



EMPLOYMENT TRIBUNALS

Claimant: Simon Bacon

Respondent: Royal Mail Group Limited

HELD AT: Liverpool

ON: 21, 22 & 23 May 2025

BEFORE: Employment Judge Johnson

MEMBERS: Mr Graham Pennie
Ms Carly Doyle

REPRESENTATION:

Claimant: Ms S Williams (partner of claimant)

Respondent: Mr R Chaudhry (solicitor)

JUDGMENT having been sent to the parties on 30 June 2025 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. These proceedings arose from the claimant's employment as a C&D driver. He was dismissed for gross misconduct on 3 January 2024 following a disciplinary process where a parcel went missing during a delivery round.
2. He believed the dismissal to be unfair and presented a claim to the Tribunal on 28 March 2024 following a period of early conciliation with ACAS from 1 March to 20 March 2024. He initially named not only the respondent employer, but also Ms Rees the appeal officer as respondents. He has mental health issues and has 'ticked the boxes' in form 8.1 of the claim form indicating that he wished to bring complaints of unfair dismissal and disability discrimination.

3. The respondent presented a response and grounds of resistance on 8 May 2024 which resisted the claim and arguing that the claimant was dismissed following a fair procedure.
4. The case was subject to case management at a Preliminary Hearing Case Management (PHCM) before Judge Leach on 12 August 2024. He listed the case for a final hearing and questioned whether an arguable disability discrimination complaint had been advanced by the claimant and consequently, whether Ms Rees should be party to the process.
5. On 11 April 2025, Legal Officer Sheard issued a judgment dismissing the complaint against the second respondent Ms Rees upon withdrawal of that claim by the claimant. At the beginning of the hearing, it was further confirmed that the complaint of disability discrimination would be withdrawn too. Accordingly, a judgment has been issued today recognising this decision by the claimant.
6. The case had been listed to be heard by a panel. Because of the discretion available to Judge Johnson concerning panel composition, he nonetheless felt retaining the panel of a Judge and two non-legal members would be appropriate in this case. The reason for this decision was because of the complicated factual issues that existed in relation to workplace practices which were evident in this case from the papers. Before the decision was reached, the question of panel composition was discussed with the parties, who raised no objections to the appointed panel being retained.

Issues

7. The issues which the Tribunal has been asked to consider are the usual issues that would be encountered in an conduct unfair dismissal.

Dismissal

8. Can the claimant prove that there was a dismissal?

Reason

9. Has the respondent shown the reason or principal reason for dismissal?
10. Was it a potentially fair reason under section 98 Employment Rights Act 1996?

Fairness

11. If so, applying the test of fairness in section 98(4), did the respondent act reasonably in all the circumstances in treating that reason as sufficient reason to dismiss the claimant?
12. If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

- (1) the respondent genuinely believed the claimant had committed misconduct;
- (2) there were reasonable grounds for that belief;
- (3) at the time the belief was formed the respondent had carried out a reasonable investigation;
- (4) the respondent followed a reasonably fair procedure;
- (5) dismissal was within the band of reasonable responses.

Remedy

13. If there is a compensatory award, how much should it be? The Tribunal will decide:
 - (1) What financial losses has the dismissal caused the claimant?
 - (2) Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
 - (3) If not, for what period of loss should the claimant be compensated?
 - (4) Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
 - (5) If so, should the claimant's compensation be reduced? By how much?
 - (6) Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
 - (7) Did the respondent or the claimant unreasonably fail to comply with it?
 - (8) If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
 - (9) If the claimant was unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct?
 - (10) If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
 - (11) Does the statutory cap apply?
14. What basic award is payable to the claimant, if any?
15. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

Evidence used

16. The claimant relied upon only her witness statement.

17. The respondent relied upon the following witnesses:
 - a) Gareth Sullivan (dismissing manager)
 - b) Rebecca Rees (appeal manager)
18. Although this case was now limited to ordinary unfair dismissal only, it was decided that the claimant would give her evidence first. Both parties were consulted and taking into account the claimant's representation by a family member rather than a legal representative, it was in the interests of justice that the claimant side observed cross examination from Mr Chaudhry. The reason for this decision was so that Mr Williams could observe cross examination taking place and review his questions for the respondent witnesses with some insight as to what was relevant and what was not.
19. In terms of the available documents, a bundle was produced the size of which, was in excess of 400 pages. It included the proceedings, Tribunal Orders, respondent policies and procedures and the dismissal 'pack' of papers relating to the claimant.

