EMPLOYMENT TRIBUNALS

Claimant: **Mr Tamunoemi Amachree**

Respondent: **Royal Mail Group Limited**

Heard at: **East London Hearing Centre**

On: **23 and 24 August 2023**

Before: **Employment Judge Suzanne Palmer**

Representation

Claimant: Mr Amachree appeared in person
Respondent: Ms Samantha Percival, Solicitor

JUDGMENT ON LIABILITY

1. The Claimant's claim of Unfair Dismissal is not well-founded and is dismissed.

2. The Claimant's claim of Wrongful Dismissal (breach of notice provisions) is not well-founded and is dismissed.

REASONS

Introduction

1. The Claimant was employed by the Respondent as a Long-Term Delivery Postperson. During the period with which I am concerned, he was based at the Respondent's Clapton (E5) delivery office. He remained in his role there until he was summarily dismissed for gross misconduct on 19 February 2021. His employment therefore terminated with effect from 19 February 2021.

2. In the course of his duties, the Claimant regularly drove a Royal Mail delivery van. In September 2020, the Respondent received a complaint from a member of the public that a uniformed postman had been seen drinking from a can and then disposing of the can on the street before driving away

in the van. The member of the public said that the can had contained alcohol. The Respondent, having identified the Claimant as the driver of the van in question, carried out an investigation and subsequent disciplinary hearing, which culminated in the Claimant's summary dismissal. That decision was upheld on appeal.

3. In a nutshell, the Claimant claims that he was unfairly dismissed. He also claims that the Respondent was not entitled to dismiss him summarily for gross misconduct and that he is therefore entitled to a payment in respect of his notice period. The Respondent asserts that the Claimant was fairly dismissed for a potentially fair reason relating to his conduct, and further asserts that it was entitled in the circumstances to dismiss the Claimant summarily.

Claims and Issues

4. The Claimant's claim form (ET1) was presented to the Tribunal on 20 May 2021. It was erroneously presented to Leeds Employment Tribunal but was subsequently transferred to this region. The claim as originally presented was for (a) unfair dismissal, (b) wrongful dismissal, and (c) race discrimination. The race discrimination claim was withdrawn at a Preliminary Hearing on 1 April 2022 and an order was made on 25 May 2022 dismissing that part of the claim.

5. The Respondent sent a response form (ET3) to the Tribunal on 21 December 2021, disputing all the claims.

6. The case was listed for a Preliminary Hearing which was heard by telephone on 1 April 2022 by Employment Judge Lewis. At that hearing, the issues were identified and case management orders were made.

7. The Final Hearing has been concerned solely with the Claimant's claims of unfair dismissal and wrongful dismissal.

8. At the outset of the hearing, both parties confirmed that the following agreed list of issues, provided by the Respondent's representatives on 22 April 2022, accurately and comprehensively reflected the issues which I was to determine. I have only included those issues which relate to liability rather than to remedy:

    8.1. Unfair dismissal

        8.1.1. What was the reason for the Claimant's dismissal? The Respondent asserts that it was a reason related to conduct, which is a potentially fair reason for dismissal under section 98(2) of the Employment Rights Act 1996.

        8.1.2. Did the Respondent hold a genuine belief in the Claimant's misconduct on reasonable grounds and following as reasonable an investigation as was warranted in the circumstances?

8.1.3. Was the decision to dismiss the Claimant within the range of reasonable responses open to a reasonable employer in the circumstances? The Claimant contends that the decision to dismiss was unreasonable for the following reasons:

a. That he should have been referred to a remedy clinic for therapy instead of being dismissed.

b. That the alleged act of drinking alcohol whilst driving a Royal Mail vehicle was not an act of gross misconduct, warranting a summary dismissal.

8.1.4. Did the Respondent adopt a fair procedure? The Claimant alleges that an unfair procedure was carried for the following reasons:

a) The Claimant contends that the conduct procedure carried out should have been contained to his line manager or delivery office manager only and that it was not reasonable for the case to be referred to anyone else within the organisation for consideration.

b) The Claimant also avers that the respondent failed to disclose relevant evidence (in respect of the respondent's communication with a customer) to him, in which such evidence led to his dismissal. The Claimant contends that he should have been provided with such communication to provide his comments to before the decision to dismiss was made.

8.1.5. If the Respondent did not adopt a fair procedure is there a chance that the Claimant would have been fairly dismissed in any event and when? The Claimant contends that the conduct procedure carried out should have been contained to his line manager or delivery office manager only and that had this been the case, that he would not have been dismissed.

8.1.6. If the dismissal was unfair, did the Claimant contribute to his dismissal by culpable conduct?

8.2. Wrongful Dismissal

8.2.1. Is the Claimant entitled to notice pay on the basis that he was wrongfully dismissed?

Documents and evidence

9. There was a tribunal bundle of 163 pages. I read this bundle prior to the start of the hearing, but informed the parties that I expected them to take me to any documents they sought to rely on.

10. I heard oral evidence under affirmation from three witnesses, each of whom had provided a witness statement. One of these was the Claimant. The other two were Mr Luke Buaka, formerly a Delivery Office Manager for the Respondent who was the dismissing manager in this case, and Mr Allan Rostron, an Independent Casework Manager for the Respondent who heard the Claimant's appeal against dismissal.

11. Both the Claimant and Ms Percival provided written closing submissions which they supplemented with oral submissions.

Fact-findings

Background

12. The Respondent provides postal services throughout the United Kingdom. It employs approximately 130,000 employees. The Claimant commenced employment with the Respondent on or around 1 December 2000, initially working as a casual seasonal worker.

13. In around January 2003 the Claimant was interviewed successfully for a role as a Long-term Delivery Postperson. Following induction, he commenced that role on 19 February 2003, based at the Respondent's Clapton (E5) delivery office. As part of his duties he regularly drove a Royal Mail liveried delivery van.

