Case No: 3316480/2021
3320883/2021

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Mark Fordham	v	Royal Mail Group Limited

Heard at: Cambridge **On:** 23 February 2023

Before: Employment Judge Tynan

Appearances:
For the Claimant: Mrs A Rumble, Counsel
For the Respondent: Ms L Stephenson, Solicitor

JUDGMENT having been sent to the parties on 16 March 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The Claimant claims that he was unfairly dismissed by the Respondent. There is no issue as to his claim having been brought in time. The claim is resisted by the Respondent. The Claimant's further claim that he was discriminated against because of disability was dismissed on withdrawal.

2. The Claimant submitted a 20-page written statement, and gave evidence at Tribunal. On behalf of the Respondent, I heard evidence from Michael Taylor and Cindy Chattaway, respectively the dismissing and appeal officers, both of whom had made written statements. There was a single agreed hearing bundle running to 205 numbered pages.

Background

3. The Claimant commenced employment with the Respondent on 20 September 1995 and was summarily dismissed from its employment on 19 June 2021. He was employed as an Operative Postal Grade ("OPG") or, as he identified in his claim form and said throughout his evidence, a Postman. He had nearly 27 years' service by the time of his dismissal. There is no suggestion that he had given other than loyal and competent service throughout those years.

4. The Claimant was dismissed having been observed on 23 April 2021 to

have collected mail from a post box eleven minutes prior to the collection time on the post box. He was found by the Respondent to have taken steps to conceal the fact that he had done so.

5. The Royal Mail is authorised and regulated in its activities by Ofcom. It has obligations to meet as the designated universal service provider and security of the mail is at the heart of these obligations. Whilst it is probably unlikely that the general public has much, or indeed any, awareness or understanding of Royal Mail's designation as the universal service provider, its regulatory obligations underpin public trust and confidence in the services it provides, including that mail will be collected and delivered securely and on time.

The Law

6. Subject to any relevant qualifying period of employment, an employee has the right not to be unfairly dismissed by his employer – section 94 of the Employment Rights Act 1996 ("ERA" 1996). It is not in dispute that the Claimant qualified for that right.

7. S.98 ERA 1996 provides:

> 98 General
>
> (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) …
> (b) relates to the conduct of the employee,
> (c) …
> (d) …
>
> (3) …
>
> (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.

8. Where this is in dispute, an employer bears the burden of establishing that it had a potentially fair reason for dismissing its employee. In this case, it is not in dispute that the Claimant was dismissed for alleged misconduct.

9. Where the reason for dismissal is misconduct, Tribunals should have regard to the long standing principles in British Home Stores v Burchell [1978] ICR 303 and Iceland Frozen Foods Ltd v Jones [1982] IRLR 439. I have not felt it necessary to include the often cited passage from Arnold J's Judgment in Burchell. Jones is similarly long-standing authority that reminds Tribunals that their function is 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. In Sainsburys Supermarket Ltd v Hitt [2003] IRLR 23 CA, the Court of Appeal confirmed that the band of reasonable responses applies to both the procedures adopted by the employer as well as the dismissal. Burchell and countless decisions since have served as a reminder that a Tribunal should be careful not to substitute its own view for that of the employer.

10. Where an unfair dismissal complaint is upheld, the Tribunal may make a basic award and a compensatory award. As regards the basic award, section 122(2) of the Employment Rights Act 1996 ("ERA") provides,

> "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."

Whilst the focus of the section is on the conduct of the Claimant, what is just and equitable requires that regard should be had to all the relevant circumstances of the case.

11. In terms of any compensatory award, s.123(1) of the Employment Rights Act 1996 provides that a Tribunal may award such compensation as it considers just and equitable in the circumstances having regard to the loss sustained by the Claimant in consequence of the dismissal. In accordance with the well established principles in Polkey v AE Dayton Services Limited [1988] A.C. 344, the Tribunal may make a just and equitable reduction in any compensatory award under s.123(1) to reflect the chance that the employee's employment would still have terminated in any event. The burden of proving that an employee would, or might, have been dismissed in any event rests with the employer. Nevertheless, Tribunals are required to actively consider whether a Polkey reduction is appropriate. In Software 2000 Limited and Andrews & Ors [2007] UKEAT 0533_06, the EAT reviewed the authorities at that time in relation to Polkey and confirmed that Tribunals must have regard to all relevant evidence, including any evidence from the employee and the fact that a degree of speculation is involved is not a reason not to have regard to the available evidence, unless the evidence is so inherently unreliable that no sensible prediction can be made. It is not an 'all or nothing' exercise.

12. Applying Polkey principles in practice requires an evidenced based approach drawing upon common sense and experience, and in the final analysis ensuring that any final decision is just and equitable.

13. The correct order in which the Tribunal is required to consider any issues regarding the amount of the compensatory award is to first determine the amount of the Claimant's losses and any compensation for loss of statutory rights, before going on to determine whether there has been any failure to mitigate, and only then to consider, in order, any just and equitable reduction pursuant to s.123(1) ERA, any reduction for contributory fault pursuant to s.123(6) ERA, any increase or reduction to reflect breach of any applicable ACAS Code and, lastly, application of the statutory cap (see Digital Equipment Co Limited v Clements 2 [1997] ICR237. I shall return to the question of whether the same conduct can lead to reductions being made under both section 123(1) and section 123(6) of the 1996 Act.

Findings and Conclusions

The applicable and relevant policies and procedures

14. The Claimant's Contract of Employment is at pages 72 – 76 of the Hearing Bundle and dates back to 1996. I was referred in particular to Clauses 9 and 15 of the Contract:

> "9. The Royal Mail has the responsibility of providing a public service, this puts a special obligation on all employees to play their part in maintaining the kind of service which the public has a right to expect..."
>
> "15. Royal Mail has a Conduct Code to which you will be subject..."