Findings of fact

20. The parties should note that the Tribunal's findings of fact do not seek to deal with every point where the parties disagree, simply what is relevant to the issues which the Tribunal is being asked to consider. If the discussion of an incident or point is not referred to within these findings, it does not mean that it has not been considered by the Tribunal, simply that it is not relevant to the issues and the findings that we are required to make.
21. In terms of the findings that we make, the Tribunal has reached its decision on what it considers to be on balance of probabilities the most likely way/reason in which an incident arose.

The respondent

22. This case concerns the respondent's (Royal Mail) Parcelforce Worldwide Liverpool office and their location in Huyton, near Liverpool. From this depot, parcels would arrive from other locations and would be sorted and placed into lorries for delivery to customers.
23. Naturally, as a large employer, the Royal Mail had many policies and procedures which involve consultation with trade unions and apply to all employees:
 - a) Business Standards (pp70-83). This included a personal commitment from employees to follow the Royal Mail business standards and that breaking any such standards could be dealt with under conduct policy. Employees had a duty to protect the mail and keep it secure and they were reminded of the loss of customer confidence that could result from a failure of that duty.
 - b) Royal Mail Conduct Agreement (8/15) was agreed with the main unions including with whom Mr Bacon was a member (pp84-114). It was detailed

document which covered disciplinary processes where matters of conduct were relevant. There was a staged approach considering the seriousness of the matter under investigation, informal process, fact finding and when a case should proceed as a formal process. It also identified the levels of management who had authority to deal with disciplinary matters. Examples of gross misconduct were included, and it confirmed that matters of this seriousness could potentially result in dismissal.

- c) Royal Mail Conduct Policy (2/1/18) (pp115-121) dealt specifically with providing employee with details and knowledge of conduct standards and expectations of behaviour.
- d) Royal Mail Group Security of the Mail – Conduct Policy: Guide for Managers (1/7/12) (pp122-127).
- e) Royal Mail Group Security of Customer's Mail and Royal Mail Group Property: Guide for employees (3/8/15) (pp128-130). This document reminded employees of the high standards expected when dealing with protection of mail in its possession and that they had a role to play in maintaining these standards. Of relevance to this case, examples of leaving mail insecure are described including:

- i) *'Mail left insecure and accessible in an unattended and unlocked vehicle.'*

- f) Royal Mail Drivers Manual (extract), (pp131-6). This document provides greater detail of the security expectations of drivers including the requirement to:

- 'Load ALL mail into rear of vehicle and ensure the door is locked...'* (p133) and *'...when parking at a Royal Mail site, ensure you close all cab windows and lock all doors as you leave your vehicle.'*

- g) RMG Security Rules for Drivers (pp137-138), which includes the following rule:

- 'When leaving vehicle unattended: always remove the ignition key and keep it on your person, close ALL windows fully and lock ALL doors, when not in use PDAs must be kept out of site'.*

And:

- 'When loading/unloading vehicles in the operational yard, drivers/back loaders must lock and secure the vehicle when not in attendance.'*

These were signed by employees with a declaration on a regular basis that they have read and understood the rules.

- 24. The claimant (Mr Bacon) was employed by Royal Mail as a Customer Services Provider. His duties included delivering parcels using a Royal Mail supplied vehicle and which he loaded at the Huyton depot. He had a written contract of employment which confirmed he was subject to the Royal Mail policies and procedures. His employment commenced in this role on 7/1/19

but his continuous employment actually began from 6/8/18. It was a full time role and he signed his agreement to this document on 10/1/19 (p55).

