EMPLOYMENT TRIBUNALS

CLAIMANT: Mr Nigel Ridge

RESPONDENT: Royal Mail Group Ltd

HELD AT: London South (by CVP) **ON:** 13 December 2022

BEFORE: Employment Judge Hart

REPRESENTATION:

Claimant: In person
Respondent: Ms Tahir, solicitor

JUDGMENT

The judgment of the tribunal is that:

1. The application to amend the claim at the commencement of the hearing, to add new claims for unlawful deduction of wages and / or breach of contract in relation to underpayment of suspension pay prior to dismissal, was refused.

2. The claim for unfair dismissal is dismissed

3. The claim for redundancy pay is dismissed upon withdrawal by the claimant.

4. The claim for holiday pay is dismissed upon withdrawal by the claimant.

REASONS

INTRODUCTION

1. This is a claim for unfair dismissal. Mr Ridge, the claimant, was dismissed without notice on the 9 June 2021 for gross misconduct (theft of personal protective equipment (PPE) amounting to approximately £20).

THE HEARING

2. The parties and their witnesses attended by CVP. They are thanked for their assistance and representation during the hearing.

3. It was confirmed at the outset of the hearing that no reasonable adjustments were required by either party.

4. The tribunal was provided with a joint agreed hearing bundle of 154 pages, the references to page numbers in this judgment are to the pages in this bundle.

5. During the hearing it became apparent that the claimant was using a previous version of the hearing bundle, that had been provided to him in paper form in February 2022. A subsequent version had been emailed to him but he was unable to access the digital version. The page numbers of his bundle were different to that before the tribunal but it was established that apart from pages 153-154 the documents were the same, and that by giving the claimant time to locate the documents in his bundle he was able to proceed. In relation to pages 153-154, the respondent had emailed these pages to the claimant on 10 August 2022 but he had been unable to open the attachment. The claimant confirmed that he could receive a digital version of the document if it was contained in the body of the email (rather than as an attachment). The tribunal adjourned for this to be done. The claimant confirmed receipt and stated that it was difficult to read but would do what he can. He was able to answer questions on the document, including confirming that he remembered signing the document in question.

6. The claimant provided a witness statement and gave evidence on his own behalf. The respondent provided witness statements for Mr O'Dell, Ms Knight-Smith and Mr Brady. Ms Knight-Smith and Mr Brady gave evidence on behalf of the respondent.

7. On completion of the evidence the respondent made oral submissions. The claimant was asked if he wished to make any submissions and declined, stating he had covered what he wanted to say in his evidence and questions. He was reassured that this would be taken into account.

8. Judgment on liability, and the remedy issues of Polkey and contribution, was reserved and a provisional date for a remedy hearing was arranged for 20 March 2023.

PRELIMINARY ISSUES

Mr O'Dell's statement

9. At the outset of the hearing the claimant objected to the inclusion of Mr O'Dell's statement.

10. The tribunal noted that this was a second listing for a final hearing, the first, listed for 16 August 2022, was postponed due to illness of one of the respondent's witnesses. Prior to this hearing witness statements had been exchanged in compliance with the tribunal's standard orders. At this point the respondent were only intending to call Ms Knight-Smith and Mr Brady as witnesses.

11. On 16 November 2022, the respondent applied to add the statement of Mr O'Dell. The respondent stated that additional information had come to light, that it would not impact on the hearing length, and that the claimant would not be put at a disadvantage since he had sufficient time to prepare and had not to date raised any objection.

12. On 20 November 2022 the claimant strongly objected to the inclusion of this late statement. The matter was left for the trial judge to determine.

13. In making its oral application the respondent explained that the additional information that came to light was the manner in which the allegation of misconduct was initially reported. The respondent did not explain why this evidence could not have been obtained prior to the previous hearing and the exchange of witness statements.

14. Having considered the submission of both parties, the tribunal refused to admit Mr O'Dell's statement. His original report was included in the hearing bundle and his statement did not substantially add to this report. The claimant was a litigant in person and had objected to its late inclusion. Further, whilst the statement was only two pages, it was an additional witness which could increase the length of the hearing beyond the day allocated.

Withdrawal of claims

15. The claimant confirmed that there was no redundancy situation. The tribunal dismissed the claim for redundancy pay upon withdrawal.

16. The claimant confirmed that he had been paid outstanding holiday pay. The tribunal dismissed the claim for holiday pay upon withdrawal.

Application to amend

17. In the schedule of loss submitted on 15 January 2022 the claimant had included a claim for unlawful deduction of wages and / or breach of contract in relation to the reduction of his pay during the period of his suspension prior to his dismissal. The schedule of loss stated that "*suspended from 18.3.21 and given OPG salary*

instead of managerial salary for 12 weeks until my dismissal on 9.6.21. I had been Deputy Manager for the preceding 7 years". The amount claimed, representing the difference in the salary, amounted to a total of £8,112.

