Case Number: No 3307033/2022

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Shane Hill	V	**Royal Mail Group Ltd**

Heard at: Watford, in person

On: 6-8 September 2023 and tribunal deliberation in the absence of the parties 26 October 2023

Before: Employment Judge Daley
Tribunal Member Mr. W Dykes
Tribunal Member Ms. A Brosnan,

Appearances:

For the claimant: Mr. G Lee- Solicitor
For the respondents: Mr. R Chaudhry- Solicitor

RESERVED JUDGMENT

The unanimous decision of the Employment Tribunal is-
(I) that the Respondent unfairly dismissed the claimant and that the claimant's claim for unfair dismissal is upheld
(ii)That the claimant's claim for Race Discrimination is well-founded and is also upheld

REASONS

The claim

1. In these proceedings, the claimant's claim is that he was unfairly dismissed and was discriminated against by his employer because of his race, he claims that he was subjected to a detriment by reason of the dismissal.
2. The claimant was employed from 19.08.19, as a Delivery and Collection Manager for the Royal Mail, until his dismissal on 14.03.22. His contract of employment was for 41 hours a week for a salary of £2472.00 per month. The claimant was dismissed for gross misconduct. In the decision letter of 14.03.22 the reason given was for An intention to steal a mobile phone.
3. Following his dismissal, the claimant applied for early conciliation; the certificate was issued on 30 March 2022.
4. The background to the dismissal was as set out in paragraphs 7-13 of the respondent's grounds of resistance, "... On 17 November 2021, a former employee of the respondent's Southeast Processing Centre ('SEPC') attended Hatfield LD and returned an iPhone that he had stolen while working at SEPC. Dave Billyard, Customer Service Provider, who had been working in the reception area at that time, took receipt of the stolen mobile phone, which had been placed within its box inside a brown paper bag with a message written on the bag, stating 'sorry'. Mr. Billyard attended the DCM's office at Hatfield LD and presented the brown paper bag with its contents to the claimant as he was the DCM on site at the time. Charley Austin, Customer Service Provider, was also present in the DCM's office for this exchange. Mr. Billyard explained to the claimant that the man who handed over the item had explained it was to be given to the night manager.
5. Later that evening, Lorraine Rolfe, Processing Unit Manager, together with other managers of the SEPC, carried out a search of the DCM's office at Hatfield LD for the iPhone, however it could not be found. On 18 November 2021, Ms. Rolfe contacted David Sells, Operations Manager (and the claimant's line manager) and informed him about the stolen iPhone, which she or others were unable to locate despite a thorough search of the DCM's office the previous night. Mr. Sells attended the DCM's office immediately to perform a search, however he was also unable to locate the iPhone..."

6. On making inquiry of the claimant on 19 November, the claimant informed Mr Sells that he had placed the phone on top of a cabinet and that he had taken it from the brown bag and placed it in a parcel force envelope. He explained that on the morning of 18 November he had later seen the phone in the cabinet although he had not put it there and did not known how it had come to be in the cabinet. The claimant took the phone from the cabinet and gave the phone to Mr Sells.
7. Mr Sells carried out an investigation and, on 29 November 2022, wrote to the claimant inviting him to a fact-finding meeting. The claimant was suspended on the same day on the grounds that he had intended to steal the I-phone. Following this meeting and the claimant's continued suspension, on completion of his investigation, Mr Sells formed the view that the matter was too serious to be dealt with by him, and his completed investigation was referred to Mr Darren Willets, Operations Manager, for a disciplinary hearing.
8. Mr Willets completed his consideration of the matter and on the 14 March 2022 wrote to the Claimant with the outcome. The letter stated-: "...I was not satisfied by the account of events provided by Shane Hill, proved he did not intend to steal a mobile phone that did not belong to him. I concluded that he did intend to steal... Decision Result: Dismissal without statutory notice (Summary Dismissal). I enclose a report giving details of how I have reached my decision. You will receive no notice and your last day with Royal Mail will be 14 March 2022. You will be

allowed one appeal which will be heard by an independent manager."

9. The claimant appealed on 14 April 2022The claimant's appeal was heard by Mr. Joe Miranda, an Independent Case Manager employed by the respondent. On 4 July 2022, Mr. Miranda wrote to the claimant dismissing his appeal on the grounds that he had been treated fairly and reasonably and he therefore believed "that the original decision of dismissal without notice is appropriate in this case."
10. The claimant denies misconduct, and claims that his dismissal was unfair. In his grounds of complaint he set out that he believed he had been racially stereotyped and that he was treated differently to a comparator. On 9 September 2022, the claimant provided further information concerning his claim and confirmed that his claim was in respect of both unfair and race discrimination.
11. The claimant denied the underlying allegation which led to his dismissal. He alleged that the dismissal was unfair in that the investigation and subsequent disciplinary hearing were unfair. He submitted that the respondent's decision to dismiss him was outside the band of reasonable responses. Further, that he was subjected to race discrimination, by stereotyping, and that he was treated less fairly than a hypothetical white male comparator would have been treated.
12. The respondent denied that the dismissal was unfair or that the respondent discriminated against the claimant.

The procedural history

13. The claimant's claim was issued on 13 June 2022, the respondent's reply was filed on 2 August 2023. On 13 September 2022, the Respondent sought further and better particulars of the claimant's claim. On 21 September 2022 the claimant provided details that he wanted to amend his claim to include race discrimination. On 21 November 2022 the respondent wrote to the Tribunal as follows-: "The Respondent is not aware that the Tribunal has responded to this application, however it confirms that it does not object to the Claimant amending his claim on the terms sought. Considering the Claimant's new claim, in accordance with rule 29 of the Employment Tribunals Rules of Procedure 2013 (ET Rules), we request an order for leave for the Respondent to amend its response. We attach a copy of the response showing the amendments the Respondent wishes to make. We do not believe that the amendment to the claim nor the Respondent's amended response will affect the hearing listed for 4-5 May 2023..."
14. However, the hearing was postponed, and the matter was listed for the dates above. On 8 September 2023 the matter was adjourned part-heard following the close of the claimant's case. Further directions were given for the hearing to be listed for a deliberation on 26 October 2023 in the absence of the parties. The directions also provided for a remedy hearing if necessary.
15. The matter was also listed for a Remedy hearing on 30 November 2023.

The Issues

16. At the hearing we noted that this case had not been listed for a case management hearing, and there was no agreed list of issues. Accordingly, we agreed the following issues to be determined by the Tribunal.

    - What was the reason or principal reason for dismissal? The respondent says the reason was conduct, that is, that the claimant was dismissed because he had intended to steal an I- phone. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

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

    - Direct Race discrimination (Equality Act 2010 section 13)
    - Did the claimant have a protected characteristic here, i.e. black male of Caribbean ethnicity is he comparing himself with people who are white/ male or white female.
    - Did the respondent do the following things:
    - conduct the investigation in a manner in which it predetermined the outcome.
    - Dismiss the claimant?
    - Was that less favourable treatment?
    - The Tribunal will decide whether the claimant was treated worse than someone else would have been treated, there being no material difference between their circumstances and the claimant's.
    - If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.
    - If so, was it because of his protected characteristic?
    - Did the respondent's treatment amount to a detriment?

The Hearing

Attendance

17. The hearing was held in person over a period of 3 days and was attended by the parties listed above. The Tribunal heard from the following witnesses: David Sells, Mr. Willets, and Mr. Joe Miranda. We heard from Mr. Shane Hill, the claimant, and Mr. Mark Porter.

The Evidence

18. We were provided with the agreed bundle of documents which consisted of 410 pages. At the hearing, we were provided with witness statements and heard oral evidence from

    a. Mr David Sells- Operational Manager

    b. Mr David Willets- Regional Operational Manager

    c. Mr Miranda- Independent Case Manager

    d. The claimant- Shane Hill

    e. Mr Mark Porter – an accredited trade union official

19. At the beginning of the hearing, we heard from the claimant's representative, Mr Lee, Solicitor, that the claimant wished to make an amendment to his witness statement, and the statement of Mr Porter. We heard that the witness statement of Mr Hill and Mr Porter referred to the claimant having placed the I-phone in the cabinet. Mr Lee stated that this had been written in error and had been pointed out by the claimant after the witness statements had been exchanged with the respondent. We considered the submissions and decided to accept the amended and signed witness statements of Mr Hill and Mr Porter.

Consideration of the evidence and finding of facts

Mr Sells- Operational Manager

20. We heard from Mr Sells who told us that he was the operational manager for the respondent's company. He had also been the claimant's line manager.