25. He also signed documents were required that he had read and understood the policies or rules that applied and credibly in evidence confirmed his awareness of the terms and conditions of his employment and the policies and procedures that applied.
26. Investigation
27. On 3 October 2023, Mr Bacon was interviewed by Peter Parry who was the security manager regarding a parcel which was believed to be missing and which he was supposed to have delivered to Taskers Angling store in Aintree, North Liverpool. He was asked a series of questions about the delivery and signed his acceptance of the handwritten note. He was then subject to a precautionary suspension on full pay. This was confirmed by letter dated 6 October 2023 and was informed that it was, '*...pending further investigations into Vehicle Security incident with loss of mail (Firearm).*' (p184-5).
28. The Tribunal understood that the firearms in question were a box of air rifles. The supplier of these items was recorded by Royal Mail as being licensed to supply equipment of this nature and were recorded as such, (in the case items of this nature went missing). The loss was reported to Royal Mail Group Security, but we did not hear evidence of what happened to this investigation and the extent to which the police were involved, if at all.
29. The security report referred to 3 boxes with tracking numbers ending 001, 002 and 003. The first box 001 was reported as not delivered and Taskers confirmed that it had not been received. The box was described as containing 5 air rifles. Boxes 002 and 003 were delivered but it was not clear what they contained. During his interview by Mr Parry, Mr Bacon accepted he was sufficiently trained, agreed that only 2 out of the 3 boxes had been delivered. He was unable to confirm what had happened to the missing 001 box but believed it had not been loaded onto the van. He confirmed that he would normally scan the tracking label of each parcel as they were placed on the pallet.
30. On 9 October 2023, his line manager Jack Leyland wrote to Mr Bacon inviting him to a fact finding meeting to establish the facts and determine whether formal action under the conduct policy was required at 11am on 12/10/23. Throughout this process he was informed that he could be supported by a trade union colleague and although Mr Bacon gave evidence that this representative was inexperienced, we did not hear any convincing evidence that this CWU representative prevented a fair process from taking place. (pp188-9).
31. The suspension was reviewed on a regular basis. The interview took place on 12 October 2023 and the interview notes shared with Mr Bacon for comment. It was determined that the investigation should proceed to a formal conduct meeting and on 16 November 2023. Mr Sullivan invited Mr Bacon to a formal conduct meeting on 24 November 2023 with the

investigation relating to the missing item (001) and that CCTV footage showed that potentially the rear door of the vehicle was not secure. In this letter he was informed that Mr Sullivan will take into consideration his conduct including a current 12 month serious warning and that if gross misconduct found, dismissal could be an outcome, p204-5). An investigation pack was included with the letter.

32. A conduct meeting took place on 24 November 2023, with Mr Sullivan, Mr Bacon and Mr Dave Edwards of CWU being present. The procedure was explained, and it was confirmed that the alleged gross misconduct was the failure to secure the vehicle contrary to RMG security policy and losing a parcel while on route because of the failure to secure the vehicle.
33. Mr Bacon was asked about his recollection of events and although he could not remember the event precisely, he focused upon his usual procedure for loading his van and for deliveries. The Tribunal accepted that his recollection was uncertain which is not surprising given the time that had elapsed, and we believed that it demonstrated credibility on his part. During the meeting CCTV was watched of the delivery of the items to Tasker's warehouse. Mr Bacon referred to having to access this site through a gate which was often locked. This would require him open them himself if a member of staff was not present and he would have to get out of his lorry to do so. He said that when this situation arose, he would often sort out the items which he would be delivering and this would mean unlocking the back of the lorry.
34. The CCTV evidence did not include footage of Mr Bacon opening the gate and despite it having been requested by Mr Bacon, this additional footage has never been provided. However, we accept that while Mr Bacon's recollection is vague, the CCTV of the Tasker's delivery reveals the gate being very close to the warehouse and the lorry reversing through it. When Mr Bacon got out of the lorry, he quickly opened the rear shutter without any obvious unlocking and removed two long boxes each sealed with 3 white straps along their length.
35. In relation to the missing 001 parcel Mr Bacon couldn't recall what happened and fair amount of speculation was discussed during the meeting. However, Mr Bacon asserted:

'As I have said all along I don't know if parcel was on or not.' (p216).
36. The meeting notes taken by the respondent were shared with Mr Bacon and his representative on 28 November 23. Mr Edwards had kept his own notes and Mr Bacon said he could not sign the management notes because they were incomplete. However, we concluded that this issue arose from his belief that the minutes should have been a verbatim record of the meeting when they were in fact, a summary of what had been discussed. It was not clear from the evidence available that any materially significant information to this case was missing from the management note, even if at times Mr Bacon corrected things that were recorded. Importantly, the CWU notes of Mr Edwards were broadly consistent with the management notes.