18. The claimant had not referred to this matter in his claim form, nor had the claimant applied to amend his claim before the date of the second tribunal hearing. The claimant was informed that if he wished the tribunal to consider these claims he would need to make an application to amend. He was informed of the legal test to be applied and that were his application to succeed, it was likely that the hearing would need to be adjourned. The claimant confirmed that he did wish to make an application to amend, and both parties were given time to prepare submissions.

19. The claimant made submissions with the assistance of the judge. He stated that he had thought that by including this sum in his schedule of loss he was in effect applying to amend his claim. ACAS had assisted him with his schedule of loss and had not advised him to make an application to amend. He stated that he had been informed by ACAS that when he had been suspended he should have received the same money as if he had been at work pending investigation. He confirmed that he received that advice a year and a half ago. He could not recall whether he had received advice from ACAS in relation to time limits. When asked why he had not referred to this matter in his witness statement the claimant responded that he thought it was sufficient to refer to it in his schedule of loss. The claimant was asked about his financial position, and confirmed that he was doing part-time delivery work and was in receipt of universal credit. He stated that he had no money and that the respondent would have to take him to court.

20. The respondent submitted (in summary) that this was a new claim which was itself out of time. That the claimant had been represented by his union during the internal dismissal proceedings and had not raised this issue at the time, or in his claim form or witness statement. No application to amend had been made until the start of this hearing, although the respondent did accept that the claimant thought what he had done was the right thing to do. The respondent also submitted that the claim was without merit, since the claimant was only contractually entitled to the managerial allowance for days when he was at work, and did not receive this allowance for periods when he was not at work, including holiday.

21. The tribunal gave oral judgment. The application to amend was refused. The reasons were as follows.

    21.1 The legal principles to be adopted are well established and set out in the leadings cases of **Selkent Bus Co Ltd v Moore** [1996] ICR 836; **Abercrombie & Oth v Aga Rangemaster Ltd** [2014] ICR. 209 and most recently in **Vaugham v Modality Partnership** [2021] ICR 535. The tribunal also took into account the Employment Tribunals (England and Wales) Presidential Guidance – General Case Management (2018). The respondent relied on the case of **Pakta v BBC** UKEAT 0190/17; in the tribunal's view this does not add to the legal principles, but rather is an example of an application to amend made at a hearing not succeeding. Inevitably these cases all turn on their own facts.

21.2 Taylor J in the recent case of **Vaugham v Modality Partnership** [2021] ICR 535 encouraged representatives and judges to re-read and think about the familiar authorities and what the words mean: paragraphs 1-2; see also paragraph 18. The tribunal took time to do so in this case.

21.3 The tribunal noted that the balance of hardship and injustice is the paramount consideration and that this has been repeatedly reinforced by the appellate courts. In **Selkent** Mummery J stated at paragraph 21 that in considering the exercise of its discretion the ET "*should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it"*. This point was reinforced by Taylor J in **Vaugham** at paragraphs 13-19, in which he criticised the tick box approach often adopted by parties in making or opposing applications to amend. He concluded at paragraph 25 that *"no one factor is likely to be decisive. The balance of justice is always key*". Further, Taylor J in **Vaughan** suggested that a practical approach should underlie the entire balancing exercise. In particular if the application was refused the severity of the consequences in terms of the prospects of success of the claim or defence and if the application was permitted what will be the practical problems in responding (paragraph 21). Where the prejudice of allowing an amendment is an additional expense, consideration should generally be given as to whether the prejudice can be ameliorated by an award of costs (paragraph 27).

21.4 In terms of the factors to be taken into account when considering the balance of hardship and injustice when an application to amend is made, **Selkent** identified the following three factors that may be relevant: the nature of the amendment, any time limits, and the manner in which an application was made. The tribunal noted that this list is not exhaustive and other facts may be taken into account, and no one factor is key.

21.5 <u>Nature of the amendment</u>: This concerned consideration of the nature of the amendment, i.e. whether the amendment sought is a minor matter such as the correction of clerical and typing errors, the addition of factual details to existing allegations or the addition or substitution of other labels for facts already pleaded to, or on the other hand whether it is a substantial alteration making entirely new factual allegations which change the basis of the existing claim. Thus the tribunal must decide whether the amendment is minor in nature or a substantial alteration pleading a new cause of action. However, as explained by Underhill LJ in **Abercrombie**, even if the amendment introduces a new cause of action, this would not of itself weigh heavily against amendment. The issue is not the fact of a new claim but the extent to which that claim is connected to or different to those claims already pleaded. At paragraph 48 he stated that: "*the approach of both the Employment Appeal Tribunal and this court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially*

different areas of inquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted."

21.6 The applicability of statutory time limits: This concerned consideration of whether the claim is out of time and whether time should be extended. However, whilst it is essential to consider the applicable time limits, the fact that an amendment would introduce a claim that was out of time is not decisive against allowing the amendment, it is a factor to be taken into account in the balancing exercise: **Transport and General Workers' Union v Safeway Stores Ltd** UKEAT 0092/07.

21.7 The timing and manner of the application: An application should not be refused solely because there has been a delay in making it. An application can be made at any time, even after promulgation of a judgment. However it is relevant to consider why the application was not made earlier and why it is now being made.

