EMPLOYMENT TRIBUNALS

Claimant: **J Harding**

Respondent: **Royal Mail Group Ltd**

Held at: **London South Employment Tribunal by video hearing**

On: **7 and 8 September 2022**

Before: **Employment Judge L Burge**

Representation
Claimant: J Stewart (friend)
Respondent: J McArdle, Legal Executive

RESERVED JUDGMENT

It is the Judgment of the Tribunal is the Claimant's claim of unfair dismissal fails and is dismissed.

REASONS

Introduction

1. The Claimant was employed by the Respondent from 23 June 2003 as a postman. He also held the role of Health and Safety Representative and Union Representative at the Dorking Delivery Office. On 9 June 2021 he was dismissed for alleged gross misconduct.

2. The Claimant claimed that his dismissal was unfair within section 98 of the Employment Rights Act 1996. The Respondent said that it fairly dismissed the Claimant for gross misconduct.

The evidence

3. Glenn Johnson (Delivery Office Manager) and Anne Walsh (Independent Casework Manager) gave evidence on behalf of the Respondent. The Claimant, John Harding, gave evidence on his own behalf.

4. The Tribunal was referred during the hearing to documents in a hearing bundle of 375 pages. The Claimant also provided the Tribunal with videos showing the location of where the accident had happened.

5. Both Mr Stewart and Mr McArdle provided the Tribunal with oral closing submissions.

Issues for the Tribunal to decide

6. At the beginning of the hearing the Tribunal agreed with the parties the issues to be decided. These were:

I. Unfair dismissal

a. What was the reason or principal reason for the Claimant's dismissal? The parties agreed that the Claimant was dismissed for alleged misconduct and that this was a potentially fair reason under sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA").

b. Was the dismissal fair or unfair within section 98(4) ERA, and, in particular, did the Respondent in all respects act within the band of reasonable responses? In accordance with the test in *British Home Stores v Burchell* [1980] ICR 303, the Tribunal would decide whether:

i. there were reasonable grounds for that belief;
ii. at the time the belief was formed the Respondent had carried out a reasonable investigation;
iii. the Respondent otherwise acted in a procedurally fair manner;
iv. dismissal was within the range of reasonable responses.

II. Remedy if the dismissal was unfair

a. The Claimant said that he wanted to be reinstated to the Respondent. The Respondent said that there were vacancies in the Dorking office and that reinstatement would be practicable, although not appropriate due to the Claimant's contributory conduct.

b. If not, is the Claimant entitled to a Basic Award and/or a Compensatory Award, and, if so, should there be any of the following adjustments:

i. any reduction or limit in the Compensatory Award to reflect the chance that the Claimant would have been dismissed in any event and that any procedural errors accordingly made no difference to the outcome in accordance with the principles in *Polkey v AE Dayton Services Ltd [1987] UKHL 8* and subsequent caselaw and/or

ii. any reduction in either award to reflect any contributory fault on the Claimant's behalf towards his own dismissal?

Findings of Fact

7. The Respondent is a company providing postal services employing 130,000 employees. The Claimant was employed from 23 June 2003 by the Respondent as a Postman ("OPG") and was also a Health and Safety Representative and Union Representative at the Dorking Delivery Office.

8. The Respondent's Conduct Policy included as gross misconduct "Deliberate disregard of health, safety and security procedures or Instructions". The penalties included suspended dismissal, suspended dismissal with compulsory transfer within or outside area, dismissal with notice and dismissal without statutory notice (summary dismissal).

9. A Safety Health and Environment ("SHE") alert was issued on "vehicle roll-away" on 8 January 2019 which reinforced the mandatory control required when parking vehicles to eliminate roll-away incidents. The overview stated "*Vehicle roll-away can cause serious injury or even fatality, and drivers could place themselves at risk of prosecution of a serious motoring offence and/or disciplinary action if they fail to comply*". The key message was:

> *"ALWAYS apply the handbrake firmly…*
> *ALWAYS leave the vehicle in a low gear…*
> *ALWAYS turn the wheels [away from danger]…*
> *THINK HIT – Handbrake on In gear Turn wheels"*

10. The Claimant gave evidence, that is accepted, that he knew about the SHE notice on the HIT procedures and that as a Health and Safety/Union representative he would stand next to trainers when they trained staff on health and safety to show that the Union supported the training. The Claimant said that he knew that there was a threat of dismissal, his evidence to the Tribunal, which is accepted, was that the Respondent had threatened dismissal for breach of the HIT procedures for 5 years. although he had not been aware of anyone who had actually been dismissed.

