EMPLOYMENT TRIBUNALS

Claimant: Mr T Inayat

Respondent: Royal Mail Group Limited

Heard at: Watford (by CVP) **On:** 12-14 February 2025

Before: Employment Judge Margo, Mrs A Brosnan and Dr Von Maydell-Koch

Representation

Claimant: Mr Amir Inayat (the claimant's brother)

Respondent: Ms K Cannell (solicitor)

JUDGMENT having been sent to the parties on 8 March 2025 and written reasons having been requested by the claimant, the following reasons are provided:

REASONS

Introduction

1. The claimant was employed by the respondent as an OPG (Operational Postal Grade) ("**OPG**") at the Respondent's Home Counties North Delivery Office. The claimant began working for the respondent in July 1997. He was dismissed for gross misconduct with the effective date of termination being 8 December 2023.

2. Following a period of early conciliation that commenced on 28 December 2023 and ended on 2 January 2024, the claimant presented the claim on 1 February 2024. He brings complaints of unfair dismissal and discrimination on the grounds of his race, which is Pakistani Asian. The issues in the case are as set out in the Record of PH sent to the parties on 1 August 2024 [46]-[48]. The claimant's discrimination claim is brought as claims of direct discrimination and harassment.

3. The claimant gave evidence on behalf of himself and relied on short statements provided in the form of emails from Mr Bernard Parsonage and Mr Tony Beardon – neither of whom were called because the respondent indicated that it had no cross-examination for them.

4. The respondent called evidence from Ms Nicola McClelland (the dismissing manager) and Mr Joe Miranda (the appeals manager).

5. The claimant was represented at the hearing by his brother, Mr Amir Inayat. For someone with no prior experience of the Tribunal system he did an excellent job in advancing the claimant's case.

6. We were provided with a Bundle of documents running to 224 pages. In addition, we were provided with documents relating to other employees that were involved in "rollaways" (incidents in which the deliver van rolls away); namely, Mr Goodwin, Mr Anwar and Mr Ellis and two Tribunal Judgments and Reasons in "rollaway" cases concerning a Mr Hutchinson and a Mr Harding.

7. References to pages of the Bundle are in the form [page number].

Findings of fact

8. The claimant's employment began on 14 July 1997.

9. Paragraph 15 of his contract of employment referred to the respondent's code of conduct and stated that it could be inspected on request to the personnel section via your line manager.

10. The respondent's conduct policy that was in force at the time of the disciplinary proceedings in this case had a section dealing with gross misconduct that stated as follows:

> "*Some types of behaviour are so serious and so unacceptable, if proved, as to warrant dismissal without notice (summary dismissal) or pay in lieu of notice. It is not possible to construct a definitive list of what constitutes gross misconduct and in any event all cases will be dealt with on their merits. However, the following examples show some types of behaviour which in certain circumstances could be judged to be gross misconduct:*
>
> - *Theft*
> - *Violence*
> - *Abusive behaviour to customers or colleague*
> - *Criminal acts against Royal Mail Group or its employees*
> - *Intentional delay of mail*
> - *Deliberate disregard of health, safety and security procedures or instructions*
> - *Unauthorised entry to computer records*
> - *A serious or persistent breach of the Continuous Disclosure and Communications Policy or the Share Dealing Policy*" [59]

11. The claimant had worked as an OPG for 26 years at the time of his dismissal. Since 2009 his work had involved driving which meant he would take the van out to the required location and deliver the mail on foot.

12. When performing that role he would drive about three miles in total and would get in and out of the van about eight times in the course of his round.

13. In August 2023, the claimant changed from a role in which he was delivering letters to a role delivering parcels. He had a significant workload that involved delivering 120 – 140 parcels in a six to seven hour round. In this role, he would drive between locations and would get in and out of the van around 200 times.

14. On 11 October 2023, the claimant began his round at about 11am. The claimant had previously complained to a Mr Anthony Beardon (Customer Operations Manager) that the driver's seat was ripped and had an excessive amount of gaffer take on the right edge. In this particular van the handbrake was on the right-hand side. Nevertheless, the van had been deemed safe to use by the respondent's workshop.

15. At about 11:15am, the claimant received a call from his wife informing him of the death of a friend who had passed away from stomach cancer. The claimant was worried about whether he would be able to attend the funeral as in the Islamic faith burials happen as soon as possible after the death.

