EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100673/17

5 **Held in Glasgow on 17,18,19 July 2017**

Employment Judge: Susan Walker

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Mr James Junnor	**Claimant** **In Person**
15 **Royal Mail Group Limited**	**Respondent** **Represented by** **Ms McGarrity -** **Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that:-

25 (i) The claim for unfair dismissal is dismissed.

(ii) The claim for wrongful dismissal succeeds and the respondent is ordered to pay £3,444.36 (Three Thousand, Four Hundred and Forty Four Pounds, Thirty Six Pence) to the claimant as damages (being 12 weeks net pay).

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REASONS

Introduction

1. The claimant was dismissed by the respondent without notice on 17
35 December 2016. The claimant claims that the dismissal was unfair and seeks compensation. He claims that he was not guilty of the alleged misconduct, he raises issues about the investigation and also claims that there was inconsistent treatment with his co-worker. He also, separately, seeks damages for wrongful dismissal in respect of notice pay for 12 weeks.

The respondent contends that the dismissal was fair, was for a reason relating to misconduct and that it followed a fair procedure. It contends that it had valid reasons for treating the co-worker differently. It contends that the claimant was guilty of gross misconduct and so was not entitled to notice.

2. The claimant gave evidence on his own behalf and led evidence from his co-worker Michael Dorrian (MD). The respondent led evidence from Sean Broadley (SB) who carried out the investigation, Lee Bannerman (LB) who made the decision to dismiss and Graham Neilson (GN) who heard the appeal. A joint set of productions was lodged and some additional documents were added by consent at the start of the hearing. Written submissions were provided by both sides and these were spoken to at the end of the hearing.

Issues

3. The issues to be determined by the Tribunal at this final hearing were: -

<u>Unfair Dismissal</u>

1. Did LB and GN have a genuine belief that the claimant was guilty of the misconduct with which he was charged?

2. If so, did they have reasonable grounds for that belief?

3. Had the respondent carried out as much investigation as was reasonable in the circumstances?

4. If so, was dismissal for the alleged conduct within the range of reasonable responses?

5. Was there a rational basis for treating the claimant and MD differently?

6. Did the respondent adopt a fair procedure?

7. If the Respondent did not adopt a fair and reasonable procedure was there a chance that the Claimant have been dismissed in any event; *Polkey v A E Dayton Services Ltd [1987] 3 All ER 974?*

8. Has the Claimant taken reasonable steps to mitigate his loss?

9. By his conduct, did the Claimant contribute to his dismissal and should any compensatory award be reduced accordingly (and if so, by what factor)?

10. Did the Claimant engage in conduct which was culpable or blameworthy, and if so should the Tribunal make a reduction to any basic award to which the Claimant would be entitled (and if so, by what factor) to reflect this?

Wrongful Dismissal

11. Was the Claimant in fact guilty of Gross Misconduct?

Findings of fact

4. The Tribunal considered the following facts to be admitted or proved:-

(i) The claimant was employed by the respondent from 28 June 1999 until he was dismissed without notice on 17 December 2016.

(ii) The claimant worked as a delivery officer (alternatively referred to as postman) at the Glasgow Delivery Office which was responsible for postcodes G52 and G53. The claimant worked with a partner MD to deliver walks 1 and 10 which were within G52. Although technically the claimant was responsible for delivering walk 1 and

MD for delivering walk 10, in practice they each delivered part of each walk. They had worked together on these walks for 4 years.

(iii) On Tuesday 15 November 2016, there was a problem with the tailgate of one of the vans delivering mail to the Glasgow Delivery Office. This meant that the mail could not be sorted until later than usual.

(iv) SB was the Delivery Office manager and Gordon Carson (GC) was the claimant's line manager on duty. GC was not based permanently at this delivery office.

(v) An instruction was given to the delivery officers in relation to the parcels. SB gave an instruction to the delivery officers of G53 that if they couldn't deliver all the parcels in their normal hours that was fine. If they wanted to work overtime and deliver all the parcels that would be paid for. If they didn't want to work overtime the officer was to let him know. SB understood that GC had given the same instruction to those in G52 (including the claimant and MD).

(vi) The claimant and MD took the mail for their walks but left the parcels. They understood that the instruction was to sort the parcels and then leave them to be delivered the next day.