11. The Respondent has a Conduct Agreement which includes an "approach for Union Representatives". That approach included step one informal step two fact finding, step three meeting with CWU divisional rep, step four action required and step 5 outcome. The Claimant gave evidence to the Tribunal that, in his view, step three had not been complied with. Step three provides that:

> "*Within one week of completion of formal fact finding under the Conduct Policy, a meeting will be held between the manager undertaking the fact finding meeting, their manager and a CWU divisional representative*".

12. Mr Johnson gave evidence to the appeal panel and the Tribunal, and the Tribunal finds as a fact, that a meeting took place in accordance with that

requirement. The Claimant may not have known about it as he was not in attendance.

13. On 1 April 2021 the Claimant was 3 hours into a four-hour delivery when he got to Dean House Farm and parked the Respondent's vehicle which he was driving to make deliveries. He applied the handbrake but did not recall whether it clicked on pulling it up. He needed the toilet, so quickly got out of the vehicle and locked it. The Claimant delivered the mail to the flats and then went into Dean House Farm, delivered their mail and used their toilet. During that time the vehicle had rolled across the street and into a private car. A witness told him that his vehicle had rolled and hit a car.

14. The Claimant immediately telephoned his manager, Warren Atkin (Delivery Line Manager), who told him to report the accident, which he did. The Claimant was upset about the incident and "horrified because of what had happened and aware that [he] could lose [his] job". The RAC said they would not be able to get to the van for four or five hours. Mr Atkin asked the Claimant to drive the vehicle back to the depot while he waited for the owner of the damaged private car. In evidence to the Tribunal both Mr Johnson and Ms Walsh were critical of Mr Atkin's decision to ask the Claimant to drive the damaged vehicle back to the depot rather than waiting for vehicle recovery.

15. Mr Atkin did not return to the office but suggested to the Claimant that he should go home to get some rest. The next day was a bank holiday and the Claimant was suspended on full pay the following day (3 April 2021) so that an investigation could be carried out. Mr Atkin completed an Electronic Reporting of Incidents for Collation and Analysis ("ERICA") on 3 April 2021. To the Tribunal the Claimant was critical of Mr Atkin for not sharing the ERICA but in cross examination could not point to what details were incorrect in the form. Notes of the conduct interview that took place on 12 May 2021 show that the Claimant was asked to review the ERICA and asked whether there was anything he wanted to add but the Claimant did not and agreed with its contents. In evidence to the Tribunal the Claimant said he did not recall this but the Tribunal, on balance, finds that the notes are an accurate reflection and so he did review the ERICA at that time. A handbrake safety inspection was carried out on the vehicle that showed no issues with the handbrake.

16. The Claimant attended a fact finding meeting with Mr Atkin on 12 April 2021. The Claimant was remorseful for his actions. He told Mr Atkin that he had applied the handbrake, there was no handbrake alarm, he had been desperate for the toilet and he had a minor delay. The Claimant said that he knew the three elements of the HIT procedure but had not done the other two elements, namely put the vehicle in gear and turn the wheels. He said that he had thought that there had not been enough of a gradient for the vehicle to have rolled away. As dismissal was a possible option the case was passed to a manager of a higher grade, Mr Johnson.

17. The letter inviting the Claimant to a conduct interview was clear that dismissal was a possible option. On 12 May 2021 a conduct interview took place with the Claimant, S Collins (SWU Area Union representative) and Mr

Johnson. The Claimant confirmed that he knew about the requirements of the HIT procedure and that, as the health and safety representative, he would stand alongside the trainer to show Union support.

18. In the decision letter from Mr Johnson dated 28 May 2021, charges against the Claimant were set out:

> *"Failing to use the correct process when parking Royal Mail OMV 814. (failing to leave the OMV in gear and failing to turn the wheels which resulted in the OMV rolling and colliding with a parked car)"*

19. The decision was to dismiss the Claimant without notice. Mr Johnson wrote lengthy reasons for this decision, including that:
    a. the Claimant had been the health and safety representative for 5 years and had supported safety briefings, especially the HIT process and so had good knowledge of the process;
    b. the Claimant had been a driver since 2003 and so had vast experience of what was expected;
    c. there were no faults in the vehicle;
    d. everything was ok in the three hour period prior to the incident, although he did need the toilet;
    e. there was no handbrake alarm and no stickers reminding the Claimant to utilise the HIT process;
    f. Mr Johnson had visited the scene, there was a small gradient but he thought it was safe to park in that location if the HIT procedure had been used;
    g. the Claimant was fully aware of the HIT process and had attended training;
    h. the handbrake was not faulty;
    i. he was disappointed in Mr Atkin's approach on the day of the incident;
    j. the Claimant worked 12 hour days 6 days a week due to overtime and that he worked on Sundays delivering covid kits and this may have contributed to a possible lack of attention.

