



EMPLOYMENT TRIBUNALS

Claimant: Mr W Santos Ramos

Respondent: Royal Mail Group Limited

Heard at: London South via CVP **On:** 4th and 5th January 2022
11th February 2022

Before: EMPLOYMENT JUDGE BECKETT (sitting alone)

Appearances:

For the Claimant: Ms S Aly (counsel)

For the Respondent: Mr R Choudry (solicitor)

Witnesses for the Respondent: Mrs Charlotte Jarvis (Delivery Office Manager)
Mrs Anna Walsh (Independent Casework Manager)

JUDGMENT

1. It is the judgment of the Tribunal that the Claim relating to unfair dismissal is well-founded and succeeds.

REASONS

Issues to be determined

2. What was the principal reason for the Claimant's dismissal and whether it was a potentially fair reason under sections 98(1) and (2) of the Employment Rights Act 1996?

3. The Respondent asserted that it was a reason relating to the Claimant's conduct in taking undelivered items of mail home from his shift, not informing management and then starting to deliver those items on a non-working day.
4. The Claimant stated that he had been dismissed unfairly as the Respondent did not take his mental health issues into account.
5. If so, was the dismissal fair or unfair within section 98(4), and, in particular, did the Respondent in all respects act within the band of reasonable responses? The Claimant stated that the dismissal was unfair as others had breached the Data Protection Act provisions and had not been dismissed. Further, he argued that the sanction was not reasonable.
6. In respect of the Claimant's claim of unfair dismissal, the focus under section 98(4) is on the reasonableness of the Respondent's decisions.

The Hearing

7. The hearing took place over the Common Video Platform and started on 4 January 2022. A face to face hearing was not possible due to the Covid pandemic and the hearing took place in accordance with the Presidential Guidance relating to remote hearings.
8. The Claimant had technical issues during the morning session, and therefore the evidence only started at 2pm.
9. Respondent called evidence from Miss Jarvis, the dismissing officer that afternoon. Her evidence continued the following day, 5 January, and then Mrs Walsh, the appeal officer, gave evidence.
10. As the hearing had been listed for two days, the hearing had to be postponed part-heard and the Claimant gave evidence on his own behalf on 11th February 2022.
11. I considered the documents from a Bundle of Documents which the parties had introduced into evidence, amounting to 445 pages. The Claimant indicated that he had further documents that he wanted to add to the bundle. Those documents were emailed to the Respondent and Tribunal for the first two days, and subsequently added to the original bundle.
12. The second bundle amounted to 485 pages. This was increased after the Claimant's evidence, as he referred to a document relating to different types of delays to mail. 4 pages of the National Conduct Agreement between Royal Mail Group, CWU and Unite were provided on the afternoon of 11 February 2022.

13. I was also provided with a cast list, chronology, a list of issues and written submissions on behalf of the Respondent, in addition to the witness statements. I was later provided with the Claimant's cast list and chronology.
14. By a claim form presented to the Tribunal on 25 March 2019, the Claimant brought claims of disability discrimination and unfair dismissal.
15. The claim in respect of disability discrimination was dismissed following a preliminary hearing on 19 March 2020.

Findings of facts

16. Based on the evidence heard and the submissions made, I found the following facts.
17. The Claimant was employed by the Respondent between 23 April 2012 and 21 February 2019. He was employed as an Operational Postal Grade (OPG) at its Catford Processing Unit.
18. He was transferred from North London to the Catford Deliver Office on 14 November 2018, after a period of illness.
19. In respect of that illness, the Claimant was signed off with stress from 25 June 2018. He had an Occupational Health assessment during his period of sick leave, on 18 July 2018. He was signed off until 25 November 2018.
20. Despite that certificate, the Claimant returned to work full time on 14 November 2018, undertaking his usual duties.
21. He had a return to work meeting on 7 December 2018. In that return to work meeting the Claimant advised the Respondent that he was suffering from panic attacks. The document noted that the reason for absence had been stress. The Claimant stated that it had been hard to adapt to the new area with different walks and different ways of working. He stated that he had been prescribed medication but had stopped that 3 weeks before. In the question relating to any issues that his illness or condition might affect his ability to attend regularly, the noted response was that the Claimant was „still having panic attacks“.
22. In answer to the question about any other issues or concerns in or outside work that were affecting his health or attendance, it is again noted “still having panic attacks and concerned re workload due to new area, delivery and Christmas”. He was noted to have asked management to be understanding as he was “still not 100%”.