21.8 Applying these principles to the facts the tribunal found as follows.

21.9 Nature of amendment: This was a substantial amendment not a minor one. It concerned new claims that had not pleaded or even indicated in the claim form. Whilst the new claims were connected to the pleaded case in that they concerned payments during the period of suspension prior to dismissal the claims involved new factual enquiry and new areas of law.

21.10 Applicable statutory time limits: The new claims were substantially out of time. The claims run up to 9 June 2021 when the claimant was dismissed. Taking into account the three-month limitation period (extended by ACAS early conciliation) the claims are approximately 15 months' out of time. In relation to a claim for unlawful deduction of wages and / or breach of contract the legal test is whether it was "not reasonably practicable" for the claim to be submitted in time. This is a strict test. The claimant had not provided any explanation as to why the claim was not included in his pleadings, or why he did not apply to amend at the point that he was advised by ACAS of these potential claims one and a half years' ago. However the tribunal accepted that this is only one factor to take into account.

21.11 Timing and manner of application: The application to amend was made at the beginning of a one-day final hearing. Whilst this was very late, it was not determinative. The tribunal noted that the respondent did have some prior notice since the additional claims were included in the schedule of loss provided on 15 January 2022. The claimant is a litigant in person, and the tribunal accepted that the claimant genuinely thought that he had done the right thing. The schedule of loss was drafted with the assistance of ACAS who had not informed him of the need to apply to amend. On the other hand the tribunal also noted that the claimant had been represented by his union whilst he was still employed and that this issue had not been raised during his employment. Further the claimant had been advised of these claims by ACAS a year and a half ago (which

the tribunal noted was around the time that he submitted his claim form). The claimant had not explained why he failed to include these claims in his claim form.

21.12 Balance of injustice and hardship: This involved a difficult balancing act in this case. The tribunal considered that if the amendment was allowed there would be real practical consequences, since it would inevitably require the hearing to be adjourned. In order to ensure a fair hearing the respondent would need to be given an opportunity to respond, adduce evidence and call witnesses. This was not something that could be addressed during the course of the current hearing since the evidence and witnesses were likely to be different to that already before the tribunal. There would therefore be a prejudice to the respondent, in terms of both the inconvenience for the current witnesses who would have to attend a further hearing, the cost of a wasted hearing and the costs of defending a new claim. Whilst the additional cost could be addressed by way of an award of costs against the claimant, he had made it very clear that he would not be able to pay any wasted costs. The tribunal did not consider the delay in itself to be an insurmountable problem, since the new claims were likely to be dependent on the terms of the contract and not the recollections of witnesses. On the other side of the balancing act, the prejudice to the claimant was that he would not be able to pursue a claim for a significant sum of money of approximately £8000. The respondent claimed that this is not a real prejudice because the claimant was not contractually entitled to this sum during his suspension in any event. The tribunal is not in a position to assess the merits of this claim because the claimant has adduced no evidence in support, either documentary or in his statement. However the tribunal noted that if the claim does have merit, any prejudice to the claimant could be mitigated by the possibility that the claimant could bring a claim for breach of contract (although not unlawful deduction of wages) in the civil courts. Refusing the application to amend would not affect the claimant's claim for unfair dismissal, which is a different claim based on different facts and which was ready to proceed.

21.13 Taking into account all the above factors, and balancing the respective injustice and hardship to both parties, the tribunal concluded that the respondent would suffer the greater injustice and hardship if the amendment was allowed, it being too late to include the new claims without an inconvenient and costly adjournment which could not be ameliorated by an award of costs.

CLAIMS / ISSUES

22. The remaining claim was for unfair dismissal. The parties agreed that the issues be determined by the tribunal were as follows:

22.1 Was the reason or principal reason for the claimant's dismissal the potentially fair reason of conduct?

22.2 Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The tribunal will usually decide, in particular, whether:
(a) there were reasonable grounds for that belief;
(b) at the time the belief was formed the respondent had carried out a reasonable investigation;
(c) the respondent otherwise acted in a procedurally fair manner;
(d) dismissal was within the range of reasonable responses.

22.3 If the claimant was unfairly dismissed, what, if any, was the % chance of the claimant being fairly dismissed had a fair procedure been followed, or for some other reason ('Polkey deduction')?

22.4 If the claimant was unfairly dismissed, did he cause or contribute to his dismissal by blameworthy conduct ('contribution deduction')? If so by how much?

23. In his schedule of loss the claimant had included a claim for bonus pay and car purchase. He agreed that these were remedy issues arising out of his claim for unfair dismissal.

FACTUAL FINDINGS

24. The tribunal has only made findings of fact in relation to those matters relevant to the issues to be determined. Where there were facts in dispute the tribunal has made findings on the balance of probabilities.

25. The claimant commenced employment with Royal Mail, the respondent, on 3 July 1989. His substantive role was Operational Grade Postman (OPG) but for the last seven years he had held a managerial role at Medway Mail Centre.

