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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102135/2023

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Held in Edinburgh Tribunal on 14-16 and 24-25 August 2023

Employment Judge Murphy

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Mr I Cowen

**Claimant
In person**

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Royal Mail Group Plc

Respondent

**Represented by
Ms F Meek -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimant's claim of unfair dismissal does not succeed and is dismissed.

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REASONS

Introduction

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1. This final hearing took place as an in-person hearing at the Edinburgh Tribunal. The case was reallocated to me in the morning of 14 August 2023 due to the unforeseen illness of the Employment Judge originally assigned to hear the case. As a result, the hearing did not begin until 2pm on that day. In the event, the hearing on 14th August was converted into a private Preliminary Hearing on case management.

E.T. Z4 (WR)

2. The claimant had sought a postponement on the basis that he felt unprepared for the hearing because his Trade Union representatives had recently informed him that they would not be representing him at the hearing. The conversion to a PH was to allow the claimant to consider the papers which he advised he had not read and to identify whether he wished to lodge any further documents or call any additional witnesses.
3. The claimant advised on 15 August 2023 that he did not wish to lodge any additional documentation having considered the respondent's inventory of productions overnight. The claimant gave evidence on his own behalf and led evidence from L Brown, his mother. The respondent led evidence from Jamie McLaughlan, Customer Operations Manager, and dismissing officer; and Alan Rankin, Independent Casework Manager and appeal manager. Evidence was taken orally from the witnesses.
4. During the hearing, the claimant confirmed that he no longer seeks reinstatement but seeks compensation only should his claim succeed.
5. Evidence concluded late in the afternoon on 24 August 2023 and submissions were discussed. The claimant confirmed that he understood he was not obliged to give a submission but indicated he wished to do so. Ms Meek confirmed that she would give a submission on the respondent's behalf. It was agreed that submissions would be heard orally on the morning of 25 August 2023 when the hearing reconvened at 10 am. On 25 August, the claimant did not attend the hearing and nor had he contacted the Tribunal by 10 am. The Clerk contacted the claimant who advised he had been sick through the night and would not be attending. Parties were given the opportunity to provide written submissions in the week that followed and to comment on the other side's submissions. Ms Meek emailed a submission to the Tribunal and to the claimant on 30 August 2023. The claimant declined to send a submission or to provide comments on the respondent's submission.

30 *Issues to be determined*

6. During the preliminary discussion on 14 August 2023, I identified the issues of liability to be determined in the case and set them out to the parties as follows:

1) What was the reason or principal reason for the claimant's dismissal?
The respondent says the reason was conduct. Was the dismissal of the claimant for the potentially fair reason of conduct?

2) If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

- a. there were reasonable grounds for that belief;
- b. at the time the belief was formed, the respondent had carried out a reasonable investigation;
- c. the respondent otherwise acted in a procedurally fair manner;
- d. dismissal was in the range of reasonable responses.

Findings in Fact

7. The following facts, and any further facts set out in the 'Discussion and Decision' section, are found to be proved on the balance of probabilities.

Background

8. The respondent is a British public limited company which provides postal and courier services. It employs approximately 800 employees in the Edinburgh area and many thousands more across the UK. It is supported by a centralised Human Resources service which is available to provide advice and support to managers throughout the UK in relation to staffing issues and HR policies and procedures.

9. The respondent also employs a team of approximately 18 Independent Casework Managers. They sit outside the operational structure and their function it is to hear appeals by employees against dismissals and suspended dismissals as well as grievance appeals and whistleblowing and harassment complaints.

10. The claimant was employed from in or around December 2011 until he was dismissed by the respondent on 20 December 2022. He was employed throughout as a postman (also known as an Operational Postal

Grade or 'OPG'). His place of work latterly was Edinburgh West Delivery Office, though the nature of the respondent and the role naturally required mobility. Latterly, the claimant's line manager was Jamie McLaughlan, Customer Operations Manager. At least latterly in his employment, a significant part of the claimant's duties involved driving a Royal Mail van. He would sometimes be the driver and travel with a colleague who attended to the deliveries and other times the driving and passenger roles were reversed.

11. The claimant was issued with a contract of employment which was updated / replaced from time to time. The most recent version was signed by the claimant on 29 October 2012 and varied by a subsequent letter dated 24 May 2014. In the period of the claimant's tenure, the respondent's operation has evolved to have a stronger focus on parcel delivery and a much reduced requirement for the delivery of letters than was historically the case, leading to more significant reliance on the respondent's fleet of vans and drivers.

12. The claimant's contract of employment included the following clauses:

Sickness and Sick Pay

11.1 *If you are absent through sickness or injury you must notify Royal Mail as soon as possible that you are unable to work and of the likely duration of your absence. Except in exceptional circumstances this should be before the start of duty, and must be no later than the first day of absence. All absences must be covered by the appropriate certification.*

11.2 *Your rights and obligations in the event of absence by reason of sickness or injury are set out in the Sick Pay and Sick Pay Conditions Policy which can be found on the Policy and Information Site and is part of your terms and conditions of employment.*

...

Our Code: Code of Business Standards

14. You will be expected to comply with the standards of behaviour set out in the Our Code: Code of Business Standards, a copy of which can be accessed on the Policy and Information Site or by contacting your Line Manager or HR Services. Our Code: Code of Business Standards does not form part of your contract of employment and may be amended / replaced from time to time.

Equality and fairness: Conduct Policy, Grievance Policy and Stop Bullying and Harassment Policy

15.1 ...

15.2 Royal Mail has a Conduct Policy. You will be subject to the Conduct Policy. If necessary, this document may be inspected on request from HR Services. If you are dissatisfied with any disciplinary decision relating to you, you should advise the manager who imposed the penalty and an appeal will be arranged with an appropriately qualified RM employee in accordance with the relevant Conduct Policy. ... The Conduct Policy, Grievance Policy and Stop Bullying and Harassment Policy do not form part of your contract of employment and may be amended / replaced from time to time.

...

15.6 Copies of the above policies, together with other relevant policies to which you will be subject are available on the Policy and Information Site or via your line manager or HR Services.

Attendance

16 Throughout the period of your employment your attendance health and efficiency will be reviewed in accordance with the relevant Royal Mail Policies. These policies do not form part of your contract of employment and may be amended / replaced from time to time.

13. The respondent publishes an Attendance Policy which is available on the respondent's website. It is an excerpt from a National Attendance Agreement negotiated collectively between the respondent and its recognised unions, Unite and CWU. With respect to long term absence, it includes the following text:

Long Term Absence

This process will be followed when an employee is absent from work for more than 14 days. It can also apply when repeated absences are due to an ongoing health condition. The aim is to enable a return to normal work activities at the earliest opportunity or, if that is not possible, to find an alternative outcome.

Managing Long Term Absence

General points which apply:

- Regular contact between the manager and employee is vital and requires the active participation of both parties.*
- Involvement of the relevant union representative can be helpful in maintaining contact and resolving cases promptly.*
- The aim is to encourage an early return to work as this is beneficial to both the employee and the Royal Mail Group.*
- Occupational health advice will be sought as appropriate to assist managers in making decisions.*
- Employees defined as disabled under the relevant legislation will be supported appropriately.*

14. The respondent also publishes a document called: 'Unauthorised Absence: Guide for managers'.

Overview

This is the manager's guide on dealing with situations where an employee has made contact or returned to work after taking time off without authorisation. If an employee is absent and attempts by

their line manager to make contact have been unsuccessful, the manager should refer to the Leaving the Business Without Notice Guide.

5 *This guide should be read in conjunction with the Leaving the Business Without Notice Policy and Conduct Policy.*

Unauthorised absence

...

10 *While it is expected that an employee will notify their manager in advance of taking time off there may be occasions when this is not possible for example sudden illness or an unexpected event. If this is the case the employee must try to make contact with their line manager as soon as reasonably practicable.*

Employee fails to make contact

15 *If the employee is not at work and has not made contact, there should be at least two attempts at telephoning the employee at home. Where possible, after the first phone call, the manager should leave a message requesting the employee to make contact with them. A second phone call should be made within a reasonable amount of time following the first call (2 - 3 hours later).*

20 *After the second phone call, where possible, the manager should leave a message explaining that the employee's Next of Kin will be contacted if there are details of a nominated contact on the employees PSP record. A record of these attempts should be kept by the manager on People Case Manager.*

25 *Where there is still no contact and the employee continues to be absent from work their manager should refer to the Leaving the Business Without Notice Policy.*

...

30 *Employee fails to return following medical certificate or fit note expiring*

5 *If an employee is absent through ill health and their medical certificate or fit note expires, the manager should refer to the Attendance Policy. An employee can provide a self-certificate for the first seven days of their absence. If the absence due to illness lasts more than seven days, the employee needs to provide medical certification also known as a fit note. Any period of absence for which certification has not been supplied may be considered as unauthorised absence.*

10 *Managers should contact the employee to let them know that their certification has expired and ask for an update. If there is no response after a period of time (usually a week), managers may consider treating the continuing absence as unauthorised. ...*

...

Unsatisfactory explanation given

15 *If the manager is not satisfied with the explanation provided by an employee for their unauthorised time off, pay should be stopped for the period of the absence.*

Where pay has already been withheld this should not be reimbursed.