15. The Respondent's 'Security of the Mail - Conduct Policy Offences, Guide for Managers' is at pages 77 – 82 of the Bundle. It is unlikely to have been a document that the Claimant was familiar with since he was not a Manager. On the issue of 'Security of the Mail', I note the following introduction at the second page of the Guidance (page 78 of the Hearing Bundle):

> "Royal Mail Group is required to minimise the exposure of postal packets to the risk of loss, theft, damage and / or interference."

The Guidance goes on to say,

> "This includes but is not limited to willful or intentional delay."

16. The seriousness with which intentional delay to mail is treated is indicated in a further section of the Guidance headed 'Intentional or willful delay' (page 79 of the Hearing Bundle) in which it is noted,

> "All incidents of intentional or willful delay exceeding 24 hours should be reported to a Security Help Desk so that consideration can be given as to whether it is appropriate to investigate the matter as a criminal

investigation..."

17. The National Conduct Procedure Agreement ("NCP") between Royal Mail Group and its two recognised unions, the CWU and UNITE-CMA is at pages 86 – 98 of the Hearing Bundle. I believe that the Claimant was a member of the CWU since it represented him in the disciplinary proceedings. The second page of the Agreement documents employee obligations; they are summarised in four short bullet points (page 87 of the Hearing Bundle), the third of which requires that employees seek help as soon as they recognise that they are in a situation which could compromise their behaviour, or if they have any concerns regarding their job. Save that there is an issue as to whether the Claimant raised safety concerns with the Respondent regarding the positioning of the post box in question, the Claimant never went to the Respondent to say that he had faced situations which could compromise his behaviour or that he had other concerns regarding his job.

18. Employee gross misconduct is dealt with at page 8 of the NCP (page 93 of the Hearing Bundle). The Agreement documents various examples of potential gross misconduct. The relevant section starts by identifying that certain types of behaviour are so serious and so unacceptable that they may warrant dismissal without notice. The list of examples is non-exhaustive. The fifth specified example of potential gross misconduct is 'Intentional delay of mail'. The continued use of this term obviously begs the question what intentional delay of mail involves and, perhaps more pertinently, what the Respondent's employees would understand by the term. The Claimant's evidence at Tribunal was that whilst he had heard the expression being used in the course of his employment, it was not so widely used that it had become everyday parlance with the organisation or a known and widely understand benchmark of conduct and performance. That is borne out by Mr Taylor's evidence, as I shall come to.

19. Delay to customers' mail is referred to at pages 10 and 11 of the NCP, (pages 95 and 96 of the Hearing Bundle). Under the heading 'Safeguarding customers' mail', the Procedure Agreement emphasises the significance of delays to customers' mail. The responsibility that staff have for avoiding delays is stated to be one of their most important duties.

20. Three categories of delay are identified in the Procedure Agreement: unintentional delay; unexcused delay; and intentional delay. Each category is expanded upon in the paragraphs that follow.

21. 'Unexcused delay' identifies various actions that can cause mail to be delayed, for example carelessness or negligence leading to loss or delay of customers' mail, and breach or disregard of a standard or guideline. Such cases of unexcused delay may be treated as serious misconduct, since the outcome can include dismissal, though equally may only merit informal discussion. That evidences that when the NCP was negotiated, the Respondent and its unions recognised a broad spectrum of circumstances that might give rise to unexcused delay, with varying degrees of culpability.

22. 'Intentional delay' is clearly and firmly placed in the category of gross

misconduct that can lead to dismissal. It is consistent with what is stated elsewhere in the Agreement.

23. One point that arose in the course of the parties' evidence was whether mail had in fact been delayed. The evidence in that regard overlooks the specific agreement between Royal Mail and the unions, namely that the relevant test "is whether the action taken by the employee knowingly was deliberate with an intention to delay mail" rather than whether mail was in fact delayed. I believe this focus on an employee's intentions rather than the outcomes of their actions accords with good industrial practice but also reflects Royal Mail's universal service obligation and its need to maintain public confidence in its commitment to standards of service, namely that mail will be collected on time and thereafter delivered securely and on time. It seems trite to me that public confidence will not be maintained if OPGs or others are perceived to be circumventing Royal Mail's regulatory obligations.

24. In addition to the NCP, there is a separate Royal Mail Group Conduct Policy (pages 99 – 105 of the Hearing Bundle) which replicates the non-exhaustive list of examples of gross misconduct set out in the NCP. There is also an Employee's Guide to Royal Mail Group's Business Standards (pages 106 – 148 of the Hearing Bundle). There is a section headed, 'Service to our customers' at page 118 of the Hearing Bundle. One of the ways in which it is identified that employees serve customers' needs is by giving them "**timely**, **reliable** and **secure services** nationwide" (Royal Mail's emphasis in the document).

25. 'Security, Privacy and Trust' is also addressed in the Guide (page 123 of the Hearing Bundle). It lists how Royal Mail Group maintains its standards. Amongst other things, the first bullet point in the right-hand column states that maintaining standards means, 'accurately reporting business performance measures, for example making sure there is no interference or undue influence on quality measurements (those measures we use to evaluate performance and quality)'. As I shall come to, the timely and accurate scanning of post box bar codes at the point at which mail is collected is a clear measure of performance and quality.

26. There is no evidence within the Hearing Bundle, for example in the form of emails, signed confirmation of receipt, or other documents, that the Conduct Policy and/or Employee Guide were brought to the Claimant's attention. His evidence is that he was not familiar with them. That is unsurprising if he had an otherwise clean disciplinary record. Likewise, there is no evidence that I was taken to in the course of the hearing or that I have been able to identify, having been through the Bundle in the course of reaching my findings, which confirms that the Claimant was provided with the Policy and Guide in the course of the disciplinary process. That is surprising; in my experience, even where an employee has union representation, employers ordinarily provide their employees with a copy of any applicable policies, or at least alert them to where those policies can be found, if the policies are believed to touch upon their alleged conduct or performance, specifically their knowledge and understanding of the employer's expectations of them.