21. In his evidence he helpfully set out information on the personal and management structure which was referred to in his evidence. We heard that Lorraine Rolfe was the South East Processing Centre Manager(equivalent to Mr Sells), who worked between 17.00 pm to 4.00 am Simon Chipperfield was the Delivery & Collections Manager who worked between 9pm to 6 am and his assistant was Mr Richard Long; Mr Billyard was the Customer Services Provider who worked between 11.30am and 7.00pm and Mr Hill, the claimant, was the Delivery & Collections Manager who worked between 6.00am and 2.18pm and was assisted by Richard Read.

22. In his witness statement he set out the incidents and the subsequent actions taken by the respondent company which led to the decision to dismiss the claimant. He set out that, as well as being the claimant's manager, he had considered him to be a friend and that they had

been out socially the weekend before. In his witness statement he set out that he was surprised and disappointed about the allegations of race discrimination.

23. In his statement he set out that on the 17 November 2021, his colleagues in Parcel Force had been investigating a television which had gone missing. His colleagues Lorraine Rolfe and Simon Chipperfield had viewed the CCTV and noted that a package containing a mobile phone which had previously gone missing had been handed in by a man identified as Bogdan, who had worked at the depot as a temporary worker. We heard that the phone was handed in in a brown sandwich-type bag. However, we noted that the evidence on this point was inconsistent, and we heard evidence that Ms Rolfe had been told that the phone would be returned by an existing member of staff, who was related to Bogden, the person who was alleged to have taken the phone. Although we have noted this inconsistency, as to how she became aware of the phone, we found that nothing turned on this and as such we have not made a finding concerning how Ms Rolfe became aware that the phone had been returned to the depot.

24. We find that the phone had been handed in to David Billyard, Customer Services Manager, who had in turn handed it to the claimant. This had been in the presence of Charley Austin, Customer Service Provider. Later the claimant discussed the return of the phone with Richard Reed, Assistant Delivery Collection Manager(Nights) and Mr Matt Doughty, Delivery Collection Manager (Days).

25. It was the claimant's case that he took the phone out of the brown bag in the presence of Charley Austin and placed it in a white parcel force envelope. Although he could not remember, he believed Richard Reed was also there. However, in his fact finding it was noted by Mr Sells that neither Ms Austin nor Mr Reed recalled witnessing this. At the initial fact finding meeting the claimant asked to view the CCTV evidence, which he stated would have supported that he had taken the discarded bag and placed it in the canteen bin.

26. We were informed that the phone was returned in a brown bag which was described as like a Pret or some other similar, sandwich shop bag. There was no direct evidence concerning the condition of this bag, or what was written on the bag. We accept there was some writing on the bag. We heard from the claimant that his recollection was that the words "parcel force" was written on the bag, although we did not hear directly from Mr Billyard as to both the condition of the bag and whether there was anything written on the bag. Throughout the investigation there was reference to a note, however we find that there was no separate note, and that something was written on the bag. We heard contradictory evidence on this point; however, we have not found it necessary to resolve this issue. We heard that the word "Sorry" may have been written on the bag, alternatively the name Bogdan and parcel force.

27. Although we heard the evidence Mr Willets relied upon, we have seen the still image, and we find that it was not possible to determine the condition of the bag from this image.

28. We heard and accepted that Lorraine Rolfe, the Processing Delivery Manager, and Simon Chipperfield, Delivery Collection Manager (Nights), had spoken with Mr. Billyard following their viewing of the CCTV of Bogden. Mr. Billyard informed them that he had handed the phone in to the claimant. We heard that Ms Rolfe and Simon Chipperfield searched the DCM office that night and that they had not in their search located the phone. We find that Ms Rolfe had not spoken with the claimant or asked him about the phone, prior to the search, she did not work on the same shift as the claimant.

29. We also find that the search did not comply with the respondent's policy 'Agreement Between Parcelforce Worldwide and The CWU Regarding a Code of Practice for Security Checks':

> "Circumstances for Security Checks in which it was noted that it is impossible to define precisely every circumstance that would warrant security check activity, but the following examples bullet pointed below… Where there is evidence of Parcelforce Worldwide or customer property missing and possibly has or is being removed from company premises… PFW agree to obtain the consent of an employee before beginning any security check relating to them. Equally, PFW accepts that they may not forcibly detain an employee on suspicion in order to question or search them. It is agreed that security check procedures will involve the need for a consent form, which must be signed by an employee before a check commences. This form will also contain a section to be completed by the person conducting the security check, giving the reasons for the check, the result of the check and their signature. All forms should be kept confidentially by the employer as a record of the event."

30. We accepted Mr Sells' evidence that he had been told by Ms. Rolfe, words to the effect that "we have a problem." His evidence is that she explained about the footage of Bogden and her subsequent search of the claimant's office (the DCM office) and the fact that she had not been able to locate the phone.

31. Although we do not know exactly what was said, it is clear from their subsequent actions, that a suspicion had been raised by the claimant not having told either Ms Rolfe or Mr Sells about the I-Phone. Ms Rolfe asked Mr Sells to carry out a search. We also find that this subsequent search did not comply with the respondent's search policy. We find it was a covert search. Although the claimant should have brought the phone to the attention of Mr Sells, we find no reason why at this stage either Ms Rolfe or Mr Sells would not simply have asked the claimant about the I-phone.

32. In his witness statement Mr. Sells set out how he had conducted the search. In his evidence Mr Sells accepted that he had concealed the fact that he was looking for the phone, and on being asked by Matt Doughty 'What he was looking for?' When he observed Mr Sells carrying out the search, Mr Sells accepted that he lied on that occasion and said that he was looking for some paperwork in connection with an audit.

33. He told us, and we accepted, that at that stage he was treating both the claimant and Mr Doughty as possible suspects as far as the whereabouts of the I-phone was concerned. However, the policy covers those who are suspected of theft. We find that at this stage Mr Sells' description of the claimant as a suspect is significant and means that he was entitled to be told that a search was being carried out. We do not accept that Mr Doughty was also a suspect as Mr Sells had already discussed with Ms Rolfe and security about the possibility of a hard search or a stop and search being carried out on the claimant. Whereas no such discussion was had about Matt Doughty.

34. In his evidence Mr Sells set out that "I thought because it's a high value item Shane could have come to me and said, "here is the phone" that would have been the end of it."

35. In his evidence Mr Sells could not remember how the whereabouts of the phone had been established. The claimant Mr Hill in his oral evidence stated that he had been asked by Mr

Sells on the morning of the 19 November 2021 about the phone, and in response he had informed Mr Sells that he had placed the phone on top of the cabinet in an envelope and later, whilst looking for a pen, had seen it in the cabinet with the stationery. We accepted the claimant's evidence that he had shown Mr Sells where the phone was. We were not convinced of Mr Sells' account that he could not remember how the recovery of the phone had occurred.

36. We noted that he stated that he deemed it inappropriate to ask the claimant about the phone. In his evidence he stated that it was his role to protect the business and that this came before any friendship with the claimant. He also told us that he had been advised not to ask the claimant about the phone by security. However, this did not accord with the documentary evidence.

37. In an email dated 18 November 2021 sent at 17.14 pm David Butcher (Lead Security Manager) wrote:

> Thanks for the update, hopefully Shane will be able to provide a satisfactory update. If this is still missing after speaking with him then we will need to report it up to the helpdesk.

38. We heard from Mr Sells that although the phone was recovered there was, in his view, an issue as to where the phone had been for the last three days. Within the bundle we were referred to a request undated, from Ms Rolfe to Fiona Whyte, senior ER/IR Manager, asking for permission to obtain the CCTV footage of the claimant leaving the building. We noted that her request was denied. We find that no permission was sought of the claimant as suggested by Ms Whyte.

39. In her report in which she sought permission Ms Rolfe also stated that Mr Sells had been "unable on 18 November to speak to the early shift manager." (the claimant).

40. In response Ms Whyte stated as follows-: "...If you believe, on balance of probability, that Shane intended to steal the phone, then you could ask him for his permission to view the CCTV to confirm his version. If he declines permission, then the balance tips slightly more to probability. Alternative would be for the Security Manager to view and give a report as supporting evidence." Ms Rolfe in her email to Mr Sells confirming the refusal to authorise permission to obtain the CCTV footage, states " I would go with Alex giving us a report but still ask Shane anyway."

41. In an email in reply during his investigations on 25 November 2021 Mr Sells stated:

> "…Hi Alex, would it be possible to do as Lorraine suggests and complete a report from the CCTV viewing?

42. We heard from the claimant that he had been in the dining area when Mr Sells was seen searching the office. We also noted that Mr Sells could have sought an explanation of the claimant on 18 November as to what had happened to the phone, prior to searching for the phone. Mr Sells stated that he had been at a health and safety meeting and that when he returned to the office the claimant had not been there. However, we accepted the claimant's evidence that whilst he had not been in the office he had been in the building.