20. Mr Johnson said he also took into account comparator cases to ensure consistency but that all cases should be decided on their own merits. To the Tribunal the Mr Johnson gave evidence that in his experience 70% of cases where a vehicle had rolled away had resulted in dismissal. A case where he had decided not to dismiss was where the employee had just received news that a family member had been taken to hospital. The Tribunal finds as a fact that Mr Johnson did consider whether the sanction was consistent with other cases.

21. The Claimant appealed the decision to dismiss him. A national appeal panel interview took place chaired by Georgina Hirsch with Anna Walsh as the Respondent's HR representative, Mick Kavanagh as the CWU Union representative panelist, Bev Stevenson as the Local coordinator, the Claimant and his advocate Martin Walsh. The interview lasted just under two hours and explored the issues. Comparator cases were discussed. In evidence to the Tribunal, that is accepted, Ms Walsh said that she attempted to get more information on other disciplinary cases involving vehicle roll-aways but she was unsuccessful. She said that she had heard about four

roll-away cases and in each case the employee was dismissed, and none of them were Trade Union representatives. The appeal panel also interviewed Mr Johnson and explored with him why he appeared to be holding a health and safety representative and union representative to a higher standard. He said:

> "*When you are Health and Safety Rep. for any incident they are fully involved in the accident investigation. He would have been involved for every accident in Dorking. From his knowledge of the correct processes gained by doing that, it stands to reason he has more knowledge than others from the experience gained*."

22. The majority decision of the appeal panel was that the dismissal decision was upheld. They took into account that the Claimant had a clean record and that the Claimant was a "a very good postman and a very good health and safety representative". The misconduct had not been disputed and so the appeal was solely on the severity of the sanction. To the appeal point that there was "not much of a gradient", they concluded that there had been enough of a gradient for the car to roll. During the appeal interview Mr Johnson answered the hypothetical question of whether he would have dismissed the Claimant if he had not been a Trade Union representative and Mr Johnson confirmed that he would have done if he had evidence that the individual had received the HIT training in the last two or three years and signed to say that they had understood.

23. The minority view of the appeal panel was that the Claimant had been dismissed because he was a Trade Union representative. The majority view was that the Claimant's Health and Safety/Trade Union representative position meant that the Claimant knew the policy well.

Legal principles relevant to the claims

Unfair dismissal

24. Section 94 Employment Rights Act ("ERA") 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 the Respondent must show the reason for dismissing the Claimant (within section 95(1)(a) ERA). S.98 ERA deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within s.98(2).

> *s.98 (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*
>
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
>
> *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

25. The second part of the test is that, if the Respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the Respondent acted fairly or unfairly in dismissing for that reason:

s.98 (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

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

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

26. In the case of *British Home Stores v Burchell* [1978] IRLR 379 EAT, the court said that a dismissal for misconduct will only be fair if, at the time of dismissal:

(1) the employer believed the employee to be guilty of misconduct;

(2) the employer had reasonable grounds for believing that the employee was guilty of that misconduct; and

(3) at the time it held that belief, it had carried out as much investigation as was reasonable.

27. In the case of *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439 EAT, guidance was given that the function of the Employment Tribunal was to decide whether in the particular circumstances the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair. If the dismissal falls outside the band, it is unfair.

28. In the case of *Sainsburys Supermarket Ltd v Hitt* [2003] IRLR 23 CA, guidance was given that the band of reasonable responses applies to both the procedures adopted by the employer as well as the dismissal.