The conduct concerns

27. The events in question occurred on 23 April 2021. The Claimant was observed by a colleague, Paul Lingwood, Delivery Line Manager, to stop at the post box situated at the end of Sutton's Lane in Market Deeping and to empty the post box at 8.49am, namely 11 minutes prior to the stated collection time on the box. Mr Lingwood remained in situ to see if the Claimant would return at or after 9am to scan the post box, as he was required to do, presumably having first checked whether any further items of mail had been placed in the box. By 9.20am the Claimant had not returned, so Mr Lingwood returned to the Delivery Office. Having checked the Respondent's IT Records, maintained on its 'Pegasus' portal, Mr Lingwood noted that the post box had seemingly been scanned at 9.03am. The reference to scanning is to the use by OPGs of a hand held device, a PDA, to scan a unique bar code on a post box. The use of PDAs in this way enables the Respondent to track collections and deliveries. In this case, the records on Pegasus were inconsistent with Mr Lingwood's own direct observations in the matter.

The investigation

28. On 24 April 2021, the Claimant was invited by letter to attend a fact finding meeting to be held on 5 May 2021. This was in accordance with the NCP. He was reminded of his right to be accompanied, he was also advised that it concerned the collection at Sutton's Lane. He was also provided with a Guide for employees (this is not the Employee Guide I have already referred to) and reminded of the 'Feeling First Class' support service that is available to the Respondent's staff where they require support.

29. The Investigating Manager at the fact finding meeting on 5 May 2021 was Catherine Stallard, Delivery Line Manager. The Claimant was accompanied by Richard Line from the CWU. One of the first questions the Claimant was asked by Ms Stallard was whether he was aware of the process for collections on delivery. He responded,

> *"Yes, you get to the box at the time it is due on the box, scan the barcode, collect the mail from the box and put the mail in the blue pouch in the van"*

(page 156 of the Hearing Bundle). His immediate response evidences to me that he understood clearly that the barcode on the post box was to be scanned at the point at which the mail was being collected. When he was then asked about the collection at Sutton's Lane on 23 April 2021, he immediately stated that he had emptied it early. When asked to explain why he had done so, the Claimant offered the following explanation,

> *"Possibly two reasons, one the road where the box is, is busy with traffic and there is nowhere to park the van safely. Apart from that I don't really know."*

30. The Claimant had had approximately 10 days to reflect on the matter and, of course, he also had the benefit of advice and representation from the CWU. At that point he did not identify any lack of understanding as to the

importance of collecting mail at the time stated on the post box, or that the bar code should be scanned in situ at the same time. On the contrary, his responses indicated an understanding in respect of both matters. The Claimant was open about his actions. He confirmed that he had scanned the bar code away from Sutton's Lane and that he had been able to do so by taking a photo of it and scanning the photo rather than the post box. He also admitted to having done this a couple of times before. He was then asked whether he gave his consent for GPS data, known as 'Trimble Data', to be reviewed in respect of the other occasions. On advice from Mr Line he declined to give his consent, as was his right under the Respondent's policies and procedures agreed with the unions.

31. The Claimant was then asked whether he had anything to add, to which he replied,

> *"From a personal point of view, basically I have some trouble outside of work with my other half going through a bad stage of anxiety and depression. I've been with it as well. I have spoken to a counsellor, however I don't feel there is anybody at work I can speak to. I'm struggling outside of work and this is affecting work."*

(page 157 of the Hearing Bundle)

32. In his evidence at Tribunal, Mr Taylor described these comments as having been added in a cavalier manner. I still do not understand that description of the Claimant's comments, not least given that Mr Taylor was not at the meeting. The Claimant had answered the specific questions which had been put to him by Ms Stallard and until that point there had been no obvious opportunity for him to refer to these specific issues. At Tribunal, Mr Taylor placed particular emphasis upon the Claimant's failure to reference any health issues when he was asked by Ms Stallard earlier in the meeting why he had collected the mail early. I find that reflects somewhat rigid thinking on Mr Taylor's part. I note that the meeting was documented to have lasted 15 minutes, indeed just 10 minutes from the commencement of the interview itself. Those 10 minutes included a detailed explanation of the procedure. Within a matter of minutes, therefore, the Claimant had introduced the issues that were affecting his partner (and impacting him) as well as his own health issues. He clearly stated that these were "affecting work".

33. Other than reminding the Claimant again of the 'Feeling First Class' service, Ms Stallard did not explore further with the Claimant how these matters were affecting him in the workplace and critically, whether they may have impacted his actions on Sutton's Lane.

34. The Respondent's position at Tribunal has been to emphasise the Claimant's obligation to place such matters before the Respondent (pursuant to the third bullet point in the NCP already referred to), rather than the Respondent's obligation as a reasonable employer to explore them with the Claimant once on notice of them.

The Claimant's dismissal

35. The Claimant was informed that the case would be passed to Mr Taylor for consideration (page 158 of the Hearing Bundle). An invitation to a Formal Conduct Meeting followed (pages 159 – 160 of the Hearing Bundle). I am satisfied that that letter meets the requirements of the relevant ACAS Code of Practice and indeed accords with good industrial practice in terms of its content.

36. The Formal Conduct Meeting went ahead on 21 May 2021. In my judgement, the key points that emerged in the course of that meeting were as follows,

    36.1 The Claimant continued to admit to having emptied the post box early and to having scanned it elsewhere;

    36.2 He identified that he had scanned the bar code in Northborough (a small village close to Market Deeping, not far from Sutton's Lane);

    36.3 When asked by Mr Taylor who had advised him that this was the process he should be following, the Claimant confirmed that no-one had issued any such advice to him. However, Mr Taylor did not ask the more pertinent question, namely whether the Claimant had received any training or other instruction or guidance on the correct process to follow;

    36.4 When asked by Mr Taylor whether he understood the correct procedure for collections on delivery, the Claimant replied in the affirmative. However, Mr Line who was again representing him at the Meeting intervened and stated,

    "I would suggest that MF does not know the correct procedure".

