claimant to a disciplinary hearing. In the circumstances, no Polkey deduction is appropriate.

9.2. Contributory conduct

Nonetheless, the Tribunal concluded that the claimant had contributed towards his own dismissal to a very substantial extent. Whilst his precise explanation varied, to paraphrase: “My managers authorised or encouraged it”, “Everyone was doing it”, “I did not know I was doing anything wrong”, and “The food would simply have gone to waste if I had not taken it”, his conduct in taking the food hugely contributed to his dismissal. Had he not taken the food (and been seen on CCTV doing so), he would never have been dismissed. Yet he had been trained in the RO-12 procedure and it was clear from the appeal hearing that he knew he had done wrong, whatever the encouragement of managers and colleagues to do so. Moreover, had he drawn attention sooner to the role of SO-E, his supervisor in plain view on the CCTV, a more rigorous and prompt investigation might have followed. In all the circumstances, it is appropriate to reduce any basic and compensatory awards by 70% for this contributory conduct.

9.3 ACAS Code of Practice

The Tribunal concluded that the respondent had unreasonably delayed stages in its investigation and failed to carry out all necessary investigations before its ultimate decision to dismiss the claimant, thereby failing to comply with the Code in this regard. In the circumstances, an increase or uplift of compensation pursuant to section 207A TULRCA 1992 of 15% is appropriate. Conversely, the provisions of the Code in respect of appeals are very general and do not touch upon second appeals. The claimant was offered and exercised his initial right of appeal against the decision to dismiss him. The Tribunal does not find any unreasonable non-compliance by him with the Code and concludes that no reduction of compensation is appropriate.

Employment Judge Parkin

Date: 10 February 2022

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