EMPLOYMENT TRIBUNALS

Claimant: Mr Sukhvinder Sanghera

Respondent: Royal Mail Group Ltd

Heard at: Birmingham remotely by video **On:** 18 and 19 October 2023
and on 3 November 2023 (without parties)

Before: Employment Judge Battisby (sitting alone)

Representation

Claimant: Mr M J Lynch, trade union representative
Respondent: Mr R Chaudhry, solicitor advocate

RESERVED JUDGMENT

1. Upon the claimant requesting its withdrawal, the claim of automatic unfair dismissal and/or detriment by reason of trade union membership or activities is dismissed.

2. The complaint of unfair dismissal is well-founded. The claimant was unfairly dismissed by the respondent.

3. The claimant caused or contributed to the dismissal by blameworthy conduct and it is just and equitable to reduce any compensatory award payable to the claimant by 20%.

4. It is just and equitable to reduce any basic award payable to the claimant by 20% because of the claimant's conduct before the dismissal.

5. The question of remedy will be heard on a date to be fixed with a time estimate of one day and notified to the parties.

REASONS

1. This claim for unfair dismissal was listed for two days. At the outset of the hearing, it was agreed there would be only enough time to hear the evidence and submissions on liability, contribution and *Polkey,* and that the judgment would need to be reserved.

2. I received a large file of documents (259 pages), a witness statement for the claimant (55 pages, 533 numbered paragraphs) and 2 witness statements for the respondent by:

   2.1. Colin Gardner, the dismissing manager (5 pages, 41 numbered paragraphs)
   2.2. Chloe Thomas, the respondent's manager on their national appeals panel (4 pages, 29 numbered paragraphs)

3. In addition, Mr Chaudhry produced a chronology and reading list and a summary of the relevant law, and the claimant produced a remedy file of documents. It was not necessary to read this file, though I note the claim is for reinstatement, or alternatively a substantial amount of compensation in excess of £42,000, but the statutory cap appears not to have been applied.

4. The evidence was only completed at 15.55 on the afternoon of the second day. It was agreed written closing submissions would be exchanged and sent to the tribunal within 7 days and I would deliberate and write my judgment without the need for any further submissions or a hearing.

5. Hereafter, documents will be referred to by their page number in the large file of documents.

The issues

6. Whilst I was reading into the case for the first two hours of day one, the parties were able to agree the issues and I set them out below. In my conclusions, I explain why, since the hearing, I have decided to reframe issues (iii) – (vi) below into one composite issue as set out in my conclusions (para. 76 below).

Unfair Dismissal

i. What was the reason for the dismissal? The Respondent asserts misconduct, which is a potentially fair reason. Was the misconduct the reason for the dismissal? The Respondent says that the details of the misconduct are set out at page 144 of the bundle.

ii. Did the Respondent have a genuine belief in the misconduct? The burden is on the Respondent to show a genuine belief.

iii. Did the Respondent have reasonable grounds for believing in the Claimant's misconduct? The burden of proof is neutral. A dismissal for misconduct will only be fair if, at the time of dismissal:

- The employer believed the employee to be guilty of misconduct.
- The employer had reasonable grounds for believing that the employee was guilty of that misconduct.
- At the time it held that belief, it had carried out as much investigation as was reasonable in all the circumstances of the case.

iv. Did the Respondent undertake such investigations as were reasonable in the circumstances, having regard to its size and administrative resources and in accordance with the principles established in *A v B [2003] IRLR 405*?

v. Was the decision to dismiss a fair sanction, i.e. was it within the band of reasonable responses of a reasonable employer?

vi. Did the Respondent consider alternatives to dismissal? If so, what were they and why where they not appropriate?

Remedy

vii. The claimant seeks reinstatement, alternatively compensation. Remedy to be determined at a separate hearing if relevant.

Contributory Conduct

viii. If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct? The Respondent must prove, on the balance of probabilities, that the Claimant actually committed the misconduct alleged.

Polkey

ix. Does the Respondent prove that, if it had adopted a fair procedure, the Claimant would have been fairly dismissed in any event? To what extent and when?

7. Mr Lynch confirmed the claimant had previously withdrawn the claim of automatic unfair dismissal and/or detriment for trade union membership or activities by a letter dated 18 November 2022. A dismissal judgment had not yet been issued under Rule 52, so I have incorporated it into this judgment.

The facts as found on the balance of probabilities

8. The Claimant was employed as a mailman/driver by the respondent. His terms and conditions of employment (**27-29**) do not state his starting date. The respondent believes it was 28 August 1989, but I accept the claimant's evidence that it was a week before his 18th birthday, namely on 28 May 1989. It is agreed he was dismissed with effect on 6 January 2022, so he had 32 continuous years of service. It is also agreed that for the whole of that time he had never had any disciplinary actions taken against him until the events leading to his dismissal without notice for misconduct.

9. As part of his duties, he was required to collect the mail from the premises of a shop called Unique within the Birmingham University campus. He would collect not only the shop's own mail, but also the mail taken there by people on the campus.

10. In July 2021, Mr Jordan Bachelor, a collector sector manager for the respondent, was made aware of issues (it is not known how) concerning the timing and manner of the collection from Unique by the claimant, so he arranged to carry out an unobtrusive observation of the claimant on 14 July. Later, on 30 July, he reported to the delivery office manager, Mr Ian Rawlings, what he had seen (**125**). His report confirmed the following. The claimant had turned up to collect the mail at about 16.10 and had left at about 16.15. Later he returned and parked outside Unique at 16.48, stayed in his vehicle and then left again at 16.50. After that, Mr Bachelor went inside and spoke with the employees present, who confirmed the claimant had collected the mail at 16.15. After that, a director, Mr Adrian Adams, had contacted Mr Bachelor by telephone about complaints from customers regarding the way the claimant had dragged the mail bags down the stairs and from employees about their being rushed by the claimant to get the mail ready by 16.00. On 23 July, another director, Mrs Adams, had telephoned Mr Bachelor to inform him of other issues raised by her staff about the claimant and she said she would send him an e mail about it.

11. According to the claimant's evidence, which I accept, early on 15 July, the day after the observation, the claimant was called to see one of his line managers, Mr Rakim, who told him about a complaint which had led to the observation of him by a manager. The claimant was not told who had made the complaint nor any details. He was told that he had been seen scanning a barcode outside a building. This triggered the claimant to say that Mr Adams of Unique had taken a photocopy of the barcode at their shop and given it to him to use. He explained to the tribunal this had been in order to save him having to enter the building so much during the Covid pandemic. At that time, the claimant had been regularly arriving early due to lack of traffic on the road and, when he returned to the building later, he was able to do the scanning outside. The claimant explained to Mr Rakim that his other line manager, Mr Jas Dhillon, had been made aware of all this and he had approved it, as long as the scanning of the duplicate copy barcode was done near the building. Mr Rakim told the claimant to carry on with the collection duty, but to stop using the duplicate barcode and make sure he went back to Unique at 16.45 to collect the mail. Mr Chaudhry challenged the claimant about the truthfulness of this authorization by Mr Dhillon. However, the respondent had never, it seems, obtained a statement from Mr Dhillon, claiming he had 'left the business'. The fact that the claimant was allowed to carry on as normal after Mr Bachelor's observation and my impression of the claimant's credibility with nothing to counter it, has led me to accept the claimant's version of events here.

12. Later, on 15 July at about 11.15, the claimant was due to collect from a mail box near Unique and, also, was going to use the toilet facility in the same building, as was his usual practice. I find he decided at the same time to call into Unique to check if the complaint about him scanning in his van had been made by them, as he suspected, and whether they had been asked about the duplicate barcode. He wanted to make sure that, if asked, the directors would confirm they had given it to him. His evidence to the tribunal was that he went

in and asked one of the employees, Tracey Lawrence, if he could speak with Adrian or Sarah. She replied they were not in and that she was in charge. He told her why he needed to speak to them and that he wanted them to confirm they had given him the duplicate barcode, if anyone asked, to which she replied she 'wasn't going to lie for' him. He told her he was not asking her to lie, but he was surprised she was seemingly unaware of the duplicate barcode. He says he gave up on the conversation at that point and left. Here there was a good deal of contention between the claimant's version and what the respondent was later told by the Unique staff.