23. On the same date there was a further return to work discussion relating to an absence ending on 17 November 2018 (which was a one day absence). That document had initially been completed with the reason for absence as upset stomach, but this was crossed out and replaced with panic attack.
24. The Respondent's policy in respect of back to work meetings is that they should take place within 3 hours of the employee starting their shift. Ms Jarvis in evidence said that she usually tried to hold such meetings within the first 24 hours of someone returning to work following sickness, however it was not always possible. She said that in the Claimant's case they had planned 2 days of training, but that he had not attended on the first day, and then was late on the second day (which was 14 November 2018).
25. Ms Jarvis said that she had not considered a phased return, or any other reasonable adjustments, as she had been told that the Claimant's stress had been due to the travel time, which had been resolved by the transfer and the Claimant's subsequent move.
26. On the same date, 7 December 2018, the Claimant sent a message to a colleague from his North London office, Mark Dolan.
27. The following day, Saturday 8 December 2018, the Claimant was due to work a full shift. It is agreed between the parties that he did not complete that shift and indeed that he took the mail that he had been unable to deliver home with him. The undelivered mail was in excess of 131 items.
28. The evidence as to what the Claimant did that afternoon was disputed. Initially the Claimant stated that he returned home when he felt unwell and would not have been able to make it back to the depot before it closed at 4.30pm. Subsequently the Claimant stated that he had attended the depot but it was closed and therefore he had to take the mail home with him.
29. The Claimant did not report his illness on that date, nor that he had taken undelivered mail to his home, to management. He was able to do so, and was required to do so by the policies in place.
30. The Claimant was not required to work on Sunday 9 December, and had a rest day on Monday 10 December 2018. On Monday 10 December, despite not being on the rota to work, the Claimant decided to deliver the mail from his previous shift. Whilst he was on his way to the depot, Ms Sharon Green, his manager, telephoned him advising him not to come into work. She did ask where his PDA device was, as he had not returned it at the end of his previous shift.
31. The Claimant attended the depot and left the device there.

32. He then continued to deliver the mail he had taken home. The postal delivery worker who was working that route, Mr Ademuyiwa Oyefusi, saw the Claimant and notified the office. Ms Green and Ms Charlotte Jarvis then drove around the delivery round and saw the Claimant delivering mail. He was asked what he was doing, and told Ms Green that he was delivering mail that he could not deliver on 8 December. At that time there were 131 items of mail still to be delivered.
33. The Claimant was asked to return to the Catford Delivery office with Ms Green, who then suspended him pending an investigation. He was suspended for "alleged wilful delay, and breaching security standards" (pages 184-5 of the Bundle).
34. At 12.36pm on 10 December 2018 the Claimant sent a text message to Mr Lee, union representative. He told Mr Lee that he had been trying to get hold of him since he had transferred to the Catford Office 3 weeks ago. He said that he had been having lots of issues with no one to help him. He said he had been off work for stress and depression and had suffered bullying, harassment and threats from management. He said that he had to work overtime for free.
35. He ended the message by saying "to the point I end up doing something stupid last Saturday, by bringing some of the work home and delivering it today, when I was told it was my day off... just been told I've been suspended pending an investigation".
36. Mr Lee responded at 19.55 with the contact details for his office representative, Richard Taylor.
37. The first fact finding interview took place at 11am on 13 December 2018. Prior to the meeting, the Claimant was sent a letter stating that he could be accompanied by a trade union representative or work place colleague. The Claimant responded on 10 December stating that he would attend and would be accompanied by Richard Taylor (pages 181 to 182 of the Bundle).
38. In that interview the Claimant stated that he had started work on the relevant Saturday at 7.59am. He said that he had had to prepare his walk all himself which took until midday. He said that at around 3.30/4pm it started to get dark and he thought he might make a lot of mistakes as he was not able to see in the dark, so he decided to take the work home with him to finish Sunday and the rest on Monday.
39. He added that he had been put on unfamiliar delivery routes and he did not know the area. He had no support in the office and felt isolated and depressed. He said that he was afraid of being bullied or harassed if he brought work back which is why he took it home to finish on his rest days (notes in Bundle pages 186 to 187).