37. Additional CCTV evidence was shared with Mr Bacon on 31 December 2023 which showed footage of his vehicle being loaded at the Huyton depot before the deliveries began on the day of the incident involving the missing parcel. (p246). He was asked to comment. These videos from two CCTV cameras were available to the Tribunal and referred to by the parties during the hearing. Our viewing these videos revealed that the parcels would arrive on a pallet and they would be scanned by the driver (in this case Mr Bacon) using their hand held PDA device, before a fork lift truck would load them onto the lorry. The videos of 18 September 2023 taken at 9.33am (inaccurately recorded as 8.33am) and were 2.37 minutes and 4.03 minutes in duration. We were not sure if they amounted to complete extracts of the loading process, but we could see Mr Bacon using his PDA and boxes similar to the two delivered to Taskers being loaded. Although the footage is grainy, on balance we were satisfied that the fork lift truck when viewed loading the lorry, included three boxes resembling those which would have been destined for Tasker. On balance, we accepted that it is likely that one box was lost between Huyton and Taskers. For the avoidance of doubt, based upon the evidence available to us at the final hearing, we accept that the missing box did not remain in the lorry and was therefore not returned to the depot).
38. Mr Sullivan completed his consideration of the disciplinary process and informed Mr Bacon on 19 December 2023 that he would meet on 3 January 2024 to confirm his decision to him at the Liverpool LD Operations Managers Office, (pp247-8).
39. The dismissal letter which was dated 2 January 2024 was given to Mr Bacon at the meeting on 3 January 2024 and informed him that:
- 1) *'Gross misconduct you failed to secure your vehicle which is against RMG Group security policy for security rules for drivers.'*
 - 2) *'Gross misconduct you have lost a parcel whilst on route for failing to secure your vehicle which is against RMG Group policy for Security rules for drivers.'*

And also, *'Decision Result: Dismissal without statutory notice (summary dismissal)'.*

Mr Bacon's last day of service was confirmed as being 3 January 2024. A right of appeal was notified and also provided were details of deliberations and conclusions which were detailed and explained the evidence that had been considered. Emphasis was placed upon the Royal Mail's expectations of standards of employees towards security. Mr Sullivan did not accept that the rear door of the van had been unlocked at Taskers prior to the gates being opened. This was because in his view, Mr Bacon could be seen on CCTV appearing to go round to unlock it again moments after going through the gate. He added that even if it had only just been unlocked, it still was breach of the security rule because it left the vehicle unsecure for a period.

40. Towards the end of the deliberations and conclusions part of the letter, Mr Sullivan explained that he reasonably believed that Mr Bacon had the

missing item in his lorry, and it went missing somewhere between the depot and Taskers. He confirmed that he had taken into account Mr Bacon's service but also his previous 12-month serious warning relating to infringements of the tachographs on his vehicles. He referred to a lack of remorse on the part of Mr Bacon, that he was blaming other people and systems and not appearing to be accountable for his actions.

41. In relation to the previous warning, a great deal of evidence was heard about the process and inaccuracies in terms of dates and sanction imposed within the documents in the bundle. We do not feel it is necessary to go into significant detail regarding these matters within these reasons given that dismissal primarily related to the two findings of gross misconduct. However, it did play a part in the decision to dismiss and we did accept that the way in which the previous warning was communicated to Mr Bacon was confusing and several different sanctions were identified within the documents.
42. We accepted that the Royal Mail management at Huyton appeared to be reacting to problems with the tachograph infringements during 2023. Four employees were identified including Mr Bacon as requiring the imposition of formal warnings. But there was no prior evidence of coaching being given and Mr Sullivan's evidence was that management had a great of discretion as to whether to coach or proceed to a warning. But whatever their decision, management still needed to be clear in explaining what they are doing and why when imposing a sanction. We accepted Mr Bacon's evidence that he did not appreciate he had received such a formal warning nor that it was in place at the time of the disciplinary hearing.
43. Mr Sullivan argued that the warning in any event had little impact upon the decision to dismiss and it was the two allegations of gross misconduct which were key. However, he clearly made reference to it in his dismissal letter and refers to a further tachograph infringement. On balance we think this contributed to the decision that dismissal was necessary and and a general feeling of a failure by Mr Bacon to accept responsibility.
44. In terms of responsibility, the Tribunal do not accept that there was evidence of Mr Bacon being obstructive or failing to take responsibility. He was having trouble remembering the situation and was understandably frustrated, but we found that he was actually engaged in the disciplinary process and was simply trying to find an explanation as to what happened. This has continued throughout the proceedings, and we were unable to find evidence in support of the contention that there was a failure to show remorse. This erroneous belief on the part of Mr Sullivan, that there was a failure to show remorse was another tipping point that persuaded him that dismissal was the only option. However, based upon the evidence available to this Tribunal, this was not a reasonable view to hold.
45. Mr Bacon appealed this decision on 4 December 2024 and on the following basis:
 - a) His dismissal based on assumptions that the van was unlocked;
 - b) The finding that he showed no remorse for what had happened;