43. This accords with Mr. Sells' written account in his undated statement to Mr. Willets, in which he stated that Lorraine Rolfe rang Russell Heppenstall for advice and "she confirmed that we should not complete a stop and search on Shane Hill". This confirms both that he had considered a "stop and search and equally he could have spoken to the claimant on 18 November.

44. We noted that Mr Sells and Ms Rolfe, rather than asking the claimant to consent to CCTV footage of him being disclosed, decided instead to seek a report from the head of security. However, we find that at no stage did Mr Sells seek an explanation from the claimant as suggested by David Butcher, Head of Security, or comply with what was suggested by Fiona Whyte prior to formalising the procedure.

45. On 29 November 2021, we find that Mr Sells invited the claimant to a fact-finding investigation. In the letter, Mr Sells set out that the reason for the meeting was "...Following my discussion with you on the 19.11.21 concerning the alleged intention to steal a mobile telephone that did not belong to you between 17.11.21 to 19.11.21".

46. We find that Mr Sells adopted a closed position prior to the fact-finding meeting. In his letter he displayed that he already considered he was looking at a potential theft, before giving the claimant an opportunity to explain what had occurred. And his rationale for not taking steps to formalise and record the I-Phone having been handed in. We accepted the claimant's closing submissions in paragraph 64 which refer to the guide on conduct in which it stated that the role of the investigator is to be "fair and objective so that they can establish the essential facts of the matter and reach a conclusion…An investigator should do this by looking for evidence that supports the allegation and evidence that contradicts it"[New Royal Mail Group Conduct Agreement Fact Finding]. We find that this was not the position adopted by Mr Sells.

47. Mr Sells also interviewed six people who he deemed able to help him with his inquiry, however his approach was to email those he interviewed asking for confirmation of the summary of the interviews and conversation rather than make a full record of his interview. We find that throughout his inquiries, he did not act objectively, or seek to challenge the position he had adopted that the claimant had intended to steal the phone, and this appeared to be his approach to the questions that he asked. He also obtained stills of CCTV footage of the claimant returning to the building on 18 November 2021, without seeking permission from the claimant, this meant that the claimant did not have the opportunity to view the footage, he was not invited to explain his actions, and even given the opportunity to request CCTV of the depot. The claimant was suspended until his disciplinary hearing in March 2022, when he was dismissed.

48. In answer to questions from Mr Lee, Mr Sells stated that the factors which led him to believe that the claimant intended to steal the item was that he had taken the I-Phone out of the brown bag in which it had been returned and put it in a white Parcelforce envelope. He also relied upon the fact that the claimant had not notified him that he had received the phone. However, Mr Sells made much of the fact that he had not seen the claimant, and this was one of the reasons he had not asked him about the phone. We heard that both Mr Sells and the

claimant were in a work WhatsApp group, so there was an opportunity to communicate outside of the office had either chosen to.

49. Mr Sells did not accept the claimant's position that he had removed the I-Phone from the brown bag and placed it in the Parcelforce envelope to make it more secure. He stated that by taking the contents out of a bag and putting in an envelope and destroying the bag he had "tampered with evidence". We find that from the outset Mr Sells had worked on the premise that some wrongdoing had been committed by the claimant.

50. The claimant told him that he had put the phone on top of the cabinet and had later seen it inside. In cross-examination, Mr Sells did not accept the proposition put to him by Mr Lee that the phone could have been missed in the first search as they were looking for an I-phone in a brown bag. He denied that he had a flawed belief, that he pursued that his enquiries centred on his belief that the phone had been taken from the depot by the claimant and that it had left the depot. However, we find that the decision to view CCTV footage of the claimant was based entirely on Mr Sells' belief that the claimant had taken the I-phone from the building. He did not seek to use CCTV to establish what had happened within the building, prior to meeting with the claimant or as invited to by the claimant at the first fact-finding meeting.

51. Mr Sells in his cross examination stated that he believed that Shane had concealed the phone with the intention to steal it. He set out that he had taken advice at all stages of the procedure from HR and had acted in accordance with that advice after carrying out a fair investigation. However, we find that Mr Sells did not act in accordance with advice received from Mr Butcher Head of Security or Fiona Whyte. He also did not comply with the respondent's policy on carrying out searches; had this been complied with, the search would have been witnessed both by a colleague and by the claimant. This may have led to the recovery of the phone on 18 November 2021, or provided evidence that the phone was indeed missing.

52. Mr Sells accepted that he had not told Matt Doughty the real reason for his searching of the room and denied that the explanation given to Mr Doughty was dishonest. He told us that at that stage Mr Doughty had also been a suspect, however, Mr Sells did not suggest that there was a need to search Matt Doughty in the same manner as he proposed concerning the claimant. We also find that once Mr Sells became aware that Mr Doughty had learned about the missing phone from Mr Billyard, he stopped treating Mr Doughty as a suspect, and he instead decided to treat him as a potential witness.

53. He did not accept that, because he had described the claimant as being a friend, he had an obligation to ask the claimant about the phone, or indeed as his line manager. He considered that the onus was on the claimant to approach him. He also did not accept that he had discriminated against the claimant by stereotyping him, although he had looked at the video with the Head of Security, and the claimant had been described as a black male.

54. He stated that he had been a friend of the claimant and was disappointed that the allegation of racism had been raised. He was referred to the respondent's 'national agreement conduct policy informal resolution' which gave managers the option of dealing with matters informally. He told us that he was aware of the policy, however he considered that matters were too serious to be dealt with informally. Mr Sells did not in his evidence set out at what point between the 18 November and 19 November 2021, that he made this decision.

David Willets- Regional Operational Manager

55. We next heard from Mr Willets; he was appointed to chair the disciplinary hearing. He told us that in his capacity as manager he was familiar with the policies of the Respondent.

56. In his witness statement he set out that all the documents that had been collated by Mr Sells as part of the fact-finding exercise were passed to him. He reviewed them and was satisfied that there was a case to answer. He held a hearing on 31 January 2022, and the claimant was accompanied by Mr Louis Burden who was a trade union official.

57. He set out that following his interview/ the hearing with the claimant on 31 January 2022, in addition to this meeting, he had also interviewed the following: David Billyard, Richard Reed, Richard Long, Charley Austin and Simon Chipperfield.

58. He had also investigated the claimant's allegation of racial stereotyping. He had interviewed Alex Slater, the field security officer who had compiled the security report at Mr Sells' request (as an alternative to asking the claimant to consent to their viewing the CCTV). His response was included within the hearing bundle. Alex had stated that the claimant was unknown to him, and he had only been described as a Black male to identify him on the CCTV.

59. As a result of his subsequent inquiries, he invited the claimant to attend a further meeting which took place on 28 February 2022. In paragraph 28 of Mr Willets' statement, he set out the factors which he had considered. He stated that on balance he considered that the case had been substantiated and notwithstanding the claimant's previous good record, he considered the Conduct Policy and Code of Business Standards. Having considered available information he concluded that the claimant intended to steal the I phone.

60. Mr Willets did not believe that the claimant had met or could continue to meet the expected standards of behaviour. He considered that the claimant's "...remaining in the business was incompatible with the Business standards". He therefore made the decision that the claimant should be dismissed for gross misconduct.

61. However, we find that that throughout his decision making he does not attempt to address the claimant's version of events and consider whether they were inherently improbable and more importantly whether the respondent had proved its case.

62. Mr Lee in his cross-examination asked Mr Willets about the use of CCTV evidence; he noted that the claimant had asked to see CCTV evidence and his request to view the CCTV was not actioned. He was particularly concerned that permission had been sought and not given for the use of CCTV and yet the respondent had relied on a report which disadvantaged the claimant.

63. Mr Willets, in his evidence stated that he was not sure that this information had been presented to him, however he had not seen the CCTV, he had only read the security report prepared by Alex Slater.

64. Notwithstanding his response, we find that Mr Willets used the CCTV evidence, and drew conclusions from it, concerning the condition of the bag in which the phone had been in, when it was returned to the depot. He also used an image of the claimant coming into the building and his subsequent return to his car to decide whether, contrary to the claimant's denials, he had returned the I-phone to the depot on 19 November 2022.

65. The investigation report concluded that the claimant had intended to steal the I-phone because the claimant had not returned it to the night manager or made his manager aware of the I-phone. The claimant had denied knowing that it was intended for the night manager.