(vii) The other delivery officers for G52 took the parcels for their walks. 3 or 4 of the delivery officers for G53 advised SB that they would not have time to deliver the parcels and it was agreed that they could leave them till the following day.

(viii) During the morning, GC advised SB that the claimant and MD had left the parcels for their walks. GC also advised SB that the claimant had said he had to pick up his son from nursery at 12.50 and so he couldn't take the parcels. The claimant's finish time on this day was 2 pm. SB spoke the Delivery Section Manager who

said to wait and see if the claimant and MD came back. If they didn't, the parcels would be deemed to be "failing" and would be delivered the next day.

5 (ix) SB agreed that GC would go to the claimant's son's nursery and see if the claimant arrived there ahead of his finish time.

(x) The claimant and MD finished delivering the mail at around 12.30 and MD dropped the claimant off close to his son's nursery before
10 heading back to the Delivery Office to return the van. MD did not plan at that stage to deliver the parcels.

(xi) It was accepted practice at that Delivery Office that only the driver had to return at the end of the shift. It was also accepted practice
15 that a delivery officer's shift finished when his mail had been delivered even if this was before his official finish time. This was referred to as "job and finish".

(xii) The claimant and MD did not consider going back to deliver the
20 parcels they had left. They understood that that decision had been made and they did not think they were doing anything wrong in finishing at 12.30 and they did not consider they needed to alert the office to the early finish.

25 (xiii) When the claimant came out of the nursery with his son, he met GC. They had a discussion in which GC said that the claimant should have taken the parcels. The claimant said he had been told to leave them. GC said that had not been the instruction. The claimant asked if he could "fix it" if he put his son back into nursey
30 and delivered the parcels? GC said that would be fine. The claimant phoned MD (who was still on his way back to drop off the van) and told him they had made a mistake and he should pick up

the parcels and then come back and collect the claimant and they would deliver the parcels.

(xiv) MD went back to the office and sorted the parcels. SB told him not to deliver the parcels and to go home.

(xv) The following day, after they had taken part in routine mail sorting as usual, the claimant and MD were sent home by SB. The following day, SB carried out a fact-finding investigation under the respondent's conduct policy with the claimant and MD. He also interviewed GC.

(xvi) The claimant said that the instruction was to leave the parcels. The claimant said in his interview that Kevin McWhinney (KMcW) , who was a delivery support officer, had confirmed the instruction. SB asked if K McW was a manager and the claimant agreed he was not. SB asked if the claimant thought he had enough work with him to take him to his finishing time. The claimant said that he thought he had but he had misjudged it. The claimant also said that he had not taken his breaks (he was entitled to 2 x 20 breaks per shift). It was common practice for the second break to be taken are the end of the shift. SB asked whose decision it was to leave the parcels and the claimant said it was a joint decision of his and MD. SB asked if he had contacted a manager to say he had finished early and the claimant said he had not as he thought it was "job and finish". SB asked about the nursery. The claimant said that his son was booked in till 2 but he was able to pick him up sooner. SB suspended the claimant on full pay.

(xvii) MD was also interviewed by SB. SB asked MD if he had taken his first break in the morning and he said he had not. MD said there was a lot of confusion and it was his understanding that if he was not able to take all of the mail then he was to take tracked and

special delivery items and leave the other parcels. SB asked if MD had ever left mail in the office before when he had finished before his finishing time. MD said he thought there were extenuating circumstances and that if he had thought he would be finished before his time he would have taken the parcels. SB asked MD why he had not taken the parcels. MD said he had spoken to his partner (the claimant) and he believed that they were allowed to leave the parcels. MD said he grabbed as many parcels as he could. SB said that he must have known he was to take parcels? MD said he wasn't sure about completing them in time but that he (MD) should have spoken to SB. SB said that they were the only pair from G52 who had left parcels. MD said that he did not know that. He said the talk on the office floor was that it was fine to leave the parcels. SB asked if it was a joint decision? MD said that it was but that he wanted to take the parcels. SB asked MD if he had had enough work to take him to his finishing time? MD said that the parcels left would only have added about 5 minutes to his duty. SB asked about the end of the duty. MD said he picked the claimant up at the end of his loop and he had dropped him off at a place very close to the end of the route. MD said it was his plan to come back and pick up what was left. SB said that he knew the claimant had phoned him when he was on his way back to the office. MD said he was coming back anyway to pick up the parcels. MD also said he did not realise he would not be allowed to come back and take out the parcels and if he had known that, he would have taken them out. He said he felt there had been miscommunication in the morning and he had misjudged the time it would have taken him to complete his delivery. SB asked if he felt he should have been more forceful and MD said that he should and that "*this was the problem working with a partner*". SB decided not to suspend MD.