40. The second fact finding interview took place on 14 January 2019. Ms Green conducted the meeting and Mr Richard Cox was present as the Claimant's representative. During that meeting the Claimant confirmed that he had taken the post home with him as he had no answer when he telephoned the office and thought that it would be closed. He stated that he had been having constant issues with his PDA and no one was available to help him.
41. At the end of the meeting Ms Green asked Mr Cox if he wanted to add anything. He responded that he did not think it was done vindictively or intending to delay the mail and that the fact that the Claimant had wanted to deliver the mail even when he was off proved that.
42. After the meeting, Ms Green wrote to the Claimant stating that the case was being referred to Ms Jarvis as she considered the potential penalty was outside her level of authority (letter at page 212 of the Bundle).
43. A formal conduct meeting was held on 31 January 2019. The meeting had initially been scheduled for 29 January 2019 but was postponed as the Claimant was unwell. In the invitation letter sent by Ms Charlotte Jarvis, the Claimant was advised that the meeting was to consider four conduct notifications, namely:
- Mail being taken home
 - Mail delivery not being completed on given day
 - Not reporting to a manager that mail has failed
 - Delivering mail on rest day without manager knowledge
- (letter pages 225 to 226 Bundle).
44. On 29 January 2019 the Claimant notified the Respondent that he was unwell. He said that he was back on medication for anxiety which caused him "horrendous headache and body ache" and that he had worked up feeling really poorly. Ms Jarvis sent him a message stating "would a painkiller not help? If you took a pain killer then we can move the meeting back to 12.00 today to help you". However, the Claimant stated that he could not mix his medication and the meeting was put back to 31 January 2019.
45. After the meeting was rescheduled, Ms Jarvis sent the Claimant a letter stating that he was being investigated for gross misconduct and if it was upheld that he could be dismissed without notice. In the original letter for the meeting on 29 January 2019, the level of allegation was misconduct, not gross misconduct.

46. In cross examination Ms Jarvis denied upgrading the severity of the charge as a result of his illness, stating that it was a paperwork error as the letters should have been the same.
47. The meeting was held by Ms Charlotte Jarvis. The Claimant's previous union representative had left, and the Claimant did not take anyone to the meeting. Ms Jarvis asked if he wanted a colleague, and he said he did. Mr Hogg, a colleague working nearby, was called into the meeting by Ms Jarvis to assist. The notes of the meeting are at pages 228 to 232 of the Bundle.
48. The Claimant was asked numerous questions about the various policies and procedures within the Bundle. Whilst the Claimant denied seeing certain documents prior to these proceedings, he accepted that the contents applied to him and that the principles relating to prompt delivery of mail and safe storage of mail were known to him.
49. Ms Jarvis stated that she did not ask the Claimant for his call log as she did not disbelieve his account that he had called the office 7 times. She had asked to see Ms Green's call log when she interviewed her. Ms Jarvis said that there was a secure box where employees could leave mail and keys if they were late and the office had closed. She said she did not know if the Claimant had known about the box, but she had not shown him.
50. She denied being against the Claimant and preferring her long-term colleague's account. She said that there was no bullying in the Catford Unit, and that the Claimant was wrong when he said he thought he would be bullied or harassed if he told management about his failure to deliver mail. She also said that if he had been concerned about bullying, that there was a separate process and he would have had to submit a form, which he had not done.
51. When the notes of the meeting were sent to the Claimant, he responded with numerous comments and additional information. Within that document he stated that he had not told anyone about the failed deliveries as he was afraid of repercussions, namely bullying and harassment, as that had happened in the past. He also stated that he struggled with anxiety and depression. Within the same document he repeated that he had been signed off work for 6 months with stress, depression and anxiety, and that being forced to work whilst he was still signed off was really disappointing (at page 236 of the Bundle).
52. On 8 February 2019 the Respondent wrote to the Claimant arranging for a further meeting to deal with additional evidence (pages 250 to 251). The further evidence was provided on the same date. The evidence related to an interview Ms Jarvis had had with Ms Green, a telephone interview she had had with Mr Manoj Patel (the Claimant's previous line manager) and

an interview with O Ademuyima (who was the colleague who had gone out on the round with the Claimant when he first joined Catford).