14. The Claimant had a clear conduct record prior to the events which are the focus of these proceedings.

The Respondent's policies

15. The Respondent had a Conduct Policy dated 2 January 2018. This set out the informal and formal processes to be followed in disciplinary proceedings, including the right to be made aware of the nature of the allegation and the evidence, the right to be accompanied by a union representatives at all stages of the formal procedure, and the right of appeal by way of a rehearing. It included the following provisions:

    15.1. Amongst the guiding principles:

        15.1.1. *No employee will be dismissed for a first breach of conduct, except in the case of gross misconduct, when the penalty will normally be dismissal without notice or payment in lieu of notice…*

    15.2. Under the heading "Conduct approach":

        15.2.1. *When it is considered that an employee's conduct or behaviour has not met the required standard, the employee's manager will make a prompt and detailed investigation of the facts and may seek a more detailed explanation from the employee. It may include examination of relevant documents and a fact-finding meeting where the employee has a right to be accompanied by their union representative…*

15.2.2. *Following the fact-finding meeting the manager should consider the information available and decide whether the case can be dealt with informally, formally or closed if there is no case to answer*

15.2.3. *If the manager who conducts the fact-finding feels there is a case to answer, they must decide whether, if the allegation is proven, the penalty appropriate would be likely to be within or outside their authority. If they feel a major penalty is a possible outcome, they must at that stage pass it to another manager, normally the second line manager.*

15.2.4. *The manager progressing the case will invite the employee to attend a formal conduct meeting…*

15.2.5. *Following the formal meeting the manager makes the decision whether the allegation is upheld and what penalty should apply…*

15.2.6. *The authority to give warnings and serious warnings lies with the immediate manager. Major penalties will normally be given by an employee's second line manager of at least Royal Mail Executive Manager Level 2 grade…"*

15.3. Under the heading "Gross misconduct":

15.3.1. "*Some types of behaviour are so serious and so unacceptable, if proved, as to warrant dismissal without notice (summary dismissal) or pay in lieu of notice. It is not possible to construct a definitive list of what constitutes gross misconduct and in any event all cases will be dealt with on their merits. However, the following examples show some types of behaviour which in certain circumstances could be judged to be gross misconduct:*

15.3.1.1. *Theft*

15.3.1.2. *Violence*

15.3.1.3. *Abusive behaviour to customers or colleagues*

15.3.1.4. *Criminal acts against Royal Mail Group or its employees*

15.3.1.5. *Intentional delay of mail*

15.3.1.6. *Deliberate disregard of health, safety and security procedures or instructions…"*

16. The Respondent also has published guidance dated 22 May 2018 entitled "*Alcohol and Drugs – Guide for employees"* which sets out the "*expected behaviour and standards regarding alcohol and drugs while at work"*. This document includes the following provisions:

16.1. Under "Overview": "*The consumption of alcohol… while at work or on Royal Mail Group premises in any capacity is prohibited".*

16.2. Under "Expected behaviour": "*Employees are expected to attend work in a fit state and to be able to work safely and effectively. Being fit for work includes starting work free from the adverse influence of alcohol… and remaining so throughout working hours".*

16.3. Under "Standards": "*While at work … the consumption of alcohol… is prohibited… All drivers have a personal legal responsibility not to drive whilst under the influence of alcohol…".*

16.4. Under "Non-compliance": "*Failing to comply with this guide may result in investigation and action under the Conduct Policy, up to and including dismissal for gross misconduct".*

16.5. Under "Support for employees": "*In Royal Mail Group, support is available to employees who declare a dependency and who cooperate with treatment and rehabilitation… Support will still be available if sought after misconduct has occurred and is being investigated, although seeking help after misconduct may not avoid any actions under the Conduct Policy"*.

17. The Respondent also has published guidance entitled "Our business standards – An employee's guide". This document includes the following provisions:

17.1. Under the heading "Personal behaviour and appearance": "*Possessing, selling and using alcohol… at work are not allowed".*

18. I find that these policy documents were made available to employees through publication on the Respondent's intranet. I find that the Claimant was aware of the existence of these policies and, whether or not he was familiar with the detail of their content, could readily have made himself aware.

The customer complaint in relation to the events of Saturday 19 September 2020

19. On 24 September the Respondent received a complaint in relation to an incident on 19 September 2020. The complaint read as follows:

"*Bad driving – The above address is my friends property. Whilst I was there I witnessed a postman drink driving. He was parked outside after dropping off a delivery and was drinking a can wrapped in a black plastic bag. He finished the can, threw it on the street and drove off. The can was 9% Karpackle polish lager. I have reported this to the police for drink driving".*

20. The complainant had provided the registration number of the vehicle as well as the address of the incident. Using that information, the Respondent identified that the Claimant was the driver in question.

The investigation and disciplinary process followed by the Respondent

21. On receipt of the complaint, the Respondent passed the matter to Karl Brown, Delivery Office Manager, to investigate.

22. On 28 September 2020 Mr Brown held an interview with the Claimant, who was accompanied by an assistant representative from the Communication Workers Union. Mr Brown summarised the allegation contained in the complaint and asked the Claimant to respond to it.

23. In the course of that interview on 28 September 2020:

    23.1. The Claimant denied drinking in his vehicle. However he admitted that he had a drink at the end of his delivery round. He said that he had a beer outside his Royal Mail vehicle, and then got back into the vehicle and drove off. He accepted that he did this while wearing a Royal Mail uniform and that he then drove the Royal Mail vehicle home.

    23.2. The Claimant said that he did this every day. When asked by Mr Brown whether he thought that this was acceptable he said "*What am I doing wrong? … I am not drunk"*.

    23.3. When his representative said to the Claimant that he was admitting to drinking and driving, he said "*I am not … driving at the time, I drink my drink and then I drive"*.