16. At around 11:40am, the claimant pulled-up near 107a Beechfield Rd and stopped the van on the footpath. The footpath did not have a kerb. The claimant left the van running with the key in the ignitions and he did not put the van into gear. In doing so he failed to comply with his "HIT" training that required him to leave the vehicle with the handbrake on and in gear. The third requirement of the HIT procedure was the turning of the wheels to the kerb – but in the absence of a kerb that did not apply.

17. The claimant went to the customer's door about 20 metres away. Although the road was fairly flat the van rolled across the road and damaged the passengers front door and wing of another vehicle.

18. At the end of his shift, the claimant reported the incident to his line manager, Mr Amer Yaqoob. Mr Yaqoob filled in an accident report the next day.

19. The handbrake of the vehicle was tested on 12 October and was found to be working properly [87].

20. Mr Yaqoob conducted an initial fact-finding interview with the claimant on 13 October [**91**]. The notes of the meeting say as follows:

> "*Could you tell me what happened with the van rolling away, I pulled up 107 Beechfield road, I had a pack for 107a as I walked up the driveway and delivered it as I was walking back I saw the van rolling away, Why did you not put the wheels to he curb? I could not as I parked on a verge,*

> *have you had a handbrake brief yes! A while ago, Why did you not put the van in gear? It was fairly flat but I did not think it needed it*.
>
> *Also the handrake was partially covered by gaffer tape which may have contributed to it not being applied properly, this is not an excuse I have been honest and I could have said I clipped the can and would not have been in so much trouble.*
>
> *I have been 26 years in service and I have a clean driving record and I have never had any complaints against me, it was a genuine mistake I just want to apologise for what has happened and it wont happen again*."

21. Accordingly, we find as a fact that the claimant had been trained on the correct "HIT" procedure when parking a van. The acronym stands for "**H**anbrake", "**I**n-gear" and "**T**urn to the kerb".

22. In addition, in his evidence, the claimant confirmed that he was aware of the importance of the HIT procedure and the seriousness of not following it.

23. Ms McClelland and Mr Miranda stated in their evidence, which we accept, that in an effort to further raise awareness about the HIT procedure and the importance of following it, there had been a campaign launched in around 2020 that involved leaflets posters and videos on display in Delivery Offices. In his evidence, the claimant further accepted he had seen one such leaflet – which he described as a "flyer".

24. Mr Beardon conducted a further fact-finding meeting with the claimant on 24 October [92]. In that meeting, the claimant said that he had forgotten to put the van in gear and he suggested that the gaffer tape may have contributed to him not properly securing the handbrake. He apologised for his lack of concentration. He also told Mr Beardon that his friend had passed away that day and that his concentration was not what it should have been.

25. Mr Beardon then passed the case up to Ms McClelland because he was not of a sufficient grade to give the sanction that may potentially follow a "rollaway" incident of this sort.

26. On 31 October, C was invited to a formal misconduct interview with Ms McClelland to take place on 3 November.

27. The letter stated as follows:

> *"…At this meeting you will be given every opportunity to fully explain your actions and present any evidence or points of mitigation in relation to your case, before a decision is made.*
>
> *I enclose details of the investigation and copies of relevant witness statements and other documents that will be referred to during the formal conduct meeting. I have also enclosed a guide that explains what to expect at the meeting.*

You should be aware that:

• I will take into consideration your conduct record which is currently Clear.

• These formal notifications are being considered as gross misconduct. If the conduct notification is upheld, one outcome could be your dismissal without notice.

You may be accompanied at the meeting by your trade union representative or a work colleague normally from the same work location…" [96]

28. The letter ended by stating: "*I appreciate that going through this process may be worrying. If you have any health and wellbeing concerns or questions about anything within this letter, please do not hesitate to contact me and you might also wish to contact our confidential and independent First Class Support service: call 0345 266 5060*".

29. We therefore find that if the claimant had had any concerns as to the process or as to the content of any relevant policies he had every opportunity to raise those concerns and request those documents.

30. The claimant was accompanied to the meeting on 3 November by Mr Karl Smith, a colleague.

31. In the meeting the claimant said that he "*understands that it is Gross Misconduct and that one of the outcomes could be that he is dismissed, or that something is put on his record and possibly removed from driving*."