13. On 27 July Mr Bachelor received the e mail from Mrs Adams, one of the owners of Unique, in the following terms (**115**):

> *'This is Sarah Adams from Unique at The University of Birmingham. We have a royal mail collect every day at 4.30pm. Recently one of your employees has been coming in at 4.00 pm asking for mail and End of day reports so he can leave early. Also he came in to my shop and asked one of my staff to lie for him Jf (sic) she was asked by anyone working for Royal mail about what time he collects our mail. Not recently but we've also had a few customers come into the shop when he has collected the mail to complain about the way he just lets it bounce down the steps when taking it to the van. I believe he also has an extra scanning card from our shop to scan at earlier or later times.'*

14. At this point, I record that nobody could produce the service agreement between the respondent and Unique, but it was agreed during Mr Gardner's evidence that the agreement was to collect from Unique at 16.45 with a leeway of 10 minutes either side. The 'End of day report' is a document completed by Unique listing all the items of mail collected. After its completion, the bags of mail are sealed and the report is handed to the mailman, who takes it back to the mail office with the mail. Finally, at each collection, the postman uses their hand-held scanning device (PDA) to scan the barcode located at each location. This tracks the time of each collection and the points of collection on the route taken.

15. On 28 July, the claimant was called in to see Mr Gareth Martin, another delivery office manager. He told the claimant that an allegation had been made about him having asked a customer to be dishonest. In the circumstances, he would be required to work indoors at the delivery office as a precautionary measure while the allegation was investigated. No other details were given and he was told he would have to attend a fact-finding meeting with Mr Rawlings. This was confirmed in letters both from Mr Martin undated (**116**) and Mr Rawlings dated 30 July (**117**). The claimant continued to work on indoor duties from then till his dismissal on 6 January 2022.

16. In an undated letter from Mr Rawlings (**120**), the claimant was invited to the meeting to take place on 4 August and told it was to discuss allegations of '*possible gross misconduct for abusive behaviour to a customer when asking a customer to be dishonest and disregard for correct collection procedures*'.

17. On 30 July, Mr Rawlings met with Mr Bachelor. This is when he reported what he had observed and done on 14 July as recorded in the notes of the meeting (**125-126**) and described above (para. 10).

18. On 4 August, the fact-finding meeting took place involving Mr Rawlings, the claimant and his union representative. Notes of the meeting were made (**127-130**) and the accuracy of these was accepted and signed off by the claimant on 5 August (**130**). The majority of the discussion was about the collection time and scanning the barcode in the van. He accepted he had collected the mail early and had later scanned the barcode in his van. He told Mr Rawlings the customer had given him a duplicate barcode to use and that his manager, Mr Dhillon, had agreed he could use it in the particular circumstances. Towards the end the claimant was questioned and denied asking anyone to lie for him. Of course, this part of the complaint had been about his asking them to lie about the early collection time.

19. On 7 August Mr Rawlings wrote to the claimant (**131**) to say he was unable to make a decision and needed to make further investigations with witnesses.

20. On 9 August, Mr Rawlings met with Ms Lawrence of Unique to discuss the matters raised in the complaint e mail from Mrs Adams. Notes of the meeting were made and signed by her (**132-134**). She said the claimant always came at 16.00 and never scanned the barcode in the shop. She confirmed that they had told their customers that the collection time for their mail was 16.00, so they could ensure their mail was collected on the same day as mailing (**133**). When asked if anyone had ever photocopied the barcode and given it to the claimant, she denied it absolutely (**132-133**). When asked about the lying allegation (**133**), she said he came in at 4pm and asked her to say, if anyone came from Royal Mail asking about what time he left on the final collection, she should say after 16.45, to which she had replied she would not lie for him. She said the claimant had responded to say it would only be a 'white lie'. She said this had made her feel 'uncomfortable and pressured'. She went on to say customers had been told to bring their mail by 16.00, if they wanted a same day collection (**133**).

21. On 16 August, Mr Rawlings sent an e mail to Mrs Adams with a questionnaire for her and her husband to answer in relation to the allegations against the claimant and Mr Adams replied on 18 August (**135-136**). They confirmed the claimant usually came to collect the mail around 16.00 to 16.15 and would return, if not ready, about 10 mins later. They confirmed they did not give permission for this. They accepted they had given him a photocopied barcode to use. They confirmed neither of them had been on the premises when the claimant had allegedly asked Ms Lawrence to lie for him, but that they trusted what she had told them.

22. On 20 August, there was a so-called Step 3 meeting between Mr Rawlings, Mr Johal, another manager, and Mr Kennedy, the union representative. Such a meeting is required to take place after the initial fact-finding by the Conduct Agreement (**98**) to discuss whether the matter should proceed to a formal conduct case or whether lesser steps, such as counselling or training or other informal resolution should be considered. It was mentioned that Mr Dhillon, the manager, whom the claimant said had given him permission to collect early and use the duplicate barcode, had been dismissed and '*would be an unlikely person to interview.'* Notes of the meeting were sent to Mr Kennedy, who returned them on 25 August with a number of amendments (**138-139**). It is not clear if the amendments were accepted or not. In response to the union suggestion that the claimant be simply removed from the afternoon overtime

collections (presumably to keep him away from Unique), Mr Rawlings concluded there were 'too many serious points to consider where SS has been dishonest by scanning and slamming and asking a customer to lie for him'.

23. Scanning and slamming is where a mailman responsible for emptying a mail-box at a particular time, opens the box, scans the code, then closes the box without removing the mail (**201**). The claimant believed this related to mailbox collections only. At a daily huddle on 16 February 2021, reference had been made and recorded in a note to 'boxes scanned as collected' (**111**). Mr Rawlings had tried to suggest in the fact-finding meeting on 4 August that this is what the claimant had done (**128**). The claimant had firmly denied doing so and said he had collected the mail from the shop and taken it back to the office for advance processing.

24. After this meeting, Mr Rawlings decided to pass the case up to Mr Colin Gardner, a more senior manager, to deal with as it involved possible gross misconduct and the potential penalty was beyond his authority. He confirmed this to the claimant in an undated letter (**142**).

25. Mr Gardner received all the investigation papers and considered them. He wrote to the claimant on 9 September inviting the claimant to a formal conduct hearing (**144-145)**. In the opening paragraph he wrote:

> *'Following your fact-finding meeting on 4th August 2021 concerning your alleged use of a duplicate barcode and asking a customer to be dishonest about the time you collected mail. You are now being invited, to a formal conduct meeting to discuss the alleged use of a duplicate barcode and intentional delay of mail by clearing customers mail early and scanning away from the point of collection, also the alleged allegation of trying to get a customer to be dishonest about the time you actually collected the mail.'*

Then he listed the conduct charges as follows (and I have corrected some of the errors in the scanning of this letter in the bundle):

> '*1/ Breach of business standards and failing to follow workplace procedure in that on 14 July 2021 you used a duplicate barcode at Unique.*
>
> *2/ Unexcused delay of the mail by collecting from the customer early and jeopardizing quality of service by moving onto the next collection point, earlier than the advertised collection time*
>
> *3/ Breach of business standards in that you asked the customer at Unique to not tell the truth about the time you collected the mail from the customer which was earlier than the advertised time.'*

He made clear in the letter that the conduct was potentially gross misconduct, which could lead to dismissal without notice. The letter enclosed a guide for employees as to what would happen at the meeting (**147-148**).