    23.4. The Claimant denied drinking Karpackle beer, saying that he drank "*Stella Artois and others".*

    23.5. When asked whether he had a drink problem, the Claimant said "*I think so".* Mr Brown responded "*I will be able to get you support… I will provide this shortly after this interview. I will be removing you from driving with immediate effect. I cannot accept this behaviour".*

24. Mr Brown suspended the Claimant later that day and advised him that the matter would require formal investigation and that he would be invited for a formal fact-finding interview. On the same day, the minutes of the interview were signed by the Claimant and by the assistant representative who had accompanied him at the interview.

25. On 5 October 2020 Mr Brown held a formal fact-finding interview with the Claimant. The Claimant was accompanied by a representative from the Communication Workers Union.

26. At the formal fact-finding interview on 5 October 2020:

    26.1. Mr Brown reminded the Claimant that in the letter inviting him to the fact-finding interview he had been provided with information about the Respondent's helpline, should he require support or advice.

    26.2. The Claimant was handed a hard copy of the customer complaint.

    26.3. The Claimant said that he understood that the meeting was about him drinking and driving. He denied that he had done so. He acknowledged that he had been the driver of the vehicle in question and that the address given by the complainant was on a delivery round where he regularly undertook an overtime round.

26.4. The Claimant acknowledged that he had said at the previous meeting that he drank a beer at the end of his delivery round and drove the vehicle home. However he said that this was incorrect.

26.5. The Claimant said that, at the time of an incident in 1991 when he was arrested and assaulted by the police, he had been advised by his solicitor "*to just agree and say yes to everything someone asks you! Because once this goes to the courts or an independent body, they will hear the truth"*. He said that he had "*just admitted to every question you were saying me. I just admitted to it all. You were putting me under pressure with your questions and raising your voice".*

26.6. The Claimant raised the fact that he had worked for Royal Mail for 17 years and "*I have not once come in drunk or smelling of drink".* He said that he does not have a can of beer at the end of his delivery, but waits until he gets home.

26.7. The Claimant said that he was drinking a bottle of Supermalt drink. He said that he then cleared out his van and found empty bottles and cans which he threw away onto the roadside. He was unsure what the cans were but thought that the customer may have seen one of those. He denied drinking polish beer, saying that he drinks Stella Artois or Kestrel.

26.8. The Claimant denied drinking every day, and denied having a drink problem now or in the past, saying "*I don't think I have a problem. I might have but I don't see it"*. Mr Brown said "*This is a question I needed to ask, you might need the help and support I can offer*", to which the Claimant responded "*I am fine".*

27. On 8 October 2020 the Claimant signed a copy of the minutes of the meeting on 5 October 2020, acknowledging that they were "*a true reflection of the interview held…"*. When he did so he made two minor amendments and added:

"*Just remembered: I had a track item to deliver at that address… I got there, scanned the item and rang on the door bell twice and waited, there was no answer. But I could hear people talking inside. I knocked on the door three … times knocking harder each time yet there was no answer. As I was writing a P739 for the item, a lady opened the door. I had a go at her for taking so long to come and answer the door".*

28. On an unknown date after 5 October 2020, Mr Brown referred the matter to a more senior manager, Mr Paul James-Elliott. Mr James-Elliott invited the Claimant to a formal interview under the Conduct Policy on 20 October 2020.

29. In his oral evidence and in his written submissions, the Claimant asserted that Mr Brown had reached the conclusion that there was no case to answer. I find on the balance of probabilities that this was not the case. There is no evidence to corroborate that assertion. Moreover, it is inherently improbable, given that Mr Brown referred the matter to a more senior manager to conduct a formal interview under the Respondent's disciplinary

process. Mr Buaka's evidence was that the case was referred first to Mr James-Elliott and then to him because "*Karl Brown considered that the potential misconduct may require a penalty that was above his level of authority".* I find that Mr Brown concluded that there was a case to answer, which is why he referred the case to a more senior manager with the requisite level of authority.

30. On 20 October 2020 Mr James-Elliott held a formal interview with the Claimant under the Respondent's conduct policy. The Claimant was accompanied by a representative from the Communication Workers Union. The charges were identified at the outset of the meeting as follows: "*1. Drinking whilst on the [sic] duty. 2. Damage to Royal Mail's reputation. 3. Breach of Health and Safety by driving a Royal Mail vehicle whilst under the influence of alcohol".* The Claimant confirmed that he understood why he was being interviewed.

31. In the formal interview on 20 October 2020:

    31.1. The Claimant confirmed that he had admitted to Mr Brown to having a drink every day after his round, outside his vehicle, before driving home.

    31.2. The Claimant confirmed that he had subsequently denied having consumed alcohol. He said that he had felt threatened by Mr Brown, and referred to the legal advice he had received in 1991 to admit to everything when he felt threatened. He asserted that Mr Brown had been aggressive. He said that he had initially denied the allegation and had only changed to admitting it because he felt "threatened, frightened and bullied".

    31.3. The Claimant denied having consumed any alcohol. He maintained that he had thrown away some empty cans and bottles from his van.

32. On 21 October 2020 the assistant union representative who had accompanied the Claimant at the first meeting provided a statement regarding his recollection of the meeting. He said that the Claimant had admitted drinking a can of beer. "*At this point Karl got quiet [sic] upset and he did raise his voice trying to explain severity of situation to [the Claimant]. [The Claimant] said 'you don't have to shout'. Where Karl explained to him that he personally experienced problem of drink driving within his circle of family and friends. He asked questions like 'What if you hit someone's child?'. This patch lasted some 5 minutes and Karl went out to let us have some time alone in the office to reflect what happened. Once Karl came back in he went through taking [the Claimant's] statement and then he asked him if he would consider himself alcoholic… [The Claimant] responded that he might have problem with drinking. Karl pointed out there is Royal Mail help line that he should call. Later in the day we… were called in the office to sign a paper that confirms interview being true".*

33. On 25 October 2020, having made some amendments, the Claimant signed the notes of the meeting of 20 October as a "*true reflection of the interview".*

34. At some stage prior to reaching a decision following the formal hearing, Mr James-Elliott suffered from an episode of ill-health. This resulted in a delay.