26. In 1995 the claimant received a commendation for his honesty.

27. The respondent has a Conduct Policy which includes theft as an example of gross misconduct (**pg 31-37**). In addition has a set of "Business Standards" that employees are expected to comply with (**pg 38-48**). Employees were expected to follow the business standards, and "breaking of any of our business standards may be dealt with under the conduct policy and any finding of misconduct could result in action, up to and including dismissal" (**pg 39**). In particular employees were required to "act honestly at all times" (**pg 38)**. Further the standard on "Security, Privacy and Trust" included "protecting company and customer property and assets, making sure they are not stolen, abused, damaged, or taken for personal use" (**pg 42**). The claimant confirmed that he was aware of these standards, that they were strictly applied and that if found guilty of theft it warranted dismissal.

28. In the run up to Christmas 2020 the respondent used an outhouse to process the additional post. The claimant was in charge of clearing it out prior to the Christmas break. As he was leaving he noticed a carrier bag of PPE containing

sanitisers, wipes and gloves for use by the post-office workers. He put the carrier bag into the boot of his car and went home. He did not return to work until a week or so later. The tribunal accepted his evidence that by that point he had forgotten about the bag of left-over PPE. Two weeks later he attended a boot fair and put his purchases, which included PPE, into the boot of his car. These were also in carrier bags. On returning home he transferred all the contents of his boot into a cupboard, where it remained for 2 – 2½ months. In mid-March he cleared his cupboard and put the items, including the Royal Mail PPE, into boxes and put them up for sale on the NextDoor website. The tribunal finds that this is what the claimant was referring to when he states that the Royal Mail PPE got 'mixed up' with his own PPE purchases. The claimant in evidence initially denied that in March he realised that he still had the Royal Mail property because the packaging and the amounts were the same as that obtained at the boot fairs, however he later accepted that he knew the wipes belonged to Royal Mail because they were red.

29. On 17 March 2021 Mr Colin O'Dell, Security Field Manager, received a report that Royal Mail PPE was being sold on the NextDoor website. A screen shot was made of the postings which included gloves, wipes, sanitisers and face masks. The seller was identified as the claimant (**pg 49).**

30. On 18 March 2021 the claimant was interviewed by Mr O'Dell. The claimant was provided with the right to be accompanied which he declined. Mr O'Dell made a handwritten note of the admissions made by the claimant during the interview and this record was counter-signed by the claimant (**pg 153-154**). The notebook recorded that:

    30.1 The claimant "admitted that he sold 5 packets of wipes, 4 small bottles of sanitiser and 1 large bottle of sanitiser which was the property of Royal Mail which were left over from the Christmas operation'. Further on it is recorded that the amount recovered from sale was £22 which the claimant was "willing to pay back".
    30.2 "The masks were items purchased from Pedham boot fair Swanley which he paid £50 for 40 boxes…."
    30.3 The claimant "currently has 5 bottles of sanitiser and several packets of wipes". These were duly recovered by Mr O'Dell.
    30.4 The claimant "accepts that the items should have been brought back to the MC [mail centre]"

    In evidence the claimant confirmed that he remembered signing this document. He stated that he did not read it before doing so, but accepted that by signing the document it would appear to a third party that he was admitting that he had sold the items recorded in the note. The tribunal considers it unlikely that the claimant did not read the notes before countersigning, although he may have forgotten this by the time of the tribunal hearing.

31. Mr O'Dell provided a report setting out his investigation (**pg 49-51**). The report stated that in addition to the admissions recorded in Mr O'Dell's notebook, the claimant admitted that he knew it was wrong for him to sell the items. The report also recorded that the claimant initially stated that he had no more items at home but then admitted to having "3 packets of wipes, 1 large bottle of sanitiser and 4

small bottles of sanitiser." During his evidence the claimant disputed the contents of this report which he stated he only saw in January 2022. The tribunal considers that the claimant is mistaken as to when he first saw the report. The evidence suggests that he was provided with a copy of the report before the formal conduct meeting on 4 May 2021, since the "Guide for employees" refers to relevant documents being provided in advance (**pg 86**). Further, the meeting notes refers to the report as "item 1" and the relevant parts of the report are referred to during the meeting (**pg 90-91**).

32. Following the interview with Mr O'Dell, the matter was referred to Mr Robert Brady, Plant Manager, and the claimant was suspended from duty pending further investigation (**pg 52-53**).

33. Ms Heidi Mackie (Acting Night Shift Manager) was appointed to carry out a fact-finding investigation. She wrote to the claimant on the 24 March 2021, referring to the meeting with Mr O'Dell on the 18 March 2021 and inviting him to a meeting "to establish the facts and to determine if any formal action under the conduct policy is required" (**pg 55-56**). The claimant was provided with the right to be accompanied by a trade union representative or work colleague.