66. In his decision letter, Mr Willets although being unable to resolve this point, had written; "Whether or not Shane Hill was aware of who the item was intended for, is a point of deliberation... My conclusion on this point is that it is impossible to determine exactly what was said, however, what is clear to me is that this would have been an unusual set of circumstances and that if Shane Hill either knew or did not know who the item was for his responsibilities as a manager would have been to establish who the item was intended for or if he could not do that, ensure his line manager was aware of the situation…"

67. He had noted Charley Austin's evidence that she could not recall the words ''it's for the night manager'' having been said. However, it was clear to us that his belief on this point was that the claimant had been told it was for the night manager, and that this was part of his reason for the conclusion he had reached. He told us that he had preferred Mr. Billyard's account and his reason for rejecting Ms Austin's account was that he had "found her statement to be short and lacking in detail." Other than this he accepted Dave Billyard's account over Charley Austin's and the claimant's account. His decision appeared to stand on his belief that "…he could not see the phone having been handed over to the claimant without instruction."

68. He stated that he deemed the claimant to have been acting dishonestly and reiterated his view of the claimant's responsibilities as a manager. Whilst we accept the respondent position that the claimant had responsibilities regarding the phone which he did not properly fulfil, we find that this alone was an insufficient basis to infer that the claimant was acting dishonestly or indeed intended to steal the I-phone.
69. Mr. Willets referred to the statement of David Sells at paragraph 14, he stated that the phone had no visibility and tracking, he stated that it was "…Absolutely Shane's responsibility to let David Sells know about the phone".
70. He was asked whether he was aware that David Sells had described Shane Hill as a friend, and that they had been out for a drink and that they were friendly outside of work. He was asked whether given this Mr. Sells should simply have asked for the I-phone. Mr Willets stated that he did not know about any friendship between them, however, he did not consider that this meant that David Sells should have asked the claimant for the phone.
71. He was asked about the removal of the phone from what was in fact a brown paper bag which was described as a bag which was like "bags used by coffee shops for sandwiches." Although there was agreement that whatever was written on the bag was very limited, he did not accept that the claimant had made the item more secure by removing it from this bag and, by placing it in a Parcel force envelope. He stated that he, the claimant, could have locked it in the safe if one was available. He stated that "… I therefore conclude that these actions were undertaken with an ulterior motive". He repeated that he disagreed with Shane's action in removing the phone from the bag. He reiterated that he had "made his decision on the evidence based on the balance of probabilities."

72. He stated that he was of the view that the claimant had removed the phone from the depot and had subsequently returned it, once he became aware that it was being looked for; alternatively, he had hidden it and had then put it in the cabinet so that it could be discovered. We find that Mr Willet did not provide any evidence for the conclusions that he reached, other than that the claimant had not dealt with the phone being handed to him in the manner that he expected he ought to have.

73. Mr Willets in his evidence confirmed his decision to summarily dismiss the claimant.

Mr Miranda Independent Case Manager HR Strategy and Service

74. We heard from Mr Miranda who had dealt with the claimant's appeal. In cross-examination he stated that in hearing the appeal he had not thought it necessary to hear from any of the witnesses. He told us that he had preferred Mr Sells' account of the search, and that Mr Sells would have seen the phone had it been in the cabinet He was of the view that "The natural way of dealing with it is for someone to volunteer that they have the item, I believed the onus to be on Shane Hill."

75. In his statement Mr Miranda, did not address the respondent's policies and whether they had been complied with. We find that in determining the appeal he failed to consider whether the fact finding, and the hearing had complied with the respondent's procedures and whether, had he concluded that they did not comply, this had led to any unfairness in the procedure adopted to dismiss the claimant. We find that at no point in the investigation hearing and appeal was there a consideration of whether Mr Hill's failure to report receiving the phone was an issue of competency rather than dishonesty. We heard from the respondents' witnesses Mr Sells and Mr Willets, that this was an unusual set of circumstances. It is clear to us that the claimant did not see the I-phone and the circumstances of it being returned as his most pressing priority, and that this was not the view of either Mr Sells or Mr Willets, however, they did not appear to consider any issues concerning what the workload of the claimant had been that day, or why he had failed to grasp its importance.

The Claimant Mr Shane Hill's evidence

76. We heard from Mr Hill, he told us that he had a correction to make to his witness statement, he explained that in his statement his solicitor had referred to the phone having been placed by him into the cabinet in which it was found. This was also set out in the statement of his witness Mr Porter. He stated that his was incorrect, and was not a change of position by himself, it arose because of an error made by his solicitor, which he had not initially spotted on reviewing the statement.

77. In his cross-examination Mr Chaudry set out that the respondent's position was that this had not been an error, but was a contradictory account given by Mr Hill which affected his credibility.

78. Mr Hill was asked about his relationship with Mr Sells. He stated that "We had a good working relationship I considered him a work colleague; the whole team were out together." He did not consider that Mr Sells had been a friend. He told us that at the start (our relationship) it was rocky. I was not his choice of DCM. Not happy with my performance not getting along with me."

79. He stated that they had had a closer relationship, after he, Mr Hill had returned from Paternity Leave and that "Mr Sells and I moved forward from there."

80. He however did not accept Mr Sells' characterization of his approach to working with him and stated that he found Mr Sells' statement in which he said "… I found it odd that Shane had not mentioned to me that the phone had been handed in Shane would always mention everything to me, no matter how minor, he was the type to person to tell you if his biro ran out of ink…"to be patronizing and unprofessional''.

81. He stated that as a manager he had been paid to use his initiative and that the Respondents had a large contract with Screwfix and that as such it was his responsibility, along with Richard Long, to ensure that they met the agreed delivery slots. This meant that his priority was ensuring that their orders made it out the depot on time so that the delivery slots were not missed.

82. He told us that the phone was handed to him at about 1pm on 17 November 2021, this was about an hour before his shift ended. He described how the phone had been in a paper bag, there was no handwritten message within the bag, and the only writing on the bag was the word Parcel force. He did not accept that the name 'Bogdan' or 'Sorry' was written on the bag. He described how he had removed the phone from the bag in the presence of Charley Austin. He had also told Richard Reed about the phone. He stated that he had placed the phone in a Parcelforce envelope and that when Matt Doughty came on shift and asked him about the phone, he had told him it was sorted and had pointed to the phone being on top of the cabinet near the microwave. In cross- examination he agreed that he had not challenged Matt Doughty's account. Mr Doughty in his account referred to the claimant telling him that it (the phone) was sorted, however he did not mention that the claimant had shown him where the phone was. He told us that he had taken the brown bag with him and disposed of it on the way to the canteen. He had not considered the brown bag to be significant. He stated that he believed the phone would be more secure in the Parcelforce envelope than it would be if he left it in the brown bag.

83. He told us that he had left the depot at about 2pm on 17 November to pick up his daughter from Nursery. He told us that he had next seen the phone the next day on 18 November. He had gone into the cabinet looking for a pen and had seen the phone in a cabinet drawer. He stated that the time had been about, 6-6.30 am. He was asked why he had not prioritized dealing with it. He explained that in the morning, the phone had been "...about a 2 out of 10 priority...", as he was trying to ensure that the drivers and parcels were out on time. He was engaged in helping with the conveyer belt to try to ensure that this happened. He stated that the Screwfix parcels had to be delivered by 10am. Given this, once he had found a pen to give the driver, he had gone back to the delivery floor.

84. He stated that he had been in the canteen when Mr Sells was searching the office for the phone, this was about 1.30pm prior to his shift ending. Matt Doughty had informed him that Mr Sells was looking for a piece of paper in connection with an audit, His evidence was that it did not cross his mind that he was looking for the phone.

85. Of the 19 November 2021, Mr Long had stated in his written statement that the claimant had come in early which was unusual. He denied that he had come into work early that day with an ulterior motive, he stated that he had been late the day before and had left earlier as a result the traffic had been lighter, and he had arrived earlier.

86. He explained that he had been in the canteen when Mr Sells had searched the office, and that he had been playing pool, during his break and had been about to clock out to pick up his daughter from nursery and had not gone back to the office. He denied knowing that the search had been about the phone.

87. He told us that he had only become aware that the phone was an issue when Richard Long had asked Mr Sells whether he had found what he was looking for.

88. He stated that Mr Sells had firstly called Richard Long and then Charley Austin in for an informal talk. Mr Sells had then called him into the conference room, and this was the first time that he had asked Mr Hill about the phone. He had told him that he had last seen it in the cabinet drawer. He stated that they had gone back into the office, and he had shown Mr Sells where he had seen it, and the phone had been there in the Parcelforce envelope under a high visibility jacket. He stated that Mr Sells had hugged him, something which Mr Sells denied.

89. He accepted that he should have messaged Mr Sells about the phone, and that he was at fault for not doing so. However, he was consistent in his evidence that he considered his action of placing the phone which was still in its original packaging within a Parcelforce envelope, rather than leaving it in the brown bag had made it more secure. He denied that disposing of the bag was a “hall mark of concealment”.

90. He was clear and consistent in his evidence that he had told at least four people who included his colleagues, Richard Reed, Charley Austin and Matt Doughty about the phone.