20 *The manager should consider dealing with the absence under the Conduct Policy. Absence without authorisation is considered to be gross misconduct and could result in dismissal.*

For guidance on proceeding with the case refer to the Conduct Policy

25 15. The respondent also publishes a policy called the 'Leaving the Business without Notice Policy'. It includes the following text:

The Policy

30 *Royal Mail Group has a duty of care towards all employees and has appropriate policies and guidelines in place to provide support in cases of absence.*

This policy applies in circumstances where an employee fails to attend work and has made no contact with their manager to inform them of their absence.

5 *Continued absence and failure to notify of absence can result in dismissal from Royal Mail Group.*

...

Expectations of the employee

It is the employee's responsibility to:

- 10 • *Come to work and carry out their role*
- *Notify their manager of their absence at the earliest opportunity if they cannot attend work*
- *Seek help as soon as they recognise there may be a problem in coming to work*
- 15 • *Raise any concerns regarding coming to work and carrying out their role to their manager*

Expectations of the manager:

It is the manager's responsibility to:

- 20 • *Communicate to employees the standards that are expected of them*
- *Understand why an employee may be having problems coming into work and provide support as early as possible*
- *When clear about the facts, identify the appropriate policy and take action in a timely manner*
- 25 • *Operate this policy objectively, consistently and fairly*

Our approach - Definition of leaving the business without notice

Leaving the business without notice describes a situation where an employee fails to attend work and has made no

contact with their manager to inform them of their absence. It also describes a situation where the manager is not aware of any reason why the employee is not attending for work and the absence has become unsustainable.

5 *How we manage an employee who leaves the business without notice*

We expect all employees to inform and request authorisation from their manager when they cannot attend work. This should be done at the earliest possible point in time.

10 *Royal Mail Group is committed to responding in the first instance by understanding the reason for absence and supporting the employee to return to work. Dismissal will take place as a last resort where either:*

- 15
- an employee fails to provide an explanation or offers an unsatisfactory explanation for their absence, or*
 - an employee fails to attend the meeting to discuss their absence*

Prior to dismissal, a full and fair review of the facts will be considered.

20 *Dealing with continued absence*

Managers should seek to make contact with the employee to establish the cause of absence informally in the first instance. This should occur in line with the Unauthorised Absence guidance and should follow the process below:

25 *Day 1 ...*

- Managers are required to make two attempts to contact the absent employee*
 - Where possible after the first phone call manager should leave a message requesting the employee to make contact with them*
- 30

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- *After the second phone call telephone call, managers should leave a message to inform employee then next of kin will be contacted if there is a nominated contact for the employee recorded in PSP*

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- *Managers should keep notes of all attempts to contact employees in People Case Manager*
- *Where there are details of a Next of Kin recorded on PSP for the employee, an attempt should be made to contact this person following two attempts to contact the employee directly*

If this is unsuccessful, managers should follow the formal steps outlined below:

...

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Day 7 For employees with more than 12 months' service

- *managers are required to send Letter 1 to the employee. This letter can be accessed in People Case Manager*
- *Stop pay on PSP*

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Day 14 for all employees

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- *If there has been either no response or an unsatisfactory response to the initial letter, the second line manager should send Letter 2... This letter can be accessed in People Case Manager*

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- *This letter invites the individual to attend a meeting and informs them that failure to attend and / or the provision of an unsatisfactory explanation for absence will be treated as gross misconduct*
- *If it has been established that the employee is a genuine 'missing person' and the police have been informed, contact should be made with the*

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employee's Next of Kin, if details of this person are held on the PSP prior to sending Letter 2. The Next of Kin should be informed of the action the business intends to take and the reason for reaching this this conclusion.

Meeting with employee

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At the meeting there should be a discussion with the employee about the reason for the absence and the manager hearing the case will give notification of the decision. In cases where the employee fails to attend the meeting, the manager is required to make a decision based on the facts available.

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Where the employee fails to attend the meeting and the reason behind the absence remains unknown, or where the employee attends the meeting and the reason for the unauthorised absence is not satisfactory, the manager will need to inform the employee that they will be summarily dismissed....

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Outcome

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The outcome of the meeting is either the employee returns to work or is summarily dismissed. This outcome will be communicated to the employee in writing. This outcome later can be accessed in People Case Manager.

16. The respondent also publishes a Conduct Procedure. It includes the following text:

Unauthorised absence

You are expected to attend work and carry out your duties. If you are unable to attend work for any reason, you must inform your manager.

5 *If you do not attend work and do not inform your manager, your absence may be considered as unauthorised. Your manager will try and contact you to understand the reason for your absence and why you did not inform them about your absence. Depending on your response, your manager will consider whether conduct action should be taken.*

10 *You should be aware that, in some cases, dismissal can be considered as a last resort. This will be because either:*

- *you have failed to provide an explanation, or you provided an unsatisfactory explanation for your absence; or*
 - *you failed to meet with your manager to discuss your absence.*
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You have the right to be accompanied at your conduct meeting by either a union representative or a work colleague, usually from the same work location.

You have the right to appeal the decision made.

20 17. The Conduct Procedure also contains a section dealing with appeals which includes the following text:

Appeal

25 *You have a right to appeal against the conduct penalty. If you decide that you want to appeal, you should inform the manager who imposed the penalty within three working days of receiving the written confirmation of the outcome.*

...

Who will hear your appeal?

...

Appeals against major penalties (action short of dismissal or dismissal) will normally be heard by an independent appeals manager.

Appeal hearing

5 *The appeal hearing is a rehearing of the case in its entirety and is an opportunity for you to present your views including why you disagree with the outcome and why you believe the penalty should be set aside or reduced. During the appeal hearing, the appeal manager will provide you with an opportunity to present your case,*
10 *ask questions and provide further evidence.*

The appeal manager may carry out further investigations, in which case, the hearing will be adjourned. You will be sent copies of any new evidence and provided with time to consider this evidence and provide feedback or comments.

15 *Appeal decision*

You will normally be informed of the outcome as soon as possible. You should be kept informed if there are any delays to your appeal hearing. In potential dismissal situations, the appeals manager may extend your notice if more time is required to conclude the appeal.

20 *In all cases you will receive a written notification of the decision with the reasons for it. The decision made during the appeal process is final and you are not able to further appeal the decision reached.*

18. The respondent operates in a regulated environment. Ofcom can impose penalties if it fails to meet its obligations. The respondent publishes a
25 document titled, 'Our business standards; An employee's guide.' The document is delivered in hard copy to all the respondent's employees, including the claimant, every year or so by post. The claimant received the latest version but declined to read it. The document is also available on the respondent's intranet.

30 19. It contains a section headed 'Personal behaviour and appearance' which includes the following text:

We expect high standards of personal behaviour at work from everyone.

We should all demonstrate:

- ***Efficiency and reliability;***
- ***honesty;***
- ***punctuality and good attendance***

.....

Behaviour

Behaviour which damages service to customers, or reputation or efficiency is unacceptable. This includes lateness; poor attendance; dishonesty, drunkenness; using illegal substances; misusing psychoactive substances (legal highs); Violent or disorderly behaviour; and abusive language.

Events in October 2022

15 20. On Monday 17th October 2022, the claimant did not attend work. He sent a text message to J McLaughlan at 8:59 am which read: *'let me know when you're in work and free for a call Jamie it's Iain.'* Mr McLaughlan telephoned the claimant. The claimant told him he would not be in attendance at work that day due to stress associated with two legal cases against him. Mr
20 McLaughlan and the claimant had a discussion about the cases.

21. Mr McLaughlan asked the claimant to provide charge letters and other legal documentation. The claimant stated that the managers knew about one of the cases because it dated back to earlier in the year, but he hadn't brought the documents in previously. The claimant asked what would
25 happen to him and Mr McLaughlan told him that for now he needed the documents and that they needed to concentrate on supporting him back to work.

22. Mr McLaughlan mentioned to the claimant the 'Feeling First Class' service which is an employee welfare and support service the respondent offers
30 its employees. This service can provide free counselling as well as practical advice and assistance to employees on a range of matters. He also referred to the possibility of an Occupational Health referral and other support the claimant might access. Counselling can also be provided

through the respondent's OH providers. He encouraged the claimant to get help early and not to wait. It was agreed between Mr McLaughlan and the claimant that he would take the next two days to recover and would return to work on Wednesday 19th October 2022.

5 23. On Tuesday, 18th October 2022, the claimant sent a text message to Mr McLaughlan. He said: "that's me booked into the mental health association first appointment is Thursday 12:00 pm mate". Mr McLaughlan replied: "well done Iain, is a big step first time you go but it will change your life".

24. Later on Wednesday, 18th October 22, the claimant sent a further text:

10 *"just been in a road traffic collision boys trying to blame me*

waiting on the police

not having the best week

15 *I doubt I will be in tomorrow now with this so just keep me on the sick mate! Let me know if I need to call in the morning still but this hasn't helped me at all with my mental health".*

25. On Wednesday 19th October 2022, Mr McLaughlan made two attempts to telephone the claimant without success. On the third attempt, the claimant picked up. He told Mr McLaughlan that he had a lot in his mind with the two cases. Mr McLaughlan encouraged him again to get help and suggested he go to his doctor and look into possible medication. He also reminded the claimant of the Feeling First Class service and the possibility of a referral to Occupational Health. The claimant said that he was visiting a mental health nurse at Bo'ness Health Centre.