(xviii) SB interviewed GC as part of the fact-finding on 23 November. GC said that he had had a number of issues with the claimant in the

morning ignoring his instructions. He said that he (GC) had told staff to sort the tracked and special delivery items and then sort the parcels. He said that he told the staff he would pay overtime if the staff cleared the mail by finishing past their finishing time and that if they were not able to work past their finishing times then they were to take out as much as they thought they would be able to deliver. SB asked if everyone else had taken all their mail and GC said that he believed they had. GC also said that when the parcels were being sorted, the claimant had said that he would not be taking then as he needed to pick up his son from nursery at "ten to one" and as such he had enough work to take him to his finishing time. GC had spoken to SB and he had gone to the nursery about 12.35 where he met the claimant and had indicated that the claimant and MD could deliver the parcels now. However the advice given was that that was not to happen.

(xix) SB considered that a postman of the claimant's experience would have checked the position with a manager before leaving parcels. He also considered that the claimant, with his experience of the route, would have had a good idea of how long it would take. SB concluded that the claimant had needed to finish early to pick up his son and had no intention of delivering the parcels. He considered there was a case to answer and referred the case to his manager.

(xx) LB was appointed as the Conduct Investigation Manager under the Policy. He had the interview minutes from the claimant, MD and GC. He spoke to SB and K McW. He asked K McW about the morning of the 15th November. K McW said the instruction from SB was to take everything to their time and if they worked past their time, overtime would be paid. K McW said there was no instruction to leave parcels. LB put to K McW that the claimant said K McW had shouted that parcels were to be left. K McW said that was not

an instruction he would be allowed to give or would ever give. LB asked if he was sure and K McW said he was *"100%"* sure he didn't say anything.

(xxi) LB spoke to SB. He said that he and GC had agreed that they would get the tracked and special delivery deliveries sorted first. Then the staff would sort manual mail and parcels. He said that after that was done, he told staff that if they took the parcels and it took them past their time, he would pay overtime. If they didn't want overtime they had to say. He said that he and GC relayed that message. He described the conversation he had with GC when GC said that he spoke to the claimant and MD and that the claimant said he would not be able to take the parcels and be at nursery to pick up his son at 12.50 and they had decided that GC would go to the nursery. He described how GC met the claimant coming out of the nursery with his son at 12.35.

(xxii) The claimant was invited to a formal conduct meeting on 9 December. There were three separate charges of gross conduct:-

- Intentionally delaying mail by failing to complete your daily duty resulting in the failure of 30 parcels for walks 1 and 10

- Failing to follow standard operating procedure for returning to the office at end of shift and instead going to pick up child at 12.35 when the contracted finish time was 14.05

- Breaching code of business standards by not being present and productive during working hours resulting in 30 parcels failing due delivery.

(xxiii) LB asked questions about his experience and his relationship with MD. He then asked the claimant to explain what had happened on

the 15 November? The claimant said that SB had said everyone was to sort the tracked mail and take to their delivery frames. Then they were to collect special deliveries and take these to their frames. He said there was then a call to sort parcels and then " *everyone was confused and there was a call from SB to sort the parcels and then leave them*"

(xxiv) LB asked about K McW. The claimant said he heard K McW shout *"sort them and leave them".* LB pointed out that K McW had said in his interview that he was 100% sure he never shouted anything and this was an instruction he would not be allowed to give. The claimant said he knew he could not give an instruction but he took him at his word. The claimant's union representative said that K McW does pass on things form manager in the unit.

(xxv) LB said that SB had said the instruction was to take what they could to finish time or claim overtime if they worked on and there was no mention of "sorting and leaving". The claimant insisted that SB had said *"sort them and leave them"*. He said that this was what MD heard as well.

(xxvi) LB said that GC had confirmed the instruction was as SB said. The claimant said that GC had not said anything to him.

(xxvii) LB said that MD had said that he wanted to take the parcels and should have been more forceful but that after a conversation with the claimant the parcels were left. The claimant denied that and said it was a joint decision. LB asked if he had forced or intimidated MD and the claimant said that he had not.