- c) The paperwork relating to the previous serious warning had not been provided;
 - d) There had been a failure by management to show suspension procedures; and,
 - e) His suspension was overly lengthy in that it remained in place for more than 90 days
46. Ms Rees was appointed as appeal independent case manager and informed Mr Bacon of her role on 10 January 2024 and a full rehearing would take place on 18 January 2024. Mr Bacon did not attend but the management letters and e-mails provided to him provided confusing dates and on 18 January 2024 a further letter was sent rearranging the appeal which would take place by Teams (pp270-1). It took place on this date and Mr Edwards supported Mr Bacon. A note was produced and supplied to Mr Bacon which recorded a lengthy discussion regarding the appeal.
47. Mr Bacon confirmed he was struggling to remember things correctly. He emphasised how remorseful he was. He confirmed that he reported the missing parcel as soon as he discovered that this was the case and he kept asking management about it for several days until was formally recorded as missing. He referred to his mental health issues and that he thought his behaviours may have been affected by his condition and medication, (which he confirmed did not affect his driving). Ms Rees was focused upon the disclosed mental health issues and decided to refer him to OH before making her decision regarding the appeal.
48. Ms Rees was undoubtedly thorough in her investigation and did allow Mr Bacon to fully argue his grounds of appeal.
49. The OH report was provided on 20 February 2024 and identified that Mr Bacon had a chronic mental health condition involving anxiety and depression. The physician Dr Weir when asked about whether the behaviour was likely to reoccur simply confirmed that the condition was chronic and recurrence was certain, but that it was not a barrier to work. There is no specific mention of a behaviour, and this opinion simply describes a condition which does not prevent Mr Bacon from resuming work. The alleged behaviours were not identified within the report (p312-3).
50. Ms Rees considered this report when resolving the appeal and her decision to uphold the dismissal was made on 28 February 2024. It was a detailed document. She began by saying said the mental health issue had little impact on the disciplinary matter. However, further into her report, she concluded that having considered the OH report she was concerned that the mental health condition '*...would not prevent a reoccurrence of a similar incident in the future ie that he may fail to secure his vehicle and lose a parcel*'. This conclusion was not supported by the OH report and we determined that the OH report findings were used (albeit erroneously), to endorse the original decision of Mr Sullivan to dismiss.

Law

51. Under section 98(1) of the Employment Rights Act 1996, it is for the employer to show the reason for the dismissal (or if more than one the principal reason) and that it is either a reason falling within section 98(2) or for some other substantial reason of a kind such as to justify the dismissal of the employee holding the position he held. A reason relating to conduct is a potentially fair reason falling within section 98(2).
52. The reason for the dismissal is the set of facts or the beliefs held by the employee which caused the employer to dismiss the employee. In determining the reason for the dismissal, the Tribunal may only take account of those facts or beliefs that were known to the employer at the time of the dismissal.
53. Under section 98(4) of the Employment Rights Act 1996, where the employer has shown the reason for the dismissal and that it is a potentially fair reason, the determination of the question whether the dismissal was fair or unfair depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and must be determined in accordance with equity and substantial merits of the case.
54. When determining the fairness of conduct dismissals, according to the Employment Appeal Tribunal in British Home Stores v Burchell 1980 ICR 303, the Tribunal must consider a threefold test:
 - a. The employer must show that he believed the employee was guilty of misconduct;
 - b. The Tribunal must be satisfied that he had in his mind reasonable grounds upon which to sustain that belief; and
 - c. The Tribunal must be satisfied that at the stage at which the employer formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.
55. The requirement for procedural fairness is an integral part of the fairness test under section 98(4). When determining the question of reasonableness, the Tribunal will have regard to the ACAS Code of Practice of 2015 on Disciplinary and Grievance Procedures. That Code sets out the basic requirements of fairness that will be applicable in most cases; it is intended to provide the standard of reasonable behaviour in most cases. Under section 207 of the Trade Union & Labour Relations (Consolidation) Act 1993, in any proceedings before an Employment Tribunal any Code of Practice issued by ACAS shall be admissible in evidence and any provision of the Code which appears to the Tribunal to be relevant to any question arising in the proceedings shall be taken into account in determining that question.
56. In Polkey v Dayton Services Ltd [1988] ICR 142, it was stated that if an employer could reasonably have concluded that a proper procedure would be "utterly useless" or "futile", he might be acting reasonably in ignoring it.