26. Mr McLaughlan discussed the text messages that the claimant had sent and told him that he would not communicate via text but advised him that he could phone at any time. The claimant told him that he just needed the rest of the week to 'get sorted'. Mr McLaughlan also discussed with the claimant the possibility of options around amended hours or different shift patterns which might facilitate a return to work. He advised the claimant to try to stay active and to try to keep a routine as Mr McLaughlan found this had helped people in similar situations in the past.

27. On Thursday 20th October 2022, the claimant sent a text message to Mr McLaughlan: *“that’s me been to my 1-1 assessment and being referred for CBT sessions ...Going to the doctors in the morning as well and hopefully I start seeing the light at the end of the tunnel soon mate ... Cheers again for caring enough to drive me in the right direction”*.
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28. On Friday 21st October 2022, the claimant sent another text message “*you able to call when you’re next free mate cheers* “. Mr McLaughlan called the claimant who said he felt he wasn't able to return to work the following week but needed a few more days to ‘get his head sorted’. Mr McLaughlan discussed with the claimant the help that was available and the claimant advised that he was pursuing this help. The claimant said that he did not know when his next mental health appointment was. Mr McLaughlan asked him about the CBT he had mentioned previously and the claimant said he didn't know if he had been referred or what the timescales were.
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15 He said he would try and find out.
29. On Tuesday the 25th of October 2022, Mr McLaughlan phoned the claimant to check how he was doing. The claimant told him he was still the same and that he had not heard further about the mental health support he had been trying to arrange. Mr McLaughlan asked the claimant to come in on Thursday 27th October at midday for a catch up which the claimant agreed to do. He agreed to bring with him the documents that Mr McLaughlan had previously requested.
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30. On Thursday 27th October 2022, the claimant attended a meeting with Mr McLaughlan and provided a sick line for one week, from 22 October to 29 October 2022. The sick line recorded the claimant’s condition as ‘mental health difficulties’. The claimant had self-certified his absence for the period from the 17th to the 21st October 2022. There was, therefore, a gap of one day between the end of his self-certification period and the beginning of the period covered by the sick line. The respondent’s policy is also that sick lines should not be given retrospectively for periods already taken off. Mr McLaughlan decided that, in the circumstances, it was reasonable not to pursue the issue of the gap and to accept the retrospective sick line which was handed in 5 days after the beginning of the period it covered.
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31. The claimant explained that the legal cases continued to affect his mental health and Mr McLaughlan again encouraged him to get support. The claimants said he had not spent much time with the doctor when they had last spoken but that he would try again. He had, however, had his first
5 appointment with the mental health nurse which he felt was ok but he was still feeling the same. He said he did not believe the therapy he thought he had been referred for was going to materialise.

32. Mr McLaughlan encouraged him that he could arrange therapy via Occupational Health but the claimant said that he would prefer to follow up
10 with his own doctor first. Mr McLaughlan again recommended that the claimant keep busy, exercise, and get out of the house. The claimant agreed to maintain contact by attending weekly face-to-face meetings, starting on 8 November 2022, after Mr McLaughlan returned from a week's annual leave. Mr McLaughlan also encouraged him to think about
15 amendments to his shift patterns which might help him when he returned.

Events in November 2022

33. On 6th and 7th November 2022, Mr McLaughlan attempted to call the claimant but did not get an answer. On 8th November 2022, the claimant attended the proposed face-to-face meeting with Mr McLaughlan, as
20 previously agreed. He explained his mobile had run out of charge so he could not answer his phone. He had not had any more counselling sessions and had no further information about when this might happen. Mr McLaughlan encouraged him again to contact Feeling First Class or to speak to his doctor about medication or other treatment for his condition.
25 The claimant was not on medication and was concerned that he was not improving.

34. He said he had not been doing anything, just staying in his flat, and Mr McLaughlan encouraged him to get out and socialise. He also suggested that Feeling First Class would be an excellent option due to the number of
30 therapy sessions they could provide and the claimant agreed to contact them. They agreed to meet weekly to provide support and maintain contact. The claimant indicated he was grateful for this, and Mr

McLaughlan reminded him to call at any time should he need support. They arranged to meet following Tuesday (15th November 2022).

35. The claimant did not attend the meeting scheduled for 15th November. Mr McLaughlan attempted to call him but a obtained no answer. Later that morning, the claimant sent him a text message: *"I've had a really bad day mentally haven't left my bed! Really hoping this medication kicks in quicker... I have that line to pick up and will get it to you as soon as I can pull my head together mate"*.

36. On 16th November 2022, Mr McLaughlan sent the claimant a letter which included the following terms. In doing so, he adapted an automatically generated template which was produced by one of the respondent's HR systems. He sent this letter by standard first-class delivery.

Dear Iain

Continuing Sick Absence

I'm sorry you did not attend the meeting with me on Tuesday 15th November 2022 to discuss your absence and what support can be offered. You have not kept in contact with me and importantly I have not been able to offer any support and discuss your absence. Furthermore, we do not have a valid medical certificate to cover your current absence.

I appreciate that your medical condition may make it difficult for you to make contact however, I feel sure that I can offer you support.

I would therefore like to give you a further opportunity to meet with me so that we can discuss how I can best support you and support you back to work. I invite you to meet with me at Edinburgh West Delivery Office on Friday 18th November 2022 at 11:00. I must advise if you do not contact me this may result in the Royal Mail element of your sick pay being withheld.

37. On Friday 18th November 2022, the claimant attended the meeting, following receipt of the written invite which had been posted to him. He handed in two sick lines: one dated 31 October, covering the period 28th

October to 11 November 2022; and one dated 11 November, covering the period from 11th to 25 November 2022. He explained that he missed the meeting proposed for the 15th of November because he had some family issues and because of his mental health. Mr McLaughlan repeated that he was there to support the claimant and that he could call him at any time but reminded the claimant that he would not communicate through text messaging. The claimant confirmed he understood this.

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38. The claimant advised Mr McLaughlan that he still had not heard further from his GP regarding therapy but had been prescribed medication which he was taking. He said he had contacted the Feeling First Class service but they had not returned to him. Mr McLaughlan suggested an OH referral as he noted it had been a month now that they had been discussing counselling sessions without any yet taking place. The claimant agreed to the referral.

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39. He advised he had been staying at home most of the time. He discussed concerns about one of his legal cases. He asked Mr McLaughlan what would happen regarding his job if he were to lose his driving licence and Mr McLaughlan noted this would have to be investigated and considered in line with relevant policies. Mr McLaughlan agreed that he would submit a referral to the respondent's OH advisers and the claimant agreed to think about what the respondent could do to help him back to work. It was agreed that a further meeting would take place on Wednesday 23rd November 2022.

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40. The claimant failed to attend the meeting scheduled for Wednesday 23rd November 2022. Mr McLaughlan attempted to telephone him, but he did not answer. Nor did the claimant send any text or other form of message to Mr McLaughlan.

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41. Mr McLaughlan sent a further letter to the claimant on the 23rd of November 2022. It was in identical terms to that sent on 16th November 2022 save that the meeting to which Mr McLaughlan invited the claimant was to take place at the Edinburgh West Delivery Office on Friday, 25th of November 2022 at 11:00. This letter repeated the intimation that a failure to contact Mr McLaughlan could result in the Royal Mail element of the

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claimant's sick pay being withheld. The letter was sent to the claimant by first-class post.

42. On Friday 25th November 2022, the claimant did not attend the meeting to which he had been invited. He did not contact the respondent to explain that he would not attend or give a reason. Mr McLaughlan tried to phone the claimant, but he did not answer. The claimant's most recent sick line expired on this date.
43. On Monday, 28th November, the claimant sent Mr McLaughlan a text message: "*Got my other line here will bring it Wednesday if you still want me in*". Mr McLaughlan declined to engage with text messages, as he had previously explained to the claimant. He believed the claimant would attend their standing weekly meeting on Wednesday 30th November 2022 and hand in the sick line at the meeting.
44. On Tuesday 29 November 2022, the claimant participated in a telephone counselling session with the respondent's OH Wellbeing Practitioner. The OH Advisor prepared a report following the session which purports to be dated 29 November 2022. However, this report was not provided to Mr McLaughlan or to the claimant prior to the claimant's dismissal in December 2022. Mr McLaughlan was unaware of the report's existence when he took the decision to dismiss.
45. The claimant failed to attend the meeting scheduled for 30th November 2022. On that date, there was a strike affecting the respondent's workforce. However, the Edinburgh West Delivery office was used as a hub for the respondent's agency, managerial and operational resource and Mr McLaughlan was present at the premises that day as were some others. Mr McLaughlan attempted to telephone the claimant when he failed to attend but obtained no answer.
46. He sent the claimant a further letter on 30th November 2022 which was in materially identical terms to the two previous letters except that the meeting to which he invited the claimant was to take place at the Edinburgh West Delivery Office on Friday 2nd December 2022 at 11 am. Mr McLaughlan sent this letter by first-class post and by the respondent's Special Delivery service.