29. *Brito-Babapulle v Ealing Hospital NHS Trust* [2013] IRLR 854 per Langstaff (P) at [40]:

"… It is the tribunal's task to assess whether the employer's behaviour is reasonable or unreasonable having regard to the reason for dismissal. It is the whole of the circumstances that it must consider with regard to equity and the

> *substantial merits of the case. But this general assessment necessarily includes a consideration of those matters that might mitigate. For that reason, we think that there was here an error of direction to itself by the tribunal."*

30. The Court of Appeal in *Shrestha v Genesis Housing Association Limited* [2015] EWCA Civ 94:

> *"To say that each line of defence must be investigated unless it is manifestly false or unarguable is to adopt too narrow an approach and to add an unwarranted gloss to the Burchell test. The investigation should be looked at as a whole when assessing the question of reasonableness. As part of the process of investigation, the employer must of course consider any defences advanced by the employee, but whether and to what extent it is necessary to carry out specific inquiry into them in order to meet the Burchell test will depend on the circumstances as a whole. Moreover, in a case such as the present it is misleading to talk in terms of distinct lines of defence. The issue here was whether the appellant had over-claimed mileage expenses. His explanations as to why the mileage claims were as high as they were had to be assessed as an integral part of the determination of that issue. What mattered was the reasonableness of the overall investigation into the issue."*

31. The Court of Appeal in London Ambulance *NHS Trust v Small* [2009] IRLR 563 warned that when determining the issue of liability, a Tribunal should confine its consideration of the facts to those found by the employer at the time of dismissal. It should be careful not to substitute its own view for that of the employer regarding the reasonableness of the dismissal for misconduct. In *Foley v Post Office; Midland Bank plc v Madden* [2000] IRLR 82 the court said it is irrelevant whether or not the Tribunal would have dismissed the employee, or investigated things differently, if it had been in the employer's shoes: the Tribunal must not "substitute its view" for that of the employer.

32. The Employment Appeal Tribunal in *Clark v. Civil Aviation Authority* [1991] IRLR 412 laid out some general guidelines as to what a fair procedure requires. But even if such procedures are not strictly complied with a dismissal may nevertheless be fair – where, for example, the procedural defect is not intrinsically unfair and the procedures overall are fair: *Fuller v. Lloyd's Bank plc* [1991] IRLR 336. An employment tribunal must take a broad view as to whether procedural failings have impacted upon the fairness of an investigation and process, rather than limiting its consideration to the impact of the failings on the particular allegation of misconduct, see *Tykocki v. Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust* UKEAT/0081/16.

Remedy

33. If an unfair dismissal complaint is well founded, remedy is determined by sections 112 onwards of the ERA. Sections 113 and 114 ERA provide for an order for reinstatement:

> *113 The orders.*
>
> *An order under this section may be—*
>
> *(a) an order for reinstatement (in accordance with section 114), or*
> *(b) an order for re-engagement (in accordance with section 115),*
>
> *as the tribunal may decide*

114 Order for reinstatement.
(1) An order for reinstatement is an order that the employer shall treat the complainant in all respects as if he had not been dismissed.

(2) On making an order for reinstatement the tribunal shall specify—
(a) any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of reinstatement,
(b) any rights and privileges (including seniority and pension rights) which must be restored to the employee, and
(c) the date by which the order must be complied with.

(3) If the complainant would have benefited from an improvement in his terms and conditions of employment had he not been dismissed, an order for reinstatement shall require him to be treated as if he had benefited from that improvement from the date on which he would have done so but for being dismissed.

(4) In calculating for the purposes of subsection (2)(a) any amount payable by the employer, the tribunal shall take into account, so as to reduce the employer's liability, any sums received by the complainant in respect of the period between the date of termination of employment and the date of reinstatement by way of—
(a)wages in lieu of notice or ex gratia payments paid by the employer, or
(b)remuneration paid in respect of employment with another employer, and such other benefits as the tribunal thinks appropriate in the circumstances.

34. Where re-employment is not awarded compensation is awarded by means of a basic and compensatory award. The basic award is a mathematical formula determined by s.119 ERA. Under section 122(2) it can be reduced because of the employee's conduct:

> *"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".*

35. A reduction to the compensatory award is primarily governed 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…"*

36. The leading authority on deductions for contributory fault under section 123(6) remains the decision of the Court of Appeal in *Nelson v British Broadcasting Corporation (No. 2)* [1980] ICR 111. It said that the Tribunal must be satisfied that the relevant action by the Claimant was culpable or blameworthy, that it caused or contributed to the dismissal, and that it would be just and equitable to reduce the award.

37. The compensatory award can be reduced if the Tribunal considers that a fair procedure might have led to the same result, even if that would have

taken longer (*Polkey v A E Dayton Services Limited)* [1988] ICR 142.

Conclusions

38. The Claimant agreed that the Respondent had a potentially fair reason for dismissal, namely misconduct. The focus of the dispute was therefore whether the Respondent acted reasonably in all the circumstances in dismissing the Claimant for that reason. In particular, did the Respondent have reasonable grounds for the belief in the Claimant's guilt and was that belief formed after a reasonable investigation?