26. The disciplinary meeting took place on 24 September and the claimant was accompanied by his union representative, Mr N Lambert. The meeting was short – 30 minutes. Notes were taken (**149-151**). These were agreed and were signed off. During the meeting Mr Lambert confirmed the claimant was not denying the fact he used a duplicate barcode and that he failed to go back at 16.45 to check if there was any remaining mail to collect. However, he made clear the duplicate had been given to him by the customer as had been accepted by Mr and Mrs Adams. Mr Lambert made the point that despite this, Ms Lawrence had still tried to say that the claimant had not been given the duplicate. Mr Lambert suggested the staff at Unique *'have got something against SS and they do not like him'* and further that *'the girls have it in for him'* (**150**). He said it may have been because the claimant had complained about them giving him overweight bags to collect. In mitigation, it was said that the claimant had unblemished service of 33 years, the mail had been advanced rather than delayed, his mother had passed away and he had had some marriage problems. The meeting was closed with no conclusion seemingly reached. The claimant was told the respondent would be in touch. There was no further communication with the claimant until he received a letter from Mr Gardner dated 15 November (**156**) calling him to a continuation of the meeting on 2 December.

27. Prior to that, on 3 November (and the delay from 24 September was not explained), Mr Gardner went to see the Unique staff to question them about the claimant's visit to the shop on 15 July and the 'lying allegation'. First, he spoke with Ms Lawrence. Notes of this meeting were taken and signed off (**152-153**). She was referred to the signed notes of her interview with Mr Rawlings on 9 August (**132-134**). She said they were incorrect in recording that the claimant came to the shop at 4pm and that it had actually been at 11.00am. She accepted he had come in and asked for Adrian or Sarah and that she had said they were out and she was in charge. At that point, she had stated he asked her to step aside and asked if she would lie for him. She said he had used the term 'white lie' a lot in the conversation and had told her that someone had seen him coming into the building early and that he could lose his job. He had asked her to say he had come in on time and, although she refused, he had continued to press her. When he was getting nowhere with her, he had left. She said she had felt uncomfortable and that this was witnessed by two other staff members.

28. Next, Mr Gardner interviewed Ms E Cobley. She confirmed she had overheard the conversation between the claimant and Ms Lawrence and had heard the claimant ask Ms Lawrence to lie for him and say he was there at the right time and that it was only a white lie. Notes were taken which she signed (**154**).

29. Finally, he interviewed their colleague, Ms M Edge. She confirmed the claimant had come into the building and asked Ms Lawrence if he could have a word. She said he had asked if she could tell a 'little white lie' for him about the time he came to collect the mail. She said she had heard Ms Lawrence say she would not lie for anyone. Notes were taken which she signed (**155**).

30. Mr Gardner sent the claimant the three signed notes of evidence with his letter of 15 November. The meeting on 2 December was another short meeting lasting 21 minutes. It was attended by the same people as before. Notes were taken and signed off (**158-159**). The claimant maintained the version of events

as given in his evidence to the tribunal. It is recorded in the notes of this meeting (**158**) that he said he '*went into the company to speak with Sarah or Adrian to ask them about giving me the duplicate barcode. They were not there so I asked Tracey about the duplicate barcode and if she knew that Adrian had given me one. She stated she did not know about it and that she would not lie about it for me. This is where the conversation about lying came in*'. Mr Lambert pointed out the discrepancy in her statement about the time, how she had misconstrued what the claimant had been saying and the staff not liking the claimant. He concluded by referring to the claimant's long and unblemished service, his acknowledgement of errors over the barcode, but nevertheless he had been allowed back on collections after the observation on 14 July.

31. At some point before making his decision, Mr Gardner obtained some further evidence from Mr Rawlings about the claimant's route (**167-168**). I assume this was after the second disciplinary meeting because, at that meeting, the claimant was not challenged by Mr Gardner about his reason for going into the Unique premises and that a mailbox for emptying was nearby. This evidence was not sent to the claimant for his comments, but it seems to have been accepted and been used by Mr Gardner to counter what the claimant had told him and support his finding that the claimant had made a diversion from his route to see the Unique staff on 15 July in order to coerce them into lying for him (**166**). It turned out in the appeal process that Mr Gardner had been misinformed and there was indeed a mailbox to be emptied very close to Unique's premises and that there were toilet facilities used by the claimant in their building (**245**).

32. The respondent relies on two relevant documents, of which Mr Gardner was aware prior to making his decision and which are as follows. However, for the reasons which will become clear in this judgment, I am not persuaded that he paid enough or any attention to them. He said he relied on the HR team to guide him. The claimant accepted that both applied to him and he was aware of them.

33. The first is the Royal Mail Group Conduct Agreement ('**the Conduct Agreement**'), which was made between the respondent and relevant unions (**43-73**).

    33.1. Its Purpose (**45**) is stated to be to '*help and encourage all employees to achieve and maintain standards of conduct including behaviour*' and it aims among other things '*to operate in a way that is supportive and corrective.*'

    33.2. Within the Guiding principles (**45**), it states: '*No employee shall be dismissed for a first breach of conduct except in the case of gross misconduct when the penalty will normally be dismissal without notice or payment in lieu.*' Mr Gardner accepted in his evidence he had not checked this provision.

    33.3. The Guiding Principles also state: '*Employees should make every effort to meet the business standards of conduct and behaviour.*'
    '

    33.4. Gross misconduct is stated (**48**) to relate to behaviour which is '*so serious and so unacceptable, if proved, as to warrant dismissal without notice.*' Examples of gross misconduct are listed and include '*intentional*

delay of the mail.' The list is expressed not to be a definitive one, so there is always discretion.

33.5. There are numerous alternative possible penalties for misconduct including the usual types of warning, warning accompanied by a transfer to another job, suspended dismissal, suspended dismissal with a compulsory transfer and dismissal with or without notice (**48**).

33.6. The procedure for appealing a conduct penalty is set out (**49**) and provides that the appeal is to *'rehear the case in its entirety'* with the possibility of the penalty being revoked or reduced.

33.7. There is a whole section dealing with delay to mail (**49**) and it may be treated in three different categories, namely:

'***Unintentional delay***
Royal Mail Group recognizes that genuine mistakes and misunderstandings do occur and it is not our intention that such cases should be dealt with under the Conduct policy beyond informal discussions for the isolated instance.

Unexcused delay
Various actions can cause mail to be delayed, for example carelessness or negligence leading to loss or delay of customers' mail, breach or disregard of a standard or guideline. Such instances are to be distinguished from intentional delay (see below), although they may also be treated as misconduct and dealt with under the Conduct Policy, outcomes may range from an informal discussion to dismissal.

Intentional delay
Intentional delay of mail is classed as gross misconduct which, if proven, could lead to dismissal. The test to determine whether actions may be considered as intentional delay is whether the action taken by the employee knowingly was deliberate with an intention to delay mail.

Where proven, such breaches of conduct can lead to dismissal, even for a first offence; indeed intentional delay is a criminal offence and can result in prosecution.'

33.8. The Conduct Agreement has further sections containing the Conduct Policy and Conduct Guides as listed in the index **(44**). The Conduct Policy is fully consistent with the Conduct Agreement.

33.9. In the section dealing with Conduct notifications (**58**) the point is made that there has to be sufficient detail to enable the employee to answer the case against him. In the case of delay to mail –

- *'Was the delay intentional, unexcused or intentional? What mail was delayed? When?'*

33.10. Where the dismissing manager comes to a decision to uphold the misconduct charges, it is incumbent on him to set out the evidence in two columns, one supporting and the other not supporting the charge, and to

evaluate the credibility of the competing evidence and explain the reasoning behind their conclusions (**61**). Mr Gardner did not do this.

34. The second document is a guide issued to employees called '**Our business standards -An employee's guide**' (**100-110**). The respondent relies on the following sections:

    34.1. *Security, privacy and trust* (**104**) as to the accurate performance of business performance and the claimant's failure to record the correct collection time.

    34.2. *Service to our customers* (**103**) as to consistent delivery of what the respondent has promised, namely collection at 16.45.