91. During cross-examination, the claimant was asked about why he considered that he had been discriminated against. He stated that he believed that he had been racially profiled. He referred to the report from security. He stated that he was the only manager within the depot who was of African/ Caribbean background and that Mr Slater, who had prepared the security report, referred to him as “a black male.” He stated that Mr Slater knew who he was. He said that Mr Sells had stated that Matt Doughty was considered a suspect and that was why he had not told him what he was searching for. However, he did not accept this. He stated that he was the only person to be treated as a suspect and suspended. He stated that He believed the decision to dismiss him for gross misconduct was to do with his race and was unfair.

92. He agreed that he could have messaged Mr Sells on the WhatsApp work group, however he stated that during Thursday evening the matter had gone out of his mind. He agreed that he should have been more proactive, but he did not consider that his failure to be proactive was a dismissible offence. He denied that he had intended to steal the phone.

93. We asked the claimant about the CCTV, in which the claimant had been seen entering the building with something white in his hand. He explained to us that it was his practice to take

his own toilet roll into work, and other than a water bottle and the toilet roll, he did not carry any other bag on the day of 18 November 2021 when he entered his place of work. He told us that his habit of bringing his own toilet roll into work had been remarked on, however he did this simply because he preferred it to the company roll.

94. We find that on the claimant producing his personal Ring Camera doorbell footage he could be seen leaving his home with these items. This evidence was accepted by Mr Willets. We find that in reaching its decision to dismiss the respondent did not rely on the CCTV report as evidence that the claimant had the mobile phone in his possession when he came to work on 19 November 2021.

95. We found the claimant, Mr Hill to be both consistent and credible in his evidence. We did not consider that there were significant contradictions in his evidence and many of the witnesses agreed on significant detail.

96. We find that he did not accord the phone the priority that he ought to have, and that there was a failing in his approach in that he ought to have informed Mr Sells at the first opportunity. We accepted his evidence that the brown bag in which the phone had been returned was not considered significant by him and that as a result he made the decision to place the phone in a Parcelforce envelope because he believed that it would be more secure. We noted that the phone was not removed from its original packaging when found, and that a smaller clear bag in which it had been placed was still around the phone.

97. We also accepted and preferred his account of how the phone had been recovered to that of Mr Sells.

Mr Porter- Union Representative

98. We heard from Mr Porter, who was a senior union official who had worked for Parcel force for 36 years. He set out that in his knowledge and experience he had not come across an investigation or a decision to dismiss which had been dealt with in the same manner as the claimant's disciplinary process.

99. In paragraph 4 & 5 of his Witness Statement Mr Porter stated "…In my experience as a national rep, I have not experienced such breaches in policy and its unfair application. I have never witnessed such an inept investigation and decision process to justify terminating an employee's employment..."

100. Mr Porter in his statement and in his evidence set out what he saw as the discrepancies with the investigation and the disciplinary process.

101. We noted that Mr Porter was not a first-hand witness, albeit that he was involved in the Appeal and how it was handled. He gave very useful contextual information concerning the approach that had been taken and his interpretation as to whether the respondent had correctly applied its policy and complied with the Acas code of practice.

102. However, it is our role to make a finding on those matters. Nevertheless, we were assisted by his evidence as he had experience of other disciplinary procedures within the respondent's business, and the way in which they are conducted. We heard that he was very concerned that the claimant had not been treated fairly.

103. We found Mr Porter to be helpful in his evidence, however we noted that as he was not a first-hand witness to events and was not involved until after a decision had been made to dismiss, the claimant. His evidence was limited to the fairness of the appeals procedure used by the respondent.

104. The hearing was adjourned after we heard from Mr Porter, directions were given to the parties which are set out in the case management order dated 22 September 2023

105. The parties provided us with closing submissions in line with the directions. The closing submissions are considered further below.

The issues and the relevant case law

The issues

106. The issues in this case were as set out above. We noted that this hearing had not been subject to a case management conference. Given this the Tribunal had not been asked to adjudicate on whether there was a time limit to the claimant's claim for race discrimination and whether, as his claim appeared to us to have been issued after the 3-month time limit, it was just and equitable to consider the claimant's claim for race discrimination.

107. We however refer to the respondent's letter in which they accept the claimant's claim. Given this, we were not invited to consider this issue and have not looked behind the respondent's acceptance of the claim, as it appears to us, that the respondent in their letter agreed to accept the claim and have waived the time limit

The Law

Unfair Dismissal

108. Subject to any relevant qualifying period of employment (two years in this case) an employee has the right not to be unfairly dismissed by his employer (Employment Rights Act 1996, section 94).

109. The Claimant plainly has served the relevant period and therefore has acquired that statutory right. The legislative basis for 'conduct' being a potentially fair reason for dismissal stems from s98 of the ERA 1996 which reads:

s.98 General (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show— (a)the reason (or, if more than one, the principal reason) for the dismissal, and (b)that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. (2)A reason falls within this subsection if it— (a)… (b)relates to the conduct of the employee, (c)… (d)… (3) …. (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) a. depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and b. shall be determined in accordance with equity and the substantial merits of the issue.

Direct Discrimination

110. Section 39 of the Equality Act 2010 ("EA") provides: (2) An employer (A) must not discriminate against an employee of A's (B) - (a) as to B's terms of employment; …; (c) by dismissing B; (d) by subjecting B to any other detriment.

111. As to the meaning of any other detriment, the employee must establish that by reason of the act or acts complained of a reasonable worker might take the view that they had thereby been disadvantaged in the circumstances in which they had thereafter to work or on account of dismissal. See: **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL** .

112. Section 13(1) EA 2010 provides: (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

113. The Tribunal must consider whether:

a. the claimant received less favourable treatment; if so, whether that was because of a protected characteristic.
b. The question of whether there was less favourable treatment is answered by comparing the way in which the claimant was treated with the way in which others have been treated or would have been treated.
c. This exercise may involve looking at the treatment of a real comparator, or how a hypothetical comparator is likely to have been treated.

114. In making this comparison we must be sure to compare like with like and particular to apply EA section 23(1), which provides:

115. (1) On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case.

116. Evidence of the treatment of an actual comparator who is not close enough to satisfy the statutory definition may nonetheless by of assistance since it may help to inform a finding of how a hypothetical comparator would have been treated.

117. As to whether any less favourable treatment was because of the claimant's protected characteristic: The Tribunal should bear in mind that direct evidence of discrimination is rare and it will frequently be necessary for employment tribunals to draw inferences from the primary facts; if we are satisfied that the claimant's protected characteristic was one of the reasons for the treatment complained of, it will be sufficient if that reason had a significant influence on the outcome, it need not be the sole or principal reason; In the absence of a real comparator and as an alternative to constructing a hypothetical comparator, in an appropriate case may be sufficient to answer the "reason why" question - why did the claimant receive the treatment complained of.

118. The burden of proof is addressed in EA section 136, which so far as material provides: (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. (3) But subsection (2) does not apply if A shows that A did not contravene the provision occurred.

119. When considering whether the claimant has satisfied the initial burden of proving facts from which a Tribunal might find discrimination, the Tribunal must consider the entirety of the evidence, whether adduced by the claimant or respondent; see Laing v Manchester City Council [2006] IRLR 748 EAT.

120. **Case law concerning claims of discrimination and unfair dismissal**

I. The Tribunal considered the following cases in respect of unfair dismissal
II. Chandok v Tirkey UKEAT/0190/14/KN
III. British Home Stores v Burchell (1980) ICR 303
IV. Shrestha –v- Genesis HA [2015] EWCA 94
V. A –v- B [2003] IRLR 405
VI. Polkey v AE Dayton Services Ltd [1987] 3 All ER 974, HL, [1987] 1 All ER 984, CA, [1987] IRLR 503, [1987] ICR 142
VII. Nagarajan v London Regional Transport (2000) 1 AC 501
VIII. Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL .

121. We were grateful to the parties for the cases provided for our consideration, however although all the cases set out in the closing submissions were considered we have not found it necessary to reference each case specifically,

What was the reason or principal reason for dismissal?

122. In reaching our decision we applied the test in *British Home Stores –v- Burchell* as set out in the list of issues.

123. The respondent in their decision letter stated that the reason for the dismissal was gross misconduct, that is that the claimant was dismissed because he had intended to steal an I-phone. We considered that we would need to decide whether the respondent genuinely believed the claimant had committed Gross misconduct.

124. The Tribunal finds that at the time that Mr. Willets heard the disciplinary hearing he had decided that the claimant had stolen or intended to steal the mobile phone. In his witness

statement and his decision letter, he set out his conclusion that the claimant "took the phone and became nervous and returned it."