34. The fact-finding interview took place on the 31 March 2021 (**pg 63-66).** The claimant was represented by Mr Tony Falluto (CWU union representative). During the interview the claimant admitted that he had taken "8 packets of wipes and some hand sanitiser, not a lot". He denied taking any face masks. When asked how much financial gain he had made by selling Royal Mail property the claimant had stated that "with his own stuff about £20", and that the items taken from Royal Mail cost about "£8 to £10, a couple of quid, not much". He denied stealing since he did not know that the items had become "mixed in" with his stuff and accepted that he should have brought the items back to the mail centre after he had picked them up from the outhouse. In closing Mr Falluto referred to the claimant's long service and his commendation for honesty. He also raised in mitigation that the claimant had been dealing with the unpleasant breakdown of a relationship. On 6 April 2021 the claimant signed the fact-finding interview notes following amendments proposed by his trade union representative (**pg 66**).

35. Following the fact finding meeting Ms Mackie passed up the case to Mr Brady for consideration of any further action (**pg 67**). Mr Brady found that there was a case to answer and on 26 April 2021 the claimant was invited to attend a formal conduct meeting (**pg 83).** The claimant was informed that the allegations were as follows:

    "*1. Gross misconduct in that you have stolen Royal Mail property, in the form of Personal Protective Equipment for use by employees during the coronavirus pandemic.*
    2. Sold and / or attempted to sell Royal Mail Personal Protective Equipment for personal gain"

    The claimant was also informed that one outcome could be dismissal without notice. The claimant was informed of the right to be accompanied.

36. The formal Conduct Meeting took place on the 4 May 2021, it was chaired by Mr Brady (**pg 89).** Again the claimant was accompanied by Mr Falluto. At this meeting the claimant provided a fuller explanation of how the Royal Mail PPE items had become "mixed in" with his own possessions. During the meeting the claimant for the first time denied that he had sold any of the Royal Mail items. He claimed that the only items he had taken were those that he had handed back to Mr O'Dell namely 1 large and 4 small bottles of sanitiser and 3 packets of wipes. He stated that the £22 referred to in his interview with Mr O'Dell was the money he had made from selling his personal items, and that he had offered to pay this back "due to the mess of the situation".

37. When asked if there was anything else he wished to add the claimant stated that he was not in the right frame of mind due to a relationship breakdown, his mother being unwell with cancer and his daughter given birth early. Mr Falluto asked the respondent to take into account the claimant's clear service record and his poor mental health which resulted in him "not thinking of the consequences of his actions and how sorry he is".

38. Following the meeting the claimant was provided with the notes for his agreement and signature (**pg 97).** On 14 May 2021 the claimant signed the notes and added the following handwritten statement:

    " 'I have read the notes of the conduct formal interview and I would like to add that'
    I have acted totally out of character, I have acted stupidly to a one-off incident and was experiencing problems in my personal life, which caused me to act as I did. I love my job with Royal Mail and I am full of remorse for what has happened and I await in anticipation for your response"

    This statement was also signed and dated (**pg 96).** The claimant stated in evidence that when he referred to "acting out of character" he was referring to his lack of focus and allowing the situation to happen and not putting the Royal Mail property back.

39. On 4 June 2021 Mr Brady wrote to the claimant inviting him to a decision meeting (pg **110).**

40. The Decision Meeting took place on 9 June 2021. Mr Brady informed the claimant that he was to be dismissed without notice for gross misconduct ***(pg 115*)**. In his reasons Mr Brady noted the disparity in the amount of PPE taken across the three interviews and in relation to whether or not the PPE had been sold. He concluded that it was "hard to accept" the claimant's case that he did not realise that the items he had posted for sale were Royal Mail items. Mr Brady referred to the claimant's signed statement of the 14 June 2021 as confirming a "level of acknowledgement". Mr Brady dismissed the claimant's mitigation in relation to events in his personal life as being "all too frequent form of defence in life nowadays". In relation to the sanction to be imposed Mr Brady referred to the respondent's business standards and recorded that theft, no matter what scale, was not acceptable, that the sale of PPE purchased for the protection of Royal Mail employees was unacceptable. He stated that he had decided against a suspended dismissal because although the claimant had shown some belated

remorse he "has not been fully honest with his account in my view nor shown understanding of the effect his actions have had".

41. The tribunal does not find that Mr Brady was hesitant as to whether to impose a suspended dismissal or a dismissal as claimed by the claimant. The tribunal considered that it was likely that Mr Brady had read out the decision as set out in the Decision Making Summary, and that therefore the reference to suspended dismissal was made in the context of explaining why it was not appropriate in the claimant's case.

42. On 11 June 2021 the claimant appealed against the decision to dismiss (**pg 120).** His grounds of appeal were: that he had not been treated fairly (unspecified), that he had gone through mental stress over the past 12 months, and that he had a clear record of 32 years which he felt had been discounted.

43. On 29 June 2021 the claimant attended an Appeal Interview with Ms Sue Knight-Smith (**pg 123-127)**. He was accompanied by Mr Joe Bleach, a CWU representative. The appeal was a rehearing of the case, and the claimant again stated that the Royal Mail PPE had become mixed up with his own and that none of the Royal Mail PPE had been sold. During the meeting the claimant complained that he had photographs of his purchases at boot fairs and that no-one was interested in seeing them. Ms Knight-Smith confirmed in her evidence that the claimant had sent these to her after the meeting, and that they only related to the purchase of face masks and not the other PPE. At the end of the meeting, Mr Bleach asked for the claimant's long service and personal mitigating circumstances to be taken into account. Mr Bleach also stated that the claimant recognised that his actions could be "perceived as dishonest". The claimant in evidence before this hearing stated that he did not recall this comment of his union representative, and that did not agree with it.