    34.3. *Equality and fairness* (**107**) as to treating customers the way *'we want to be treated ourselves'* and being *'open, honest and polite'* and *'not use inappropriate behaviour or intimidate … customers…for any reason.'*

35. Mr Gardner made his decision and by a letter dated 30 December (**160)** invited the claimant to a decision meeting on 6 January 2022. I understand the meeting was simply to notify the claimant of the decision, which was to dismiss him without notice. He was given the dismissal letter (**162**) enclosing the decision report and deliberations (**163-170**). On the final two pages, Mr Gardner's conclusions on mitigation and why a lesser penalty is not appropriate and his decision to dismiss for gross misconduct are set out.

36. In the dismissal letter, the three conduct notifications were set out in exactly the same wording as at paragraph 25 above (**162**). The decision section in the letter was worded as follows (**170**):

    > *'I have considered whether a lesser penalty would be appropriate, but I do not believe this would correct Mr Sanghera's behaviours. Mr Sanghera was allowed back onto collections after the initial discussion. Mr Sanghera then approached the customer and proceeded to ask them to be dishonest about the time he collected the mail. I believe that the overall actions of Mr Sanghera qualify as Gross misconduct. This could affect Royal Mail's business and brand image with our regulator, shareholders, and customers, putting quality of service at risk by intentionally delaying customers mail, leading to customer complaints and compensation payments being made. Mr Sanghera's actions have led to a fundamental breakdown of trust and confidence in his ability to discharge his duties within Royal Mail and therefore warrant dismissal without notice.'*

37. In his evidence, Mr Gardner accepted there had been no evidence of any actual delay to mail and that no complaints had been received from any quarter about delayed mail. His case was that there was potential delay to the mail in that any mail taken to Unique after the claimant had made his final collection, would have to await collection till the following day. On 14 July, this would have meant the period between 16.15 and 16.35 (allowing for the 10 minutes leeway granted). The other scenario would have been if the claimant had left mail behind, but he conceded the potential for that in this case was low. He accepted that the Conduct Agreement did not cover cases of potential delay

and that he had not checked this before drafting the conduct notifications or making his decision.

38. He accepted also there was another error in the drafting of the conduct notifications. The second charge related to ‘unexcused’ delay rather than ‘intentional’ delay. He said he had meant it to say ‘intentional’ as that was his belief and he had referred to ‘intentional delay’ in the first paragraph of the letter (**144**). He accepted the complaint from Unique did not relate to delay to the mail. As a result, he said he should have worded the second charge by substituting the words ‘potential delay’ of mail rather than ‘unexcused delay’.

39. In addition, he said he should have worded the decision section of the dismissal letter differently by substituting the words ‘intentionally delaying customers mail’ with ‘potentially delaying customers mail.’

40. He maintained his belief that the claimant’s conduct had been intentional and that this caused the potential delay. He was aware of the seriousness of a charge relating to intentional actual delay to the mail and how this can lead to a criminal prosecution. He gave the example of where mail has been hoarded at the employee’s home. He agreed that, even if there had been proven actual delay to mail in this case, the conduct notification could have been for ‘unexcused delay’ by breaching or disregarding a business standard, and that that could not have led, on its own, to the claimant being dismissed due to it being a first offence and not in the category of gross misconduct.

41. Finally, Mr Gardner accepted that, if the claimant had admitted he had asked the Unique staff to lie for him and had given a reasonable excuse, such as being under pressure about the possibility of losing his job, it would have led to a different outcome. He suggested either a suspended dismissal or a disciplinary transfer to another office would have been appropriate.

42. The claimant appealed against dismissal and the hearing of it was arranged to take place on 25 March 2022 by video before the National Appeal Panel (‘**NAP**’). A letter dated 10 March 2022 confirming this and enclosing the appeal bundle of documents was sent to the claimant and copied to his union representative, Mr Steve Halliwell (**174**). The letter confirmed there was an opportunity to call witnesses to give evidence.

43. On 10 March, Ms Angela Steel, the NAP Coordinator, wrote to Mr Adams at Unique to ask if the three employees, who had been interviewed previously, would attend the hearing by video or telephone (**177**). On 11 March, Ms Steel sent an e mail to the Panel members with a copy to Mr Halliwell to inform them that Mrs Adams had been in touch to say none of the witnesses wanted to attend and felt their statements were enough. She quoted Mrs Adams as saying: *‘they did not realize that it would go this far & did not want to get anyone into trouble nor would want Mr Sanghera to lose his job if this was the case. They were approached & asked questions by Royal Management, they didn’t raise a complaint themselves.’*

44. On 22 March Ms Steel requested Mr Rawlings to provide some delivery route information and this was provided (**179-185**).

45. The NAP consisted of Mr Peter Thompson, chair, Mr Mick Kavanagh, union appointee, and Miss Chloe Thomas, Royal Mail appointee, who gave evidence to the tribunal. She told me he was an external panelist. Mr Chaudhry, who acts regularly for the respondent, said Mr Thompson is a retired solicitor, who often sits on such appeals.

46. Mr Halliwell's submissions on behalf of the claimant were sent in prior to the hearing and addressed the three conduct notifications (**188-189**) and then dealt with the conflict between the claimant and Unique staff over the heavy mail bags, loss of trust and the claimant's good record (**189-190**). He pressed the NAP to revoke the dismissal.

47. At the hearing notes were taken. Firstly, they interviewed the claimant with Mr Halliwell (**196-214**). This lasted from 09.41 to 11.19 and was most thorough. After this they interviewed:

    - Mr Gardner from 11.36 to 12.30 (**214-224**)
    - Mr Rawlings from 13.18 to 13.58 (**225-233**)
    - Mr Bachelor from 13.59 to 14.22 (**234-238**)
    - Mr Simon Turley (the local union representative who assisted the claimant in the fact-finding meeting with Mr Rawlings) from 14.31 to 14.51 (**239-243**)

48. Following the appeal Mr Halliwell made an additional submission including a picture of the mailbox the claimant was due to empty on the morning of 15 July and its close location to the steps leading to the building housing Unique and the toilets he was going to use (**245-246**). This was to counter Mr Rawlings' allegation seemingly accepted by Mr Gardner that the claimant had gone off route to confront the Unique staff after he had been made aware of the complaint. This was forwarded to the NAP members.

49. The NAP did not send out its decision until a letter dated 27 July 2021 (**249**). The letter enclosed the Decision Document (**250-259**). The appeal was dismissed by a majority of the three members. The majority decision is set out at paragraphs 30-34 (**257-258**) and Mr Kavanagh's minority decision is at paragraph 35 (**258**). At the end the NAP noted its concern that everyone had been placed at a disadvantage by the non-attendance of the Unique staff members and that a repeat of this kind of situation should be avoided if at all possible in the future.

50. The majority decided that the conduct notification relating to the use of the duplicate barcode should not have been made as its use had been supported by the customer. Accordingly, the decision was based on the other two notifications.

51. As to the second relating to the delay of mail, they decided that, whilst there was no proof of any actual delay to the mail, it *'must have been inevitable that, if [the claimant] had not returned to check at 4.45pm, any mail left there would have remained until the next day and must have been delayed.'* They accepted there was no evidence of any mail having been left behind on the day in question (and Mr Bachelor had not checked), nor had there been any complaint from the customer. However, they determined that delay was an inevitable

consequence. Their decision clearly related to the conduct notification of 'unexcused delay', and not 'intentional delay'. This is confirmed by the title page of the Decision Document (**250**) and the opening sentence of the decision (**257**) where they refer to *'Turning to the Notifications',* which they had set out at paragraph 12 (**252**).

52. As to the third relating to asking the customer to lie about the time the claimant collected the mail, they did not find the claimant to have been credible and upheld the charge. They decided it would be *'unthinkable that [Ms Lawrence would commence a conversation by asking [the claimant] "Do you want me to lie for you?" unless he had already introduced the topic. He had asked her to lie'* (**257**). They agreed with Mr Gardner that asking a customer to lie was *'clearly a breach of business standards.'* They accepted Mr Gardner was entitled to treat this as a breach of trust and it was a reasonable response to have transferred the claimant to indoor duties once it was suspected he had lied.