125. Mr. Willets' belief was that it had not been found during the two searches that had taken place and that had it been within the office it would have been seen. Although he was equally prepared to accept that it had been removed from the depot, we consider that he came to this conclusion in the absence of firm evidence.

126. In the decision letter we noted his approach to evidence which was supportive of the claimant was to ignore the evidence, evidence which was inconclusive he construed against the claimant and evidence which contradicted the claimant's evidence was accepted by him as proof of the claimant's dishonesty.

127. Mr. Willets interviewed, Dave Billyard, on 31 January 2022, in the interview Mr. Billyard told him that that "a chap came in with a bag and told him it was for the night manager."

128. Neither the claimant, nor Ms. Austin, recalled Mr. Billyard saying that the I-Phone was for the night manager. Further in Mr. Willet's interview with Mr. Richard Reed, Mr. Reed reported hearing about the incident from Mr. Billyard. In reporting what Mr. Billyard told him, there is no mention of the night manager. Although neither the claimant nor Ms. Austin recall Mr. Billyard saying the phone was for the night manager, nevertheless, in his evidence to us, Mr. Willets concluded that this is what the claimant had been told.

129. Similarly, there was contradictory evidence on whether the brown bag had any writing on it and if so, what was said. In his account to Mr. Sells, Mr. Billyard stated that he did not notice any writing on the bag, Mr. Billyard recalled that he had written a "post it note", however this had been left in his office, and subsequently destroyed by him, this note had been written by him and was not from Bogdan. Mr. Billyard stated that either the claimant or Ms. Austin had noted writing on the brown bag. However, this was not set out in Ms. Austin's account to Mr. Sells, (as recorded by him in the email of his discussion on 3 December 2021). Mr. Doughty in his account which was recorded by Mr. Sells in an email on 3 December 2021, stated that Mr. Billyard had told him that there was a "post it note" on the brown bag.

130. In Mr. Billyard 's account to Mr. Willets (in an interview conducted on 31.1.22,) Mr. Billyard stated that he did not "notice any writing on it". On the same day Mr. Willets interviewed Charley Austin. She stated that the condition of the brown bag was 5 out of 10 and had "Bogdan" written on it in biro.

131. The only person whose account was that the brown bag had "Sorry written on it from Bogdan" was the account from Mr. Reed.

132. This account was given to Mr. Willet on 2.2.22. and was written up by Mr. Willets following his interview with Mr. Reed. In this account he stated that the claimant looked at the bag in his presence and he observed writing on it.

133. In Mr Reed's account to Mr. Sells which is recorded in an email dated 3.12.23, Mr. Reed stated that Mr. Billyard told him about the bag, and that in his conversation with the claimant about the I-Phone he stated that the claimant pointed to the bag which was near the Microwave. This written account does not state that he personally looked at the bag or its contents or personally observed writing on it. He was asked whether the claimant removed the phone and the clear bag from which it was in and placed it in the Parcelforce envelope. He stated "… I don't remember seeing him do that in front of me."

134. The Claimant's consistent account was that the words "Parcel force" were written on the bag.

135. However, Mr. Willets in his reason for the decision concluded that there was a personal note of apology on the bag. He stated that although David Billyard could not remember who

had stated this, either the claimant or Charley Austin had stated that the bag had the words "sorry" written on it.

136. In his decision letter he stated "...My thoughts on this point are that if a former employee is returning an item, he has stolen... the message would not simply have been Parcel force and his name and would have contained some form of apology." Accordingly, he stated that he formed the view that the bag was "more personal and significant than made out by the claimant". He also rejected the claimant's claim that he had taken the phone and the box and bag that it was in and placed it in a Parcel force envelope as he considered this more secure. He did not appear to consider the significance of the fact that the original phone packaging was undisturbed and there was nothing to suggest that the claimant had removed the phone from its original packaging.

137. Mr. Willets also decided that the bag in which the phone had been delivered to the depot was a key piece of evidence even though it was an ordinary sandwich bag, and the phone was recovered still boxed and packaged.

138. He decided that the disposal of the bag was due to the claimant having "an ulterior-motive...," He also makes a finding that the bag was in good condition. Although we consider, having seen the still of the CCTV image, that this is impossible to determine from the still of the CCTV. He ignored both Charley Austin's and the claimant's evidence that the condition of the bag was not good, the claimant describing it as the "worse for wear" and Ms. Austin describing it as "5 out of 10".

139. Mr. Willets chose to disregard this evidence and preferred that of Mr. Billyard, He also set out his belief that the phone had left the building and been brought back in by the claimant. However, this did not accord with Mr. Willets' accepting the claimant's evidence from the Ring doorbell footage which supported his account as him having left his house on 19 November 2021, with a white object in his hand which was a toilet roll.

140. We find that in reaching this decision he failed to give sufficient regard to evidence which pointed towards the employee's explanation.

141. We find that he failed to consider the fact that there were several members of staff who knew about the phone's existence, and the claimant was not naïve or unaware of this.

142. Given this, as a manager with over 2 years' experience, the claimant knew that it was highly likely that he would be asked to account for the phone. Yet Mr. Willets was satisfied that the claimant, who was previously of good character, was prepared to steal an item of relatively low value, when compared to his reputation and the potential loss of his salary.

143. In his evidence, Mr. Willet accepted that he had never dealt with a gross misconduct case involving theft/ intention to steal involving a manager. However, Mr. Willet failed to consider the cogency of the evidence and whether it was capable of supporting another more innocent explanation.

144. Accordingly, although we accepted his evidence that the reason for the dismissal was gross misconduct, we find that there was a lack of balance in his decision-making. We reject the submission of the respondent that the claimant was dismissed because his behaviour fell far below the standard expected when he concealed a mobile phone with the intention to steal.

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 whether: there were reasonable grounds for that belief

145. We say that to answer this question we must consider whether there are reasonable grounds for that belief. We have already set out that there was a lack of balance in the decision making. To answer this, we next considered the initial events prior to the finding of fact meeting on 29 November 2021. This includes all the steps taken by the respondent between the night

of the 17 November until 19 November 2023 when we find that, in response to Mr. Sells asking about the phone, the phone was given to him by the claimant.

146. We consider that reasonable grounds can only be found when the respondent, prior to deciding that there is a conduct issue, acts reasonably. There is a requirement for the respondent to exercise good judgment and common sense in reaching that belief. That means that the employer must first establish that the item is missing, which means carrying out a preliminary inquiry of the last person to have had the phone, in the same way that Ms. Rolfe asked Mr. Billyard what had happened to the phone when she became aware that it had been returned to the depot.

147. We find that the respondent reacted prematurely and jumped to the conclusion that the item had been stolen. Firstly, by Ms. Rolfe carrying out a search on the night of the 17 November 2021, and secondly by Mr. Sells discussing the possibility of a stop and search on 18 November 2021.

148. We accept that the respondent may have had reason to question the claimant because of his rectitude in handing over the phone. However, on 17.11.21 when they searched the office the claimant had not been asked about the phone. There was no attempt made to contact him. Notwithstanding this, we accept that the claimant should have been proactive on 18.11.21 and should have sought out Mr. Sells and told him about the phone. The claimant accepted this at the hearing.

149. Given this, we find that the claimant's failing was sufficient to generate a fact-finding enquiry, however this should have been a fact-finding meeting where the outcome was not predetermined. This was not the case with the meeting held by Mr. Sells, which set out that the claimant was being asked to attend a meeting because he had attempted to steal an I-phone.

150. From the outset Mr. Sells' attitude to the claimant is of suspicion and mistrust. He concealed the real reason that he was searching the DCM office. Although in his evidence Mr. Sells purported to state that this was because he was also treating Matt Doughty as a potential suspect at this time, Mr. Sells also did not elaborate on why he had decided that Mr. Doughty should instead be treated as a witness. Given this, we found his evidence somewhat disingenuous.

151. We next heard that rather than asking the claimant what had happened to the phone Ms. Rolfe and Mr. Sells, on 18 November, asked to view CCTV of the claimant, this was all without taking the very early step of asking him to account for the phone, and provide an explanation of why he had not taken steps to either hand the phone to Ms. Rolfe or to Mr. Sells if he was unaware of what was required.

152. We noted that Ms. Whyte refused this request, having considered her email, she does not consider it proportionate at that stage. Ms. Whyte appears to be unaware that neither Ms. Rolfe nor Mr. Sells have failed to approach the claimant, and very sensibly suggests this as a precursor to handing over the CCTV. The claimant is to be asked whether he consents to the CCTV being viewed. Ms. Whyte suggests that if he does not agree this might tip the balance to probability. This did not occur.

153. We find that contrary to the evidence of Mr. Sells, the Head of Security, David Burgess, suggested that he ask the claimant about the missing item. We find that there was no evidence that he was told not to discuss the matter with the claimant. We note that Ms. Rolfe conveyed to Mr. Sells that security considered there were "no grounds at that stage for a stop and search."