(xxviii) LB then asked the claimant why he had said he would be picking his child up at 12. 50 when his contracted finishing time was 2.05? The claimant said he could not remember saying that. He said it

was a joke among the staff and he did not need to pick them up at that time,

(xxix) LB then asked when the claimant had left the office. The claimant said it would be about 9.15/9.20. LB asked if he knew how many parcels were left. He said he did not look. The claimant repeated that he heard "*sort them and leave them*" and that's what he did.

(xxx) LB asked if the claimant had spoken to a manager before leaving. The claimant sad he had not, he didn't think he had to.

(xxxi) LB said that there were 22 members of staff in G52. 20 heard the instruction. He asked why the claimant and MD did not? The claimant repeated that he thought he was to leave the parcels. He had called MD to go back and get the parcels. GC had said it was ok but SB had said that the parcels were not to leave the office.

(xxxii) The claimant's union representative asked why the claimant was suspended and MD was no?. The claimant had said that it was a joint decision. It should be the same allegations for both him and MD.

(xxxiii) LB asked whether the claimant thought he was present and productive during working hours as required by the code of business. The claimant accepted he could have been more productive but he should have had the correct information relayed to him. LB said that the code required staff to exercise sound judgment. The claimant said that he thought he used his judgment but he and his partner had heard "sort them and leave them".

(xxxiv) LB then interviewed MD on 13 December. He asked what the instructions were on 15 November. MD said that SB and GC said the priority was the special deliveries and the tracked items and

other parcels were to be left till the next day. LB asked was it shouted or an instruction given to him. MD said that he heard SB say it and a *"lot of guys agreed*" but there was a lot of confusion that morning. LB asked MD if he wanted to take the parcels. MD said he was happy to take them because a Wednesday was a very busy day. LB asked if it was a joint decision to leave the parcels. MD said it depended on how you looked at it. He said that he wasn't a forceful person. If he had known there would be an issue he would have taken the parcels. He was sure staff in G33 left parcels. He said they were under the impression they could be left. LB asked what was said in the conversation with the claimant. MD said it wasn't much of a conversation and if he had been on his own he would have taken the parcels. LB said that SB and GC had said the instruction was to take parcels to your time or claim overtime if required. MD said if that was the instruction he didn't hear it. He heard concentrate on special deliveries and tracked items. LB asked why the others had taken the parcels. MD suggested that they wanted to get them done because Wednesday was a busy day.

Charge 1

(xxxv) LB accepted the instruction was given as stated by GC and SB. He also accepted that the claimant had said to GC he was going to pick up his son from nursery at 12.50 as there was no other reason GC would have known to go to the nursery at that time. He took into account that the claimant had been a postman for 17 years and had been covering this route with this partner for 3-4 years. He took into account that the claimant and MD were the only pairing that didn't take the parcels that morning. From that, he concluded that they had heard the instruction. He noted the claimant had said that he thought they had enough parcels to finish at his contracted hours but instead finished 1 hour and 30 minutes early. He

concluded that this was not a misjudgment but “a contrived way to finish even earlier than usual “. He noted that the claimant did not call the office to say he was ahead of time nor offered to come back and get the parcels. Instead he finished prior to 12.35 and proceeded directly to the nursey. The claimant said at his interview that he understood intentional delay of mail to mean *“leaving mail in and finishing before your time”.* LB concluded this is what eth claimant had done.

Charge 2

(xxxvi) LB accepted that there was a local agreement that the non-driver did not have to return to the office. He did not uphold this charge.

Charge 3

(xxxvii) LB noted that the claimant had deprived the respondent of 1 hour and 30 minutes of valuable resource that should have been used to deliver the parcels. He concluded that this demonstrated disregard for the code of business standards and the requirement to be present and productive during working hours and upheld this charge.

(xxxviii) LB therefore found the claimant had intentionally delayed mail and had failed to be present and productive suing working hours. These constitute gross misconduct under the respondent’s policies. He considered that the needs of the customer were put behind the claimant’s desire for an early finish resulting in 30 parcels failing delivery that day. He concluded that the bond of trust had been irretrievably broken and that a penalty of less than dismissal would not be appropriate. He decided to dismiss the claimant without notice.

(xxxix) The dismissal was intimated to the claimant. He was advised of a right of appeal. The claimant did appeal and the appeal was considered by GN. The appeal took the form of a rehearing.