    Proceeding, as I do, on the basis that the notes are a full and accurate record of the Meeting, Mr Taylor did not explore this further with the Claimant or Mr Line. I find that he approached the matter on the basis that it was for the Claimant to justify his actions, rather than his responsibility as the appointed Investigating Manager to explore with the Claimant his training, instruction and understanding in the matter;

    36.5 The Claimant was asked by Mr Taylor why he had scanned the bar code early on 23 April 2021 and on the further occasions he had admitted to. The Claimant's explanation was that the "main" reason was that the post box was on a T-junction and was not safe

    36.6 Mr Taylor asked the Claimant whether he had reported his concerns to the Respondent, to which the Claimant responded,

    "Yes, years ago before the duty moved to Peterborough Delivery Office."

    This issue was not explored further at the time nor was it followed up by Mr Taylor. He did not look into whether the post box was

situated in a potentially unsafe location, something it seems to me that Mr Lingwood might have commented upon given that he had been to Sutton's Lane and observed the collection. Nor did Mr Taylor undertake any further enquiries as to whether the Claimant, or other OPGs, had reported safety concerns regarding the post box and, if so, with what result.

36.7 Mr Taylor asked the Claimant how his mental health had affected his ability to collect from a post box on time. The way that the question is documented in the Meeting minutes indicates a degree of scepticism on Mr Taylor's part, namely that he could not readily understand how mental health might have impacted the Claimant's performance of this task. He did not explore with the Claimant why his mental health might have led him to act as he did, including taking a photo of the bar code and scanning it away from the post box. I find that he could not conceive how mental health issues might account for the Claimant's actions in respect of the physical act of emptying a post box and scanning its bar code. When the Claimant sought to provide an explanation for his actions, as recorded at the bottom of page 164 of the Hearing Bundle, this was not explored further with the Claimant. I was struck by Mr Taylor's suggestion at Tribunal that if the Claimant had made a conscious decision to scan the bar code away from the post box, this meant his actions could not have been because of impaired judgement resulting from mental health issues. I cannot agree with that as a proposition nor do I follow the logic of his assertion that if, as the Claimant had told him, he had taken his eye off the ball, this meant it was more likely that he would have scanned the bar code at the post box.

It is not that Mr Taylor was indifferent to the Claimant's situation, on the contrary, at a subsequent meeting on 9 June 2021 he offered the Claimant the opportunity to be referred for an Occupational Health Assessment, an offer the Claimant took up. He also reminded the Claimant on 21 May 2021, and again on 9 June 2021, of the availability of the 'Feeling First Class' support service. However, his actions in this regard evidence to me that he perceived any mental health issues as a welfare issue rather than something that could have impacted the Claimant's judgement and actions.

36.8 When Mr Taylor indicated that he had no further questions for the Claimant but asked whether there was anything that he or Mr Line wished to add, the Claimant raised a confidentiality issue, before going on to say,

"I am extremely sorry for the whole situation."

As I shall return to, as part of her decision on the Claimant's appeal, Ms Chattaway said - page 204 of the Hearing Bundle - that the Claimant had not shown any remorse. It is impossible to reconcile her conclusion in that regard with what I find to be a clear and unequivocal expression of remorse on the part of the Claimant.

36.9 The Claimant was advised at the conclusion of the Meeting that he would remain suspended from deliveries and collections, but he was not suspended altogether from employment. The parties referred to the Claimant being *"kept indoors"*. I accept the Claimant's evidence that although he was taken off his regular duties, he was not supervised or otherwise subject to any other restrictions. That might suggest that the Respondent had not then lost all loss of trust and confidence in him.

37. The Claimant signed the notes of the Formal Conduct Meeting to confirm their accuracy.

38. In the course of his evidence at Tribunal, Mr Taylor disclosed that he had not had regard to the provisions of the NCP, Conduct Policy or Employee's Guide whilst dealing with the matter. In terms of the NCP therefore, he had not given active thought as to whether the Claimant's conduct amounted to unintentional delay, unexcused delay or intentional delay. Had he had regard to the provisions of the NCP this would have guided him in his approach to the Meeting and ensured that he asked focused, relevant questions. It would also have informed his views of the Claimant's answers to his questions and supported an objective assessment of the Claimant's actions. When asked if he had considered the Respondent's policies when deciding whether the Claimant was guilty of gross misconduct, he said,

> *"No, because I am well aware that delaying mail or intending to is gross misconduct"*

Only intentional delay to the mail is gross misconduct under the provisions of the NCP. Furthermore, Mr Taylor's response begs the question whether there had been intentional delay in this case. When asked why he had not considered remedying the situation through training, his response was,

> *"because the charge was gross misconduct"*

Even if there had been intentional delay to the mail, that does not, in and of itself, answer the question of what sanction may have been appropriate. Once again, his answers evidenced to me a degree of rigid thinking on his part.

39. As noted already, there was no follow up by Mr Taylor in terms of the safety issue raised by the Claimant. He also confirmed at Tribunal that he had not looked into the other occasions when the Claimant said that early collections had been made and the bar code may have been scanned away from the post box.

40. The reconvened Formal Conduct Meeting on 9 June 2021 focused on the question of whether the Claimant had returned to the post box at 11am on 23 April 2021 as he had claimed. The Claimant would still not give permission to the Trimble Data being used in this regard. There was some discussion again of the Claimant's mental health though, as on 21

May 2021, Mr Taylor did not explore with the Claimant how it might have impacted his judgement or actions.

41. Regrettably, I was not provided with a copy of the Occupational Health referral letter or instruction, rather just the report itself (page172). Given, as I find, that the referral was made from a welfare perspective, I conclude that Optima was not asked to consider or advise on whether the Claimant's judgement and actions on 23 April 2021 or more generally might have been affected by mental health issues. The report itself confirms to me that the focus instead was on the Claimant's current fitness to work and possible workplace adjustments. In any event, Mr Taylor's evidence at Tribunal was that he had not considered the report before arriving at his decision to dismiss the Claimant.