32. The claimant went on to state that he knew the HIT procedure and that he made an honest mistake in not following it – he said it was human error.

33. Mr Smith stated that the claimant had been rushing to get the work done and had a lapse in concentration. Mr Smith accepted on the claimant's behalf that he had checked the handbrake and it had worked and that the claimant had not put the handbake on.

34. Mr Smith emphasised that the claimant had 26 years of good service and said "*we accept that the business has to do something but feel that dismissal is extreme*."

35. On 4 November, Ms McClelland sent the claimant the meeting notes and asked him to amend them if necessary. The claimant did not propose any amendments.

36. On 6 November, McClelland invited the claimant to a meeting scheduled for 13 November at 08:30, to discuss her decision.

37. By this point Ms McClelland had drafted the letter setting out the decision and it was dated 6 November albeit the decision was not in fact communicated to the claimant until the meeting on 13 November.

38. Based on the evidence we heard, we find as a fact that Ms McClelland only made her decision to dismiss the claimant after she had met with him on 3 November. However, we also find that before the meeting she had, on the basis of her experience of other rollaway cases, formed the view that dismissal was a likely outcome.

39. On 13 November, just prior to the decision meeting, Ms McClelland asked to have an off-the-record meeting with the Claimant and Mr Smith.

40. At that meeting she told the claimant that she believed that if he was dismissed for gross misconduct he would lose his pension and she offered him the option of resigning to avoid that happening. In his evidence, the claimant said that it was inappropriate of Ms McClelland to have had this conversation with him but that she was not psychologically or emotionally abusing him.

41. The reason Ms McClelland had made this suggestion is that she had heard that there had been another case in which a similar suggestion had been made to an employee and she was genuinely worried at the prospect that if she dismissed the claimant he would lose his pension.

42. In fact, Ms McClelland was wrong to tell the claimant that he would lose his pension if he was dismissed for gross misconduct and it was a mistake for her to have had made this suggestion to the claimant without making absolutely sure that the information she had was correct.

43. Ms McClelland gave the claimant 24 hours to think about her suggestion but nevertheless proceeding with the meeting at which she informed the claimant that her decision was that he would be dismissed, on notice, for gross misconduct.

44. The only reason why the claimant was dismissed on notice rather than without notice was that Ms McClelland selected the wrong template letter.

45. We accept Ms McClelland's evidence that the reason she dismissed the claimant was that she believed the claimant was fully aware of the HIT process and of how serious it was not to follow that process but had ignored it. Further, she believed that irrespective of how far the vehicle actually rolled, a rollaway incident had the potential to cause a serious accident and that in the claimant's case the rollaway had occurred in a residential area.

46. Ms McClelland was aware of and took into account the claimant's long service and clean disciplinary record but did not feel those matters justified a sanction less than dismissal. However, as it had not been raised with her in the meeting on 3 November, she did not consider or take into account the call the claimant had received on the morning of the accident telling him that his friend had died.

47. After the meeting, on 13 November, the claimant sent Ms M a text message at 10:03 [108]. The message and the exchange that followed with Ms McClelland was as follows:

> **The claimant**: "*Hello Nicola it's Tass just been speaking to both pension companies both gave me same information there is no such rules please can you confirm if it is Royalmail policy"*
>
> **Ms McClelland**: "*I spoke to HR if they have confirmed to you then I would take what the pension people say to be correct"*
>
> **The claimant**: "*Just to let you know I will be appealing the decision do you want me to put in any additional evidence with the appeal which has been brought to my attention about previous similar cases"*
>
> **Ms McClelland**: "*You can put in anything you want to part from the conversation we had this am about the pension"*.

48. There was no text message in which Ms McClelland repeated the assertion that the claimant would lose his pension if he did not resign. In fact, she told the claimant that he should take what "*the pension people*" say to be correct.

49. As for the reason why Ms McClelland told the claimant that he could not in his appeal refer to the conversation about the potential loss of his pension, we find that she said that to the claimant because she wanted it to be kept off the record and confidential as between her, the claimant and Mr Smith because she appreciated that in having this conversation with the claimant and Mr Smith she had not acted in line with the respondent's formal conduct policy and preferred therefore that it was not referred to as part of the appeal process.