53. They noted they took his long service and clean record very seriously, but that *'to approach a customer with a suggestion that they lie is an extremely serious offence.'* (**258**).

54. The claimant completed the ACAS early conciliation between 18 March and 28 April and presented his ET1 on 9 May 2022.

Submissions

55. After the hearing I received written submissions from the claimant (19 pages) and the respondent (9 pages). These have been most helpful and I am grateful to both representatives. I had already received Mr Chaudhry's submissions on the law in the document already referred to above. I will not recite the submissions here, but have taken them into account in my conclusions.

The law

56. Under section 98 of the Employment Rights Act 1996 ('ERA'), it is for the respondent to show the reason the dismissal and conduct is a potentially fair reason for dismissal. Under section 98(4) ERA, the determination as to whether the dismissal is fair or unfair having regard to the administrative resources of the respondent a depends on whether 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 the dismissing the employee, and be shall be determined in accordance with equity and the substantial merits case.

57. In most unfair dismissal cases involving misconduct, the tribunal will consider three questions following the case of *British Home Stores v Burchell* [1978] IRLR 379, in which they were set out, namely whether:

   a) the employer had a genuine belief in the employee's guilt
   b) that belief was formed on reasonable grounds
   c) the employer carried out a reasonable investigation in forming that belief

58. Tribunals are not obliged to follow these guidelines, although they are used in virtually every misconduct case.

59. The investigation has to be a reasonable one. In *W Weddel & Co Ltd v Tepper* [1980] IRLR 96 at 101 per Stephenson LJ, it was held that employers:

    20.. 'must act reasonably in all the circumstances, and must make reasonable inquiries appropriate to the circumstances. If they form their belief hastily and act hastily upon it, without making the appropriate inquiries or giving the employee a fair opportunity to explain himself, their belief is not based on reasonable grounds.'

60. Further, the investigative exercise that was undertaken must be considered as a whole: *Shrestha v Genesis Housing Association Limited* [2015] IRLR 399, where Richards LJ held:

    23 'To say that each line of defence must be investigated unless it is manifestly false or unarguable is to adopt too narrow an approach and to add an unwarranted gloss to the Burchell test. The investigation should be looked at as a whole when assessing the question of reasonableness. As part of the process of investigation, the employer must of course consider any defences advanced by the employee, but whether and to what extent it is necessary to carry out specific inquiry into them in order to meet the Burchell test will depend on the circumstances as a whole'.

61. The Court of Appeal in *Sainsbury's Supermarkets v Hitt* [2003] IRLR 23 clarified a point, namely that the tribunal must not substitute its own view as to what was reasonable or adequate in terms of the investigation. This means the need to apply the objective standards of the reasonable employer applies as much to the question whether the investigation into the suspected misconduct was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss for the conduct reason.

62. Following the Court of Appeal decision of *Taylor v OCS Group Ltd* [2006] IRLR 613, there is a general acceptance that procedural defects in an initial disciplinary hearing may be remedied on appeal. This case made it clear that what matters is not whether the internal appeal was technically a rehearing or a review, but whether the disciplinary process as a whole was fair. The task of the tribunal is to apply the statutory test and, in doing so, they should consider the fairness of the whole disciplinary process. If they find that an early stage of the process was defective and unfair in some way, they will want to examine any subsequent proceeding with particular care, but their purpose in so doing will not be to determine whether it amounted to a rehearing or a review but to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision maker, the overall process was fair, notwithstanding any deficiencies at the early stage.

63. To be clear and reiterate the point, I remind myself of the long-standing principle of law that, when determining whether dismissal is a fair sanction, the tribunal must not substitute its own view of the appropriate decision for that of the employer: *Rolls-Royce Ltd v Walpole* [1980] IRLR 34).

64. There is an area of discretion within which management may decide on a range of outcomes, all of which might be considered reasonable. It is not for the Tribunal to ask whether a lesser sanction such as a final written warning would have been reasonable, but whether the dismissal was reasonable: *British Leyland v Swift* [1981] IRLR 91. In *Tayeh v Barchester Healthcare Ltd* [2013] IRLR 387 it was held the tribunal had erred in finding that Ms Tayeh's dismissal had not been within the band of reasonable responses; it had substituted its own views as to the seriousness of the charges for those of the employer. In this case the EAT held that where an employee faced disciplinary proceedings relating to more than one charge, a tribunal must consider whether the employer regarded the charges as being cumulative or standalone. If the charges were cumulative, in the sense that they formed a composite reason for dismissal, it would be fatal to the fairness of the dismissal if any significant charge were found to have been taken into account without reasonable grounds.

65. It is well-established law that the function of the Employment Tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted; *Iceland Frozen Foods v Jones* [1982] IRLR 439.

66. With regard to the *Polkey* issue, the respondent relies upon the case of *Polkey v AE Dayton Services Ltd* [1987] IRLR 503 and submits that the claimant has not cited any procedural failings but, even if it is found the respondent failed to follow a fair procedure, any such failure was insubstantial and would not have made any difference to the outcome and the claimant would still have been fairly dismissed. Helpful guidance as to the approach to be taken by tribunals was given in the case of *Software 2000 Ltd v Andrews* [2007] IRLR 568.

67. In addition, Mr Chaudhry drew my attention to further authorities, which I deal with here only so far as they are relevant. It is for the employer to show that conduct was the reason for dismissal. For the purposes of establishing the reason for dismissal, the employer only needs to have a genuine belief in the employee’s misconduct; the belief does not have to be correct or justified: *Farrant v Woodroffe School* UKEAT/1117/96.

68. The question is not whether the individual acts of misconduct found by the appeal panel individually, or indeed cumulatively, amounted to gross misconduct. Rather, it is whether the conduct in its totality amounted to a sufficient reason for dismissal under s 98(4): *Governing Body of Beardwood Humanities College v Ham* UKEAT/0379/13).

69. He reminded me of *Foley v The Mail Office* [2000] IRLR 827 about the tribunal not substituting its own view for that of a reasonable employer and upholding the ‘band of reasonable responses test’.

70. He referred me to *Sandwell & West Birmingham Hospitals NHS Trust v Westwood* UKEAT/0032/09 as to the meaning of ‘gross misconduct’. There it was held that it involves ‘either deliberate wrongdoing or gross negligence’ (para 113). There would need to be a deliberate flouting and wilful disregard of contractual provisions.

71. .The remaining authority relied upon is *Royal Mail Group Plc v Adam & Stephen* UKEATS/0056/06. However, that was a case concerning what was then described as 'wilful delay' defined as 'deliberately holding up the delivery of mail'. That would be the same thing as 'intentional delay of mail' in this case where both parties accept it could lead to summary dismissal for gross misconduct.

Conclusions

72. I will now give my judgment on each of the issues identified above using the same numbering.

<u>Unfair dismissal</u>
<u>Issue (i)</u>

73. The reason for dismissal was misconduct. The respondent relies on the three conduct notifications (**144**) set out at paragraph 25 above. I will now refer to them as charges.

74. I am satisfied that the misconduct in the mind of Mr Gardner which caused the dismissal was a combination of the three charges. He said in his decision report (**170**) that he believed the '*overall actions*' of the claimant '*qualify as gross misconduct*'. He reiterated this in his evidence.

<u>Issue (ii)</u>

75. Mr Gardner confirmed his belief that the three charges were made out and that they were the reason for the claimant's dismissal in the dismissal letter of 6 January 2022 (**162**). His reasoning behind the decision was set out in the report which accompanied the letter (**163-170**). I am satisfied his belief in the claimant's misconduct was genuine.