42. The dismissal letter is at pages 174 – 177 of the Hearing Bundle. As with the invitation to the Formal Conduct Meeting, it complies with the ACAS Code of Practice, in so far as it sets out Mr Taylor's findings and conclusions, as well as confirming the Claimant's right of appeal.

43. In terms of mitigation, Mr Taylor wrote,

> *"… you are aware of the correct processes and procedures and that the reason for your actions do not justify them."* (page 175 of the Hearing Bundle)

It is very difficult to understand how Mr Taylor reasonably arrived at that conclusion when the NCP, Conduct Policy and Employee's Guidance were seemingly not available to him, had not been considered at any point by him and copies had not been provided to the Claimant. As I have noted already, he did not ask the Claimant about them. Nor did he seek advice or guidance from HR or indeed anyone else within the organisation to secure a better understanding of the issues that arise when considering delays to the mail or of the Respondent's policies and procedures in that regard.

44. Mr Taylor went on to address the fact that the post box was on a T-junction and, in the Claimant's view, unsafe. As I have identified already, there were no follow up enquiries on this issue notwithstanding Mr Lingwood, as a minimum, might reasonably have been asked about the position of the post box relative to the T-junction and any potential risks to safety.

45. Mr Taylor reiterated that he failed to understand why the Claimant's mental health would affect his ability to collect from the post box at the correct time. I do not repeat what I have already said in this regard.

46. Mr Taylor questioned why the Claimant would not give authorisation for the use of Trimble data, unless the Claimant had not in fact returned to the post box as he had claimed. In my judgement it was a reasonable point for him to make. Whilst it may be the case that Royal Mail Group has an agreement with its unions that such data cannot be used without employee consent, a situation that Ms Chattaway certainly regards as unsatisfactory, in my judgement it is entirely understandable that someone

in Mr Taylor's position might draw an adverse inference from an employee's refusal to make relevant data available, particularly in circumstances where the employee himself is seeking to put forward an account that could be verified (or not, as the case may be) by the data.

47. In the dismissal letter, Mr Taylor dealt separately with the questions of culpability and sanction, though the latter was addressed fairly briefly. Mr Taylor wrote,

> *"In terms of the penalty that this constitutes then I did look at whether a penalty just short of dismissal was appropriate. As much as I felt that your behaviour since joining Royal Mail was positive, this does not sway my decision. Therefore gross misconduct of this type has, in my opinion, only one result and that is summary dismissal..."*

I find that he proceeded on the basis that summary dismissal is the presumed outcome in cases of gross misconduct. That is reinforced by his evidence referred to in paragraph 38 above. He did not clarify why the Claimant's positive behaviour over the course of 27 years' employment had been discounted. He dismissed it as a relevant consideration in a fairly perfunctory way.

48. When it was pointed out to Mr Taylor in the course of cross examination that the Claimant had been remorseful, he said,

> *"In my experience most OPGs are remorseful when they have been caught out."*

His remarks betray an unhealthy cynicism. It is entirely possible that many, if not all, employees who commit misconduct regret being found out by the employers. That does not mean that such an employee cannot also genuinely regret their actions and be remorseful for them. Given his comments, it seems to me that very few employees would ever be given credit by Mr Taylor for their contrition .

49. The other comment by Mr Taylor that stood out came at the end of his cross examination. Notwithstanding his letter and earlier evidence that training had been ruled out because the charge was gross misconduct, he was offered the opportunity by Mrs Rumble to explain why he had settled upon dismissal as the appropriate sanction. She identified a range of other options potentially available to him, including coaching, counselling, a warning, a serious warning, or a suspended dismissal. He said,

> *"Because my decision was summary dismissal. My decision was what it was."*

That was the beginning and end of the matter, and as far as his explanation went on the matter.

<u>The Claimant's appeal against his dismissal</u>

50. The Claimant appealed against his dismissal (page 176 of the Hearing Bundle). The Claimant did not identify training or mental health issues in

his grounds of appeal. On the contrary, on the face of it, he seemed to accept that there had been misconduct, but that the Respondent had failed to take account of his 27 years' service. He described Mr Taylor's decision as "over zealous". He was invited to an appeal hearing on 6 July 2021, to be chaired by Ms Chattaway who had been appointed to hear his appeal. I am satisfied that she was fully independent in the matter and have heard no evidence to impugn her integrity or professionalism. She is evidently an experienced Case Work Manger as she amply demonstrated in the course of her evidence to the Tribunal.

51. The typed notes of the appeal hearing are at pages 181 – 186 of the Hearing Bundle. The Claimant was accompanied by Mr Butts from the CWU. Ms Chattaway sent the notes of the hearing to the Claimant on 6 July 2021 so that he could review and approve them. He marked them up by hand as can be seen at pages 186 and 187 of the Hearing Bundle. The typed notes themselves are extremely detailed. Ms Chattaway's evidence that the appeal proceeded by way of a re-hearing was not challenged by the Respondent. I am satisfied in any event that the appeal proceeded by way of a complete re-hearing. The notes evidence that Ms Chattaway had sought to be thorough in her approach. As she said at Tribunal, and as I observed myself in terms of how she gave her evidence, she is someone who works at pace.

52. As with the Formal Conduct Meeting, I have reviewed the complete typed notes of the appeal hearing. In my judgement, the key points that emerged in the course of the hearing were as follows:

    52.1 The Claimant was asked by Ms Chattaway why he had not scanned the post box bar code at 9am but instead scanned a photo of the bar code at 9am. He said he did not know, though went on to say that "this was where the mental health thing came into it". I find, by those comments, that the Claimant was again suggesting a connection between his mental health issues and his actions on 23 April 2021. Although she was admirably thorough in various other respects, Ms Chattaway did not explore this particular aspect any further with the Claimant.