Other rollaway cases

50. We pause the chronology there to set out our findings of fact in relation to the sanction imposed by the respondent in other rollaway cases.

51. In terms of other rollaway cases in respect of which Ms McClelland was the decision maker, she said in her evidence that she thought she had previously dealt with six rollaway cases and had dismissed the employee on three of those occasions.

52. However, the respondent was only able to provide documents relating to three of those cases (four including the claimant); namely, the cases of Mr Goodwin, Mr Anwar and Mr Ellis.

53. As noted further below, Ms McClelland had also been involved at the fact-finding stage in the case of Mr Parsonage but she had not had any further involvement in the case after that stage. We note here that she had had no involvement in the case of Mr Tabott who, along with Mr Parsonage, is one of

the comparators the claimant relies upon for the purposes of his direct discrimination claim.

54. We take the cases in turn below.

55. Mr Goodwin is white. At the time of the rollaway in April 2021 he had worked for the respondent for over seven years and had a clear conduct record. He did not follow the HIT process and was dismissed by Ms McClelland. In short, the facts of his case, in particular in terms of the nature of the misconduct, were very similar to the claimant's case.

56. Mr Anwar is Asian. At the time of the rollaway in September 2020 he had worked for the respondent for over 15 years. He too was found to have been aware of the HIT process. He had partially applied the handbrake but the vehicle had still rolled. He had not followed the other parts of the HIT process. He was given a suspended dismissal.

57. Mr Ellis had been employed by the respondent for 17 months at the time of the rollaway in December 2020. He had a clean conduct record. He did not follow the HIT process and that was found to be partly because he was distracted by a lady who was talking to him. He too was given a suspended dismissal.

58. The other cases that we have some details in respect of are the cases of Mr Parsonage, Mr Tabott, Mr Harrison and Mr Harding.

59. Mr Parsonage was involved in a rollaway in November 2022 having been involved in a similar incident at the same address earlier that year that had, without the respondent's knowledge at the time, been dealt with as a private matter [79]. He did not follow the HIT process and was given a suspended dismissal. The manager, Ms Leckning, considered summary dismissal but decided on the lesser sanction because she felt Mr Parsonage had been honest and fully accepted his responsibility for the incident. As stated, Ms McClelland was the fact-finder in that case but played no part in the decision as to the appropriate disciplinary sanction.

60. The respondent was not able to find documents relating to Mr Tabott's case. Mr Beardon, in an email to the claimant dated 9 December 2024, simply stated that Mr Tabott was not dismissed.

61. We pause here to note that, as the claimant accepted in his evidence, he did not know about the cases of either Mr Parsonage or Mr Tabott at the time of his rollaway incident. Indeed, there was no evidence that the claimant knew about the disciplinary outcome of any other specific rollaway cases at the time that his rollaway incident occurred and we find as a fact that he had no such knowledge.

62. Mr Hutchinson and Mr Harding were both dismissed for rollaways. Both cases proceeded to the Tribunal where the claims of Unfair Dismissal were dismissed. We were provided with copies of the Reasons in those cases. For present purposes it is sufficient to note that the facts were similar to the claimant's case,

albeit Mr Harding had particular knowledge of safety procedures due to the fact that he had been a health and safety representative for five years.

63. Finally in terms of other rollaway cases, in the bundle of documents relating to the appeal in Mr Goodwin's case was a table that showed that in the period from April 2020 to June 2021, there had been 34 cases involving rollaways across the respondent's business that had led to appeals with dismissal being the result in 31 of those cases.

64. Because the table only showed cases that had been appealed, it did not provide a full picture of the action that was taken in all rollaway cases. However, based on the evidence we have seen it is likely, and we find as a fact to be the case, that the large majority of rollaway cases resulted in dismissal and that it is the practice within the respondent to treat rollaways as cases of gross misconduct.

65. The table shows that Mr Miranda had heard two appeals against dismissals for rollaways in the period covered by the table and had upheld the dismissal on both occasions.

The appeal

66. The claimant appealed the dismissal on 14 November 2023. There were 15 appeal points as set out in his letter [112]. Amongst other things, the claimant cited the respondent's code of conduct and stated that his conduct had been neither wilful nor deliberate. The claimant also contended that Ms McClelland had failed to take into account the fact that deployment of the handbrake was impeded by duct tape and that "*it would have been clear that successful operation of the vehicle would not have been possible*"

67. The claimant also stated in the appeal that the workload meant that it was utterly impossible for him to have followed every procedure.