35. During this hearing, the Claimant asserted that Mr James-Elliott had, following the formal meeting on 20 October 2020, concluded that there was no case to answer. The Claimant says that he was told that this decision had not yet been written. I find on the balance of probabilities that Mr James-Elliott had not reached a decision prior to going off sick. There is no evidence to corroborate the Claimant's assertion. Moreover, it is inherently improbable both that an employee would be told the outcome (second hand) before a formal decision was reached, and that the case would be referred to a different manager to be concluded in Mr James-Elliott's absence if a decision had already been made. I find that Mr James-Elliott had not reached any conclusion prior to the matter being referred to Mr Buaka.

36. As a result of the delay, the matter was referred to Mr Luke Buaka, another senior manager at the same level as Mr James-Elliott. Mr Buaka wrote to the Claimant on 18 January 2021 inviting him to attend a formal conduct meeting on 22 January 2021. The allegation was set out in the invitation letter as follows: "*1. Gross Misconduct of unacceptable external behaviour of damage to Royal Mail reputation in that you were seen on 19.09.20 by a member of the public consuming alcohol before driving off in Royal Mail van … which led to a customer complaint being submitted. 2. Gross misconduct of breach of Health and Safety standards by drinking alcohol whilst in charge of Royal Mail vehicle putting yourself and others at risk".*

37. On 18 January 2021 the Claimant signed to acknowledge receipt of the invitation to a formal conduct meeting.

38. On 22 January 2021 Mr Buaka held a formal conduct meeting with the Claimant. The Claimant was accompanied by a representative from the Communication Workers Union.

39. At the formal conduct meeting on 22 January 2021, it is apparent from the minutes signed by the Claimant on 27 January 2021 that:

    39.1. It was explained to the Claimant that following the interview conducted by Mr James-Elliott, he was unable to conclude the case "*because he is off for health reasons"*, so it had been passed to Mr Buaka to conclude.

    39.2. The Claimant acknowledged that he understood the charges on the formal invitation letter. He also confirmed that he agreed the notes of the meeting with Mr James-Elliott (with the amendments he had made).

    39.3. The Claimant confirmed that he had signed the notes of the meeting on 28 September 2020 but said that he had not challenged the notes because he did not have the chance to review them prior to signing.

    39.4. The Claimant said that he had initially denied the allegation on 28 September but had "*started saying yes to everything"* because he felt intimidated by Mr Brown. When it was put to him that he had not said

yes in response to every question, he had said that he had tried to be truthful so was not able to say yes to everything.

39.5. The Claimant identified the question at the top of page 2 of the notes as the point where he started to feel intimidated. He did not accept that this meant that he had answered truthfully for the entirety of the first page. He then said that he started to feel intimidated from question 6 on page one.

39.6. The Claimant said that he would buy a drink when he finished his duty and then drink it when he got home.

39.7. The Claimant said that he had bought a malt drink in a black bag and consumed some of it outside the address. He had then decided to clear out his van. He said that he had not finished the drink. He believed that the customer had been mistaken about whether he was drinking alcohol.

39.8. The Claimant did not suggest to Mr Buaka that a decision had already been taken by Mr James-Elliott. Neither did he raise any concern about the use of the words “gross misconduct” in the charges.

40. On 19 February 2021 Mr Buaka wrote to the Claimant advising of his decision following the formal conduct hearing. He upheld both allegations and decided to impose the penalty of summary dismissal. The Claimant was advised of his right to appeal.

41. Mr Buaka set out his reasons for his decision in a document running to 6 pages. In summary:

41.1. He did not consider that the admissions made on 28 September 2020 could be disregarded on the grounds that the Claimant had felt intimidated. He noted in particular that the Claimant had not simply answered “yes” to every question as he claimed. He concluded that the Claimant had initially not believed that he had done anything wrong, but had subsequently realised the seriousness of the incident and changed his account.

41.2. He considered on the balance of probabilities that the customer had seen the Claimant drink a can of alcohol and discard it on the road. He did not consider it credible that the customer would have lied about this and reported the matter to Royal Mail and to the police simply because the Claimant had had a go at him/her for being slow to answer the door.

41.3. He did not consider the Claimant’s account (as given at the meetings on 5 October 2020, 20 October 2020 and 22 January 2021) credible. He did not believe that the Claimant was telling the truth.

41.4. He believed that the Claimant drank one or more cans of alcohol and then threw the can(s) on the street and drove off, as seen by the customer. He believed that by doing so, the Claimant breached Health and Safety standards by putting the safety of other road users at risk, and acted in a way that could damage the reputation of Royal Mail.

41.5. He considered a lesser penalty but rejected it because of the seriousness of the Claimant's actions, because the Claimant showed no remorse and because he believed that there was a risk that the conduct would be repeated.

42. Mr Buaka's oral evidence at the hearing was consistent with the reasons set out in his decision letter. He denied that he had felt under any management pressure to dismiss the Claimant. He said that he had considered the case on its own merits and denied applying a "one strike and you're out" policy. He denied being made aware that the customer had said that they wanted to drop the case, but said that even if he had been made aware, he felt that it was open to him to decide what action was appropriate under the Code of Conduct. He told me that he had considered the possibility of a suspended dismissal or a lesser penalty, but because of the severity of the offence and the admission of drinking on a regular basis, and because the Claimant did not accept he had done anything wrong, he considered that this was a serious breach of health and safety rules and that summary dismissal was the only appropriate sanction.