Events in December 2022

47. Unknown to the respondent, in the early hours of the 1st December 2022, following a night out on 30 November 2022, the claimant had been remanded in custody. The claimant made no contact with the respondent to inform them of his circumstances. Nor did he arrange for contact to be made on his behalf.
48. The claimant failed to attend the meeting which had been scheduled for 2nd December 2022.
49. Mr McLaughlan attempted to call him but obtained no answer. At this stage, the respondent had no medical certificate covering the claimant's ongoing absence, the most recent certificate having expired on 25th November 2022.
50. On the same date (2 December), a manager of the respondent called at the claimant's property but found no one home.
51. On 4th December 2022, in the absence of contact from the claimant, Mr McLaughlan decided to contact the police. He was concerned about the claimant's welfare and was following the respondent's 'Leaving the Business without Notice Policy'. He did not hold any contact details for the claimant's next of kin. The police returned to Mr McLaughlan after making their own inquiries and told him that the claimant was not a missing person and was "safe and well" but that they could not provide more details. Mr McLaughlan, therefore, remained unaware of the claimant's whereabouts.
52. On 5th December 2022, Mr McLaughlan sent the claimant a further letter by first class post and by Special Delivery service. The letter was prepared by Mr McLaughlan by adapting another of the respondent's auto-generated templates. The letter sent included the following terms:

Dear Iain

Unauthorised Absence

I am concerned that you have been absent from work without any explanation. You have failed to attend meetings on 23rd November

2022 and 30th November 2022, you have not responded to my letters on 23rd November 2022, 30th November 2022, and 2nd December 2022, and have not answered the multiple phone calls I have made during this time.

5 *Accordingly, I write to inform you that I require an explanation for your absence within three working days of the date of this letter. Furthermore, a failure to provide an explanation for your absence or an unsatisfactory explanation will lead to disciplinary action being taken against you which could possibly result in your dismissal. Replies to this letter should be sent to myself. An*
10 *addressed envelope is provided for this purpose.*

Finally, I should inform you that as of the date of this letter your pay has been stopped as a result of your continued unauthorised absence.

15 53. On 8th December 2022, in the absence of any response to his letter of 5th December, Mr McLaughlan wrote again to the claimant. The letter was sent to the claimant's home address, as before, by first class post and by Special Delivery service. The letter was in materially identical terms to that sent on 5 December 2022, save that it also referred in the first paragraph
20 to the claimant's non-attendance of the meeting on 5 December 2022.

54. Mr McLaughlan did not hear further from the claimant. On 12th December 2022, he wrote to the claimant again. Once more, the letter was sent by first class post and by Special Delivery service to the claimant's home address. So far as relevant, the letter was in the following terms:

25 ***UNAUTHORISED ABSENCE – REQUEST TO ATTEND A FORMAL REVIEW UNDER THE ROYAL MAIL CONDUCT CODE***

I refer to my earlier letters dated 05.12.2022 and 08.12.2022 regarding your unauthorised absence from work.

30 *Following your failure to respond to these letters and provide me with a satisfactory explanation of your absence, I am now charging you with gross misconduct under the Royal Mail Conduct Code in that you have been absent from work without authority and without*

providing any good reason for this. I enclose copies of the documentation I will be referring to when considering my decision. These are numbered for ease of reference.

5 *You should attend for a formal conduct interview with me on Friday 16th December 2022, at 08:00 at Edinburgh West DO.*

You have the right to be accompanied by a companion who may be your trade union representative or work colleague from RMG plc.

10 *I would also mention that if I decide that the charge is substantiated then I may also need to take into account your current conduct code record when determining any penalty. For your information, your conduct code record is currently clear.*

15 *You should be aware that if the charge against you is substantiated then one possible outcome could be your dismissal (with or without notice). This is your opportunity to answer the charge and provide reasons why you should not be dismissed, should the charge be substantiated. I should also advise you that in the event that a decision is taken to dismiss you, you are entitled to one appeal against that decision under the Conduct Code.*

20 *Please could you sign and return to me the attached reply slip confirming you will attend the interview. An addressed envelope is provided for this purpose.*

25 55. With this letter, Mr McLaughlan enclosed his previous letters dated 16th and 23rd November and 5th and 8th December 2022. Unknown to Mr McLaughlan, the claimant did not receive or read the letters sent on 5th, 8th and 12th December 2022 at the time they were delivered because he was not at his home during this period, and the letters were not passed to him in prison by any family members attending at his property. The letters were delivered to his property and those dated 5th, 8th and 12th December 2022 sent by Special Delivery received a delivery scan.

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56. Unbeknown to the respondent, by 14 December 2022, the claimant's sister had learned that the respondent had contacted Police Scotland to report

the claimant a missing person and she had made the claimant (who remained incarcerated) aware of this fact.

57. Mr McLaughlan received no contact from the claimant in response to his invite letter dated 12 December 2022. When the claimant failed to attend the meeting on 16th December, Mr McLaughlan decided to proceed with the hearing in his absence.

The claimant's dismissal

58. Mr McLaughlan decided to dismiss the claimant. He concluded the claimant was guilty of unauthorised absence and had abandoned service without notifying the respondent. He prepared a decision report on 19 December 2022, outlining the factual background and his reasoning. The report was a genuine reflection of Mr McLaughlan's reasoning. It included the following text:

Case Outline

- 15 • *Mr Cowen's last contact with any member of the management team at Edinburgh East [sic] was a meeting on 17th November 2022 and then a text message on Monday 28th November 2022, which is 32 days without making contact as per the attendance standards at the time of writing, and 21 days with no*
- 20 *contact of any kind.*
- *During which time Mr Cowen was telephoned five times and sent 6 letters requesting that he make contact, this is in line with initially Royal Mail attendance process, and laterally [sic] in line with Royal Mail abandonment of service process.*
- 25 • *I have checked whether the letters were being received by Mr. Cowen and can confirm that the third no contact later and all three abandonment of service letters were sent Special Delivery and received a delivery scan at Mr Cowen's address. Therefore it is reasonable to assert that Mr Cowen received these letters.*
- 30 • *No member of Mr Cowen's family has been in contact with any member of the Edinburgh West management team.*
- *As stated above ... Police Scotland were contacted due to concern for his welfare. Police Scotland could confirm Mr.*

Cowen was “not a missing person” and he is safe and well, but could not give any more details due to GDPR.

- ...

Deliberations

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- *Due to the fact that Mr Cowen did not attend this meeting the following deliberations have been made based on the evidence available.*

10

- *...The first point in the day 1 letter for absences and in Royal Mail attendance policy is for the person to “maintain contact with the office”, and it is reasonable to believe that Mr Cowen was aware of these standards having had an attendance review earlier in 2022, and still choose not to follow these standards.*

15

- *I have considered that Mr Cowen agreed a contact strategy involving a weekly meeting, and failed to attend these ... Mr. Cowen is non-compliant with the sick pay and attendance policies.*

20

- *The day 1 letter for absences and Royal Mail attendance policy also detail what is required with regards to providing medical certificates, ... In Mr Cowen’s text message on 28 November he made reference to “another line”, however no medical certificates have been provided.*

- ...

25

- *I have considered mitigation in the form of Mr Cowen's previous absences relating to stress and the criminal proceedings against him. However, based on the evidence available, every effort has been made to contact Mr Cowen and it would be reasonable to expect some form of contact by Mr Cowen to his employer during this period.*

30

Conclusions

In conclusion, Mr Cowen has not been at work for 32 days without speaking to his line manager. Mr Cowen has been attempted to be contacted by letter on 6 occasions and telephone on five occasions however no contact by Mr. Cowen

5 *has been made. Police Scotland confirmed that Mr Cowen was
“safe and well and not a missing person”, and no effort to
contact Royal Mail has been made by Mr. Cowen. It is
reasonable to expect Mr. Cowen to be aware of what is
expected with regards to making contact and 32 days without
contact cannot be considered reasonable. The final letter which
Mr Cowen was sent, the invite to this interview, had been
received and signed for at his home address so it is reasonable
to expect Mr Cowen to have attended this interview or to have
10 made contact. Overall, based on all the evidence available, I
have come to the conclusion that Mr Cowen has abandoned
service.*

15 59. Mr McLaughlan dismissed the claimant for gross misconduct without
notice. He sent a letter on 19 December 2022 to the claimant’s home
address by first class post and by Special Delivery. It was in the following
terms:

Dear Iain

Decision

20 *I have now carefully considered all the circumstances of your case
and my decision is detailed below;*

Decision: Penalty Notification

Decision Result: Dismissal without notice

I enclose a report giving details of how I made this decision.

25 *You have the right to appeal against my decision. If it is your
intention to do so, you must let me know within three working days
of receipt of this letter. If you decide to appeal, you will be notified
of the time and place of your appeal interview.*

30 *I recognise that being faced with conduct action can be a stressful
time and I would like to remind you of the Feeling First Class:
Support services ...*

60. In the meantime, unknown to Mr McLaughlan, the claimant was released on 19 December 2022. He did not immediately return to his property but spent the night at his mother's house. He did not immediately seek to make contact with the respondent on the date of his release.