53. During her interview with Ms Green, Ms Jarvis asked how Ms Green had known that the Claimant was delivering mail on his rest day. She answered saying that she had been told that he was out delivering so she had driven out with Ms Jarvis and that “we” had come across him. Ms Jarvis asked Ms Green what the Claimant was doing when she came across him, and again Ms Green answered “we saw his light weight trolley on its own outside the leisure centre so we stopped and I got out of the car and went over”.
54. This exchange highlights the issue when a witness becomes a decision maker, and is then interviewing the investigator who was also a witness. In her evidence Ms Jarvis said that she was not classed as a witness in the business in terms of work, that she had just dropped off her colleague. She commented that she would understand the issue if it was a murder investigation.
55. The Claimant provided his comments on the further evidence the following day. He did refer to the issue that Ms Green had conducted the fact-finding interviews and investigation and was now a witness.
56. The Claimant attended the second formal conduct meeting on 13 February 2019. The notes are within the bundle at pages 262 to 265. There were no questions about the allegations themselves, simply about the further evidence.
57. On 18 February 2019 the Claimant was notified of his appointment with Occupational Health.
58. On 19 February, the Respondent invited the Claimant to a decision meeting, which took place on 21 February 2019.
59. The Claimant was dismissed without notice on 21 February 2019. The decision outcome is at pages 280 to 285 of the Bundle. The decision relates to three charges namely intentional delay of mail, breach of mail integrity and loss of mail items. Miss Jarvis informed the Claimant that the decision was made that he would be dismissal without notice.
60. Miss Jarvis attached the report in which she explained her findings. In respect of intentional delay of mail she said that she had upheld that point. She commented that throughout the investigation the Claimant had changed his statement several times. She also stated that she found that the Claimant had shown little acceptance of the impact it had had on the business and that the mitigation he had offered about being concerned he would be bullied was unsubstantiated. She stated that when considering the penalty for the case a suspended dismissal might have been considered if the only element of the case was this factor.

61. Miss Jarvis then moved on to consider the failure to safeguard mail. Again, she decided to uphold that point and stated that the Claimant had demonstrated a clear disregard for mail integrity. She had considered the Claimant's mitigation which was that he was not trained at the branch and that he had not prepped mail in his previous office. She found that that was not in fact correct and that in light of the fact that the Claimant had attended training on the importance of mail integrity she did not feel a suspended dismissal was appropriate. She gave the reason for that as the Claimant's disregard for the seriousness of the issues and the lack of confidence that the Claimant would not repeat it again.
62. Miss Jarvis then moved onto loss of items and stated that during the investigation 11 items had been located as missing. Two items were subsequently located. The other items remained missing and Miss Jarvis stated that miss the Claimant was unable to explain where those remaining items were.
63. Miss Jarvis stated that given the combination of the notifications, the employee's lack of appreciation and her concerns of a repeated incident, she felt that the only appropriate option was summary dismissal without notice.
64. The Claimant advised the Respondent that he wanted to appeal. He stated that he thought it was unfair dismissal and that he had evidenced that his own postman, that is the postman that delivered to his home address, had delayed or lost mail.
65. Miss Jarvis in evidence was asked about the fact that she had dismissed the Claimant for a charge he had not faced, namely intentional conduct in delaying mail, which had not been stated in her first letter. She stated that she did not agree that intentional conduct was more serious, that mail being taken home is a breach of contract, and mail not being completed on a given day is intentional. She said that those were terms used every day working for Royal Mail and they meant the same thing.
66. Ms Jarvis denied dismissing the Claimant for lost mail items, until she was referred to the relevant documents. She commented that she had "a trusted employee who worked for Royal Mail for over 20 years" in Ms Green, and that she had no reason not to believe in her. When asked if she accepted that there was no evidence provided to the Claimant on the lost mail issue, she said that she accepted that she did not look into it as she trusted the investigation manager.
67. The Occupational Health report was provided on 25 February 2019. The author of the report, Karen Shields, stated that following her assessment of the Claimant's mental state she confirmed that the Claimant was suffering from severe depression and severe anxiety. She noted that currently the Claimant's short, medium and long term prognosis was poor but that he was seeing his General practitioner the same day to discuss further treatment.