68. By letter dated 14 December 2023, the claimant was invited to an appeal meeting with Mr Miranda. He was told of his right to be accompanied and provided with the relevant documentation relating to the appeal [115].

69. In accordance with the respondent's conduct policy, the appeal took the form of a rehearing rather than merely a review of the original decision. In short, as stated in his evidence, Mr Miranda took the decision as to the appropriate disciplinary sanction afresh and imposed the sanction that he considered to be the correct one.

70. At the appeal hearing itself, the claimant stated that a training record that showed that he had received handbrake training on 25 April 2023 had a signature next to his name but it was not his signature. However, in the course of the interview, the claimant confirmed he knew the HIT process although he said he used to think it was "HIP" that stood for 'Handbrake In Gear, Park'.

71. The claimant was asked whether he had switched the engine off at the time of the incident and he said "*I can't remember. But it must have been as I had the key in my hand. It locks automatically when you get out*."

72. On 23 January 2024, Mr Miranda interviewed Ms McClelland [152]. In the course of that interview he asked her if it was possible that the claimant had not left the vehicle in gear because he had left the engine running. Ms McClelland said "perhaps" and that she would get the report and forward it to Mr Miranda, which she did shortly after the end of the meeting.

73. On or around 23 January 2024, Ms McClelland had a conversation with Mr Miranda in which she explained what the Activity Report showed. In summary, it shows that at 11:40am the ignition of the van was off when the vehicle was at or near 51 Glenview Road and is then turned on again at 11:41am. The point at which the vehicle is nearest to 107 Beechfield Rd is when it shows on the report as going at 0mph – i.e. it is stationary, at or near 115 Beechfield Rd. The ignition is not turned off again until 11:59 until the vehicle was at or near 50 Beechfield Rd. Between the ignition being turned on at 11:41am and being turned off at 11:59, the vehicle is shown as stationary on four separate occasions [147].

74. Mr Miranda emailed the claimant on 31 January 2024 and provided him with the notes of his interview with Ms McClelland and with the Activity Report. Mr Miranda asked the claimant for his comments on the additional evidence.

75. In his reply, amongst other things, the claimant repeated that the unsafe condition of the vehicle "*would be a major contributing factor*". In respect of the activity report, the claimant said that the respondent was trying to prove his guilt and that because the GPS just provides an estimation of the location of the vehicle, and did not show the vehicle as outside 107 Beechfield Rd, it should not be relied upon. The claimant did not, in response to the activity report, repeat what he said at the appeal meeting that he must have turned the engine off prior to the rollaway incident [158].

76. On 12 February 2024, Mr Miranda sent the claimant his decision. The decision dealt with each of the 15 appeal points in turn and then set out Mr Miranda's decision as to why the appeal was not upheld.

77. In short, Mr Miranda did not accept that the duct tape played any role in the failure to apply to handbrake.

78. Mr Miranda found that the claimant should have applied the handbrake and should have left the car in gear but that by leaving the vehicle running the claimant had decided to break safety rule because leaving the vehicle running meant he could not leave the vehicle in gear.

79. Mr Miranda did not feel that at the appeal stage the claimant had accepted the seriousness of his actions. Further, he believed that the claimant knew the correct procedure as he was able to describe it.

80. Mr Miranda noted and took into account the mitigating factors but believed that the standards of behaviour and the potential consequences had been made clear to employees.

The law

81. Section 94 of the Employment Rights Act 1996 (the "**ERA 96**") confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111.

82. Section 98 of the ERA 96 deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

83. Section 98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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 shall be determined in accordance with equity and the substantial merits of the case.

84. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions in *British Home Stores v Burchell* [1978] IRLR 379 and *Post Office v Foley* [2000] IRLR 827. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer: see *Iceland Frozen Foods Limited v Jones* [1982] IRLR 439, *Sainsbury's Supermarkets Limited v Hitt* [2003] IRLR 23 and *London Ambulance Service NHS Trust v Small* [2009] IRLR 563.

85. Fairness should be judged at the time of dismissal. However, when considering whether an employer acted reasonably in dismissing an employee, the whole process including any appeal should be considered: see *Taylor v OCS Group Ltd* [2006] ICR 1602.