44. On 28 July 2021 the Claimant was informed that the original decision to dismiss him had been upheld (**pg 129)**. Ms Knight-Smith did not accept as credible the claimant's explanation, noted the discrepancies in his account and concluded that the claimant's comments in the first interview with Mr O'Dell was likely to be the most accurate. In relation to sanction she stated that the monetary value of the property was not a relevant consideration, and whilst the claimant's long service, clean record and personal mitigation was taken into account so was the fact that he was in a managerial position. Ms Knight-Smith also noted the claimant's "lack of contrition".

45. On 29 July 2021 the claimant was provided with notes of the appeal interview, which he did not sign.

46. The claimant entered into ACAS Early Conciliation on 5 August 2021 and was provided with the Early Conciliation certificate on 11 August 2021. The claim form was presented to the tribunal on the 8 September 2021. The respondent's response form was submitted to the tribunal on the 18 October 2021. The tribunal finds that the claim was presented in time.

Claimant's submissions

47. The claimant's submissions, drawn from his witness statement and evidence, were:

    47.1 That he was innocent of any intentional wrongdoing and Royal Mail could not prove that he had done anything wrong.
    47.2 That the real reason for his dismissal was redundancy.
    47.3 That the disciplinary procedure was unfair in that:
        (a) "*On the 4 May 2021 when Rob Brady called me into his office and accused me of wrongdoing I did not know what he was talking about. I respected him as my manager and felt he must be right and I was wrong. I felt ill and the room was closing in on me - I just wanted to get out. This could not be happening to me. If he had said black was white I would have agreed with him".*
        (b) The respondent had failed to take into account evidence that he had purchased the PPE at boot fairs.
    47.4 That the sanction was unfair in that the respondent failed to take into account his previous unblemished record and personal mitigating circumstances.
    47.5 That Mr Brady appeared uncertain as to whether to give a suspended dismissal or instant dismissal, and in the light of this uncertainty Mr Brady should have given more weight to his extenuating circumstances.

48. The respondent's submissions were:
    48.1 The claimant's claim that he was dismissed in order to avoid paying him redundancy had not been pleaded but in any event there was no evidence of a redundancy situation.
    48.2 That the respondent had a genuine belief in the claimant's wrongdoing. The respondent referred to the inconsistences in the evidence provided by the claimant during the investigative process and the lack of credible explanation as to how he came into possession of Royal Mail property and / or how it got "mixed up" and put it up for sale with his own possessions.
    48.3 That the respondent's genuine belief was informed by a fair investigation process.
    48.4 Dismissal was a reasonable sanction for the theft, regardless of the amount concerned. It was a criminal offence. The respondent has a zero-tolerance policy to theft due to the reputational consequences to the respondent's business, with reference to the business standards, which the claimant had accepted in evidence. The claimant's mitigating circumstances did not justify the seriousness of the offence and the damage to trust and confidence connected to the offence.

THE LAW ON UNFAIR DISMISSAL

49. Section 94 of the Employment Rights Act 1996 (1996 Act) 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. In this case there is no dispute that the claimant was dismissed by the respondent.

50. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages. First, the respondent must show they had a potentially fair reason (in this case misconduct) for the dismissal within section 98(2). Second, if the respondent shows that it has 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.

51. The first stage concerns consideration of the "set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee": **Abernethy v Mott, Hay and Anderson** [1974] ICR 323 (NIRC). The burden of establishing the reason for the dismissal is on the respondent. It is not a heavy one but if the reason for the dismissal does not fall into one of the fair reasons then the dismissal will be unfair.

52. Section 98(4) deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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. The tribunal is required to determine this issue in accordance with equity and the substantial merits of the case.

53. The correct approach that tribunals should adopt in misconduct dismissals is that set out in the well-established guidance in **BHS v Burchell 1978 IRLR 379** and **Post Office v Foley 2000 IRLR 827**. In particular, the question under section 98(4) is whether the employer had reasonable grounds for believing that the claimant was guilty of misconduct, and whether those reasonable grounds were based on a reasonable investigation. When considering whether the respondent acted reasonably or not, the tribunal must decide whether it acted within the range of reasonable responses open to an employer in all the circumstances. It is immaterial how the tribunal would have handled the events or what decision it would have made, and the tribunal must not substitute its views or its values for that of the reasonable employer. The range of reasonable responses test applies to the conduct of investigations as well as decisions, **Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23.**

54. The nature of the employer's business, length of service and personal mitigating factors are relevant considerations in determining whether an employer acted reasonably in all the circumstances in dismissing the employee for the misconduct in question.

DISCUSSION AND CONCLUSIONS

Reason for Dismissal

55. The tribunal finds that the respondent has established on balance of probabilities that the reason for the claimant's dismissal was misconduct. This was the reason provided for the internal investigation and for the dismissal.