43. I accept Mr Buaka's evidence that at the time he dismissed the Claimant, he had formed the belief that the Claimant had committed misconduct by consuming alcohol and then driven his van.

44. On 20 February 2021 the Claimant exercised his right of appeal, on the basis that he believed that the facts of the case had not been properly considered. Amongst other things, he said in his grounds of appeal that:

44.1. "*When the residence [sic] … were contacted, they denied reporting any such incidence to the police saying it was probably reported by a visiting family friend. They apologised for any inconveniencies caused and said they do not wish to take this further."*

44.2. He referred to his long service and clear conduct record and said that he considered the decision too harsh.

45. On 26 February 2021 Mr Allan Rostron, Independent Casework Manager, invited the Claimant to attend a virtual appeal hearing on 8 March 2021.

46. On 11 March 2021 Mr Rostron heard the Claimant's appeal against dismissal by video hearing. The Claimant was accompanied by a representative from the Communication Workers Union.

47. At the appeal hearing on 11 March 2021, it is apparent from the notes signed by the Claimant on 16 March 2021 that:

47.1. Mr Rostron advised the Claimant that the appeal was a re-hearing.

47.2. The Claimant said again that his answers in the initial interview with Mr Brown were as a result of the pressure he felt at that interview, and based on the legal advice he had been given in 1991.

47.3. The Claimant said that he considered that Mr Buaka's decision was too harsh for a first offence, referring to his length of service.

47.4. The Claimant says that the charges at the hearing with Mr James-Elliott were expressed differently from those at the hearing with Mr Buaka, with gross misconduct only appearing in the charges set out by Mr Buaka.

47.5. He said that what he had said to Mr Brown on 28 September 2020 should not be relied on as "*The 2nd time there was no pressure on me and I had a union rep with me and the situation was calmer and more friendly".*

47.6. He said that no support was provided. He denied having a drink problem.

48. On 14 April 2021 Mr Rostron forwarded to the Claimant an email exchange he had had with Mr Brown, inviting the Claimant to provide any further comment if he wished to do so. In that exchange, Mr Brown said "*No my demeanour was fine, yes I did get a little bit agitated as he openly admitted that he was drink driving. In regards to the position of where the vehicle was this is situated near a school and therefore my first point raised what's the fact that this gentleman was driving a Royal Mail vehicle while clearly under the influence. This could have had devastating consequences. I can confirm at no point I banged on the table but I may have raised my tone but not shouting…"*

49. On 14 April 2021 the Claimant replied reiterating his view that Mr Brown had shouted at him and banged the table.

50. On 16 April 2021 Mr Rostron wrote to the Claimant advising him of the outcome of the appeal. His decision was that the original decision of summary dismissal was appropriate. He provided a copy of his full decision and rationale, running to four pages. In summary:

50.1. He had little faith in the Claimant's version of events. He believed on balance that the Claimant had an alcoholic drink and threw away the can as described by the complainant. He found the allegations proven;

50.2. He considered the Claimant's length of service and clear conduct record and considered penalties short of dismissal. However he considered that in the circumstances summary dismissal was a reasonable response.

51. Mr Rostron's oral evidence at the hearing was consistent with the reasons set out in his decision letter. He believed on the balance of probabilities that the Claimant had consumed alcohol and then driven his vehicle. He acknowledged that the can was not provided by the complainant and was not available, but accepted the complainant's account and rejected the Claimant's. He took into account the Claimant's length of service and conduct record. However he considered that in order to protect customers and the business, summary dismissal was the appropriate penalty. He believed that a referral for counselling was not required because the Claimant denied having a drink problem. He said that if he believed that the matter was wrongly categorised as gross misconduct, he would have

allowed the appeal. He said that although it was a finely balanced case on the balance of probabilities, what tipped the balance for him was the contemporaneous information from the interview on 28 September 2020, and the different explanation subsequently given. He did not accept that he had simply "rubber-stamped" the original decision.

52. I accept Mr Rostron's evidence that he believed that the Claimant had committed misconduct by consuming alcohol and then driving his van.

Findings of fact in respect of unfair dismissal

53. My findings in respect of the investigation and disciplinary process which was followed are set out in detail above.

54. I find that the reason for the dismissal was the genuine belief by the dismissing manager, Mr Buaka, that the Claimant had consumed alcohol on 19 September 2020 and had then driven his Royal Mail van home, as alleged by the complainant who reported his actions.

55. I accept Mr Buaka's evidence that he considered this to be in breach of Royal Mail's policy on the consumption of alcohol, a breach of health and safety standards, and conduct posing a risk to the reputation of the business. I find that this was a reason relating to the Claimant's conduct.

56. I find that Mr Rostron, who conducted the appeal, also had a genuine belief that the Claimant had consumed alcohol prior to driving his Royal Mail van home, and that this was a breach of Royal Mail policy, giving rise to concerns about health and safety and the reputation of the business.

Findings in respect of wrongful dismissal

57. For the purposes of the wrongful dismissal claim, I am required to make a finding as to whether the conduct alleged by the Respondent took place.

58. I note that there is limited evidence available from the complainant as to what s/he saw. No interview was carried out with that individual, either prior to or subsequent to the Claimant providing his alternative explanation of events from 5 October 2020 onwards.

59. However there is hearsay evidence of what the complainant saw on 19 September 2020, set out in the original complaint. The complainant says that s/he witnessed the Claimant drinking from a can which was in a black plastic bag, and then throwing the can onto the street before driving away in his van. S/he observed the can s/he saw on the street to be a can of beer. S/he provided some detail in relation to that can, including that it was 9% alcohol by volume, and the brand name of the beer.