5 61. On 20th December 2022, the claimant sent Mr McLaughlan a text: "*Tried phoning this morning Give me a call back when you have a moment!*" Mr McLaughlan called the claimant. He told him of the dismissal as set out in his dismissal letter. It was a short conversation. He advised of the claimant's right of appeal.

10 62. On 23 December 2022, the claimant sent a letter to Mr McLaughlan intimating an appeal against his dismissal. His appeal letter was in the following terms:

Jamie

15 *I am writing and sending this letter on with advice from the union to appeal against your decision to let me go under the circumstances of my situation with also contacting you prior to let you know I would be attending our weekly Wednesday meeting.*

Regards

20 63. Mr McLaughlan uploaded the letter to the respondent's system and selected the option for an appeal manager to be selected from the respondent's pool of Independent Casework Managers. The appeal was allocated to Alan Rankin on 18 January 2023. Mr Rankin had no previous relationship with the claimant and very little familiarity with Mr McLaughlan.
25 He had no prior involvement with the case. He was not briefed upon it by Mr McLaughlan but received electronic notification of its allocation to him.

January 2023 and thereafter (appeal process)

64. At some stage after the dismissal, Mr McLaughlan left the delivery stubs associated with the Special Delivery post sent to the claimant in November

/ December 2022 in an envelope in his office which was removed by the cleaner with other wastepaper for shredding.

65. On 23 January 2022, Alan Rankin wrote to the claimant, inviting him to attend an appeal meeting via Microsoft Teams on 2 February 2023. The claimant was given the option of dialing in by phone if he so chose or, in the alternative, of submitting his case in writing. Mr Rankin sent the invite by email. As well as including the text in the body of the email, he sent his letter as a word attachment. He also attached to his email copies of what purported to be letters from Mr McLaughlan to the claimant dated 5th, 12th and 19th December 2022.

66. Mr Rankin had downloaded these from the electronic file. This issue was not identified until much later, in the course of these proceedings, but these letters dated 5 and 12th December were not the letters which Mr McLaughlan had sent the claimant on these dates. (The dismissal letter dated 19 December 2022 was as sent). This disparity arose from the fact that the respondent had two separate systems. Mr McLaughlan had prepared and adapted the letters from the People Systems Portal and these letters (of 5 and 12 December) were the ones he printed and sent the claimant.

67. The People Case Manager system required him to recreate the same letters on that system using slightly different templates in order to process the case and dismissal. The system sent Mr Rankin the wrong set of letters which it took from the People Case Manager. The discrepancy was not known to either Mr McLaughlan or Mr Rankin at the material time. The letters were in materially similar terms but were not exact replicas of what Mr McLaughlan had sent.

68. Mr Rankin was unaware of this when deciding the claimant's appeal. He attached these letters to his email to the claimant dated 23 January 2022.

69. At the claimant's request, due to a prior commitment, the appeal hearing was rescheduled, initially to 3 February 2022. The claimant advised that John Kidd, his trade union representative, would attend the appeal hearing with him. On 1st of February 2023, the claimant sent an e-mail to Mr Rankin advising him that he could not use a PC or laptop and that he could

not access the attachments to Mr Rankin's earlier e-mail. He requested paper copies to be sent to him and to his union representative. Mr Rankin duly sent all the attachments to John Kidd. Mr Rankin agreed to postpone the hearing to allow sufficient time for the claimant and Mr Kidd to have a consultation and for both to receive and digest the attachments previously sent. The appeal hearing was rescheduled to 8 February 2023.

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70. On that date, the appeal hearing went ahead by Teams. The claimant was accompanied by John Kidd. Mr Rankin took careful notes of the hearing which he typed up and sent to the claimant after the hearing for comment. Th claimant agreed with the notes which he accepted were virtually verbatim. The meeting lasted around 2-3 hours.

10

71. At the appeal, the claimant's representative alleged on his behalf that he had, in fact, attended the delivery office for his meeting with Mr McLaughlan on 30th November 2022 but that there had been no access to the building which was locked up because it was a national strike day.

15

72. The claimant explained that he was arrested later on 30th November 2022 and locked up overnight. He explained that he attended court straight from the police cells on 1st December 2022 and thereafter was remanded in custody until 19th December 2022. Mr Kidd explained that the claimant had sent a text to Mr McLaughlin on 20th December following his release and had then telephoned Mr McLaughlin the same day to learn of his dismissal.

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73. The claimant alleged during the appeal hearing that he had not received a number of the letters which had been sent to his home address it due to being held on remand. He said that upon his return, he could not get access to his home which had been flooded and was unable to make contact with Mr McLaughlan earlier than 20th December 2022. He alleged that, while in custody, he only had access to the telephone numbers of his mother and sister which he had written down following his arrest and before his mobile battery had died.

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74. He alleged that he had a very small amount of credit on his card to enable to make him to make calls. He alleged that he told the lady in prison that

he wished to contact the respondent but that she told him that “you don't just get to do what you want in prison”.

- 5 75. The claimant said that he had letters and fit notes from his GP relating to his anxiety and depression which he would send to Mr Rankin. The claimant discussed the court cases which had been causing him stress. He advised his mental health had been on a downward spiral. He indicated that there was an OH report from November 2022 which confirmed that he was having mental health issues and was unfit for work.
- 10 76. His representative asserted that the process followed by Mr McLaughlan to dismiss the claimant had happened far too quickly.
77. The claimant alleged nobody had ever informed him that text messages could not be used for contact with the respondent whenever he was already on sick leave. The claimant alleged that the letter dated 23rd November 2022 had never come to his house.
- 15 78. The claimant alleged that during his time in custody, his mother and sister and their respective partners were looking after his house but that they would not have been noseey and gone through any of his mail. He said that they told him that they had put his mail to the side for him. He confirmed that he had had phone calls with his family while in custody when they had told him this. When asked why he didn't ask his family members to contact the respondent to let them know where he was, the claimant said he wasn't thinking clearly at the time and that his medication had turned him into a different person.
- 20 79. The claimant was asked who signed for the letters at his address if he was living alone. He said it “could have been the postie or anyone in the stairs” who could have signed for them.
- 25 80. When asked why he didn't contact Mr McLaughlan immediately on his release from prison on 19th December 2022, the claimant said that by the time he got back to his parents' house it was around 10:00 pm and he was very tired and fell asleep. He said he didn't think it would be appropriate to contact Mr McLaughlan at that time of night.
- 30

81. The claimant said that the last year had not been a great time for him and he wasn't thinking clearly at many times as his medication had affected him. He said he was going through dark times and that he had had suicidal thoughts due to drinking too much and using cocaine.

5 82. After the appeal meeting, on 10 March 2023, Mr Rankin undertook further investigations with Mr McLaughlan regarding a number of the matters the claimant had raised in the meeting. He put to Mr McLaughlan various points made by the claimant including his suggestions that:

10 (1) he had attended Edinburgh West for the meeting on 30 November;

(2) that the claimant had never been informed that text messages couldn't be used for contact whenever he was already on sick leave;

15 (3) that the letter dated 23 November 2022 was never delivered to the claimant's home;

(4) that the last missed call the claimant had from Mr McLaughlan was 14 November 2022;

20 (5) that the claimant had been told in the past that you couldn't ask family members to contact the respondent for you.

25 83. On 14 March 2023, Mr McLaughlan responded by email. He denied that the Edinburgh West Delivery Office was unmanned on the 30th of November and indicated that Darren Hush was there at the time the claimant alleged he had arrived (at 12pm, two hours after the agreed arrangement). Mr McLaughlan said that he specifically recalled telling the claimants that he noticed he had texted him several times and that he does not text people regarding absence as it's not an effective way of supporting them.

30 84. With regard to the letter dated 23rd November 2022, Mr McLaughlan's response was that all letters were sent using the same process and that the claimant had, in response to a previous letter, attended a meeting which was proposed within the letter (the 18 November meeting). With

respect to telephone calls, Mr McLaughlan advised that he recalled multiple attempts to call the claimant from his business mobile and or landline. He also denied that there was any policy of the sort suggested by the claimant in Edinburgh West whereby family members were not allowed to contact the respondent. He gave various examples of circumstances in which this had happened.

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85. On 14 March 2023, Mr Rankin sent a copy of Mr McLaughlan's responses to the claimant by email for his comment. On 16 March 2023, the claimant emailed Mr Rankin with his further comments. He maintained his account in relation to each of the disputed matters. He provided Mr Rankin with certain further documentation following the appeal hearing. He provided correspondence from Falkirk Sheriff Court regarding the legal proceedings which resulted in his custody. He provided a letter dated 31 January 2023 from his GP which confirmed he had been seeing his doctor on a regular basis since 25 October 2022 regarding significant mental health difficulties and confirmed the medication he has been prescribed. Along with this, he provided six retrospective fit notes, all dated 30 January 2023, covering the period from 25 October '22 to 13 February '23. He provided a letter from his solicitor dated 3 March 2023 to confirm that he was remanded in prison from 1-19 December 2022. He provided copies of some text messages between him and Mr McLaughlan including one screenshot which showed a missed call from Mr McLaughlan on 14 November 2022.