Further the facts before the respondent were such as to support a genuine belief in the claimant's misconduct. It was not disputed that the claimant was in possession of Royal Mail PPE property over a 2-3 month period (Christmas 2020 to March 2021), albeit that the amount was in dispute. Further it was not disputed that the claimant had put some of this property up for sale, albeit whether any was actually sold was in dispute. The only real issue for the respondent to consider was whether the retention and sale of that property was accidental (as the claimant claimed) or theft. It was clear from the documentation and the evidence of the respondent's witnesses that it did not accept the claimant's explanation as to how those items came into his possession and came to be put up for sale. It was the rejection of the claimant's explanation that caused the respondent to dismiss him.

56. In relation to the claimant's case that the real reason for his dismissal was redundancy, there was no evidence of this other than the claimant's assertion. When this was put to the respondent's witnesses they denied that there was a redundancy situation, and the tribunal was provided with no evidence that there was. Further, the tribunal accepts the evidence of Mr Brady and Ms Knight-Smith, that even if the respondent had been making managers redundant, in relation to the claimant this would have resulted in him reverting to his substantive OPG grade, rather than being dismissed.

Whether dismissal was fair in all the circumstances

Were there were reasonable grounds for that belief?

57. The tribunal finds that the respondent had reasonable grounds for believing that the claimant was guilty of misconduct (theft). The undisputed fact was that the claimant was in possession of Royal Mail property that he had put up for sale. When considering the claimant's explanation as to how this had come about, it was within the range of reasonable responses for the respondent to reject it. In particular:

    57.1 The claimant had signed Mr O'Dell's notebook admitting that he had sold Royal Mail property. This account makes no mention of the wipes, sanitisers or gloves being mixed in with his own purchases from boot fairs; the only items he stated had been obtained from a boot fair were the masks. The claimant accepted in his evidence that this signed statement would look to a third party like an admission. The tribunal concludes it was not unreasonable for the respondent to consider this account to be the most accurate provided by the claimant (it being the first in time and signed by him) and to accept the admissions at face value.

    57.2 The claimant had provided inconsistent accounts as to what he had taken. In the interview with Mr O'Dell he had admitted to selling 1 box of gloves, 5 packets of wipes, 4 small bottles and 1 large bottle of sanitiser plus he had a further 5 bottles of sanitiser and wipes in his possession. In the fact-finding interview he stated that he had taken 8 packets of wipes and some sanitisers. In the formal conduct meeting he stated that he had taken 1 large and 4 small bottles of sanitiser and 3 packets of wipes.

57.3 The claimant had provided inconsistent accounts of what, if anything, he had sold. In the interview with Mr O'Dell he had admitted to selling gloves, wipes and sanitisers belonging to Royal Mail for £22. In the fact-finding interview he had stated that the items from Royal Mail cost about £8-£10. In the formal conduct and appeal meetings he denied that he had sold any of the Royal Mail property. The tribunal accepts that it was reasonable for the respondent to take these inconsistencies into account.

57.4 The claimant had provided on his own volition a signed statement dated 14 June 2021, which referred to him acting "out of character". Mr Brady interpreted this as a "level of acknowledgment". The tribunal considers that it was reasonable for this to be interpreted as an admission in relation to theft, and not the claimant's lack of focus as he now claims.

57.5 At the appeal hearing the claimant's trade union representative had admitted that the claimant's actions "could be perceived as dishonest", it was therefore not unreasonable for the respondent to perceive it this way.

57.6 Neither Mr Brady nor Ms Knight-Smith considered it was credible that the claimant did not realise that he was in possession of Royal Mail property at the point that he put it up for sale. Ms Knight-Smith stated in her evidence that the PPE must have been recognisable as Royal Mail property by the person who initially reported it. The tribunal also notes the claimant's admission in his evidence that he knew the wipes belonged to Royal Mail because they were red.

Taking all this evidence into consideration, the tribunal finds that there were reasonable grounds for the respondent's belief that the claimant was guilty of theft.

<u>Whether the respondent conducted a fair procedure.</u>

58. The tribunal finds that the respondent carried out a fair procedure. In particular:

58.1 At every stage, the claimant was provided with the right to be accompanied.

58.2 With the exception of the report by Mr O'Dell, the claimant was provided with the opportunity to amend the notes of the various investigation and disciplinary meetings. Mr O'Dell asked the claimant to sign a statement in his notebook.

58.3 The claimant was notified of the charges against him and provided with the evidence in advance of the meeting.

58.4 The claimant was provided with the opportunity to respond to the case against him, and provide a detailed account at each of the meetings as to how the Royal Mail PPE came into his possession and came to be sold.

58.5 The claimant was provided with the opportunity to raise mitigating circumstances, including his long service, previous honesty award and personal mitigating circumstances.

58.6 The claimant was provided with the right to appeal.

58.7 The decision-makers at each stage were different.

59. The claimant in the hearing before this tribunal raised two specific matters in relation to the fairness of the procedure.