60. I note that when first interviewed in response to the allegation, the Claimant admitted to having drunk a can of beer and then driven away. His initial account was therefore entirely consistent with the complainant's evidence. He went beyond that account in the interview of 28 September 2020, adding that drinking a can of beer before driving home was something he did on a

daily basis, that he saw nothing wrong with it as he was not drunk, and accepting that he may have an alcohol problem.

61. I note that the Claimant has subsequently sought to resile from his original admission. In the fact-finding interview on 5 October 2020, the first formal conduct hearing in October 2020, the second formal conduct hearing in January 2021 and then at the appeal hearing in March 2021, the Claimant said that his original admission was incorrect, and denied having consumed alcohol.

62. The account the Claimant put forward as an alternative explanation was somewhat embellished at each hearing as he was asked to explain the details of what he said. Ultimately, his account was that he purchased a bottle or can of malt drink in a black plastic bag, partially consumed it while it was still in that plastic bag, and then in order to make space for the bottle in his driver's door, cleared out some empty cans and bottles (he has never said what kind of cans or bottles they were) which were not his, disposing of them in the street. He considers that the customer was therefore mistaken about whether he was consuming alcohol.

63. The Claimant signed the notes of the interview on 28 September 2020, later the same day. He has since said that he did not have an opportunity to review those notes. However he accepts that he had the opportunity to review them on 5 October 2020. When he did, he accepted that they reflected what he had said at the first interview: however he then sought to resile from his admissions.

64. I find the Claimant's reasons for seeking to resile from his original admission to be lacking in credibility. He has put forward reasons why he says that admission cannot be relied upon. I do not accept those reasons.

65. The Claimant says that he felt intimidated by the interview and, based on advice he had received nearly 20 years earlier from a solicitor about an incident in a police station, decided to tell Mr Brown what he wanted to hear, and to answer "yes" to every question. I do not consider it plausible that this would have impacted on his ability to tell the truth at the interview on 28 September 2020. He had a representative with him and the interview was taking place at his place of work, not in a police station. He was making admissions from virtually the outset of the interview, before he alleges the intimidation arose. Neither he nor his representative objected at the time to the way Mr Brown was asking questions. He did not answer all subsequent questions with a "yes": in some instances he said "no" or provided further explanation or detail. This is not consistent with his account of simply saying "yes" to everything to get out of the situation as fast as possible. He raised no grievance or formal concern about the interview. At his next meeting, with the same manager, on 5 October 2020 he clearly felt able to raise with Mr Brown the fact that he claims to have felt intimidated at the first interview. This is not consistent with the fear or intimidation he describes. I further note that the assistant representative provided a statement on 21 October which refers to the Claimant having made admissions, without raising any concerns about the context in which those admissions were made. The statement also describes Mr Brown having left the room for a period during

the interview (after the 5 minutes of more agitated questioning) during which there was an opportunity for the Claimant to talk to his representative.

66. I note that the Claimant voluntarily made admissions at the interview going beyond what was being asked of him. For example, he said that he behaved in this way every day and that he had a problem with alcohol. I further note that if, as he subsequently said, there was a perfectly innocent explanation for his actions (that he was consuming a soft drink and had subsequently disposed of other cans and bottles which had nothing to do with him) there appears to be no good reason why he could not have offered that explanation from the outset.

67. The Claimant has sought to undermine the complainant's account by suggesting that during an earlier incident he had "had a go" at someone at the address for taking a long time to answer their door. The person who made the complaint was not the resident at the address in question, so there seems to be no basis to think that s/he would have taken issue with the Claimant's behaviour on the previous occasion. In any event, however, it is inherently improbable that the complainant would wait for an opportunity to seek revenge, as the Claimant suggests. It is more likely that they would complain about the Claimant's rudeness. Instead, they took the trouble to complain to the Respondent and to the police about what they saw, giving a careful description of what occurred. It is also improbable that they would have invented the level of detail provided in the complaint, including the detail of the Claimant consuming a drink out of a black plastic bag (which he accepts he did), and the specific brand and alcohol content of the can found on the street. If the Claimant's account is correct, the complainant would have found a number of cans or bottles, and would no doubt have reported this fact.

68. On the balance of probabilities, I find that it is more likely that the account originally given by the Claimant on 28 September 2020 is the correct one. It is entirely corroborated by the original customer complaint. It was the one given closest in time to the incident, when the Claimant was first confronted with the allegation. Notably, it was given at a time when the seriousness of having consumed alcohol on duty does not appear to have dawned on the Claimant: I note that his immediate response to the question "Do you think that this is acceptable?" was to ask "What am I doing wrong?", later adding that he was not drunk. I consider it more likely than not that the Claimant made his admission without initially realising that what he had admitted was a breach of the Respondent's express prohibition on alcohol consumption and potentially a serious breach of disciplinary rules. Once he had realised those matters, and found himself suspended and facing a disciplinary investigation, he sought to resile from his admissions.

69. On the balance of probabilities, I therefore find that the Claimant consumed alcohol on 19 September 2020 and then drove his Royal Mail van home.

Law

70. The right not to be unfairly dismissed is set out at Section 94(1) Employment Rights Act 1996 (ERA).

71. Fairness is dealt with in Section 98 ERA, which 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,
…
(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.

…"

72. In so far as Section 98(1) & (2) are concerned, it is for the employer to show the principal reason for dismissal, and that it was a potentially fair reason. A reason is "*a 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 & Anderson* [1974] ICR 323, CA. I am mindful that the burden is not a heavy one. It will be sufficient that the person making the decision on behalf of the employer genuinely believed, at the time the decision was taken, that the employee was guilty of misconduct.