68. Ms Shields was asked questions that had been prepared by management, Ms Jarvis. She was asked what steps could be taken that would guarantee that the incident would not happen again. The response was that as the Claimant had been dismissed from his role as postman it was not appropriate to respond to that question.
69. She was also asked whether the Claimant's medical condition, namely stress and anxiety, "had contributed to his behaviour ie not completing his delivery round, taking mail home and returning on a rest day to complete it". Ms Shields replied stating that in her professional opinion she would advise that his condition did contribute to him not being able to deliver his post round that day. She added that "symptoms associated to his diagnosis most likely would have caused the Claimant not to function in a safe manner".
70. When Ms Jarvis was asked why she had ordered the OH report but not waited for the report to make her decision, she stated that although she had "started the ball rolling" to get the OH report, once she sat down and looked through the documents she had, she decided that she had all the information that she needed. She stated that she felt that she "had enough to go on" without waiting for the medical report.
71. Ms Jarvis said that even though one of the factors for her to consider was the Claimant's reactions and actions, she did not think it was critical to wait for the report. She said that as far as she was concerned, the Claimant had understood the implications of his actions and still chose to do what he did, and that she was "not entirely certain that he would not do it again".
72. When asked if it did not make her feel uncomfortable that she reached a decision before she receive the OH report, Ms Jarvis stated "that is why we have the appeals process".
73. Ms Jarvis was asked about whether she knew that the Claimant had suffered a panic attack during his shift. She said that she did not. She had asked him to talk her through the day and he had not stated that he had had a panic attack. When asked to refer to her notes as to where she asked that question, she conceded that she had not in fact asked him, but that she had not done so as Ms Green had asked the Claimant that question in her fact-finding interview. She added that she would not have asked the question, as it had been asked by "a trusted line manager".
74. Ms Jarvis was asked questions by the Tribunal in respect of the Claimant's earlier OH report which referred to work related stress due to bullying and harassment at work. Ms Jarvis said she was not aware of that. She was also referred to the back to work meeting notes, which cited panic attacks on the first page. Ms Jarvis simply commented that the note did not say if the attacks were at work and that she had not been aware of that. She was not able to explain why the return to work meeting had not been conducted

until 7 December 2019, but stated that it could have been due to leave or sickness of managers.

75. It is clear to the Tribunal from Ms Jarvis' evidence that she was not investigating the matter fairly and independently. She had a clear and obvious bias towards her colleague and friend Ms Green.
76. The Claimant was written to on 1 and 7 March 2019 in respect of dates for his appeal hearing. On 13 March 2019 the Claimant requested that the appeal be heard in his absence and provided lengthy written submissions and evidence (pages 325 to 350 of the Bundle).
77. Mrs Anna Walsh dealt with the appeal. She wrote to the Claimant on 1 March 2019 arranging a meeting at Bromley Delivery Office on 8 March 2019. She did not receive a response so rearranged the interview for a later date in March. On 13 March 2019 the Claimant stated that he had been advised that he was not fit to attend the meeting scheduled for the following day, 14 March, and that the appeal should be held in his absence. At that time, he provided lengthy submissions relating to his appeal for her to consider.
78. On 11 April 2019 the Respondent provided the Claimant with all of the evidence that had been collated for his appeal hearing, and asked for his comments. He provided comments the following day (documents at pages 353 to 385 of the Bundle).
79. On 17 April 2019 the Respondent provided the appeal outcome and report. She stated in her letter that she had decided that the Claimant had been treated fairly and reasonably and therefore she believed that the original decision of summary dismissal was appropriate in the case. She provided her report in which she commented on the Claimant's submissions.
80. Mrs Walsh stated within her report that she accepted that the Claimant was unable to cope with his delivery and that his lack of ability had a medical basis. However, she also noted that she understood why he feared that he would lose his job, as he had prompted consideration of the dismissal under the attendance policy before he transferred to Catford. She did not find that he feared for his job as a result of bullying.
81. Mrs Walsh was asked if it had bothered her that the letter relating to misconduct had different charges, and that the addition of the issue of dismissal was "heavier". She stated that it did bother her, but it was an appeal so it was a rehearing, which she felt should be dealt with by using the original charges as that was "more fair".
82. She stated that she did think that the medical evidence was relevant when considering intentional delay of mail, and that she had the OH report and had asked a further question in respect of that issue. She said that it had troubled her that Ms Jarvis had not waited for the report. Mrs Walsh had

not put that in her report as it was a rehearing and she was looking at the case afresh, as if she were the dismissal officer.