39. The Respondent is a large employer and had a HIT policy that it expected all employees to follow. The Claimant admitted the misconduct. He knew that he had to follow the HIT procedure, he knew what it was and that it was mandatory and he admitted that he had not done so. As a result his vehicle rolled across a lane into a car and caused damage. The Claimant also knew how important the HIT policy was to the employer. He knew that for the five years previously the Respondent had threatened dismissal for breach of the HIT procedures. When the accident happened the Claimant was "horrified because of what had happened and aware that [he] could lose [his] job".

40. Mr Stewart provided valuable representation to the Claimant at the hearing. He argued that the wheels must have been turned for the car to roll across the lane. However, even if that was the case, that still does not alter the fact that the Claimant had not complied with the other requirement – put the vehicle in gear –and this would have stopped the vehicle rolling away. The policy mandates all three actions.

41. Mr Stewart argued that the investigation was deficient because Mr Atkin had asked the Claimant to drive the damaged vehicle back to the depot. The Respondent's witnesses agreed that in their view he should not have done this. In the Tribunal's view, while this may have been poor practice this did not affect the investigation. Mr Stewart also argued that the investigation was not fair as step three of the "approach for Union Representatives" had not taken place. However, the Tribunal has found as a fact that it did take place.

42. The Claimant provided videos to the Tribunal showing that the distance the car rolled could only have been 6 – 10 metres, not 20 metres as stated in the disciplinary procedures. This challenge was not before the appeal panel when they were making their decision and was only raised in the Tribunal.

43. This was a case of admitted misconduct. There was an investigation, the vehicle was inspected to ensure that there was no fault with the handbrake, the Claimant was informed of the charges against him and that the result could be dismissal. Detailed disciplinary and appeal hearings took place. The only potential unfairness in the investigation was that the car rolled 6 – 10 metres, rather than 20. The Tribunal reminds itself that employers are not expected to carry out perfect investigations. In accordance with *Shrestha v Genesis Housing Association Limited* the investigation as a whole must be fair. Both Mr Johnson and Ms Walsh gave evidence, that is accepted, that the distance of 6m as opposed to 20m would have made no

difference to the outcome. The mistake about the distance of 20m did not taint the overall fairness of the investigation. The Tribunal's conclusion on this case is that the investigation as a whole was fair.

44. Mr Stewart produced pictures of the Respondent's vehicles parked outside a depot and argued that they were clearly not parked in accordance with the HIT procedure. He maintained that this was a health and safety risk, those employees who had parked them there had not had disciplinaries against them and so the Claimant was not being treated consistently. However, while the Respondent will no doubt wish to take notice of these potential breaches, there is a significant difference in that the Claimant, and others who have faced disciplinary for breach of the HIT procedure, have caused a vehicle to roll away and thus cause or have the potential to cause damage or cause injury. This explains the difference in treatment.

45. The allegation that the Claimant was held to a higher standard for being a Health and Safety and Trade Union representative is not borne out in the evidence. Others, who were not Trade Union representatives, were dismissed for failure to follow the HIT procedure leading to a roll-away. Further, it is the fact that the Claimant not only knew about the HIT procedure but he was very well versed in it – he would stand next to health and safety trainers while they delivered training on it. This is a legitimate consideration for Mr Johnson to take into account.

46. The Claimant deliberately did not follow the HIT policy because he was in a rush and needed the toilet and the Respondent did not consider this to be a valid reason not to adhere to the procedures. The Claimant was remorseful, he was very upset and he had 17 years' service at the Respondent. He had been working a lot of voluntary overtime. The Claimant was a very good postman and a very good health and safety representative. The Tribunal had considerable sympathy for him. However, the Tribunal reminds itself that the analysis must centre around whether dismissal was within a range of reasonable responses of a reasonable employer. It does not matter whether the Tribunal would have dismissed in these circumstances. Mr Johnson did weigh length of service, remorse, and upset along with consistency of sanction and many other factors into the balance when he made his decision. The decision to dismiss was harsh but it was within the range of reasonable responses of a reasonable employer.

47. For all the above reasons, the Tribunal concludes that it is in accordance with equity and the substantial merits of the case that the Respondent acted reasonably in treating the Claimant's misconduct as a sufficient reason for dismissing him.

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Employment Judge **L Burge**

Date: 9 September 2022

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