<u>Issues (iii), (iv), (v) and (vi)</u>

76. These issues can be conflated as they are constituent parts in answering the question of reasonableness and ensuring the statutory wording under s98(4) ERA is followed. This cannot be controversial, so I have not felt it necessary to seek any further submissions from the parties. Their existing submissions are more than adequate to cover what needs to be considered. This is now how I put the overall issue:

If the reason was misconduct, did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the claimant? The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case. It will usually decide, in particular, whether:

- *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.*

77. The first time the claimant was aware of any possible misconduct charge was on 28 July 2021 when he had the meeting with Mr Martin, who told him an allegation had been made about him having asked a customer to be dishonest. Shortly after that, he received an undated letter from Mr Martin to say he was being transferred to indoor duties, while they investigated an allegation he had asked a customer to be dishonest for him. Around the same time, he received another undated letter from Mr Rawlings inviting him to a fact-finding meeting on 4 August to discuss 'possible gross misconduct for abusive behaviour to a customer when asking a customer to be dishonest and disregard for correct collection procedures.' He gave his explanation, which remained consistent throughout the disciplinary process, namely that he collected the mail early at about 16.15 together with the 'End of Day report', meaning there was nothing more to collect, and he took the mail back to the office for processing and then returned at 16.45 to scan the barcode outside Unique's premises. Mr Adams of Unique had given him a duplicate barcode to use and was content with the arrangements. No mail had been left behind. He denied asking Ms Lawrence to lie for him. He confirmed his manager, Mr Dhillon, had authorized the early collection arrangements including the use of the duplicate barcode.

78. Nobody was able to give any evidence about when Mr Dhillon had left the respondent's employment or the circumstances, but it was clear no effort was ever made to interview him. This was clearly a failure, especially as the respondent strongly challenged the claimant's evidence about the permission given to him by Mr Dhillon. Even if Mr Dhillon had been dismissed by the respondent (as was recorded in the Step 3 meeting -**138**), it would have still been reasonable to make some attempt to find out whether he had in fact authorized what the claimant alleged. Mr Gardner did not mention this alleged authorization in his deliberations within the decision report (**166**), so either he overlooked it, chose to ignore it or disbelieved the claimant. This was a crucial part of the claimant's defence to the first two charges and it was negligent of Mr Gardner and a failure of procedure not to have treated the point more seriously and carefully. If he did not believe the claimant, he should have explained why.

79. At the Step 3 meeting, Mr Rawlings took the view, and recorded, that this was a case of the claimant having been dishonest 'by scanning and slamming' and asking a customer to lie for him (**139**). As to the former, he did not explain how or why he discounted the evidence of Mr and Mrs Adams about the scanning, and, of the claimant, regarding Mr Dhillon's authorization, nor regarding the disputed allegation by Ms Lawrence. He appears to have made quite a peremptory decision to pass up the case as potential gross misconduct at this stage of the process.

80. Mr Gardner then took on the case. He considered the documents sent to him by Mr Rawlings and decided to hold a formal disciplinary meeting to consider the three charges, which he drew up (**144**). Prior to this there had never been any allegation made about the claimant having delayed the mail. It was about arriving early, scanning the barcode away from the collection point, and asking the customer to lie about the time of collection, if asked. Mr Gardner accepted, when giving his evidence, that the charge in relation to unexcused delay of the mail was incorrect and that he should have referred to potential delay, as he

had no proof of any actual delay nor any complaint of delay. He agreed the Conduct Agreement does not cover potential delay and that, if any kind of delay to the mail is being alleged, particulars must be given. He should have taken more care to consider the relevant provisions of the Conduct Agreement and the Business Standards before drafting the conduct charges. To express the charge incorrectly and without evidence to support it was a substantial failure of procedure.

81. At the disciplinary meeting with Mr Gardner on 24 September 2021, the claimant admitted he had used a duplicate barcode and that he had failed to go back at 16.45 to check if there was any remaining mail to collect (**149**). However, he had previously made clear the duplicate had been given to him by the customer and this had been confirmed by Mr and Mrs Adams. Mr Gardner was aware of this from the questionnaire that had been completed by them for Mr Rawlings as part of the investigation (**136**). Further, the claimant had argued he had been given permission by Mr Dhillon. Rather than accept the admission as a potential breach of business standards and consider the defence and the mitigation and, notwithstanding the lack of evidence, Mr Gardner must have decided to persist with the charge of unexcused delay to the mail, given it was maintained later as part of the reason for dismissal. However, there was no discussion about this charge at the meeting. This was contrary to the Conduct Guide relating to conduct meetings (the '**Conduct Guide'**)(**60**) In addition and contrary to the Conduct Guide, he did not summarize the main points at the end, tell him what the next steps would be or that he would need to interview witnesses, nor what the timescales were. The claimant was then left not knowing what was happening next until 15 November when he was called to the second disciplinary meeting on 2 December. Again, this all contributed to an overall unfair process.

82. In this interim period, Mr Gardner interviewed Ms Lawrence and the two other members of staff at Unique about the third charge. Had he properly discussed the third charge with the claimant at the disciplinary meeting, he could have double-checked the claimant's side of the story, so he would have been able to put that to the witnesses. Had he even just told the claimant that he needed to see the witnesses before making his decision, that would have alerted the claimant to make any points he wanted putting to them about his defence.

83. When Mr Gardner interviewed Ms Lawrence, he was by then aware that Mr and Mrs Adams had corroborated the claimant's evidence about having been given the duplicate barcode. He knew that Ms Lawrence had previously told Mr Rawlings that nobody had ever copied or given the barcode to the claimant or any other mail worker. Despite this, he did not ask whether she would like to reflect on that statement and correct it. He did not question why she had made such an outright denial, when she could have simply said to her knowledge, nobody had given him a copy. Also, she said she had no idea why the notes of her interview with Mr Rawlings had recorded her as saying that, when he asked her to lie, the claimant had come to the shop at 4pm. She confirmed it was actually at about 11am, yet she had signed those notes as true. Even though he had not asked the claimant for any more points of defence on this charge, he was aware of the points the claimant had made to Mr Rawlings, and of a possible motivation for Ms Lawrence to lie or misrepresent the position. Accordingly, Mr Gardner should have asked her why, if the claimant knew he

had been seen coming to collect the mail at 16.10 on 14 July, he was nevertheless asking her to lie about the time he arrived. It would have been illogical and pointless. He might have asked her whether she felt she might have been confused about what was said or if she had failed to recall the conversation properly. He could have put the claimant's case to Ms Lawrence that he had been asking for Mr and Mrs Adams, which she now accepted, and she had asked why, whereupon he had replied it was so they could say he had been given a copy of the barcode. He could have then asked whether she thought the claimant was asking her personally to verify this to which she might have responded by saying she would not lie about it. Whilst I appreciate Mr Gardner was dealing with customers and had to be careful when involving them in a disciplinary process, it is clearly envisaged that this is bound to happen and, indeed, the NAP Coordinator tried to get them to attend the actual appeal hearing to give evidence and the NAP made it clear such attempts should be made so as not to disadvantage anybody. Finally, Mr Gardner asked her no questions about whether the claimant had complained to them about overloading the mail bags, so did not test the possibility they may have held a grudge against him over this. All these failures on the part of Mr Gardner were serious and shut out what might have been vital evidence in the claimant's defence or mitigation. It seems Mr Gardner's only concern was to get her short evidence that the claimant had asked her to lie and that it had upset her. The same went for his interviews with the other two staff members. They were each asked a leading question and were not asked to recount in their own words exactly what they had overheard. Neither were asked anything about the overweight bags or possible grudge.

84. The next disciplinary meeting on 2 December 2021 was similar to the first in the way the Conduct Guide was not followed. Mr Gardner opened it again by asking the claimant, if he had asked anyone to lie for him about the time at which he collected the mail. The claimant repeated what he had said to Mr Rawlings in the fact-finding meeting and how the conversation with Ms Lawrence had gone. Again, there was no discussion at all about the second charge regarding delay to the mail, which is remarkable. No new ground was covered and the meeting was very short. There was then a further delay until the claimant was invited to the decision meeting on 6 January 2022.