57. It is not for the Tribunal to substitute its own decision as to the reasonableness of the investigation. In Sainsburys Supermarkets v Hitt [2003] IRLR 23 the Court of Appeal ruled that the relevant question is whether the investigation fell within the range of reasonable responses that a reasonable employer might have adopted.
58. Nor is it for the Tribunal to substitute its own decision as to the reasonableness of the action taken by the employer. The Tribunal's function is to determine whether, in the particular circumstances of the case the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted. See: Iceland Frozen Foods v Jones [1982] IRLR 430.
59. In Taylor v OCS Group Ltd [2006] IRLR 613, the Court of Appeal stressed that the Tribunal's task under section 98(4) of the Employment Rights Act 1996 is not only to assess the fairness of the disciplinary process as a whole but also to consider the employer's reason for the dismissal as the two impact on each other. It stated that where an employee is dismissed for serious misconduct, a Tribunal might well decide that, notwithstanding some procedural imperfections, the employer acted reasonably in treating the reason as sufficient to dismiss the employee. Conversely, the Court considered that where the misconduct is of a less serious nature, so the decision to dismiss is near the borderline, the Tribunal might well conclude that a procedural deficiency had such impact that the employer did not act reasonably in dismissing the employee.
60. In respect of certain claims, such as unfair dismissal and breach of contract, Section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 provides that where an employer or employee has unreasonably failed to comply with the Code of Practice, it may, if it considers it just and equitable in all the circumstances to do so, increase or reduce compensation awards by up to 25% (this does not apply to any Basic Award for Unfair Dismissal).
61. The Polkey principle established by the House of Lords is that if a dismissal is found unfair by reason of procedural defects then the fact that the employer would or might have dismissed the employee anyway goes to the question of remedy and compensation reduced to reflect that fact. Guidance as to the enquiry the Tribunal must undertake was provided in Ms M Whitehead v Robertson Partnership UKEAT 0331/01 as follows:
- (a) what potentially fair reason for dismissal, if any, might emerge as a result of a proper investigation and disciplinary process. Was it conduct? Was it some other substantial reason, that is a loss of trust and confidence in the employee? Was it capability?
 - (b) depending on the principal reason for any hypothetical future dismissal would dismissal for that reason be fair or unfair? Thus, if conduct is the reason, would or might the Respondent have reasonable grounds for their belief in such misconduct?
 - (c) even if a potentially fair dismissal was available to the Respondent, would he in fact have dismissed the Appellant as opposed to

imposing some lesser penalty, and if so, would that have ensured the Appellant's continued employment?

62. In *Hill v Governing Body of Great Tey Primary School* UKEAT/0237/12/SM the Employment Appeal Tribunal held that a "*Polkey* deduction" has these particular features. First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between these two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done. The question as to what a hypothetical fair employer would have done is not the test: the Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand.
63. Section 122(2) of the Employment Rights Act 1996 provides that where the Tribunal finds that any conduct of a Claimant before the dismissal was such that it would be just and equitable to reduce the amount of the Basic Award, the Tribunal must reduce that amount accordingly.
64. Section 123(1) of the Employment Rights Act 1996 provides that where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the Claimant, it must reduce the amount of the compensatory award by such proportion as it considers just and equitable.
65. The Tribunal must award compensation that is just and equitable. Even if the loss arising from the dismissal is substantial, the Tribunal can still award no compensation if it would be unjust or inequitable for the employee to receive it.