154. We are concerned that, quite inexplicably, at a very early stage the claimant had become a suspect. We cannot find that there were reasonable grounds for this belief as the early stages of the matter were tainted by the refusal of Mr. Sells to ask the claimant, as the manager in charge of the shift, what he had done to the phone.

155. We are concerned that Mr. Sells had prior to the fact-finding meeting already made up his mind. We found there was a reluctance on his part to accept that the phone was "not discovered or found" but on his request it was provided by the claimant. He stated that he did not recall how the phone had been recovered, we accepted the claimant's evidence on this point.

At the time the belief was formed the respondent had carried out a reasonable investigation;

156. We find that prior to commencing an investigation the respondent did not take steps to establish that an investigation was necessary. We considered but rejected the respondent's submissions that the respondent carried out a careful and detailed investigation.

157. We find that Mr. Sells continued to display an attitude which suggests that he had predetermined the outcome of his investigations. We say that the respondent had not carried out a reasonable enquiry at the outset, as this would have involved simply asking the claimant for the phone. As Mr. Sells suspected, the claimant could not account for it, carrying out a search in line with the respondent's policy on searches would have been a reasonable next step.

158. The respondent was very quick to think the unthinkable (given their lack of experience of any other manager behaving in this way). We say the unthinkable, as given the claimant's role in the respondent organization, the lack of previous disciplinary findings and his position of trust, the claimant had been in a working environment charged with delivering valuable items. The starting point should have been a presumption of innocence.

159. The respondent did not ask the claimant if they could view the CCTV as suggested by Fiona Whyte, nor were full copies of the CCTV records kept and retained for viewing. We note that the claimant at the fact-finding meeting asked for CCTV of the office corridor to be viewed, as this may have supported him in his explanation of what had happened to the bag. No attempt was made to try and secure this - it was not until 11 January 2022 that Mr. Sells asked to see the CCTV footage, suggested by the claimant, when he was told that it had been "overwritten" and not retained.

160. We also noted that Mr. Sells failed to take proper statements from those whom he had interviewed. Accordingly, there is no record of the questions that he asked, and the full answers provided, save for the handwritten statement of Richard Long. The only information provided is the summaries in email form.

161. We have considered the case of Av- B [2003] IRLR 405 referred to above, in particular paragraphs 60 and 61. In paragraph 61 it is noted that employees found to have committed a serious offence of a criminal nature may lose their reputation, their job and even the prospect of securing future employment in their chosen field, as such anything less than an even handed approach to the process of the investigation would not be reasonable in all of the circumstances. We find that Mr. Sells was not even-handed in his approach.

The respondent otherwise acted in a procedurally fair manner

162. In considering whether the respondent acted in a procedurally fair manner, we first considered whether there was an applicable procedure which should have informed the respondent in conducting its investigation and the disciplinary procedure.

163. We considered the respondent's procedure which governed security checks. The respondent's Code sets out that "...Where there is evidence of Parcel force worldwide or customer property missing and possibly has been removed from company premises.", the code emphasizes the need to obtain written consent to a search being undertaken. The code states "... A PFW Manager will undertake the security check ensuring that a witness is available which where practicable would be another manager or another person e.g., a member of security a CWU representative or a colleague Employees will have the right to be accompanied by a CWU representative or a friend who must be a PFW employee..."

164. In all circumstances of checks detailed above it is agreed that the employee must be present when the check is commenced." Given this it is not clear to us that Mr. Sells had the authority to carry out the search that he did, contrary to his evidence to us on this point.

165. We next considered his approach to the factfinding meeting held on 29 November 2021. Prior to the fact-finding meeting, Mr. Sells sent a letter inviting the claimant to a fact-finding meeting concerning "…the claimant's intention to steal an I-Phone", this would appear to us to suggest that Mr. Sells has already formed a view as to what had occurred prior to hearing from the claimant. The PFW in its guidance states-: "...Making a decision without completing a reasonable investigation can make any subsequent decisions or actions unfair and leave an employer vulnerable to legal action."

166. Mr. Sells, in his evidence and in the written account, did not set out clearly that the claimant provided him with the phone. As a result, words such as "the phone was recovered" and the phone was concealed and discovered have been included in the fact-finding documents. We consider this characterization unfair to the claimant.

167. We find that the claimant did not adhere to its policy on searching or the use of CCTV evidence, which are important safeguards to ensuring fairness. Had the claimant been asked to explain the CCTV evidence, he might have been able to request to see further CCTV evidence which potentially might have supported his account.

168. Given our findings about the initial procedure, Mr. Willets failed to consider whether the threshold had been met to initiate a disciplinary hearing, and whether steps could be taken by him to remedy some of the failings and unfairness this produced prior to making his decision.

169. We then considered whether the independent appeal was sufficient to cure the procedure. The appeal was allocated to Mr. Miranda, Mr. Miranda's role was to re-hear the decision, as such a fundamental requirement is that Mr. Miranda should be seen to be independent. Given this, we were concerned that he chose to write a separate email to Mr. Sells on 6 April 2022, it is unclear to us how this supports his role as an independent decision maker.

170. In the email he informs Mr. Sells that he has been allocated the appeal and then states-: "... If there is anything you think I should know, or you simply want an update on the appeal please get in touch." We consider that it was highly inappropriate for Mr. Miranda to suggest that Mr. Sells should contact him to discuss "anything you think I should know", however innocent his intentions may have been.

171. We considered the closing submissions of the respondent. The respondent submitted that it relied upon a fair reason for dismissal and that a fair procedure was followed, and that the respondent followed both its Code of conduct and the ACAS guidance. However, we find that there were flaws in the investigation and in the procedure followed.

172. Mr. Chaudry also made much of the fact that both the witness statements of the claimant, Mr. Hill, and Mr. Porter referred to the claimant having put the phone in the cabinet, however consistently throughout the investigation and the appeal, the claimant, Mr. Hill's, case was that he placed it on top of the cabinet, and then came across it in the cabinet when he was looking for a pen. We accepted the claimant's evidence on this point. Much was made of the

fact that he could not explain how the I-phone ended up in the cupboard, however in our view, the inability to explain is not inconsistent with there being an innocent explanation.

173. Accordingly, we are not satisfied that the respondent acted in a procedurally fair manner.

174. In considering this we have taken the size of the organization into account and the resources which we would expect to be readily available to them to carry out such an investigation.

Was dismissal within the range of reasonable responses?

175. We note that honesty and integrity are integral to the respondent's business and as such the respondent is rightly concerned about any suggestions of a potential theft by an employee. The test of the band of reasonable responses gives the employer a considerable margin of discretion which means that as a tribunal we should not interfere with a decision on the grounds that we may have come to a different decision. However, we find that although disciplinary proceedings may have been justified after a reasonable fact-finding exercise had been undertaken, given the claimant's admitted lack of proactivity in dealing with the phone, the respondent's code suggests several steps that could have been taken, and alternative outcomes were available.

176. We have considered the case of A & B and the evidence on which the respondent reached their decision, we find that the respondent found an intention to steal, in doing so the respondent gave no weight the fact that the claimant had worked in a capacity where he had responsibility for a wide range of valuable items in his role and there was no suggestion that his integrity had ever previously been called into question. In reaching our decision we have had regard to the size of the organization and the resources open to them in carrying out their investigation.

177. Given this, although we have been careful not to substitute our own decision for that of the respondent, we find that the respondent acted outside the range of reasonable responses. We find that dismissal was not within the band of reasonable responses.

Whether the claimant dealt with race discrimination within his evidence, and as part of his case.

178. In his skeleton argument Mr. Chaudry set out that the claimant had not specifically set out in questioning of the respondents' witnesses the allegations concerning race discrimination. We considered that the scope of the claimant's case was set out in the claimant's ET 1.

179. In reply to the respondent's written submissions, in paragraph 11, the claimant's submissions set out "The claimant's amended case was pleaded on the basis that the entire disciplinary and investigation and appeal process was unfair/or discriminatory." We have considered the case of *Chandok v Tirkey; it* was stated about a claimant's ET1, that -*: "*It sets out the essential case. It is that to which a Respondent is required to respond. A Respondent is not required to answer a witness statement, nor a document, but the claims made – meaning, under the Rules of Procedure 2013, the claim as set out in the ET1".

180. We carefully considered the claimant's ET1 and whether on the face of it, the issues that the claimant sought to rely upon during the hearing were set out in such a way that the respondent could understand what the claimant's complaint was and respond to the complaint. We were satisfied that the claimant set out that he considered that he was discriminated against by being stereotyped, on the grounds of his race, he set out his belief that as soon as the item appeared to be unaccounted for, he was under suspicion for theft, and that in considering the

video footage of him entering the building he was referred to “as a black male” even though he considered that Mr. Slater was aware of his name.