86. So long as the whole process leading to the dismissal is within the band of reasonable responses, the dismissal will be fair: see *Sainsbury's Supermarket Ltd v Hitt*.

87. In *Hadjioannou v Coral Casinos Ltd* [1981] IRLR 352, the EAT held that a complaint of unreasonableness by an employee based on inconsistency of treatment would only be relevant in limited circumstances:

    a. Where employees have been led by an employer to believe that certain conduct will not lead to dismissal;

    b. Where evidence of other cases being dealt with more leniently supports a complaint that the reason stated for dismissal by the employer was not the real reason;

    c. Where decisions made by an employer in truly parallel circumstances indicate that it was not reasonable for the employer to dismiss.

88. In respect of arguments of unfairness based in truly parallel circumstances, the EAT said as follows:

> "… *Tribunals would be wise to scrutinize arguments based upon disparity with particular care. … there will not be many cases in which the evidence supports the proposition that there are other cases which are truly similar, or sufficiently similar, to afford an adequate basis for the argument. The danger of the argument is that a Tribunal may be led away from a proper consideration of the issues raised by s.57(3) of the Act of 1978. The emphasis in that section is upon the particular circumstances of the individual employee's case*. …"

89. The EAT's decision in *Coral Casinos* was subsequently endorsed by the Court of Appeal in *Securicor Ltd v Smith* [1989] IRLR 356, CA.

90. Under s.122(2) and s.123(6) of the ERA 96, the Tribunal has a discretion to reduce the basic award and the compensatory award by such amount as is "just and equitable", if the claimant's conduct to any extent caused or contributed to the dismissal.

91. In order for a deduction to be made for contributory fault, the employee's conduct must be culpable or blameworthy: see *Nelson v British Broadcasting Corp (No 2*) [1980] ICR 110.

92. Where the Tribunal finds that there was contributory fault on the part of the claimant it must reduce the compensatory award by such proportion as it considers just and equitable: see *Optikinetis Ltd v Whooley* [1999] ICR 98.

93. If there has been some procedural or substantive failing by the employer, the Tribunal can make a "polkey reduction" to any compensation to take account of the chances that the claimant would have been fairly dismissed in any event meaning that the failing made no difference to the outcome: see *Polkey v AE Dayton Services Ltd* [1987] UKHL 8 and *Software 2000 Ltd v Andrews* [2007] ICR 825.

94. In *Software 2000* the EAT gave the following guidance:

> "*The question is not whether the Tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice*" (at paragraph 53)

Direct discrimination within the meaning of section 13 of the Equality Act 2010 ("EqA 2010")

95. A claim of direct discrimination within the meaning of s.13 of the EqA 2010 is of less favourable treatment, because of a protected characteristic, than would have occurred if the claimant had not had that protected characteristic. This is a claim of an unlawful motivation, the motivation being the fact that the claimant had the protected characteristic in question. Proving a person's motivation is usually difficult, for obvious reasons. That is why s.136 of the EqA 2010 was enacted. It provides:

> "(*1) This section applies to any proceedings relating to a contravention of this Act.*
>
> *(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*."

96. When applying s.136, it is possible, when considering whether or not there are facts from which it would be possible to draw the inference that the respondent did what is alleged to have been less favourable treatment because of a protected characteristic, to take into account the respondent's evidence about, but not its explanation for, the treatment. That is clear from paragraphs 19-47 of the judgment of Leggatt JSC (with which Lord Hodge, Lord Briggs, Lady Arden and Lord Hamblin agreed) in the Supreme Court in *Efobi v Royal Mail Group Ltd* [2021] UKSC 33, [2021] ICR 1263.

97. However, as the House of Lords said in *Shamoon*, in some cases the best way to approach the question whether or not there has been direct discrimination within the meaning of s.13 of the EqA 2010 is by asking what was the reason why the conduct or omission in question occurred.

98. In respect of harassment, s.26 of the EqA 2010 provides as follows:

> *"(1)A person (A) harasses another (B) if—*
>
> *(a)A engages in unwanted conduct related to a relevant protected characteristic, and*
>
> *(b)the conduct has the purpose or effect of—*
>
> *(i)violating B's dignity, or*

(ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

…

(4)In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a)the perception of B;

(b)the other circumstances of the case;

(c)whether it is reasonable for the conduct to have that effect."