83. Mrs Walsh stated that she was not saying that the first hearing was fair, but as a rehearing she did not consider that Ms Jarvis had done anything that she could not rectify at the appeal. She said that the process followed had been fair, that the fact-finding had been in accordance with procedure, that there had been a disciplinary hearing where the Claimant had a representative, notes were taken and he had been sent them. She cited those parts as fair. She did accept that the whole process needed to be fair.
84. Mrs Walsh was asked to compare the two initial letters sent to the Claimant (pages 214 and 225 of the Bundle) where the allegations were upgraded from conduct to gross misconduct. She accepted that the only event that had occurred between those dates was that the Claimant had been ill for the first meeting. However, she repeated Ms Jarvis' evidence that she said it had been an error. She said that she believed the first letter was erroneous and did not accept the Claimant's submission that the charge was upgraded because he had been ill.
85. Mrs Walsh confirmed that the Claimant had been dismissed for allegations including loss of mail, however she had not considered that allegation as he had not been charged with that.
86. In respect of the OH report Mrs Walsh agreed that the opinion was that his mental health did contribute to him not being able to complete his round that day. She therefore agreed that the Claimant's act was not intentional as there was a genuine medical condition as to why it had happened.
87. Mrs Walsh said that she had based her decision on his behaviour on the Monday when he tried to hide what had been done, did not tell his manager and then continued delivering mail when he was not working. She accepted that the rationale in respect of not informing management was not in her report, but it was a reason. She said that she would still have been likely to dismiss him if he had just delayed the mail on the Saturday, as the OH report said there was no guarantee that it would not happen again.
88. When pushed by counsel in cross examination, Mrs Walsh said that she accepted that the delayed mail was not his fault, but the fact that he did not go into the office and explain was his fault.
89. Mrs Walsh had asked OH an additional question about whether it could happen again. By the time that question was answered the Claimant had already been dismissed, and therefore did not have the opportunity to make any comments or representations on that issue. The answer to the question was that "a recurrence of the behaviour would always be unpredictable".

90. The Claimant gave evidence on 11 February 2022.
91. He accepted that the relevant policies (detailed below) applied to him and that he was familiar with issues relating to the security of mail. He accepted that the required standards are that all mail due for service on any given day must be delivered. He agreed that if mail was deliberately withheld that it could be an issue of integrity and honesty.
92. The Claimant said that he had reported bullying and harassment, but that the Respondent had not taken any notice, so he did no more about it. He was then signed off sick. He said he had reported it to his managers and to his union representative.
93. The Claimant said that 14 November 2019 was not his start date, he was simply told to attend an informal meeting with Ms Green. During that meeting he said he told Ms Green that he was still signed off sick and gave her his doctor's certificate.
94. The Claimant accepted that he had had a week of leave in late November, returning on 26 November 2019. He said that the back to work meeting was held after a lengthy delay, as he had been working on his own for 2 weeks, still feeling ill and having panic attacks.
95. The Claimant said that he had not contacted his union representative on 8 December 2019, and had not only done so after he had been "caught" delivering mail. He said that he had contacted the union after he had been suspended and that prior to that he was suffering severe stress, panic attacks and his mind was foggy due to the medication he was taking. He said that he was severely depressed on the Sunday as he was "kicking himself" that he had "made a mistake". He said he was just looking forward to starting his work early on the Monday morning to deliver the mail.
96. He had kept the mail securely in his living room, in the small trolley he used to deliver. He said that he was going to speak to his manager on Monday but then he was given the day off and he panicked and thought if he took the post home it could be a criminal offence, but if he went into the depot he would be intimidated and bullied. He said that customers were waiting and the least he could do was deliver the post on the Monday.
97. The Claimant said his anxiety and depression had affected his decisions. He therefore thought that the best thing to do on the Monday was to "deliver the mail quietly and not tell anyone", and not to make someone else do a third of his walk.
98. The Claimant stated that he had not mentioned his anxiety to Ms Green as she was being aggressive accusing him of stealing the PDA (relating to text messages at page 173 of the Bundle).
99. He said that in the first fact finding meeting he had mentioned his panic attack but it was not put in the notes. In the second meeting he was not

asked questions about the date. He repeated that he was aware of how important it was to keep mail safe and that the mail had been safe in his home. He said that he had been told that there were circumstances in which you could take mail home if there was no other option.