    52.2 Mr Butt then raised the issue of the Trimble Data and suggested that the Trimble system had not been installed in the vehicle that the Claimant had been driving on 23 April 2021. He went on to say that the Claimant had no objection to data from his PDA being used and, further, that the Claimant believed this would confirm that he had returned to the post box on Sutton's Lane at around 11am on 23 April 2021.

    52.3 Ms Chattaway commented during the appeal hearing that she and Mr Butts had dealt with many other disciplinary cases where employees had been dismissed for having photos of bar codes on their phones. Whilst Mr Butts acknowledged this to be the case, he went on to assert that not all employees had in fact been dismissed and that it depended on mitigation.

52.4 Later in the meeting there was a further discussion of the Claimant's health issues (page 184 of the Hearing Bundle), during which the Claimant said he had not raised his mental health issues or those of his partner in the course of his employment because he did not feel managers "had any idea about mental health issues". His comments in that regard are at odds with his evidence at Tribunal when he said that he had raised the issue of his mental health with managers on at least two occasions (though when asked, he could not recall the managers' names), and that his specific request for an Occupational Health referral had not been progressed. I prefer his more contemporaneous comments on 21 April 2021, namely that it was not something he had previously shared with colleagues.

52.5 In the course of this further discussion, Mr Butt stated that the Claimant's mental health issues had affected his judgement and this was why the Claimant had accessed the 'Feeling First Class' service. There was some follow up by Ms Chattaway in so far as she asked questions of the Claimant as to whether he was seeing his GP and whether he was on medication, but she did not explore with the Claimant how his judgement might have been impacted or how issues away from work may have affected him at work. By the time of this hearing, the Respondent's own Occupational Health providers had reported that the Claimant was someone who could be considered as potentially disabled under the Equality Act 2010. It seems largely immaterial therefore that he was not seeing his GP or on medication.

52.6 As the meeting progressed, Ms Chattaway asked the Claimant about other occasions when he had potentially scanned the post box bar code away from the box. The Claimant said that he did not know why he had done it on other occasions, though again made reference to his mental health.

52.7 Ms Chattaway explored with the Claimant the fact that he understood not to scan the post box bar code before 9am and what this meant in terms of his understanding of the Respondent's expectations of OPGs. He told her that he was unaware that scanning the bar code before 9am would raise a "red flag" to his manager and thereby generate a conversation. In the course of his evidence at Tribunal, the Claimant described one Saturday when he had used his PDA to scan a bar code before the relevant collection or delivery time and the fact it had generated an alert on the device. Even if, as he claims, he was unaware that this would also have raised a red flag to his manager, I agree with Ms Chattaway that it evidences some understanding on the Claimant's part that the timing of the scan was important, specifically that the bar code should not be scanned before the advertised collection time.

53. Ms Chattaway wrote to the Claimant on 8 July 2021 with copies of typed notes she had kept of interviews with Ms Stallard and Mr Taylor on 7 and

8 July 2021, as well as the Occupational Health report on the Claimant of 15 June 2021. She invited any comments the Claimant might have by 13 July 2021. He provided his comments the following day, 9 July 2021 (page 193 of the Hearing Bundle).

54. Thereafter Ms Chattaway contacted Optima Health to see whether she could secure access to copies of Occupational Health reports in relation to the Claimant from 2017 and 2018. On the basis that it might take up to one month for the reports to be disclosed, Ms Chattaway decided not to delay her decision any longer, which was issued on 13 July 2021. Although she provided her decision without the benefit of seeing the 2017 and 2018 reports, it has not been suggested by the Claimant or on his behalf that either report might have shed some further light on his actions in 2021.

55. The Conduct Appeal Decision Document is the final document in the Hearing Bundle. It is a detailed, ten-page document that addresses each of the points of appeal in turn. Ms Chattaway did not uphold the Claimant's appeal against his dismissal. I have re-read the Decision Document in its entirety in coming to this Judgment.

56. Ms Chattaway found that, although the Claimant considered the location of the post box on Sutton's Lane to be unsafe, he had not reported his concerns to his Managers. It is unclear to me how she came to that conclusion. I have reviewed Ms Chattaway's evidence and have also gone back through the documents in the Hearing Bundle, including Ms Chattaway's notes of her interviews with Mr Taylor and Ms Stallard. The safety, or otherwise, of the post box was not discussed with either of them or seemingly with anyone else. As I have noted already, it was not investigated any further at the first stage by Mr Taylor. As such, there is no obvious evidential basis for her finding.

57. Ms Chattaway noted the Claimant's failure to consent to the Trimble Data being used at the point when the data was thought to be available, a position she described as "bizarre". She contrasted how apparently keen he was for the data to be used once he knew that in fact it didn't exist. In my judgement it was not unreasonable for her to highlight his apparently shifting position in this regard.

58. At the fifth page of the Decision Document, Ms Chattaway addressed the Claimant's claim that he acted as he did because he was suffering with mental health issues (pages 200 and 201 of the Hearing Bundle). Whilst Ms Chattaway expressed herself more eloquently in the matter than Mr Taylor did, as he did, she placed weight on the fact, as she saw it, that he only raised his mental health issues at the end of the initial Fact Finding Meeting. I have already set out why I consider that he raised this issue at the first available opportunity.

59. As Mr Taylor did, I find that Ms Chattaway approached the Claimant's mental health issues from a welfare perspective and that she failed to actively turn her mind to the question of whether and, if so, how they might have caused the Claimant to act as he did. Nor did she consider his

health issues as potential mitigation. Whilst she demonstrated greater insights in the matter than Mr Taylor, nevertheless it is difficult to understand her logic when she said (page 201 of the Hearing Bundle) that "if his mental health was a significantly contributing factor then again it is reasonable that he would have raised this with his managers on earlier occasions when he was unable to perform his duty correctly". In my judgement, that indicates an unrealistic view as to how workers respond to and deal with mental health issues that are affecting them, even assuming they are indeed aware of the effects. In my experience, people with mental health issues frequently mask the effects of their condition and are often reluctant to disclose to their managers that there are issues.