(xl) The grounds of appeal were the differences in treatment between the claimant and MD and the use of MD as a witness in the claimant's investigation. The claimant stated that he understood that MD had not received any sanction. The claimant said that the morning in question was "chaotic", the instruction was unclear and his usual manager was on leave. He and MD had heard the instruction to sort and leave. There was no intentional delay of mail. He said that he had not contacted a manager as he had an instruction to sort and leave. He denied that the conversation had taken place as stated by GC and had such a conversation taken place he would have expected that to be challenged. He said there was no benefit to finishing early. His son attended nursery from 7.30 to 15.00. He questioned why he and MD had not been allowed to deliver the parcels and correct the miscommunication? He said that he had not taken his breaks on the morning so worked through 40 minutes of break time. He said he had been unfairly treated and what had happened was unintentional delay of mail. He also said it was unfair that he and MD had been treated differently. He pointed to his long service and clean record. He said he had been diagnosed with depression as a result of the dismissal.

(xli) The appeal was heard on 19 January. GN confirmed the details with the claimant and that the claimant understood what was meant by intentional delay of mail. GN pointed to the Conduct agreement where it stated that if an OPG planned to leave mail as they didn't think they could deliver it in time, then they should agree with their manager what was to be left. The claimant said there had been problems with the mail. GN read out the part of GC's statement

where he said what instruction was given. The claimant said it was SB who had given the instruction. His representative said he had been in the office and he didn't think GC had been that specific. His representative also said he thought there was a conflict in SB interviewing GC. GN asked why the claimant and MD were the only pair not to take the parcels? The claimant's representative said they thought they had enough to take them to finishing time. GN then asked questions about the length of the route and when the claimant had finished. He asked about the collection and the claimant said he could pick his child up any time till 5. GN asked if he had to phone the nursery if he would be late and the claimant said not. There was then discussion about MD's interview and how long it would take to deliver the parcels. The claimant said that was only MD's opinion. GN asked when the claimant realized they would finishing well before their time. The claimant said it depended. There were a number of buzzer entries (meaning if people did not answer the buzzer they could not deliver and the route was completed quicker). He said it had been a misjudgment. He hadn't been aware there was a problem with them leaving the parcels. GN asked why they didn't phone the office to ask for the parcels to be brought to them or go back for them? Again the claimant said that they were not aware there was a problem with the parcels being left.

(xlii) GN asked about the alleged comment that the claimant had said he needed to pick his son up at "ten to one". The claimant said it was a standing joke that he would go and pick up his son at one o'clock. He denied saying that he had to pick him up at 12.50 and if had said that, he would have expected to be taken into the office. If he did say something like that then it was a joke. GN asked why GC would make the effort to go to the nursery if the claimant had not said he was going there to pick up his son? The claimant said he had no idea how long GC had been waiting and that in his view

he should have waited at the final point of delivery not at his child's nursery. He also questioned how GC knew where the nursery was? He also pointed out that GC had not signed the interview notes. He said that he believed there was a conflict of interest with SB interviewing GC.

(xliii) GN asked why, if the instruction was as described by the claimant, that 20 out of 22 staff in G52 took the parcels? The claimant said that a lot of people were "floaters" and didn't want to leave things for anyone the following day or they may have wanted to claim overtime. The claimant repeated that staff in G53 left their parcels. The claimant in a further letter stressed that MD should face the same allegations as it was a joint decision.

(xliv) GN then conducted a telephone interview with SB. He questioned him about the instruction that was given. SB said that he discussed it with GC and GC relayed the information to the G52 staff. SB said that the instruction was that they were expected to deliver all the mail they had. They would be paid overtime if they went over. If they were unable to go over their time and were not likely to deliver everything, they were to let him know.

(xlv) GN asked about the alleged comment made by the claimant to GC about not being able to take the parcels as he had to pick up his son. He asked why that had not been challenged. SB said that he and GC thought it was "tongue in cheek" and they didn't take it seriously. SB said it was a standing joke in the office about the claimant collecting his son.

(xlvi) GN asked if the claimant and MD were the only ones to leave parcels? He said they were the only ones in G52. He said that G53 was a bit different as they had 25 minutes to get to the start of their route. He said that 4 duties from G53 approached him and said

they would not be able to deliver in time and that all came back late from their deliveries.