Discussion

Dismissal

66. There was no dispute that the claimant was dismissed on 3 January 2024 at a meeting with Mr Sullivan who was the dismissing manager.

Reason

67. Royal Mail have confirmed that Mr Bacon was dismissed by reason of gross misconduct and that they therefore rely upon conduct as the ground for the dismissal. This is a potentially fair reason under section 98 Employment Rights Act 1996?

Fairness

68. In applying the test of fairness in section 98(4), we agree that in broad terms that the disciplinary was conducted in an appropriate way with:

- a) notification being given of the conduct under investigation;
- b) the right to be supported by a union representative; and,
- c) a fact finding meeting taking place before an investigation manager before it was referred to a formal hearing.

Mr Bacon was given an opportunity to consider notes of all meetings. We did not accept that the issues raised by him in relation to the management of the suspension materially impact upon the fairness of the process. There were regular communications sent by management to Mr Bacon confirming the suspension. Indeed, the procedure concluded relatively quickly taking into account the evidence that had to be gathered and the need to have time to properly deliberate before a decision was given by Mr Sullivan. We also accepted that the Christmas period intervened and understandably this was a busy time for the Royal Mail.

- 69. We agreed that any issues regarding inexperience of the CWU rep was a matter between Mr Bacon and his union and there was no evidence of this encouraging poor practice on the part of the Royal Mail.
- 70. Mr Sullivan genuinely believed that Mr Bacon had been responsible for the misconduct identified in that he had lost the parcel and had driven with the rear door of the van in an unlocked state.
- 71. There were reasonable grounds for the belief that the parcel was lost. It is accepted that many different theories have been advanced during the disciplinary process and during the hearing as to whether the loss involved a physical parcel actually going missing or whether it was erroneous labelling and a misplaced reliance on data records from the automated systems.
- 72. Considering what was available to Mr Sullivan as disciplinary manager at the relevant time, he had evidence that the 001 parcel had not been delivered to Taskers as they had recorded it not being received and being missing. The CCTV evidence on balance showed 3 parcels resembling the Taskers consignment being loaded onto the van at the Huyton depot and the that 001 was scanned and that 002 and 003 were manually recorded at Taskers, but importantly they were delivered. 001 remained missing but on balance, we determined that it had disappeared somewhere between Huyton depot and Taskers in Aintree which was the last delivery for Mr Bacon that day. The 001 parcel was not returned undelivered with the van afterwards.
- 73. It was therefore reasonable to conclude that Mr Bacon had been responsible for a parcel which had gone missing while under his control. Royal Mail clearly train employees regarding the importance of protecting mail and Mr Bacon was aware of this.
- 74. In relation to the door of the vehicle being unlocked, Mr Sullivan concluded that this was a routine practice and that he did not believe he would have simply unlocked the back door as he opened the gate to Taskers and reversed the few metres to the delivery site. However, in the absence of CCTV evidence to confirm what happened at the gate, Mr Sullivan clearly concluded that had Mr Bacon only unlocked the back door at this point, he

would still be in breach of leaving the load unsecured and unattended. This was because he would not be able to see the access to the rear door from his cab.