73. I remind myself that when I come to consider the issue of reasonableness under Section 98(4), the burden of proof is neutral. I am required to assess reasonableness in the context of the particular reason established by the employer, and in the light of good industrial relations practice. It is the employer's decision which is the focus of my assessment, rather than the impact of the decision on the employee. I am required to have regard to all the circumstances of the case, including the matters set out in Section 98(4) (the size and resources of the employer, equity and the substantial merits of the case). In considering the reasonableness of the employer's belief, I remind myself that an honest belief held on reasonable grounds, even if it

is wrong, will be enough: there is no requirement to prove that the misconduct occurred.

74. The case law is clear that I must not substitute my own views for those of the employer: it is not for me to consider how I would have responded in the same circumstances. I am required to consider whether the respondent's decision fell within the band or range of reasonable responses which would be open to a reasonable employer in the circumstances (*Iceland Frozen Foods Ltd v Jones* [1983] ICR 17), based on the facts or beliefs known to the dismissing officer at the time the decision is taken. I do, however, remind myself that although a dismissal for gross misconduct will often fall within the range of reasonable responses, this is not invariably so: in a small number of cases, there may be mitigating factors (such as length of service, previous unblemished record, consequences of dismissal) which render a dismissal unfair, notwithstanding the existence of gross misconduct (*Brito-Babapulle v Ealing Hospital NHS Trust* [2013] IRLR 854, EAT, *East of England Ambulance Service NHS Trust v Sanders* EAT/0319/15).

75. I remind myself that I should not conflate the issue of unfair dismissal with that of wrongful dismissal, which I will consider separately below. Once a decision to dismiss has been reached on reasonable grounds, it is for the employer to decide whether or not to dismiss with notice or summarily. If a dismissal is fair, then it is fair irrespective of whether or not it should have been on notice (*BSC Sports and Social Club v Morgan* [1987] IRLR 391, EAT).

76. I am required to have regard to the three-stage test set out in *British Home Stores Ltd v Burchell* [1980] ICR 303, EAT. I remind myself that the range of reasonable responses test applies to all three stages of this test (*J Sainsbury plc v Hitt* [2003] ICR 111, CA). The burden of proof is on the employer in relation to the first stage, and neutral in relation to the other two. I am required to consider whether the employer:

    76.1. Believed the employee guilty of the misconduct;

    76.2. Had in mind reasonable grounds upon which to sustain that belief;

    76.3. At the stage at which the belief was formed on those grounds, had carried out as much investigation into the matter as was reasonable in the circumstances.

77. If I find that the answer is "yes" to all three of those questions, then I am required to go on to consider whether dismissal was a reasonable sanction open to a reasonable employer in the circumstances. If so, the dismissal will be fair.

78. In terms of the wrongful dismissal claim, I remind myself that whilst unfair dismissal is a statutory concept which considers the reasonableness of the employer's belief and decision, a wrongful dismissal claim is based on whether or not there is a contractual right in the circumstances to dismiss summarily. This requires a finding of fact about what happened in order to determine whether or not the behaviour amounted to gross misconduct rather than simply to misconduct (*West v Percy Community Centre* EAT/0101/15).

79. The distinction is expressed in this way in *Rawson v Robert Normal Associates Ltd* [2014] 1 WLUK 647: "*In a conduct dismissal [an employment tribunal] examines the employer's view of the employee's behaviour. It is not concerned with whether that behaviour actually occurred, only whether, on the facts, the employer reasonably might conclude after a reasonable investigation that it did. … In [a wrongful dismissal case], what is relevant is not what the employer thought happened, however reasonable that might be. It is what actually happened. A tribunal needs to know, and say why it takes the view that it does, that the conduct happened as alleged or did not".*

80. What type of behaviour amounts to gross misconduct will depend on the facts of the individual case. However, there must be an act by the employee which fundamentally undermines the employment contract (*Wilson v Racher* [1974] ICR 428, CA). The ACAS Code says that an employer should set out in its disciplinary rules matters which are likely to be regarded as gross misconduct, that is to say misconduct sufficiently serious to justify summary dismissal. However other types of conduct may, in the circumstances of a particular case, be regarded as sufficiently serious to warrant summary dismissal even if not expressly set out and drawn to employees' attention.

81. The relevant question, as set out in *Neary & another v Dean of Westminster* [1999] IRLR 288 and approved in *Briscoe v Lubrizol Ltd* [2002] IRLR 607, CA, is whether, viewed objectively, the employee's conduct is such as to "*so undermine the trust and confidence which is inherent in the particular contract of employment that the [employer] should no longer be required to retain the [employee] in his employment"*. Whether the conduct will cross that threshold will depend on the circumstances of the particular case.

Conclusions

Unfair dismissal

82. I find that the reason for the dismissal is misconduct, that is to say the Respondent's dismissing manager's belief that the Claimant had consumed alcohol and then driven his vehicle.

83. Having regard to the reasons given by the dismissing manager Mr Buaka and the appeals manager Mr Rostron, I find that they both genuinely believed that the Claimant committed the misconduct.

84. I consider that that belief was held on reasonable grounds. There was evidence from a member of the public who had set out in brief but careful detail what s/he saw. That evidence was corroborated by the admissions originally made by the Claimant when first confronted about the incident by Mr Brown on 28 September 2020.

85. I note that both Mr Buaka and Mr Rostron gave careful consideration to whether they could or should place reliance on those admissions after the Claimant had sought to resile from them. They considered the alternative explanations which he put forward. Both of them provided cogent reasons

for disbelieving the Claimant's subsequent account. They also provided cogent reasons for rejecting the explanation he subsequently gave for why he said he had made untruthful admissions in the first place. They were entitled to find, for the reasons they gave, that the Claimant's explanation was unconvincing and that his original admission was likely to be accurate. They were, in my judgment, reasonably entitled to take into account the original admission.

86. I consider that there was a fair and reasonable investigation in this case. The Claimant did not identify any other lines of enquiry which he considers should have been pursued. It is fair to say that no statement was taken from the complainant. However, given that the Claimant's only explanation was that s/he was mistaken in what s/he saw, I consider that it was open to a reasonable employer in the circumstances to conclude that no further investigation was required.