60. Unlike Mr Taylor, Ms Chattaway gave active thought to the different categories of delay to mail. Although the NCP was not explicitly referred to in her decision, when she wrote to the Claimant on 8 July 2021, she stated that the appeal was being considered with reference to the RMG Conduct Agreement, which I find was a reference to the NCP. At Tribunal, she said that if OPGs do not adhere to Royal Mail Group's practices, processes and procedures for collection and delivery, the organisation will "be stuffed". Though bluntly expressed, her comment touched upon the critical issue I referred to in opening, namely ensuring that public confidence is maintained. Royal Mail Group's commitment and ability to deliver on its regulatory obligations as the country's universal service provider for the mail is necessarily dependent upon the conduct and performance of its staff. I am confident that Ms Chattaway gave this important issue her clear, focused attention and, in so doing, that she clearly understood the different circumstances in which delays to mail may occur. For the reasons she set out in her Decision Document, she concluded that the Claimant's actions were not accidental or as a result of negligence, oversight or omission. Her observations in that regard were in direct reference to the different categories of delay identified within the NCP. She clearly addressed her mind to the issue and I am satisfied, on the evidence that was available to her, reasonably came to the conclusion that the Claimant's actions fell within the scope of intentional delay to mail. Her reasons in that regard are set out in some detail at pages 203 to 204 of the Hearing Bundle.

61. Towards the end of the Decision Document, Ms Chattaway gave consideration to what the appropriate outcome (or sanction) should be. I have noted already that she recorded that the Claimant had not shown any remorse for his behaviours, whereas the Claimant had plainly expressed remorse for his actions and, moreover, had done so early on. He not only showed remorse but volunteered that he had scanned a photo of the bar code on other occasions.

62. In my judgement, Ms Chattaway attached unreasonable weight to the fact that, when first asked about the matter, the Claimant had initially denied that he had scanned the post box at the wrong time. The reason he did so was because he was asked about the matter in an open office environment, in front of others. The question was effectively sprung on him, rather than at a formal Fact Finding Meeting or even as part of an informal management discussion in which he was asked to provide an

account of himself. As soon as he was asked about the matter at the Fact Finding Meeting he immediately admitted to having collected the mail early and that he had scanned the bar code away from the post box.

63. On the final page of the Decision Document, Ms Chattaway referred to the Claimant's actions as having not been a one-off event due to circumstances outside his control, rather they were "a repeated and planned event". Given my comments and conclusions already, she failed to consider whether the Claimant's health and family circumstances meant that he had been influenced by events outside his control. Furthermore, whilst the Claimant may well have admitted to having scanned the post box bar code away from the box on more than one occasion, the "Conduct Notifications" at both the disciplinary and appeal stages clearly identified that he was under investigation and thereafter that he was dismissed, solely because of the events on 23 April 2021. He was not dismissed for any other reason. Accordingly, Ms Chattaway brought into consideration matters outside the ambit of the Conduct Notifications issued to the Claimant. I consider that it was unreasonable for her to effectively 'shift the goalposts' in that way.

64. In conclusion, and in summary, Mr Taylor acted unreasonably, and thereby treated the Claimant unfairly in a number of respects. As I have said, he was somewhat rigid in his approach. He unreasonably failed to apprise himself of the Respondent's relevant policies, including the different categories of delays to mail and he unreasonably failed to follow up the issue of the safety of the Sutton's Lane post box. He unreasonably failed to explore the Claimant's mental health issues with the Claimant and his representative or to have regard to whether and, if so, how those issues had impacted the Claimant's judgement and actions. His approach to the question of sanction was also unreasonable in so far as he failed to give any meaningful thought to disciplinary sanctions short of dismissal. In my judgement, Mr Taylor did not have reasonable grounds for concluding that the Claimant was guilty of misconduct in so far as he failed to have regard to the three categories of delay to mail or to frame the Claimant's actions within those categories, having appropriate regard to any relevant health issues affecting the Claimant. He did not conduct a reasonable investigation insofar as he failed: to explore the Claimant's health issues with him; to consider what training and instruction the Claimant had been given or what Mr Line meant when he suggested the Claimant did not know what was expected of him; and to make any further enquiries regarding the safety of the Sutton's Road post box. The sanction of dismissal was not within the range of reasonable responses in circumstances where dismissal was presumed, the Claimant's long service was dismissed seemingly out of hand and there was little or no thought or follow up given to the impact of the Claimant's mental health on his judgement and actions.

65. The question is whether these failings were remedied on appeal by Ms Chattaway. She was a credible and reliable witness. She is knowledgeable about the Respondent's business and its regulatory obligations. She is undoubtedly generally thorough in her approach and I accept her evidence that she does not dismiss employees lightly, not least

where they have long service. On the central issue of whether or not the Claimant's actions constituted gross misconduct, namely whether there was intentional delay to the mail, I am satisfied that she addressed her mind to this question in accordance with the provisions of the NCP and, in doing so, that she rectified the errors in Mr Taylor's approach at the initial stage. However, what she did not rectify on appeal, was Mr Taylor's failure to consider the impact of the Claimant's and his wife's mental health issues, specifically whether these had impacted his judgement and actions on 23 April 2021. This went to the heart of the Claimant's culpability and ought reasonably to have been considered both in terms of why he had acted as he did and whether it was a mitigating factor if he was guilty of misconduct. It was also potentially relevant to the Respondent's ability to have continued trust and confidence in the Claimant. And like Mr Taylor, Ms Chattaway unreasonably failed to further investigate the safety of the Sutton's Road post box.

66. On the issue of mitigation, as well as unreasonably failing to give adequate thought to the Claimant's mental health issues, Ms Chattaway also unfairly identified that the Claimant had not shown any remorse for his behaviours, when in fact he had clearly expressed his regret at what had happened. And, as I have said, she attached undue and unreasonable weight to the fact that when initially questioned in public by Ms Stallard the Claimant had denied any wrong doing.