100. It was put to the Claimant that the first time he had mentioned panic attacks was in the OH report. He denied this and said he raised them in his back to work meeting. He also said that he had told Ms Green and Ms Jarvis but they had not taken notes.

101. The Claimant said that he completed his work on 8 December 2018 to the “maximum of [his] abilities”.

Relevant policy documents

102. In addition to the terms and conditions of his employment, the parties produced declarations, guides and policies. The relevant parts are summarised below.

103. The Claimant also signed a Personal Declaration to Royal Mail Group on 26 April 2012 (page 60 of the Bundle). Within that document, under the sub heading Safety of Postal Packets, the following is set out:

“It is ... a criminal offence to open or delay (contrary to your duty) a letter, parcel, mailbag or any other postal packet in course of transmission by post”.

104. The Respondent also provides a Guide for employees entitled “Security of Customers’ Mail and Royal Mail Group Property” (pages 95 to 97 of the Bundle), which states that employees must protect the security of the mail, and that whether mail is stolen or not, a conduct investigation can still take place in respect of an employee whose actions cause the mail for which they are responsible to be insecure. This includes mail being left at an unauthorised drop off point.

105. The Respondent has published a National Joint Statement with CWU, the communications union entitled “Avoiding Delay (Commit to deliver) and Reporting Standards”.

106. That document confirms that delay to mail is a serious matter and could potentially be unlawful. Further, any time that mail is delayed, for whatever reason, Royal Mail employees should attempt to correct the problem efficiently and effectively as soon as possible. In particular, under general rules, it states the following:

“Employees must be made aware that mail must never be taken home at the end of a delivery. Correct endorsement procedures and correct use of the pouching wallet, where appropriate, will avoid this

Under normal circumstances, if procedures have been followed no conduct action will be taken against individuals if it is not possible to deliver all mail within their scheduled time ...

Measures must be put in place to advise employees on the course of action to be taken when difficulties arise when managers are unavailable” (page 102 of the Bundle).

107. The Respondent’s Conduct Policy provides, inter alia, that:

- Conduct and behaviour should be managed by providing constructive feedback... At every stage in the procedure the employee will be advised of the full nature of the allegation and the action that might be taken against them and will be given the opportunity to state their case before any decision is made
- No conduct action will be taken against an employee until the case has been fully investigated
- No employee will be dismissed for a first breach of conduct, except in the case of gross misconduct, when the penalty will normally be dismissed without notice or payment in lieu of notice
- Notification of action in line with the Conduct Policy will only be made when sufficient facts of the case have been determined.

108. The Policy also stated that the authority to give warnings and serious warnings lies with the immediate manager. Major penalties will normally be given by an employee’s second line manager of at least Royal Mail Executive Manager Level 2 grade.

109. The Policy outlines types of behaviour that are so serious and so unacceptable that if proved they would amount to gross misconduct and warrant dismissal without notice or pay in lieu of notice. One example cited is the intentional delay of mail. Another example is deliberate disregard of health, safety and security procedures or instructions.

110. In respect of appeals, the Policy states that for appeals relating to dismissal the appeal will normally be held by an appeals manager.

Law relating to unfair dismissal

111. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that he was dismissed by the Respondent under section 95, but in this case the responded admits that it dismissed the Claimant (within section 95(1)(a) of the 1996 Act) on 14th January 2019.

112. Section 98 of the 1996 Act deals with the fairness of dismissals.

113. Section 98(4) provides:

“... the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) 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 shall be determined in accordance with equity and the substantial merits of the case".