(xlvii) GN asked when GC had left to go to the nursery and SB said it was 12.15/12.20. GN asked if he had spoken to GC afterwards SB said that he had and that MD was coming back to get the parcels. SB said he took guidance from his DSM and was told that if GC hadn't gone to the nursery the parcels would have been left and so SB had proceeded on the basis that they were not being delivered

(xlviii) GN said he didn't understand why only the claimant had been suspended. SB said that MD knew he had to deliver the parcels but that the claimant never had any intention of delivering them until he was spoken to by GC,

(xlix) GN asked if any other staff had come forward to support what the claimant and MD had said about the instruction. SB said no but a few people had said to him that morning that they weren't sure if they had heard him right. SB said he couldn't see why the claimant and MD didn't know what they were meant to do.

(l) GN then tried to arrange to speak to GC. This proved difficulty to arrange and as quite a bit of time had passed (partly caused by GN being unwell) GN decided to carry out an email exchange with GC. He asked what instruction was given. GC replied that the instruction was "*if delivering the mail would take them over their finishing time and they were willing to work on and clear the mail they would be paid overtime and if they could not work past their time, and could not complete their full delivery they were to let managers know so they could make arrangements for the mail that was going to fail*." He said that SB gave the instruction to the whole unit and then he (GC) had relayed to staff in G52 so there was no doubt. GN asked why the alleged statement about the nursery

collection was not challenged at the time? GC said that it was "*such a ridiculous statement to make in front of a manager that it was not taken seriously at that point*". He said that he had explained to staff that the expectation was that as a minimum to take out delivery workload to their finish time. He said that this was standard practice is any unit in which he had worked. He asked, "*Why would a manager allow someone to fail items of fila and yet finish early?* "

(li) GN asked GC if the claimant and MD were the only members of G52 who left parcels. GC said that they were and that 4 members of staff in G53 left parcels to allow them to finish on time.

(lii) GN asked when GC had left the delivery office and he said about 12.15. GC asked why he would have done that if the claimant had authority to finish early? When asked by GN, GC said that a member of staff had told him which nursery the claimant's child was at. He agreed that he had initially said that the claimant and MD could deliver the parcels but on reflection conceded that the claimant had in effect finished for the day and had chosen not to return. After speaking to SB and the DSM, he said that the decision was to proceed on the basis that the claimant had no intention to deliver mail that he had time to deliver and that had been allocated to him. GC said that for the claimant to leave mail in the unit, that was allocated to him, and then to finish early was "*not acceptable and warranted investigation*"

(liii) GN send the notes of his conversation with SB and the email from GC to the claimant for comments. The claimant stated that he had around 50 "closes" on his route and that it could be difficult to judge how long the route would take as this depended on whether he got access. He said that there had been a breach of confidentiality ion respect of information about his child's nursery. He questioned why GC had not challenged him about the alleged statement and why

GC thought this was "tongue in cheek". He stated that GC was an inexperienced member of staff and he accepted the resolution without authority. The claimant repeated that he should not have been treated differently to MD and that MD had confirmed that the instructions were not clear. He said it was not normal protocol to go back to the office to take out more mail. He thought he had been victimized by SB. He considered that SB and GC had acted unprofessionally. He also said that several employees in G52 had raised a complaint against SB for his conduct in the office. He also said that, having seen the photos of the parcels that were left, 11 were from his walk and 16 from MDs. 3 were not from either of their walks.

(liv) GN issued his decision by letter dated 16 March 2017. His decision was that the appeal was rejected. He set out his reasons. He noted that responsibility for avoiding delay to mail and giving it prompt and correct treatment is one of the most important duties of the respondent's employees. If mail is delayed for whatever reason, employees should attempt to correct the problem. When they have completed their preparation if an employee believes they may experience difficulty within the time allotted they should approach their manager before setting out on delivery and the manager will advise what action should be taken. If an employee is unable to complete their delivery this must be reported immediately. He considered the procedure that had been followed. He considered the claimant's appeal points. His conclusions were as follows:-

- He accepted that the non-driver did not always return to the office. However, he noted that the claimant had arrived to collect his son 90 minutes before his finish time. Even if he had not taken his breaks this would still mean he finished 50 minutes early. It was reasonable to assume that the claimant's parcels would not have taken longer to deliver

that MD's (about 5 minutes). He would therefore have had enough time to deliver the parcels.