85. After this disciplinary meeting Mr Gardner must have obtained some evidence from Mr Rawlings, which he used to support his finding that the claimant had gone back to the Unique premises on the morning of 15 July to coerce the staff into lying for him (**166**). This evidence was never put to the claimant. Had it been, the claimant would have explained what was in his union's second submission to the NAP (**245-246**). This showed the claimant was telling the truth about his route and his usual use of the toilet facilities there. It is clear Mr Gardner had taken this evidence to cast doubt on the claimant's credibility.

86. The meeting on 6 January 2022 was simply to read out the decision. He had decided to dismiss the claimant without notice. In writing his report to go with the dismissal letter, the Conduct Guide (**61**) requires the dismissing manager to consider the entire evidence, list each of the issues and conduct charges and, in one column list the evidence in support of each charge, and in another column list the evidence that does not support. Where the evidence is contradictory, the manager must evaluate the credibility of the information received and record their reasoning (**61**). The fact that he did not do any of

this, or do it sufficiently, may well be a factor in how he did not properly weigh the evidence and came to such confused and illogical conclusions in his recorded decision (**170**).

87. The decision letter (**162**) sets out the charges and says the decision result is 'dismissal without notice'. It encloses the report explaining how the decision was reached by Mr Gardner. His evidence to the tribunal was that the dismissal was not due to one particular charge, but was on the basis of a combination all three charges which he had upheld. The decision recorded at the end of the report (**170**) deals first with the third charge and makes a finding that the claimant asked the customer to be dishonest about the time he collected the mail. It then goes straight on to say: '*I believe the overall actions of [the claimant] qualify as gross misconduct. This could affect Royal Mail's business and brand image with our regulator, shareholders, and customers, putting quality of service at risk by intentionally delaying customers mail, leading to customer complaints and compensation payments being made. Mr Sanghera's actions have led to a fundamental breakdown of trust and confidence in his ability to discharge his duties within Royal Mail and therefore warrant dismissal without notice.'*

88. First, he never properly explained why he disbelieved the claimant about the third charge other than to say the evidence of Ms Lawrence was corroborated by two other staff members (**169**). He was clearly influenced by the fact he thought the claimant had been lying about his reason for going to Unique on 15 July. It turned out his evidential basis for that conclusion was wrong. I do not believe he properly weighed the evidence and competing versions nor gave due to consideration to the claimant's case that they had a grudge against him because he had not completed a sufficiently thorough investigation as outlined already above.

89. Next, he refers to the claimant's '*overall actions*' by which he intended to bring the first and second charges into the equation. The first charge was so weak in the circumstances, it was removed on the appeal. The second charge of 'unexcused delay' to the mail and his illogical and incorrect finding there was 'intentional delay' to the mail was wrong as explained above (at para 80).

90. It is not clear at all as to what causation he is alleging for the respondent's business and brand image being possibly affected in the way he sets out. Was it because of the third charge? If so, it is difficult to see how that would have had any impact on the regulator or shareholders and it would really only be of concern as a private issue between the respondent and Unique. However, there was no evidence of Unique being overly concerned – they said expressly to the NAP Coordinator as set out in her e mail to the panel (**178**) they did not want the claimant to lose his job and, strangely, that '*they didn't raise a complaint themselves*' inferring to me that Mr Bachelor may have encouraged them to send the complaint e mail of 27 July 2021 (**115**). Although expressed badly from a grammatical point of view, it would appear he attributed the cause of *'putting quality of service at risk'* to '*intentionally delaying customers mail'.* The claimant was never charged with this and I do not see how Mr Gardner could have come to such an unfair conclusion. On reflection, in giving his evidence, he has rightly confirmed it could only ever have led to a potential delay of mail and that this could not come within any category of delay to mail as set out in the Conduct Agreement. No customer complaints were made

about delay to mail and no claims for compensation were made. I find this was Mr Gardner simply exaggerating the seriousness of the charges to justify a finding of gross misconduct. The breakdown in trust could not have come about as a result of the first two charges. The claimant had been allowed to carry on working indoors right up to his dismissal. It was all about the third charge and, for all the above reasons about the lack of clear evidence and failure to properly investigate and weigh the available evidence, I do not find it was a reasonable conclusion to reach. Mr Gardner seemed all too keen to come to that conclusion and the notion that he took into account the claimant's length of service and clean record is not born out by the lack of care and attention in his whole approach. The claimant deserved much better.

91. It follows from the above that I do not believe the respondent conducted such investigations as were reasonable in all the circumstances. I have taken into account the principles established in *A v B [2003] IRLR 405.*

92. The nature and seriousness of the charges against the claimant, which, it was said from the outset, could have led to his dismissal for gross misconduct warranted a thorough and rigorous investigation and a reasonably expeditious process. There were the gaps and errors in the initial investigation, the laying of the charges and the further investigations, which I have pointed out already. The process was inexplicably delayed. It started on 14 July with Mr Bachelor's Observation and questioning of the Unique staff. It did not conclude until the decision was relayed to the claimant on 6 January 2022. Within that timescale there were significant gaps especially between the fact -finding meeting on 5 August 2021 and the invitation to a conduct meeting issued on 9 September 2021 with little having happened in that time to justify the delay. The same goes for the period from the first disciplinary meeting on 24 September 2021 and the next on 2 December 2021, during which time the claimant had been left in complete limbo, made to work indoors and not knowing what the next step would be with his job in the balance after 32 years unblemished service. Even after that second hearing he had to wait almost another month till 6 January 2022 for the decision to be communicated. It is not necessary to prove any actual prejudice caused by the delay. The question whether an employer has carried out such investigations as is reasonable in all the circumstances necessarily involves a consideration of any delays. In certain circumstances, a delay in the conduct of the investigation might of itself render an otherwise fair dismissal unfair. In this case, the Unique staff were not interviewed for the purposes of taking a statement within the conduct code investigation until 3 November 2021. Aside from the points already made by me about the unsatisfactory way in which those interviews were conducted, it must be fair to assume that the memories of those witnesses had by then faded.

93. Mr Gardner asserted in his evidence, and I have found, that the reason for the dismissal was a composite one, namely the three charges together. I do not accept the respondent's closing submission that each of the charges met the definition of gross misconduct and should be considered independently of each other. The evidence simply did not support that submission. In a situation involving a composite reason, where a significant charge is found to have been taken into account without reasonable grounds, it is usually fatal to proving the dismissal was fair.

94. On any reasonable basis, Mr Gardner should not have found the first charge proven, and this was remedied on the appeal. As for the second charge, Mr Gardner clearly had in his mind at the time that the claimant had been guilty of intentional delay to the mail. For the reasons above, his thinking on this was flawed. But the actual charge given as a reason for dismissal, namely unexcused delay to the mail, was also flawed. In Mr Gardner's mind, intentional delay to the mail was a very serious act of misconduct justifying instant dismissal. The fact he believed this must have weighed heavily in his assessment of the claimant and whether dismissal for the composite reason was justified.

95. The third charge involved Mr Gardner having to judge whether the claimant was telling the truth or whether he should believe what he had been told by Ms Lawrence of Unique. It cannot have assisted the claimant's case at all that Mr Gardner had decided he was guilty of intentionally delaying the mail and of using a duplicate barcode without permission. I believe he formed this view at an early stage, probably when the claimant made his admission at the start of the first disciplinary meeting on 24 September. I have no doubt this influenced the way he conducted his investigations, which were unreasonable for the reasons above.

96. In relation to his finding the third charge proven , Mr Gardner said in his decision (**170**) it resulted in a '*fundamental breakdown in trust and confidence in [the claimant's] ability to discharge his duties within Royal Mail*'. This is despite the fact the claimant had been allowed to carry on with his normal duties for 14 days after the complaint by Unique was first raised. Then he was allowed to work on indoor duties as a precautionary measure while the allegation about asking the customer to be dishonest was investigated. He remained on those duties right up to the day of his dismissal on 6 January 2022. Had there been such a fundamental breakdown of trust and confidence, it is hard to see how he could have been allowed to continue working and why he was not suspended, as was provided for in serious cases.