114. In respect of misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions in *British Home Stores v Burchill* 1978 IRLR 379 and *Post Office v Foley* 2000 IRLR 827. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt.
115. The Tribunal must then decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation.
116. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band of reasonable responses open to an employer in the circumstances.

Conclusions

117. The first issue is what was the principal reason for dismissal. I find that the reason is misconduct based on the Claimant taking undelivered mail home with him, not advising a manager of the undelivered mail and attempting to deliver mail on a non-working day.
118. These actions were in breach of the Respondent's policies.
119. The next question is the three stages in the *BHS v Burchell* case. First, did the Respondent genuinely believe that the Claimant committed the misconduct alleged. I find that there was not a genuine belief. This stage needs to be considered in conjunction with the second stage.
120. Second, was that belief held on reasonable grounds? The burden of proof in respect of this overall question of fairness is neutral. I must consider the reasonableness of the Respondent's conduct, not the injustice to the Claimant.
121. I find that the belief was not held on reasonable grounds. The dismissing officer initially formed the view, based on the account given by the Claimant, that an occupational health report would be necessary for her to consider the conduct. However, having ordered the report, Mrs Jarvis did not wait for it; she dismissed the Claimant.
122. She also showed bias towards colleagues she had worked with for years, as set out above.

123. Third, was there a fair and reasonable investigation? I find that there was not. The dismissing officer was a witness to part of the acts complained of. Ms Jarvis had in fact witnessed the Claimant delivering mail on 10 December 2018. It was submitted on behalf of the Respondent that the use of a witness as the investigation officer did not prejudice the investigation so as to render it wholly unfair. It was submitted that Ms Jarvis had limited involvement in the events of 10 December 2018 and that she remained independent of the investigation. I do not accept the Respondent's submissions on this point. The initial process which led to the Claimant being dismissed was not fair.
124. There was an initial fact-finding meeting with the Claimant in which he gave his account. There was then a conduct meeting, at which the Claimant had union representation, was given the appropriate notice and was given the opportunity to make representations. However, those representations were not properly considered. To have done so would have required the dismissing officer to review the Claimant's mental health through an OH report. Ms Jarvis had ordered the report be obtained, but had not waited a matter of days for the report to be provided. From her evidence it appears that she was not concerned by the criticisms made of her, stating that that was why there were appeal hearings.
125. After the decision had been made to summarily dismiss the Claimant, he was given the opportunity to appeal the decision, which he did.
126. The Claimant chose to make written submissions. Those were made in detail. They were considered in detail, and his appeal was not upheld.
127. As regards procedure generally, I find that the procedure followed in respect of the investigation and dismissal was not reasonable as set out above. Ms Walsh in her evidence stated that she felt that the appeal had been able to correct any issues from the original decision. However, one of the key elements was the question of the potential reoccurrence of the Claimant's condition. He was not given any opportunity to comment upon the opinion given in response to Mrs Walsh's further question.
128. The Claimant had raised the fact that he was having panic attacks, and was concerned about working new routes and using unfamiliar practices on more than one occasion. I accept the evidence he gave on the balance of probabilities that he raised it with management on occasions prior to the two return to work meetings. Within the meetings themselves, panic attacks were clearly discussed and the condition was ongoing. The Claimant was not referred to Occupational Health in his new role until after he was suspended, and then the decision maker did not wait for the report before dismissing the Claimant.
129. Finally, the question is whether the dismissal was a fair sanction. Could a reasonable employer have decided to dismiss for the Claimant for acting in the way the Claimant did in this case? I find that they could not.

130. The circumstances leading to the Claimant failing to deliver all the mail in his shift were as a result of medical conditions which the Respondent had been made aware of. The OH report supported his position.
131. I make it clear, that it is immaterial how the Tribunal would have handled the events or what decision it would have made. I do not, nor am I entitled to, substitute my own view for that of the reasonable employer.
132. It is accepted that summary dismissal is the most serious outcome for an employee. However, I find that it is outside the range of reasonable responses in this case.
133. I find, therefore that the Claimant was unfairly dismissed by the Respondent within section 98 of the Employment Rights Act 1996.
134. Remedy will be considered on a date to be fixed by the Tribunal.

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Employment Judge Beckett

Dated: Draft 17 February 2022
Final draft after submissions received
from Respondent on 23 May 2022,
16 June 2022