59.1 *That he was unaware of the case against him at the 4 May 2021 meeting, and his mental state at that meeting.* The tribunal notes that the claimant accepted under cross-examination that he was aware of the allegation of theft in advance of the meeting and that his witness statement (quoted at paragraph 47.3) was not entirely correct. He stated that what he meant was that he did not understand why he was being accused of theft when he had not stolen anything. The tribunal finds that the claimant had full knowledge of the allegation of theft in advance of the meeting since he had been informed of this at the beginning of the meeting with Mr O'Dell on the 18 March and Ms Mackie on 31 March 2021. He had also been provided with written notice of the charges that he faced on the 26 April 2021.

59.2 The tribunal does not accept that the claimant's mental state at the meeting was such that he just agreed to everything that Mr Brady put to him. He was represented during this meeting, and at no point did he say he was confused, feeling ill or unable to continue. The tribunal notes that the account that he gave was similar to that provided at the appeal interview (which was a re-hearing) and at the hearing before the tribunal today. Further the notes records that Mr Brady took him through Mr O'Dell's report and the claimant was able to identify those sections that he disagreed with. On 14 May 2021 he signed the notes as a true reflection of the interview and further provided a handwritten signed statement admitting to acting "totally out of character". The claimant did not raise any concerns as to the manner in which the meeting had been conducted or his mental state at the meeting. The tribunal concludes that it was reasonable for the respondent to consider the meeting was fairly conducted in all the circumstances and that the claimant was provided with an opportunity to state his case.

59.3 *That the respondent refused to consider evidence that he had brought similar PPE items from boot fairs, and that the Royal Mail items had become 'mixed up' with his own purchases.* The tribunal notes that this was put to Ms Knight-Smith in evidence who confirmed that following the appeal hearing the claimant did provide her with photographs of the masks that he had brought. The tribunal notes that the claimant did not provide the respondent with evidence of purchasing the other PPE items from boot fairs. The tribunal considers that it was within the range of reasonable responses for the respondent to consider that proof of purchasing the masks did not take matters any further, since the claimant had always denied that the masks were Royal Mail property.

Whether dismissal was a fair sanction in all the circumstances

60. The tribunal notes that the claimant accepted in his evidence that it was reasonable for the respondent to instantly dismiss an employee for theft, no matter the amount involved. He understood the reasons for a strict adherence to the respondent's business standards. His primary case was that that his dismissal was unfair because he had not committed theft. The difficulty for the claimant is that in a claim for unfair dismissal the issue is not whether or not he had committed the misconduct in question, but whether it was reasonable in all the circumstances for the respondent to believe that he had and to dismiss for that reason.

61. The tribunal considered whether the low level of the theft in this case was such as to make instant dismissal outside the range of reasonable responses. The tribunal takes into account the nature of the respondent's business which depends on maintaining public trust in post workers, no matter the value of the goods being transported. It was for this reason that the respondent had business standards that it required all its employees to adhere to. It was also reasonable for the respondent to consider the claimant's managerial position to be an aggravating factor since he should have been setting an example to others. The tribunal also notes the respondent's case that that this was PPE, obtained for the protection of post office workers, and that seeking to make a profit by putting it up for sale was considered by the respondent to be particularly unacceptable. Finally, the tribunal takes into account that the claimant himself accepted that dismissal was a reasonable response to any theft. The tribunal concludes, taking into account all the circumstances, that dismissal even for low value theft was within the range of reasonable responses.

62. In considering whether dismissal was a fair sanction, the claimant's long service and personal mitigation circumstances were relevant considerations. What weight to place on these factors was a matter for the respondent and a dismissal would only be unfair if the respondent's response was outside the range of reasonable responses. Mr Brady was perhaps too dismissive of the claimant's personal circumstances, and some employers may have been more sympathetic and given this more weight. However that does not mean that the dismissal was unfair. Ms Knight-Smith did take it into account when considering the appeal and still considered dismissal to be a fair sanction. Further, it was open to the respondent to consider that the claimant's personal circumstances did not explain how he failed to realise that he was in possession of Royal Mail property at the point that he put it up for sale. Nor does it explain the inconsistent accounts that he provided. Similarly whilst long-service was a significant factor in this case, given the claimant's denial of theft, it was within the range of responses for the respondent to consider that he had not been fully honest with them and failed to demonstrate sufficient insight and remorse. Both Mr Brady and Ms Knight-Smith referred to the seriousness of the conduct and lack of trust a confidence in the claimant. In such circumstances it was permissible for the respondent to consider that the theft of PPE was so serious as to warrant dismissal despite the claimant's long service and mitigating circumstances.

FINAL CONCLUSION

63. For the reasons set out above the tribunal concludes that the claimant was not unfairly dismissed.

64. Having found that there were no unfair dismissal it is not necessary for the tribunal to consider whether the claimant would have been dismissed in any event had the dismissal been unfair and / or whether the claimant objectively contributed towards his dismissal.

65. The remedy hearing listed for 20 March 2023 is vacated.

Employment Judge Hart

Date: 17 January 2023