97. Mr Gardner said in his decision he had taken into account whether a lesser penalty than dismissal would be appropriate (**170**). He concluded it would not, because he did not believe it would correct the claimant's behaviours. This does not seem to be a reasonable conclusion. For example, it would have been possible to maintain the claimant's employment doing the indoor role, since the range of penalties provided for a transfer (**48**). He does not appear to have called for any evidence as to how the claimant had been performing in that role, but one assumes there had been no problems due to his being allowed to continue in it for over five months. Although he said he considered the claimant's length of service (32 years) and clean conduct record, it is difficult to see, given the range of penalties he could have considered and applied. The respondent is a huge organization employing 139,000 employees approximately. It has substantial administrative resources. These allow for a wide and extensive range of penalties for misconduct short of dismissal. Their Conduct Agreement is meant to be operated in a way that is supportive and corrective. I am not satisfied Mr Gardner really took these properly into account and why he discounted them other than to say alternative penalties would not have corrected the claimant's behaviours. What behaviours was he addressing? The claimant accepted the criticism about his use of the barcode and early collection time. At their worst and not allowing for the claimant's

defence, these were breaches of the respondent's business standards and could not on their own have given rise to a dismissal of the claimant, given his record. It was unreasonable of him not to consider properly the alternatives. A reasonable employer might well have concluded that a warning as to future conduct would have sufficed. As to the third charge, the respondent had already taken the claimant away from dealing with the public direct and there was no evidence as to why he could or should not have been able to continue at the very least in the indoor job. A reasonable employer might have made this a permanent arrangement or continue it for a suitable period. Accordingly, and, being careful at all times to ensure I am not substituting my own view, I do not find dismissal was in all the circumstances within the range of reasonable responses of a reasonable employer.

98. Accordingly, looking objectively at the whole of the respondent's investigation and disciplinary process and in view of the failings I have identified, my conclusion on this composite issue is that Mr Gardner did not act reasonably in all the circumstances, including the respondent's size and administrative resources, in treating the misconduct as a sufficient reason to dismiss the claimant and so the dismissal was unfair. The failings were not sufficiently remedied on the appeal.

Issue (vii)

99. A hearing on remedy will be fixed. As, in the order of deductions from any compensatory award, a *Polkey* reduction on the total awarded comes before one for contributory conduct, I will deal with that next.

Issue (ix) - *Polkey*

100. I must not judge the *Polkey* issue on the basis of a hypothetical employer, but on the assumption that this respondent would this time have acted fairly even though they did not do so before. The question is whether, on the balance of probabilities, the claimant would have been dismissed, if a fair procedure had been followed. If it would have been more likely than not i.e. 51% or more, the question then becomes one of when the dismissal would have been effected. If, however, there was only a chance of a fair dismissal i.e. less than 50%, then any compensation for unfair dismissal should be reduced by whatever percentage is considered appropriate to reflect that chance.

101. A fair procedure would have involved the following. Attempts would have been made to contact Mr Dhillon about whether he had given the claimant permission to use the duplicate barcode and/or collect the mail from Unique earlier than the agreement. Whether or not that would have been possible is impossible to say. However, the NAP withdrew the first charge on the appeal and it is likely this charge would have been removed by Mr Gardner, if he had considered it on the same basis as the NAP fairly did. Mr Gardner would have carefully checked and reflected upon the Conduct Agreement and Business Standards and all the accompanying guidance and probably would have come to the conclusion that the second charge should have been brought as a service to customers issue, namely not collecting the mail at the agreed time. Delay to the mail would not have featured as part of the charge. Mr Rawlings had never looked at it in that way before referring the case to Mr Gardner. After this, Mr

Gardner would have interviewed the owners and staff of Unique and properly put the claimant's explanation for attending their premises on 15 July. Before so doing he would have checked and put to the claimant whether the claimant's route in the morning took him near to the Unique shop and whether he used the toilet premises there. He should have been satisfied with the claimant's response and withdrawn his suspicion as to the claimant's motives in going there. His questioning of the owners and staff of Unique, especially if done more promptly, may have yielded less contradictory statements, which could have been more or less favourable to the claimant. It is impossible to say at this stage. However, it is clear they did not want the claimant to lose his job. They may have been prepared to accept there had been a misunderstanding leading to the allegation that the claimant had asked them to lie. He could have checked if the owners of Unique had any issue with the claimant carrying on serving them.

102. With the first charge removed and the second charge reframed, this alone would not have been enough to warrant dismissal, especially with the claimant's record. Added to this would have been a highly contested allegation with different recollections of what was said. Clearly, that allegation was serious and, if proved, would amount to a breach of the respondent's business standards in not being *'open, honest and polite'* and using *'inappropriate behaviour or intimidate … customers…for any reason.'* He would have observed the strange point about the complaint is that Unique were saying the claimant had said to Ms Lawrence that if she was asked by anyone working for the respondent about what time he collected their mail, he should lie. That should not have rung true, given they were aware that Mr Bachelor had seen him collect the mail early. Given their evidence later in their letter of 11 March 2022 was that they '*were approached and asked questions by Royal Mail management*' and '*they didn't raise a complaint themselves'* strongly suggests to me that Mr Bachelor asked them to put something in writing after he had made the observation of the claimant, despite the way Mr Bachelor had explained it to Mr Rawlings.

103. Given that Ms Lawrence accepted the claimant had gone in the shop and asked for Mr and Mrs Adams, was it more likely than not this was to get verification that he had their permission to use the duplicate barcode than to ask anyone to lie about a fact that was already known, namely the collection time. Surely Mr Gardner would have concluded the latter, especially with the removal of his other doubts about the claimant's credibility.

104. Mr Gardner would be aware of the wide range of options available to him in dealing with this situation. I find it most unlikely he could have come to a fair decision to dismiss. He had to weigh the balance and contradictions between the two versions, the room for possible confusion and poor recollection, the motivations of all involved against the claimant's long and unblemished record. He would have been aware of the guiding principles behind the Conduct Agreement and of the many options short of dismissal. If he did have concerns about the claimant continuing to serve Unique and lack of trust, he could have transferred him to a different round or kept him working indoors or given him a final warning about repeat conduct. It seems unlikely, however, in view of their comments in the letter that the Unique owners had any problem with the claimant as long as he abided by the agreed collection time. He could have asked them and received that response.

105. In the circumstances, I find the chances of the claimant being fairly dismissed at any time were less than 50% and there should be no *Polkey* reduction.

Issue (viii) – contributory conduct

106. Under s122(2) ERA the basic award may be reduced by such percentage as is just and equitable by virtue of the claimant's conduct before dismissal.

107. Under s123(6) ERA the compensatory award may be reduced by such percentage as is just and equitable where the dismissal was caused or contributed to by any action of the claimant.

108. The claimant did in my judgment contribute to his dismissal in the following ways. Firstly, he collected the mail from Unique too early and, whilst they went along with it, they were not happy. The claimant could have asked for a re-appraisal of his route if he was regularly ahead of time and management could have taken it up with Unique to renegotiate the agreement and change the time. By not so doing it led to tension with Unique and caused the observation by Mr Bachelor and everything that followed. It is mitigated by his belief in permission having been granted, but he should have checked again with other managers after Mr Dhillon. The other action was in going to see Unique soon after he became aware an issue had been raised about his scanning of the barcode away from the premises. He should not have involved himself in that way. His manager, Mr Rakim, had heard his explanation and told him to carry on as normal with his collections as long as he abided by the correct time and scanned the barcode inside the premises. There was no reason for him to get involved with the customer, but it is mitigated by what must have been his concern about having been observed and an allegation made.

109. It is open to me to make a finding of contributory conduct in respect of both the basic and compensatory award, in separate or the same percentages; or in the case of one, but not the other. Here, I find it is just and equitable to make a reduction of 20% against both awards.

Employment Judge Battisby
Date: 17 November 2023

All judgments (apart from those under rule 52) and any written reasons for the judgments are published, in full, online at https://www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimants and respondents