67. Notwithstanding the challenging environment within which the Respondent operates, it is a well-resourced organisation. Ms Chattaway is testament to the experienced and talented resource that it can draw upon. HR advice and guidance was available to Mr Taylor if he needed it. In that context, there is no real explanation for the failings I have identified. In acting as it did, I conclude that the Respondent dismissed the Claimant unfairly, that is to say that in the circumstances as I have described them, it acted unreasonably in treating the Claimant's misconduct as sufficient reason for dismissing him.

Polkey and contributory conduct

68. The Claimant's conduct was plainly culpable. The question is how it should be reflected in the basic and compensatory awards, taking care not to penalise him twice for the same conduct. He was an experienced, long serving OPG who had been using a PDA for some years before he took on a collection round. I have taken on board Ms Chattaway's point that, by his own account, the Claimant had received an alert on one occasion when he had scanned the mail early. Accordingly, he had at least some understanding that the timing of any scan was potentially significant.

69. Given that the Claimant brought his claim approximately 18 months ago, it is unfortunate that there is no evidence within either the Hearing Bundle or the witness statements regarding any training and instruction given to the Claimant. It makes it more difficult for me to come to a fully informed view as to the extent of the Claimant's culpability in the matter. In summary, however, he collected mail from a post box earlier than the advertised collection time on the box. It may only have been 11 minutes, but such

conduct does serve to undermine public confidence in the postal service. If sufficient OPGs were to behave as the Claimant did on 23 April 2021 the service could not be relied upon and the Respondent's status as the universal service provider would be called into question.

70. The Claimant took a photo of the post box bar code. He may say that he did not understand the significance of what he did, but its significance is all too apparent to me and in my judgement would be clear to others, as I believe it is now clear to the Claimant. Regardless of his intentions, it is conduct that serves to undermine public trust in the postal service as it calls into question whether delays to mail are going unreported or, indeed, being misreported or covered up. Royal Mail Group needs to have confidence in its own data, in particular in order to demonstrate to the Regulator that it is meeting its regulatory obligations in respect of the service it provides. The Claimant's actions served to undermine this.

71. I conclude that it would be just and equitable to make a 50% reduction to the basic award to reflect the Claimant's conduct prior to his dismissal. I have weighed in the balance that there is no evidence available to me that the Claimant received formal training or instruction regarding his collection duties. Likewise, although reference was made in the course of the Respondent's evidence to written guidance on the use of PDAs, any available guidance was not included in the Hearing Bundle to enable me to evaluate what guidance is available to OPGs, and accordingly would have been available to the Claimant, on the use of the device when undertaking collections and deliveries. I have also weighed in the balance the clear evidence of mental health and significant family issues that have affected the Claimant. Against this, I have regard to the Claimant's evident culpability in the matter and how this served to undermine his employer's trust in him and potentially the Regulator's and public confidence in the postal service. There were shortcomings on both sides and whilst their respective culpability cannot be evaluated scientifically, my broad sense of the matter it is that they were equally culpable, such that I consider a 50% reduction to be the appropriate level of the reduction to the basic award.

72. As regards the compensatory award, I have concluded that there should be a slightly higher reduction than I have made to the basic award. I am mindful of the Court of Appeal's judgment in Rao v The Civil Aviation Authority [1994] ICR495 and the evident risk of penalising the Claimant twice for the same conduct. I have set out already the correct order in which any adjustments are to be made. Dealing firstly, therefore, with any Polkey reduction, Mr Taylor did not disclose to Ms Chattaway that he had seen data on the Respondent's systems which led him to conclude that the Claimant had not returned to the Sutton's Lane post box at approximately 11 o'clock on 23 April 2021 as he had claimed. Mr Taylor had been unable to use this information since the Claimant had exercised his right to withhold consent to the use of personal data. By the time Ms Chattaway was dealing with the matter, any relevant data had been automatically deleted from the Respondent's systems. However, by the time of the appeal, the Claimant and his trade union representative were agreeable to personal data being used (possibly because they believed it

would by then have been deleted and did not know that Mr Taylor had seen data that was potentially relevant to the Claimant's account of events on 23 April 2021). Had Mr Taylor either been able to use that information himself or share it with Ms Chattaway (as I find he might have done had she followed up in more detail on all matters raised by the Claimant in his appeal), it would have introduced a further relevant consideration to their deliberations. At the very least, it might have suggested that the Claimant was being disingenuous and added to the existing circumstantial evidence that he had possibly sought to cover his tracks. In my judgement, it certainly might have reinforced Ms Chattaway's views regarding his actions in taking a scan of the bar code away from the post box.

73. The burden of establishing that it would be just and equitable to reduce the amount of the compensatory award to reflect the chance that an employee would have been dismissed lies with the employer. There is relatively limited information available to me regarding the issue of whether or not the Claimant returned to the post box on Sutton's Lane later on the morning of 23 April 2021 (such that mail was not delayed). Whilst I consider that Mr Taylor sometimes lacked insight regarding mental health issues in the workplace, and showed some rigidity of thinking, he was spontaneous and clear in his evidence on this further discrete issue. My principal concern is that his evidence only emerged in the course of re-examination so that there was no opportunity for Ms Rumble to challenge his evidence.

74. In conclusion, I believe there was a real chance that the Claimant would still have been dismissed even had the Respondent made the further enquiries I have identified and both Ms Chattaway and Mr Taylor had given greater thought to the Claimant's mental health issues and mitigation more generally. I conclude that there is a 50% chance he would have been dismissed. Much of the Claimant's contributory conduct is conduct that has lead me to conclude that there was a 50% chance of dismissal. Nevertheless, I consider that the Claimant's conduct was such that it would be just and equitable to make a reduction over and above the Polkey reduction. I reduce the compensatory award by 60% in total.

_____
Employment Judge Tynan
Date: 21 July 2023

Judgment sent to the parties on
25 July 2023
GDJ
For the Tribunal office