Conclusions

Unfair Dismissal

Was the claimant dismissed?

99. There is no dispute that C was dismissed.

What was the reason or principal reason for dismissal and was it a potentially fair reason?

100. As set out in our finding of fact, the reason for the claimant's dismissal was his conduct in failing to follow the HIT process. It is the standard practice across the respondent's business for rollaways to be treated as gross misconduct and in the large proportion of cases dismissal was the sanction imposed. Accordingly, we accepted the evidence of both Ms McClelland and Mr Miranda that incidents if this sort are taken extremely seriously by the respondent given the potential consequences and risks posed by a vehicle rolling away and that it was claimant's conduct that was the reason for his dismissal.

101. Conduct is a potentially fair reason for dismissal and so the next question is whether dismissal was reasonable in all the circumstances.

Were there reasonable grounds for the belief in the misconduct?

102. First, were there reasonable grounds for the belief in the misconduct?

103. The answer to this is 'yes'. It was clear that the claimant had not followed the HIT process. The handbrake was working but he had not applied it and he did not leave the van in gear. Further, by the time of the appeal hearing Mr Miranda was in receipt of the activity report that provided reasonable grounds for his conclusion that the van had purposely been left running at the time the rollaway occurred with the consequence that it would not have been possible for the van to have been left in gear.

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

104. Again, the answer is yes. The claimant was given the opportunity to explain what happened at an informal fact-finding meeting, a disciplinary hearing and on appeal. The respondent established that the handbrake was working. In addition, the respondent carried out further investigations at the appeals stage by considering the activity report and giving the claimant the opportunity to comment on it.

Did the respondent otherwise act in a procedurally fair manner?

105. The claimant's main complaint is that he did not understand the disciplinary process and was not provided with a copy of the conduct policy. However, not only is it clear that the claimant had a copy of the conduct policy by the time of the appeal, but all the formal correspondence signposted him to the fact that he could ask questions about the process at any stage. Moreover, the process itself was fair. The claimant knew the charges against him, was provided with all the relevant evidence and was given a full opportunity to comment on it. The appeal process was a complete rehearing of the disciplinary case and all of the claimant's appeal points were considered and responded to by Mr Miranda.

106. Finally, although the suggestion that Ms McClelland made to the claimant that he had the option of resigning so as not to lose his pension was not in accordance with the formal conduct policy, but it had no impact on the overall fairness of the dismissal process.

Was dismissal within the range of reasonable responses?

107. This is the more difficult question. This was, in the Tribunal's view, a harsh decision given, in particular, the claimant's long service and the upsetting news the claimant had received about his friend shortly before the rollaway occurred.

108. However, we bear in mind that we must not substitute our view for that of the respondent and that the question we must ask ourselves is whether the respondent's decision to dismiss was within the range of reasonable responses.

109. We have come to the conclusion that it was.

110. In particular, we take into account the fact that at the appeal stage, that took the form of a complete rehearing, the activity report was available and considered. In our judgment, it was reasonable for the respondent to rely on that report as showing that the claimant had left the vehicle running at the time of the rollaway and that the decision to leave the engine running was a deliberate one that meant that the van could not be left in gear.

111. Further, the claimant's contention that the presence of duct tape on the chair was in some sense a cause or contributing factor in the rollaway supported the conclusion that the claimant had not fully accepted the seriousness of his own actions. There was simply no reason (had the claimant not left the engine

running) why the claimant could not have applied the handbrake properly irrespective of the duct tape.

112. Similarly, a large workload cannot justify failing to follow basic safety procedures and the claimant's failure to acknowledge that fact was again a reasonable indication that he had not fully accepted the seriousness of his own actions.

113. More generally, the claimant knew the procedures that he was supposed to follow and understood their importance. Given the serious consequences that can result from a rollaway, it is, in our judgment, within the range of reasonable responses to treat these incidents as gross misconduct, as the respondent does in the large majority of cases (as discussed further below).

114. As for mitigation, all relevant factors were taken into account by Mr Miranda. However, given the matters set out above it was not, in our judgment, outside the range of reasonable responses for him nonetheless to conclude that dismissal was the appropriate sanction.