- He noted that some in the G53 had left parcels. However he accepted SB and GC's accounts. SB had said that those staff had told him in advance they would be unable to deliver all the mail because of the delay and that they had then returned late. He noted that the claimant and MD were the only ones from G52 who had not taken the parcels. He found it difficult to believe that the claimant and MD were the only ones who did not hear the instruction. Similarly if the instruction was not specific, as alleged by the claimant, he found it illogical that the rest of the staff did as instructed. He also noted that GC's version of events was corroborated by SB and K McW.

- He noted the claimant considered there was a conflict for SB to interview GC. He understood the point but did not believe there was a conflict at the end of the day as SB was not the decision maker.

- He considered the point that the claimant and MD thought they had enough work to take to their finish time. He found this hard to believe given their length of service and the fact that Tuesday is a light day.

- He considered the claimant's contention that there had been miscommunication and that he had misjudged the time. He did not accept this as over 95% of the staff appeared to be aware of what was to happen.

- He considered the fact that the claimant had been willing to return and deliver the parcels. He concluded that the

claimant had no intention of doing this until he was "caught red handed".

- He considered that there was no challenge to the claimant's statement to GC because they did not take it seriously.

- The claimant had raised a point that GC's statement was unsigned and undated. GN did not think this was significant and noted that the claimant did not raise this with LB. he considered he was "clutching at straws".

- It was true that no one contacted the claimant or MD about the parcels. However conversely, neither the claimant nor MD contacted the office to say they were finished early.

- He considered the point of inconsistent treatment. He had investigated and found that MD had been disciplined but had received a penalty short of dismissal. He considered there was a distinction to be drawn between the two cases. He considered that the claimant had no intention of returning to the office. However MD had no option but to return and he had said that he knew leaving the parcels was a mistake and that he planned to rectify this but was prevented from doing so by his manager. He noted that MD had the parcels sorted and ready for delivery.

- He also considered the claimant's clean record.

- In summary, GN did not believe the claimant's account and accepted the account given by GC and SB. This was because the other staff had acted in accordance with the instruction which SB and GC said was given and that GC would not have known to go to the nursery had the claimant

not said what GC alleged. GN conclude that the appropriate sanction was dismissal, notwithstanding the claimant's clean record and long service. Intentional delay of mail is a serious offence and could lead to prosecution. Together with the second charge, he concluded that the penalty should be at the highest end of the scale.

(lv) Since dismissal, the claimant has taken reasonable steps to find alternative employment, although he was hampered in this by being dismissed for gross misconduct. He has now found alternative employment but at a lower rate.

Observations on the evidence

5. The main issue of dispute in this case related to the instruction given on the morning of the 15 November 2016 and/or what the claimant understood the instruction to be. For the case of unfair dismissal, it is not relevant what instruction was actually given or what the claimant actually thought– what matters is what LB and GN believed had happened and whether that belief was reasonable (see below). However for the claim of wrongful dismissal (failure to pay notice) the tribunal has to make a finding about whether the claimant was in fact in fundamental breach of contract and for that claim it is relevant what instruction the claimant believed had been given as well as how the claimant acted later in the day.

6. Both the claimant and MD gave clear accounts that they understood that they were to sort the parcels and then leave them and that they did not consider they were doing anything wrong. GC did not give evidence to the Tribunal to contradict that. In his evidence. SB did not say that he had given the instruction direct to those staff in G52, such as the claimant, but that GC had done so. I did have two documents, one of which was a note of the interview with GC and another was the email exchange with GN in which GC says he gave a similar instruction to G52 staff. I also had evidence from

SB about what GC had said to him on the day. I noted that everyone else who worked in G52 did take the parcels but this could be explained, as MD said, by the fact that they did not want a backlog the following day which was a busy day or as the claimant said to LB, that they were floaters. It could also be explained if the instruction was given by GC as he stated in his statement but that the claimant and MD did not hear it or misunderstood it. MD, before me, said that he had not heard any instruction directly from a manager but it was relayed by another member of staff. MD said in evidence that when GC was asked what the plan was he said "speak to SB". MD said another employee, Brian Martin had spoken to SB and the message came back to concentrate on specials and tracked mail and that the instruction from SB was that the parcels could "wait till tomorrow". MD gave evidence that he understood the instruction was "sort and leave". The claimant said that SB gave an instruction but he also said that K McW had said "sort and leave" the parcels . K McW in a statement (but again not in evidence before me) denied giving an instruction to that effect or saying anything.