181. In his evidence before us he stated that he did not agree that the decision to suspend him was not based on his race, he stated “I don’t agree, the only person to be investigated, suspended and subjected to a fact-finding investigation was me, Matt Doughty was not treated in this way.” “The decision to dismiss me unfairly was all part of my race.”

182. Accordingly, we were satisfied that the claimant had set out his case in sufficient detail to require a response from the respondent.

Direct Race discrimination (Equality Act 2010 section 13)
Did the claimant have a protected characteristic here,

183. We find that the claimant is a black male of Caribbean ethnicity is he comparing himself with people who are white male/ females. He is also the only black male manager working within the respondent’s depot. The claimant’s protected characteristic is race.

Did the respondent do the following things

(I) conduct the investigation in a manner in which it predetermined the outcome.

184. We find that the answer to this is yes, because the investigation started on the premise that the phone was missing and that the only explanation was that it was likely to have been stolen by the claimant.

185. Although Mr. Sells says the claimant was not the only suspect, we find that he was treated differently by being stereotyped and the assumption being made that he would be prepared to steal an item. Although he was a manager in a position of trust at no stage was, he accorded the benefit of the doubt. We find that very early on he was treated as the principal suspect even before there were grounds to assume wrongdoing.

186. This contrasted to the simple and straightforward approach that Ms. Rolfe adopted towards Mr. Billyard of asking what had happened to the phone.

187. We reminded ourselves that to act in a discriminatory manner it is not necessary for discrimination to be a conscious state of mind. See Nagarajan v London Regional Transport (2000) 1 AC 501.We find that on the 18 November 2021, Ms. Rolfe and Mr. Sells decide at some point that rather than treating the claimant as a colleague to whom a measure of trust was due, in the same way Ms. Rolfe did with Mr. Billyard a was treated with suspicion and mistrust. We have asked ourselves the reason why this was. The claimant says he was stereotyped. We have considered what this means. “A stereotype is a set idea that people have about what someone or something is like, especially an idea that is wrong”. We consider that the claimant was stereotyped, and the reason why was his race.

Was that less favourable treatment?

188. We have, in reaching a decision on this matter, considered all of the surrounding circumstances. We reminded ourselves of the burden of proof as set out in Section 136 of the Equalities Act 2010 which states that if there are facts from which the ET could decide in the absence of any other explanation that the employer contravened the provision concerned, the court must hold that the contravention occurred. Firstly, we have noted, the claimant was the only black male employee, the phone was handed in on 17 November 2021, prior to this incident the claimant had an unblemished record and was on friendly terms with his manager according to Mr. Sells, by 18 November without seeking any explanation from the claimant the respondent’s operation manager was ready to think the unthinkable, that is, that Claimant was about to throw away his career on account of a new I-phone. In doing so the claimant ran the

risk of immediate discovery, on account of the fact that Mr. Billyard, Ms. Charley Austin, Richard Long and Matt Doughty all knew about the existence of the phone.

189. We heard from Mr. Sells that he and the claimant were friends, however he made disparaging remarks about the claimant in his witness statement, He implied the claimant lacked initiative, he said that Shane would not even get a "paper clip without telling him about it... "So given his failure to report the matter to him he must have intended to steal the phone.''

190. The claimant expressed the view that he considered this? remark demeaning and unprofessional, we find that this did not reflect the reality of the claimant having a managerial role in which he had to make daily decisions on behalf of the respondent. The claimant in his evidence, which we accepted, stated that he was accountable for items of considerable value which passed through the depot daily,

191. However, both Ms. Rolf and Mr. Sells immediately treated the claimant as a suspect. The claimant was not a warehouse worker, he was a manager in a responsible position. Mr. Willet noted that he had "never taken this sort of disciplinary action against a manager before", yet the claimant was not treated in accordance with his position by his colleagues. Before asking him and establishing whether he had the I- phone, and in the absence of the claimant having the phone, establishing that the item was missing, there was a discussion of stopping and searching him, although this did not take place as security advised against this approach.

192. Instead, the office in which he worked was searched and CCTV footage was collected of him without his knowledge or consent. Having applied the decision in Shamoon we find that the claimant established that by reason of the act or acts complained of a reasonable worker might take the view that they had thereby been disadvantaged in the circumstances in which they had thereafter to work or on account of dismissal.

193. In Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL the employee must establish that by reason of the act or acts complained of a reasonable worker might take the view that they had thereby been disadvantaged in the circumstances in which they had thereafter to work or on account of dismissal.

194. We accept that the claimant was entitled to come to this conclusion, and we find that this amounts to less favourable treatment.

The Tribunal will decide whether the claimant was treated worse than someone else would have been treated, there being no material difference between their circumstances and the claimant's.

195. We first considered whether the claimant had a comparator which he could refer to. Although the claimant sought in submission to rely upon Mr. Doughty, who is a white male who Mr. Sells stated was initially also have considered to be a suspect, we noted that Mr. Doughty lacked the claimant's seniority and he also had not been provided with the phone. We also heard that Mr. Doughty had been suspended for gross misconduct, for some other reason, and had subsequently resigned. We had no information about Mr. Doughty and the reason that he was suspended. It was apparent that the claimant's representative was unaware of Mr. Doughty and his circumstances and had not advanced him as a comparator. For all of the reasons we have set out here, we did not consider Mr. Doughty to be an appropriate comparator as we had insufficient information concerning him.

196. We accordingly considered a hypothetical comparator. In our view this was a white male or female who was of the same seniority as the claimant, who had worked in the organization for two or more years, whom Mr. Sells regarded as in his view a friend. We consider that Mr. Sells would not have treated a hypothetical comparator in that way, he would have been less willing to believe that they would throw away a career which had a level of responsibility, job

security and which offered the possibility of advancement on account of his desire to steal an I-phone.

197. We find that he would have been less willing to "think the unthinkable." of a hypothetical white male or female? comparator of similar seniority. We find that the explanation given by Mr. Sells for not simply confronting the claimant and asking for the phone is that he treated the claimant differently than he would have treated a hypothetical comparator. Whether or not his thought process was unwittingly he brought into a negative stereotype, which considered that the claimant as a black manager, was more likely than another manager who was white to act dishonesty and give in to temptation to steal an item of comparatively low value compared to the loss of a career and reputation.

198. We consider that Mr. Willet was insufficiently critical, he failed to stand back, and consider whether the explanation advanced by the claimant was more probable than not, that is that he had insufficiently prioritized the matter, and had been very busy on the 18 November dealing with pressing problems of the day.

199. He accepted that there was no evidence of the claimant returning the item to the depot on 19 October 2021, however he did not question why the claimant had not been given the opportunity to view the CCTV requested. We also consider that he made much of the condition of the bag, and failed to explain why he did not accept Charley Austin's evidence of its condition.

200. He also did not consider whether the claimant might have to answer questions concerning his competency rather than jumping to the conclusion on scant evidence that in the absence of an explanation the claimant must be acting dishonestly.

201. We find that he readily accepted that the claimant intended to steal. Accordingly, we find that the claimant was treated less favourably on account of his race. We consider that in coming to this decision Mr. Willet also adopted a stereotypical view of the claimant.

202. We find that instead he adopted the flawed investigation, which was tainted by Mr. Sells' stereotyping of the complainant. We find that the procedure that was adopted by Mr. Miranda did not cure the flaws.

203. Where there was nobody in the same circumstances as the claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated. We have decided that the answer to this is yes for the reasons given above.

a. If so, was it because of protected characteristic? We have decided that the answer is yes, the claimant is a black male of African Caribbean descent and because of this protected characteristic the claimant was stereotyped.
b. Did the respondent's treatment amount to a detriment?
c. We say that the answer to this is yes, the detriment was being dismissed following an unfair procedure, in which the respondent treated the claimant differently from the outset as we have set out above. Although we were not able to find a comparator, we noted that the treatment was materially different to the approach adopted towards Mr. Billyard. Mr. Billyard who was seen on video was asked by Ms. Rolfe what had happened to the phone, on his confirmation that he had given it to the claimant the respondent chose not to engage in a conversation with the claimant, this was very different to the treatment afforded to Mr. Billyard,
d. In respect of the decision to dismiss we find that the respondent did not consider whether there was some alternative explanation for the claimant's action and whether it may have decided that some other disciplinary action short of dismissal was appropriate. We find that the approach adopted by the respondent, whether they were aware of it or not was on account of the claimant's race.

204. We find that the claimant's claim for unfair dismissal and race discrimination was well founded.

Employment Judge Daley

Date: 16 November 2023

Sent to the parties on:
17 November 2023

For Secretary of the Tribunals

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