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86. There was some correspondence between Mr Rankin and the claimant regarding whether the claimant may wish to produce phone records to demonstrate his lack of phone contact generally at the material times, but in the event, he elected not to provide these. He explained in an email dated 15 February 2023 that he was "*Figuratively speaking in the manner of not calling anyone at all.*" He went on: "*I'm not sure who I called or what days I did that month as it was 4 months ago... I wasn't in the right frame of mind during the period and certainly not in the appeals process!*"

35

87. Mr Rankin also obtained a copy of the OH report and gave consideration to its terms as part of his deliberations. It confirmed that the claimant was not fit for work and that his reported symptoms of depression and anxiety

were severe. The advisor recorded her opinion that the claimant would be covered by 'the relevant disability legislation'. She recommended in the report that regular management contact be maintained as per the Royal Mail's sick absence policy, whilst the sickness absence continued. That the claimant was suffering from mental health difficulties was accepted by Mr Rankin as it had been by Mr McLaughlan. Mr Rankin did not identify that the report contained information to indicate that the claimant's health issues impacted upon his ability to maintain contact with his employer.

5
10 88. There was a significant delay in the issue of the appeal outcome. Mr Rankin's father was taken into hospital in early April 2023 and sadly passed away at the end of June 2023 it. The funeral took place on 19th July 2023. At this time, Mr Rankin hadn't completed his deliberations and written up his decision. He decided not to pass the claimant's case on to a
15 colleague because he felt it would be more appropriate for him to conclude it, given the stage it had reached.

89. Mr Rankin took time off around his father's funeral. He thereafter returned to work but was working at less than full capacity. He felt that if he passed the claimant's appeal to somebody else, they may feel that they should
20 start from scratch with their own investigations which, he felt, would not be ideal either for the respondent or for the claimant. Mr Rankin did not inform the claimant of the reason for the delay with his appeal or provide any update after the correspondence in March 2023. The claimant did not
25 contact him to seek an update. In the event, Mr Rankin took the appeal decision and sent the outcome on 2 August 2022.

90. He sent the claimant a letter by email on that date and enclosed a document he had prepared called a Conduct Appeal Decision report. In it,
30 he set out the factual background. His methodology was to set out the issues that had been raised by the claimant or his representative at the appeal meeting and then give his response and decision after each point.

91. Mr Rankin concluded that it was much more likely that the claimant was
35 informed that text messages were not acceptable by Mr McLaughlan, given that this would not support the Royal Mail contact strategy. He noted

that, if the claimant believed text messaging to be acceptable, it was surprising that the claimant did not send Mr McLaughlan a text on 19 December following his release.

5 92. Mr Rankin also preferred Mr McLaughlan 's account of events on the 30th of November 2022 it. He did not consider that the claimant came across as credible when describing his arrival at the delivery office on that date and he concluded that the claimant failed to attend the meeting with Mr McLaughlan on that date.

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93. Mr Rankin likewise did not consider the claimant was credible in relation to his point about only having phone numbers for his mother and sister and not having much cash on his phone card in order to make calls at. He noted that there were inconsistencies in the amount the claimant said he had on his card which he initially said was £1.92 and then changed this to £3. In 15 either case, Mr Rankin's view was that when contacting his mother or sister he could have asked either of them to inform his employer of his whereabouts. He considered the claimant's suggestion that he believed a family member could not make contact on his behalf was disingenuous.

20

94. Having conducted a re-hearing of the case, Mr Rankin concluded that the dismissal should be upheld. His report set out in detail his reasoning. He considered the claimant's actions were sufficiently serious to merit dismissal and that any lesser award would ignore the respondent's 25 commitments and obligations to its customers in delivering strong service by enabling managers to run an effective operation in terms of resource planning. He considered whether he might impose a lesser sanction such as suspended dismissal but concluded that it was of considerable concern that the claimant showed no obvious regret for his actions and that he considered the risk of future breaches would be high.

30

The claimant's post-termination losses

95. At the time of his dismissal, the claimant had 10 complete years' service with the respondent. He was contracted to work 37 hours per week and his basic pay was £467.20 per week (gross).

96. The claimant has been certified as unfit for work ever since his dismissal on 20 December 2022. He has not applied for alternative work. He has been in receipt of Universal credit, LCWR and Adult Disability Allowance.

97. He has been subject to a driving ban since 1 December 2022 which is
5 expected to continue for a further two years from the date of the hearing.

98. Under the respondent's sick pay arrangements, subject to compliance with certain requirements, there is an entitlement to six months' full pay followed by six months' half pay during long term sickness absence.

Observations on the evidence

10 99. I found the respondent's witnesses to be credible and reliable. Their evidence to the Tribunal was consistent with the contemporaneous notes and other documents which were produced. I found that the evidence was given in a straightforward way and my impression, in particular, of Mr McLaughlan was that he felt genuine concern and empathy for the
15 claimant and would have preferred not to have been in the position of progressing a disciplinary process, as prescribed the respondent's policies and procedures.

100. I found the claimant to be less reliable. His evidence was often vague. The impression at times was that he was not necessarily seeking to mislead
20 the Tribunal but that his recollection was poor and that his own grasp of events at the time (from October 2022 through to March 2023 when the appeal investigations ended) had been weak. The claimant was candid in his evidence to the Tribunal about his abuse of alcohol and other substances at the material time. He explained that his medication affected
25 him as did his symptoms of anxiety and depression. I found his evidence hazy, at best. There were some differences between the evidence which he gave at the hearing and the position which he took at the appeal meeting. There were also some areas where his evidence during the Tribunal hearing itself evolved.

30 101. An example is his position with respect to whether various letters Mr McLaughlan said he sent to his home in November and December 2022 were delivered to the claimant's address. The claimant's implication was

that these letters were either never sent or never delivered. When the claimant was cross-examining Mr McLaughlan on this issue, I asked him to explain specifically which letters he maintained did not arrive at his address. The claimant pinpointed letters dated 16 November and 23
5 November 2023 and the disciplinary invite letter dated 12 December 2022. Later, when giving his evidence in chief, he alleged instead that he didn't receive any of the letters Mr McLaughlan says he sent at all, including those said to have been sent on 5 and 8 December 2022.

102. This represented a change too from what the appeal notes record he told
10 Mr Rankin at the appeal hearing, when John Kidd is recorded as saying the claimant had not received "*a number of the letters that had been sent to his home address due to IC being held on remand..*" At that point, he did not claim to have received none of the letters. He did not appear to allege he had not received those which were sent prior to his incarceration.

15 103. The claimant gave evidence to the Tribunal that there was a flood at his home on 22 December 2022 when all of his possessions were lost. He was adamant, however, that those possessions did not include the (potentially unopened) correspondence from the respondent. At his appeal hearing, the agreed notes record the claimant asserted to Mr Rankin that
20 the flood had, in fact, taken place before he was released on 19 December. The notes record that John Kidd said "*when IC was released from prison he couldn't get access to his home, as it had been flooded, so IC couldn't contact Jamie McLaughlan any earlier than 20th December 2022.*"

104. It was also inherently improbable that the claimant attended the meeting
25 on 18 November 2022 which was notified to him only in Mr McLaughlan's letter of 16 November 2022, without having received that notification. The claimant alleged that he had attended the premises coincidentally on the date and time the meeting was scheduled for an *ad hoc* chat. I did not find his evidence to be credible in this regard.

30 105. In contrast, Mr McLaughlan had kept a live file note of his interactions with the claimant which included his recording of the letters he had sent. In addition, copies of the letters themselves were produced. I heard a rather complicated account of the two different systems operated by the

respondent which resulted in the confusing generation of two sets of letters, an 'auto-generated' set on one system, and the other prepared on a different system which were edited and adapted by Mr McLaughlan. I found it improbable that Mr McLaughlan went to the lengths of tailoring and adapting letters as the documentary evidence showed he had done, in order to then not send them to the claimant. I likewise found it improbable that there was a failure of delivery in relation to as many as five different items of mail, each of which were sent separately in duplicate copies by standard First-Class post and by Special Delivery.

5
10 106. It was regrettable that the respondent had not preserved the evidence of the Special Delivery scans, but, on balance, I found Mr McLaughlan's account of the matter to be considerably more credible than the claimant's, and accepted that all letters were sent and delivered to the claimant's address, whether or not he ultimately opened and read them.

15 107. Likewise, I did not find credible the claimant's evidence that he attended the respondent's premises on 30 November 2022 to meet with Mr McLaughlan but found the premises locked. His evidence was that he attended two hours later than the agreed meeting time of 10 am without first contacting Mr McLaughlan to check he would be there. He alleged he arrived to find the premises locked and did not attempt to make telephone contact with Mr McLaughlan to advise him of his attempted attendance. He alleged he had brought sick notes with the intention of tendering these but that they subsequently got destroyed in his car when it was scrapped so could not be produced to the Tribunal. I found a number of aspects of the claimant's account improbable, and accepted Mr McLaughlan's evidence that the Delivery Office was indeed manned that day and that his colleague, Mr Hush, would have been available at noon to take delivery of the sicknotes, had the claimant attended to hand these in.