87. As regards procedure generally, I find that the procedure followed was reasonable and was in accordance with the Respondent's policy and with good industrial practice.

88. In his submissions, the Claimant asserts that the decision to pass the matter to Mr Brown to investigate was erroneous and not in line with established procedures. I have seen no evidence to corroborate that assertion. I find that, as a local Delivery Office Manager, Mr Brown was an appropriate person to carry out the initial fact-finding investigation under the Respondent's Conduct Policy. I further note that the Claimant conceded in cross-examination that there was no prejudice to him in Mr Brown conducting that investigation.

89. An investigation was carried out by Mr Brown and the matter was appropriately referred up to a more senior manager. The Claimant was notified in advance of the allegations against him. He was given the right to be accompanied at all hearings, both informal and formal. A hearing was held at which he was able to put his case. He was informed of the outcome and of his right of appeal. I do not consider that the appeal was, as the Claimant asserts, a sham or a rubber-stamping exercise.

90. I do not think that anything turns on the fact that the charges at the time of Mr James-Elliott's conduct hearing did not expressly refer to the words "gross misconduct". I do not accept that this represented an escalation in seriousness by the time Mr Buaka dealt with the matter. This was simply a question of labelling. The underlying allegations remained exactly the same, and would if proved amount to a breach of the same provisions of the Respondent's Conduct Policy. No issue was taken with this at the time of the hearing itself. The Claimant was made aware of the charges prior to the hearing with Mr Buaka and said at the outset of the hearing that he understood them.

91. Finally the question is whether dismissal was a fair sanction in all the circumstances, having regard to the misconduct the Respondent believed had occurred. I accept the evidence of both Mr Buaka and Mr Rostron that they regarded this misconduct as a serious departure from the standards

required by the Conduct Policy. In my judgment that belief was reasonable. The Respondent's alcohol policy contained an express prohibition on the consumption of any alcohol at work. As is explained in the Conduct Policy, driving a vehicle while under the influence of alcohol, whether or not within the legal limit, is likely to impact on a driver's ability to drive safely. This has safety implications for the Claimant and for other road users. It was also something likely to impact on the reputation of the business. Those were matters which Mr Buaka and Mr Rostron were properly entitled to take into account when they assessed the issue of seriousness.

92. I note that the Claimant asserts that he should have been offered support instead of being dismissed. That may be an appropriate outcome in a case where someone accepts that they have an alcohol problem and wishes to avail themselves of support. However, whilst it might be one reasonable outcome, that does not mean that dismissal is unreasonable. The Respondent's Alcohol policy clearly states that providing support may not prevent any disciplinary sanction under the Conduct Policy. When offered support by Mr Brown on 5 October 2020 the Claimant said "I am fine". He continued to deny having a problem with alcohol. In the circumstances it would be open to a reasonable employer to conclude that nothing would be gained by providing support. Mr Rostron was clear that this was his conclusion at the time of the appeal.

93. The Claimant asserts that the penalty was too harsh and failed to take into account his length of service and clear conduct record. I accept the evidence of both Mr Buaka and Mr Rostron that they considered those matters, and considered penalties short of dismissal. I consider that they both gave cogent reasons for rejecting a lesser sanction. Those reasons related to the seriousness of the misconduct, the Claimant's lack of remorse and refusal to acknowledge that he had done anything wrong, and the risk of repetition of similar behaviour. I find that those reasons were open to a reasonable employer in the circumstances.

94. In the circumstances of this case, I consider that dismissal was within the range of reasonable responses available to a reasonable employer in light of the misconduct found proved.

95. I therefore find that there was a fair dismissal by reason of misconduct.

Wrongful dismissal

96. In terms of wrongful dismissal, I have found that the Claimant consumed alcohol and then drove his Royal Mail vehicle. I am required to consider whether, viewed objectively, that conduct is such as to "*so undermine the trust and confidence which is inherent in the particular contract of employment that the [employer] should no longer be required to retain the [employee] in his employment"*. Whether the conduct will cross that threshold will depend on the circumstances of the particular case.

97. In this case, I note that the conduct was contrary to express provisions in the Respondent's alcohol and drugs policy which prohibit the consumption of any alcohol at work. Those provisions make it clear that any contravention

may result in disciplinary action up to and including summary dismissal. The seriousness with which such conduct will be regarded is therefore expressly drawn to the attention of employees. I further note that the Claimant acknowledged in cross-examination that the consumption of alcohol before driving would, as a matter of common sense, be a serious matter.

98. I consider that this was conduct which had significant health and safety implications, in that driving a van under the influence alcohol (even if within the limits of criminal law) presents a risk to the driver, to the property (the van) of the Respondent and to the safety of other road users, whether other drivers or pedestrians. Moreover, there is a significant risk of reputational damage to the employer, in the sense not only of what the complainant saw, but of the likely consequences if a postman who was involved in an accident turned out to have consumed alcohol prior to driving.

99. In the circumstances, I consider that this was misconduct of a type which not only breached the Respondent's express rules but which, viewed objectively, went to the root of the contractual relationship and undermined the employer's trust and confidence in the employee. I consider that it crosses the threshold of gross misconduct and is of a comparable level of severity to the examples set out in the non-exhaustive list set out in the Respondent's disciplinary procedure.

100. I therefore find that the Respondent was entitled to dismiss the Claimant summarily and that the complaint of wrongful dismissal is not well-founded.

Conclusion

101. For the reasons I have given, I find that the Claimant was fairly dismissed by the Respondent by reason of misconduct and that his claim of wrongful dismissal is not well-founded. The Claimant's claims of unfair dismissal and wrongful dismissal are dismissed.

Employment Judge S Palmer
Dated: 31 August 2023