115. As for the other cases concerning rollaways, this is not a case in which the claimant was given a false sense of security by a lesser sanction being applied in other cases as he did not know about those cases before the rollaway incident occurred.

116. Further, and importantly, none of them were truly parallel cases. In particular, they did not involve the employee deliberately leaving the engine running and in the cases we have seen where dismissal did not result, the employees did not blame the incident on other factors – as the claimant did in suggesting that the duct tape or the workload was in some sense the cause or contributed significantly to his to apply the handbrake or leave the van in gear.

117. Finally, the broad picture across the respondent is that whilst they deal with rollaways on a case by case basis, dismissal is the by far the most common sanction imposed. In those circumstances, those employees who are not dismissed are, in our judgment, lucky to have avoided that sanction. Mr Parsonage is one such example given that it was not his first rollaway incident – but it does not follow from the fact that Mr Parsonage and other were not dismissed for rollaways that the dismissal of the claimant fell outside the range of reasonable responses.

118. The fact that dismissal is by far the most common outcome in a rollaway case further reinforces our conclusion that the claimants conduct was the reason for the dismissal.

119. Accordingly, the claimant's claim of unfair dismissal falls to be dismissed.

Direct discrimination

120. The claimant has not proved facts from which we could conclude that the dismissal was an act of direct discrimination on grounds of his race.

121. First, the claimant confirmed that he pursued no such claim against Mr Miranda, even though, given that the appeal was a complete rehearing, Mr Miranda reached the independent view that the claimant should be dismissed.

122. Secondly, in any event, there are no facts from which we could conclude that Ms McClelland's decision to dismiss the claimant was because of his race.

123. Ms McClelland was not the decision-maker in the cases of either Mr Parsonage or Mr Tabott (the comparator cases relied upon by the claimant) and Ms McClelland dismissed Mr Goodwin, who is white, in similar circumstances and did not dismiss Mr Anwar, who is Asian, again in similar circumstances.

124. Further, as set out above, the reason for the dismissal was the claimant's conduct in failing to follow the HIT process. It was not his race.

Harassment

125. There are three allegations of harassment; namely that:

    a. On 13 November 2023 Ms McClelland tried to force the claimant to resign from his position by making a verbal offer that if he resigned he would not lose his pension. The offer was open for 24 hours.
    b. Ms McClelland sending misleading text messages stating that the claimant would lose his pension if he did not resign, which was not true; and,
    c. Ms McClelland sending a text asking the claimant not to mention the "offer" she made to him.

126. The first question is whether Ms McClelland did those things.

127. Ms McClelland did not try to force the claimant to resign. She made the suggestion and gave the claimant that option out of a genuine concern that if the claimant was dismissed for gross misconduct he would lose his pension.

128. The suggestion that the claimant would lose his pension if he did not resign was not repeated in a text message.

129. Ms McClelland did, however, send a text message asking to the claimant asking him not to mention the suggestion, albeit that was solely in the context of the appeal.

130. The next question whether the conduct was unwanted?

131. Given, that the suggestion that Ms McClelland made was based on incorrect facts, we find that it was unwanted. We further find that telling the claimant that he could not refer to the conversation on appeal was also unwanted.

132. Did the acts relates to the claimant's race?

133. The answer to that question is ‘no’. The suggestion was made because of Ms McClelland’s incorrect belief as to the effect of the claimant being dismissed for gross misconduct and because she did not want the claimant to lose his pension. It was not related in any way to the claimant’s race

134. The statement that the claimant should not mention the suggestion on appeal was made because Ms McClelland wanted it to be kept off the record because she appreciated that the suggestion she had made was not in line with the formal conduct policy. Again, it was not related in any way to the claimant’s race.

135. Did the conduct have the purpose or effect the of violating the claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

136. Again, the answer is ‘no’. It was no doubt upsetting to the claimant to be told that losing his pension was a possibility but his evidence was that the conversation was “inappropriate”. In our judgment, the suggestion that the claimant could resign to avoid that happening, cannot be said to meet the high threshold of having the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant or of reasonably creating that environment.

137. Accordingly, the direct discrimination and harassment complaints also fall to be dismissed.

APPROVED BY:

Employment Judge Margo

9 April 2025

JUDGMENT AND REASONS SENT TO THE PARTIES ON
11/04/2025

FOR THE TRIBUNALS