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30 108. The claimant made an allegation during the hearing which had not been specified in his ET1 claim form. He alleged that, when Mr McLaughlan was on annual leave, I understand in early November 2022, he had tried to submit a sick line to a manager named Darren Hush. He alleged Mr Hush passed the sick line to another manager called Bruce Young and that Mr Hush said to the claimant, '*You're a fucking waste of space*'. Mr

McLaughlan's evidence was that this was the first he had heard of any such alleged comment. Mr McLaughlan noted in his evidence that the particular sick line to which the claimant was referring had, in fact, been handed to him previously by the claimant at their meeting on 27 October 2022 (before Mr McLaughlan's week of annual leave).

5

109. The claimant did not put to Mr McLaughlan when cross-examining him that he had told Mr McLaughlan of this incident and Mr McLaughlan was very clear that he denied any awareness. The claimant did not raise this alleged comment by Mr Hush during his appeal. In email correspondence to Mr Rankin dated 16 March 2023 the claimant commented on Mr McLaughlan's earlier comments obtained by Mr Rankin during the appeal process. On the question of the practice of text messaging (or not) with the members of the respondent's management, the claimant said this: "*And had a voicemail and messages through messenger from Mr Hush saying as I can recall and I quote "work?!"*"

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110. Mr Hush was not called to give evidence as the response had not been placed on notice of the allegation. In any event, I did not find, on the balance of probabilities, that the comment was made as the claimant described. Had such a comment been made, I consider it unlikely the claimant would not have shared this with Mr McLaughlan, with whom he shared a decent working relationship, at the time. It is further unlikely that he would have omitted to raise the allegation in the appeal proceedings, particularly when he was commenting critically on other alleged communications from Mr Hush in his correspondence to Mr Rankin.

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111. On the whole, I found the respondent witnesses to be more credible and reliable than the claimant and preferred their accounts in instances of conflict.

Relevant Law

Unfair Dismissal

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112. Section 94 of ERA provides that an employee has the right not to be unfairly dismissed. It is for the employer to show the reason or the principal reason (if more than one) for the dismissal (s98(1)(a) ERA). A reason that

relates to the conduct of the employee is one of the 'potentially fair reasons' listed (s98(2)(b) ERA). Where, as here, the employer relies upon a reason related to conduct, it does not have to prove at this stage of the analysis that the conduct actually did justify the dismissal; the Tribunal will later assess the question of reasonableness for the purposes of section 98(4).

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113. At this stage, the burden on the respondent is not a heavy one. A "reason for dismissal" has been described as 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 and Anderson** [1974] ICR 323).

114. Once a potentially fair reason for dismissal is shown, the Tribunal must be satisfied that in all the circumstances the employer acted fairly in dismissing for that reason (Section 98(4) of ERA). There is no burden of proof on either party when it comes to the application of section 98(4).

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115. The Tribunal must not substitute its own decision for that of the employer in this respect. Rather, I must decide whether the respondent's response fell within the range of reasonable responses open to a reasonable employer in the circumstances of the case (**Iceland Frozen Foods Limited v Jones** [1982] IRLR 439). In a given set of circumstances one employer may reasonably decide to dismiss, while another in the same circumstances may reasonably decide to impose a less severe sanction. Both decisions may fall within the band of reasonable responses. The test of reasonableness is an objective one.

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116. In a case concerned with conduct, regard should be had to the test set out by the EAT in **British Home Stores v Burchell** [1978] IRLR 379 in considering section 98(4) of ERA:

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What the Tribunal have to decide whether the employer ... entertained a reasonable suspicion amounting to a belief in guilt of the employee of that misconduct at that time ... First of all there must be established by the employer the fact of that belief, that the employers did believe it. Secondly that the employer had in his mind reasonable grounds upon which to sustain that belief. Thirdly, we think that the employer at the stage at which he formed that

belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

5 117. This well-established guidance was endorsed and summarized by Mummery LJ in **London Ambulance Service NHS Trust v Small** [2009] IRLR 536 where he said the essential enquiry for Employment Tribunals in such cases is whether, in all the circumstances, the employer carried out a reasonable investigation and at the time of dismissal genuinely
10 believed on reasonable grounds that employee is guilty of misconduct. If satisfied in those respects, the Tribunal then must decide whether dismissal lay in the range of reasonable responses.

118. Both the ACAS Code of Practice on disciplinary and grievance procedures (“the ACAS Code”) as well as an employer’s own internal policies and
15 procedures should be considered by a Tribunal in assessing the reasonableness of a dismissal. In making an assessment of the reasonableness of the procedure, Tribunals should apply the range of reasonable responses test (**J Sainsbury’s Plc v Hitt** [2003] ICR 111).

119. With regard to investigations, the Code states that:

20 *It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases, this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the
25 collation of evidence by the employer for use at any disciplinary hearing.*

120. Informing the employee of the basis of the problem and giving them an opportunity to put their case in response is one of the basic elements of fairness within the ACAS Code. The Code provides:

30 *If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct*

or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.

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121. The ACAS Code includes the right of appeal as one of the basic elements. Paragraph 26 of the ACAS Code states:

Where an employee feels that disciplinary action taken against them is wrong or unjust they should appeal against the decision. Appeals should be heard without unreasonable delay and ideally at an agreed time and place...

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122. Paragraph 27 of the Code provides:

The appeal should be dealt with impartially and wherever possible, by a manager who has not previously been involved in the case.

123. Paragraph 29 of the Code provides:

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Employees should be informed in writing of the result of the appeal hearing as soon as possible.

124. Single breaches of a company rule may found a fair dismissal (e.g., **The Post Office t/a Royal Mail v Gallagher** EAT/21/99). Exactly what type of behaviour amounts to gross misconduct will depend on the facts of the individual case. However, it is generally accepted that it must be an act which fundamentally undermines the contract of employment (i.e., it must be repudiatory conduct by the employee going to the root of the contract – **Wilson v Racher** 1974 ICR 428, CA). Moreover, the conduct must be a deliberate and willful contradiction of the contractual terms or amount to gross negligence (**Sandwell and West Birmingham Hospitals NHS Trust v Westwood** EAT 0032/009). Even if an employee has admitted to committing the acts of which he is accused, it may not always be the case that he acted willfully or in a way that was grossly negligent (e.g., **Burdett v Aviva Employment Services Ltd** EAT 0439/13).

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Submissions

Respondent's submissions

125. Ms Meek provided a written submission on behalf of the respondent. The main tenets of her argument are summarised for brevity.
- 5 126. Ms Meek submitted that both decision makers genuinely believed that the claimant was guilty of the conduct resulting in his dismissal. Such belief was, in Ms Meek's submission, based on reasonable grounds. It was not disputed the claimant was absent from work from 17 October to 20 December 2022, nor that the last sick leave received had expired on 25
10 November of that year. Nor was it disputed, said Ms Meek, that the claimant had not been in contact with the respondent for 21 days at the time of the decision to dismiss. She pointed out the claimant did not attend scheduled meetings in November before his incarceration and, after it, he made no effort to contact the respondent to explain his circumstances, despite knowing by 14 December that they had reported him missing to
15 Police Scotland.
127. She reminded the Tribunal that, when assessing whether the respondent had reasonable grounds for its belief, the Tribunal should not consider whether it would have reached that belief but whether the respondent was
20 reasonable in doing so.
128. Ms Meek submitted that the investigation carried out by Mr McLaughlan had been reasonable. She noted that there were multiple attempts to contact the claimant by letter and phone call and latterly by a manager attending at this address and by contacting Police Scotland. She also
25 submitted that there had been a fulsome investigation at the appeal stage, and referred to Alan Rankin's neutrality and lack of prior involvement in the case.
129. Ms Meek submitted that the decision to dismiss was in the band of reasonable responses. The claimant was aware, she said, of the
30 respondent's processes and of the importance of regular contact during his absence. She placed emphasis on the terms of the respondent's Conduct Policy, its Leaving the Business without Notice Policy and its

5 Manager's Unauthorised Absence Guide, which make clear that in cases of unauthorised absence, dismissal could be considered. She also referred to the respondent's evidence on the impact of unauthorised absence on the respondent's operations and ability to meet its service obligations and regulatory requirements.

10 130. Ms Meek went on to assert that the dismissal was procedurally fair. She recapped on the procedure which had been followed. The issue with respect to the incorrect versions of letters being generated by the respondent's system and supplied to Mr Rankin was not, in Ms Meek's submission, a material one which affected the substance or quality of the investigation. She addressed the delay in concluding the appeal but submitted that this did not of itself render the dismissal unfair. It did not deny the claimant a full opportunity to put his case. The overall process should be assessed, said Ms Meek, and overall the procedure was fair and
15 reasonable.

Claimant's submissions

131. The claimant declined to provide a submission or to comment on Ms Meek's submission.

Discussion and Decision

20 *Was the dismissal of the claimant by the respondent for the potentially fair reason of conduct?*

25 132. I accept that the respondent dismissed the claimant for a reason relating to his conduct for the purposes of s.98(2)(b) of ERA. There was no dispute that was the reason for dismissal and no other reason was put forward by the claimant. A finding in fact has been made that Mr McLaughlan concluded the claimant was guilty of unauthorised absence and had abandoned service without notifying the respondent.