75. Despite allowing Mr Bacon the opportunity to put forward his arguments in relation to the rear door, we concluded that Mr Sullivan did not take them into account when reaching his decision and was unwilling to make further enquiries. He had an opportunity to seek the CCTV for a longer period at Taskers to see whether the van door was unlocked at the gate as suggested. What was noticeable was that the vehicle was reversed towards the gate and would continue to be reversed towards the actual loading bay in what was no more than a few metres. If Mr Bacon had been right and only unlocked the rear door at the gate to Taskers it is difficult to see how that was a clear breach of procedures. Mr Sullivan simply appeared to decide that the rear door was routinely left unlocked without properly assessing that there was any truth in what Mr Bacon said. We heard convincing evidence during the hearing that unlocked rear doors on the Royal Mail lorries had a tendency to roll up as they were sprung and any pothole or uneven road surface could cause the doors to roll upwards. No consideration appeared to be made of this factor by Mr Sullivan either. Even if Mr Sullivan adopted a strict approach to the requirement not to leave the vehicle unattended, this appeared to be a disproportionate and unreasonable view to take. There was no evidence that when considering the meaning of leaving a vehicle unattended in accordance with policy, it would include the scenario in this case where Mr Bacon by or in his van and when the van's rear was facing the gate. If anything, the greater concern here were matters of health and safety when a van is being reversed into a small area where people are working. Accordingly, we cannot accept that Mr Sullivan had reasonable grounds to believe that gross misconduct had taken place as there was insufficient consideration as to whether there was not a clear breach of the policy.
76. While overall a reasonable investigation had taken place, Mr Sullivan was reluctant to engage with any challenge from Mr Bacon and was not prepared to consider Mr Bacon's concerns.
77. In terms of sanction, we concluded that Mr Sullivan considered the two main grounds of the disciplinary process which he believed amounted to gross misconduct. However, he also expressly mentioned the warning as being a consideration as to whether he should stop short of imposing a dismissal and also the belief that there was a lack of remorse.
78. It was our conclusion that the warning and the remorse issue were key in Mr Sullivan's decision to dismiss. The difficulty was that the warning was problematic because it arose from a confused process which was not supported by clear evidence. We noted the pressure that senior management were under regarding the tachograph infringements amongst drivers at Huyton depot and there appeared to be a desperation to act quickly upon this problem. This meant that it was wrongly treated as an aggravating feature by Mr Sullivan when deciding to dismiss as it appeared to be an additional factor in the decision that dismissal was appropriate.

79. Moreover, the firm conclusion of a lack of remorse seemed to simply relate to Mr Bacon having difficulties remembering what happened, not admitting guilt and questioning the processes that existed and what he believed were his usual practices were so that some clarity could be obtained. We did not accept that there was evidence that he was seeking to blame others and he was not trying to disrupt the process. It was unfortunate that some of his requests for additional evidence were not actioned as this may have assisted the overall outcome of the investigation.
80. While potentially the driving of a van with the rear gate being left unlocked could amount to gross misconduct, a proper interrogation into the factual background as to what happened took place. Conclusions were made by Mr Sullivan without first making enquiries regarding what happened at Tasker's gate. Despite what Mr Sullivan said, it would not be reasonable to conclude gross misconduct without there being any previous warning not to do so and that unlocking the rear gate before reversing would amount to a dismissal decision for gross misconduct.
81. Even if Mr Sullivan concluded that the single ground of losing the parcel was enough to justify dismissal, we do not accept that there was sufficient evidence available that this was what he concluded at the time. He placed a great deal of attention upon the rear door and also the warning and the alleged lack of remorse were 'tipping points' justifying dismissal. Taking into account our findings, we concluded that dismissal for the missing parcel was not within the range of reasonable responses available to a dismissing manager where this appears to be the first time conduct of this nature had taken place.
82. Having considered how the respondent managed the disciplinary process overall, we were satisfied that they complied with the ACAS Code of Practice in that there was a clear disciplinary process followed with investigation and final hearing and appeal. The claimant was able to put forward his arguments and was supported by a trade union official. The issue actually arose from failure on the part of the dismissing manager. No uplift to the compensatory award is appropriate.
83. However, the question of contributory fault remains unresolved and the Tribunal felt that it had did not have sufficient evidence available to consider whether it is just and equitable to reduce any award and this is a matter which the parties will be invited to address at a future remedy hearing.

Conclusion

84. Accordingly, the judgment of this Tribunal was as follows:
- a) The claimant was unfairly dismissed by the respondent on 3 January 2024. This means that the complaint of unfair dismissal is successful.
 - b) The complaint of disability discrimination is dismissed upon withdrawal by the claimant in an email sent on 9 April 2025 and confirmed at the final hearing.

- c) The successful complaint of unfair dismissal will now proceed to a remedy hearing which will determine questions relating to:
- i) Compliance with the ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2015) and whether compensation should be increased/reduced;
 - ii) Any application of Polkey (any reduction in an award for future loss to reflect the chance that the claimant would have been dismissed fairly in any event); and,
 - iii) any reduction of an award due to contributory fault.

A remedy hearing date will be listed for one day on a date to be confirmed and the parties will provide details of dates to be avoided to the Tribunal by no later than **4pm Friday 30 May 2025**.

Employment Judge Johnson

Date: 24 July 2025

REASONS SENT TO THE PARTIES ON
Date: 2 September 2025

FOR THE TRIBUNAL OFFICE