Did the respondent have a genuine belief that the claimant was guilty of the allegations which led to dismissal?

30 133. I accept that Mr McLaughlan's belief in the claimant's guilt was genuine. The claimant has not denied his absence or that it was unauthorised or his

lack of contact with the respondent, at least from and after 30 November 2022.

Did the respondent conduct a reasonable investigation?

5 134. The question for the Tribunal turns, then to the application of section 98(4), and whether, in all the circumstances of the case, the respondent acted unreasonably in treating the conduct relied upon as a sufficient reason to dismiss the claimant. I remind myself that I must avoid substituting my own view of the matter for that of the respondent, and of the need to assess objectively whether the respondent's approach fell within the range of
10 reasonable responses.

135. The ACAS Code states that "It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case." The amount of investigation that is reasonable will depend on all of the facts and circumstances of the case.
15 In a case such as this one, where the conduct in question was not denied, the extent of the investigation reasonably required is likely to be less than in a case where allegations are denied or substantially disputed.

136. The respondent carried out a diligent investigation at all stages of the process. Mr McLaughlan made numerous attempts to contact the claimant
20 to allow him to explain his absence. It has been found as a matter of fact that the disputed letters were sent by Mr McLaughlan and that the disputed unanswered voice calls were made by him. A manager attended at the claimant's property to check on his welfare and reinstate contact with the respondent. Police Scotland were contacted in an effort to locate the
25 claimant and ensure his welfare.

137. At the appeal stage, the claimant was given ample opportunity to provide his account of the matter and to comment on evidence gathered from other sources. Extensive enquiries were made by Mr Rankin, and the claimant was given substantial opportunity to gather documentary evidence and
30 submit this for consideration.

138. Mr McLaughlan made reasonable efforts to understand the facts before reaching the decision to dismiss but was thwarted by a lack of contact or

5 explanation from the claimant. Mr Rankin explored the matters raised by the claimant at the appeal stage and his investigation included consideration of the additional documents which they claimant put forward which had been unavailable to Mr McLaughlan. Overall, the investigation conducted was objectively reasonable in all of the circumstances of the case.

Was the respondent's belief that the claimant had committed misconduct based on reasonable grounds?

10 139. There were reasonable grounds for the respondent's belief that the claimant had committed the conduct set out in the disciplinary invite letter of 12 December 2022, namely absence from work without authority and without providing any good reason for this. That the claimant committed this conduct has never been materially disputed. It was clear from the claimant's contract that he had been signposted to relevant policies and
15 where they could be found. He did not dispute that he was introduced to the respondent's policies on induction and that he was sent the respondent's Business Standards annually (save, possibly, for a possible lapse in frequency during the Covid restrictions).

20 140. Mr Rankin was entitled to come to a belief about the disputed matters which the claimant put forward at appeal following reasonable investigation into these. It is not the tole of the Tribunal to assess whether it would have reached the same view of the evidence before him that Mr Rankin reached. I am satisfied that he had objectively reasonable grounds for his belief about the factual position which was supported by evidence
25 he had gathered, principally from Mr McLaughlan, and which he found more persuasive than the claimant's evidence.

Was the decision to dismiss within the band of reasonable responses?

30 141. What must be determined is whether dismissal lay within the range of reasonable responses open to an employer of the respondent's scale and nature. It is not relevant whether I would have imposed a lesser sanction in the circumstances.

142. The circumstances were that the claimant's conduct was self-evident at the dismissal stage and was not materially disputed at the appeal stage. The respondent operates in a regulated environment. Ofcom can impose penalties if it fails to meet its service obligations. I heard evidence from
5 both managers about the challenges posed to the respondent's logistical operations by absence, late reporting of absence and a failure to report absence. The respondent publishes standards expected of its employees and it is not disputed the claimant was or ought to have been aware of these standards which included demonstrating reliability, punctuality and
10 good attendance.
143. I accepted that it was reasonable for the respondent to believe the claimant was familiar with its policies and procedures regarding attendance given he had encountered these before earlier in the same year.
- 15 144. The respondent's published Conduct Policy stated: *You are expected to attend work and carry out your duties. If you are unable to attend work for any reason, you must inform your manager.* It made clear that dismissal could be considered as a last resort where either the employee failed to provide an explanation, or provided an unsatisfactory explanation for their
20 absence; or failed to meet with their manager to discuss their absence. It was supplemented by the terms of other policies and guides which reinforced this message and prescribed a process in cases of absence without contact.
- 25 145. Mr McLaughlan and Mr Rankin were both aware of the claimant's mental health difficulties and considered this. Mr Rankin considered all mitigation put forward at the appeal stage, including the claimant's long service but concluded that the claimant's guilt of the conduct in question warranted dismissal.
- 30 146. The decision to dismiss in response to the conduct of which the respondent found the claimant guilty fell within the band of reasonable responses open to the respondent, having regard to: the serious nature of the conduct; the notice given to employees in their contracts and various policies, procedures and guides, of how such conduct would be dealt with;

and the logistical challenges posed for the respondent by unreported and unauthorised absences.

Was dismissal of the claimant by the respondent procedurally fair?

- 5 147. The claimant alleged a failure to send, or alternatively to deliver letters in connection with the process but it has been found that, as a matter of fact, these were indeed sent.
- 10 148. He took issue with Mr Rankin's failure to offer him a face-to-face appeal hearing . However, it was not disputed that the claimant had the facility to access the meeting via Teams nor is it suggested that he requested a face to face meeting with Mr Rankin. The meeting was lengthy and unhurried and there was no suggestion that the claimant was not given the opportunity to put forward all points and evidence which he wished to put forward.
- 15 149. It was less than satisfactory that Mr Rankin received copies of the incorrect versions of letters purporting to have been sent to the claimant. This arose from a structural systems issue within the respondent with concerning scope that such a mishap could be repeated unless safeguards are put in place to ensure the correspondence provided to appeal managers is taken from the correct system. It was unfortunate that the discrepancy was not
20 identified throughout the lengthy appeal process but was only picked up when preparing for the Tribunal hearing.
- 25 150. With that said, I do not accept that this anomaly was sufficiently serious as to tarnish the fairness of the appeal process and, by extension, the dismissal. There was little material distinction between the versions of the letters such as may have affected or prejudiced Mr Rankin's deliberations and decision-making.
- 30 151. More troubling was the delay in concluding the appeal process and the failure to contact the claimant to update him as to progress or the reasons for the delay. I readily accept that, as it transpired, Mr Rankin had good reason for the delay, and I offer my sympathies for his loss. Nevertheless, it is troubling that the respondent, a very large organisation, which employs many other Independent Casework Managers did not provide alternative

resource in recognition of the importance to the claimant of an appeal against the loss of his job.

- 5 152. I require to have regard to the ACAS Code on Disciplinary and Grievance Procedures which states "*Employees should be informed in writing of the results of the appeal hearing as soon as possible*" (para 29).
- 10 153. The authorities confirm that procedural defects in handling an appeal can, in principle, render a fair dismissal unfair. As Ms Meek acknowledged in her submission, in **West Midlands Co-operative Society Ltd v Tipton** [1986] IRLR 112, the House of Lords held that the failure to permit an employee to exercise a right of appeal may render an otherwise fair dismissal unfair. It has been stated (obiter) by the EAT in **Whitbread & Co v Mills** [1988] IRLR 501 that a minor departure from an appeal process can be ignored but that a total failure might entitle a Tribunal to find a dismissal unfair, through it will not necessarily follow that they should do so. The EAT suggested that the question will be whether the employer dealt fairly with the employee at the various stages.
- 15 154. Ms Meek cited the case of **London Central Bus Company Limited v Manning** EAT 0103/13. In that case, the EAT accepted that the material question was that formulated by Morritt LJ in the case of **Westminster City Council v Cabaj** [1996] IRLR 399 (para 29), namely whether the procedural defect in the internal appeal process denied the claimant employee an opportunity of showing the employer's reason for dismissal (conduct in the present case) was an insufficient reason for the purposes of section 98(4).
- 20 155. The answer to that question on the facts of the case before me can only be 'no'. The claimant was not denied such opportunity by the unhappy delay in the appeal process. Nor, applying the guidance in **Whitbread**, could I assess that he was dealt with unfairly at any stage or in a way that was contrary to the principles of natural justice. I hesitate to describe a delay of over four months 'minor', but I accept that, viewed holistically, the overall procedure followed by the respondent fell within the band of reasonable responses, and that this unfortunate feature of the appeal
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process was not sufficiently fundamental as to undermine the overall fairness of the dismissal.

Conclusion

5 156. The respondent dismissed the claimant for a potentially fair reason relating to his conduct. Applying section 98(4), in all the circumstances of the case, it acted reasonably in treating that conduct as a sufficient reason to dismiss the claimant. The claimant was not unfairly dismissed.

Employment Judge:	Murphy
Date of Judgment:	19 September 2023
Entered in register:	20 September 2023
and copied to parties	