7. I found both the claimant and MD credible and convincing on this point. They have also consistently stated from the start that they understood the instruction was to sort and leave the parcels. There was clearly confusion on the morning and I think it is likely that the instruction was not given as clearly as SB suggested in his evidence nor as suggested by GC in his interview. I also note that the precise instruction is described differently in various documents by different people. So in the fact-finding interview, GC says he told staff that he would pay overtime if they cleared the mail by working past their finishing time and if they were not able to work past their finishing time they were to take out as much as they thought they would be able to deliver". He does not mention in that interview that the staff were to let managers know if they were unable to complete delivery or work overtime but adds that in his email answers to GN. SB said to LB that the instruction was that if the parcels would take them over time and they did not want overtime to clear them then "they had to let us know this would be

the case." K McW says that the instruction was to take everything to time and if they worked past their time overtime would be paid. He does not mention an instruction of what was to happen if an employee was not able, or did not wish to work overtime. GC said SB gave had instruction to both sections and that he spoke to the claimant and MD. MD said he was working in another area and didn't hear the instruction. MD then said to LB that it was SB who gave the instruction. K McW said that SB gave te instruction and the claimant said that SB gave an instruction to sort and leave but that GC did not speak to him at all.

8. I think it is more likely than not that an instruction was given at least to some staff as described by K McW and that it was not specifically stated that they were to tell a manager if they were not taking parcels. However, I do not think it has been proved by the respondent (on whom the onus lies in relation to proving there was a fundamental breach) that that instruction was given clearly to all employees and specifically to the claimant and MD. Taking account of the long service and clean records of the employees concerned, I consider it is unlikely that the claimant and MD would have disobeyed an instruction when it was clear that this would quickly be discovered when the parcels were left. If they had been told clearly to tell a manager if they were not taking parcels, I consider they would have done so.

9. What is less clear, is whether the claimant and MD understood that they were expected to take the parcels if they could deliver them within their time. Both the claimant and MD have consistently said, since first challenged that they understood they were to "sort and leave" the parcels and not to calculate whether or not they had time to deliver them in normal time. The claimant did say he had misjudged the time but this was in response to a question. I do not consider that was an admission that he should have taken the parcels if he could.

10. Important to the respondent's case is that GC says that the claimant said to him that he was not taking the parcels because he had to pick up his son at 12.50. Had the claimant said this that would support the contention that he knew he was to deliver the parcels if he could complete that in his time. It is therefore a critical finding as to whether or not this was said. The claimant denies saying this but he accepts that his picking up his son from nursery was a standing joke at work. I had clear evidence from the claimant under oath that he had not said this. He has maintained this throughout. I did not have the opportunity to hear directly from GC and the claimant did not have the opportunity to challenge GC's assertion. I agree with the claimant that had he mentioned a specific time like that to GC which well before his finish time, and in the context of his not being able to complete his delivery of parcels, he would expect to be challenged by GC. However, if the claimant had said nothing at all about the collection of his child at the nursery at that time, why would GC would have gone to the nursery to see if he finished early? It seems to me the answer is that the claimant routinely finished early (but quite legitimately as "job and finish") and was therefore usually in time to pick up his son from nursery by 1 o'clock. This was the standing joke among the staff and is likely to have been known to GC. If GC thought he had given an instruction to take the parcels to finishing time, and parcels were left, he may have believed that the claimant was disobeying that instruction to pick up his son. He would know that the claimant routinely picked up his son at that time.

11. On balance, I do not accept that this conversation took place as asserted by GC. Without that, I consider it is more likely than not, that the claimant and MD did not understand they were to take parcels to their time and only leave them if they could not do so, or work overtime. They believed the instruction was to "sort and leave" the parcels.

Relevant law

Unfair dismissal

12. The Employment Rights Act 1996 (the "ERA") sets out the right not to be unfairly dismissed. It is for the respondent to prove that it had a potentially fair reason for dismissal in terms of section 98(1). In the present case it is contended that the reason is one relating to conduct. In such cases , the case of *BHS v Burchell* 1980 ICR 303 provides that the Tribunal must find that the respondent had a genuine belief in the misconduct, and that that belief must be based on reasonable grounds having carried out a reasonable investigation. It is not required that the Tribunal consider whether or not the claimant was in fact guilty of the alleged misconduct and the respondent's belief is assessed at the time the decision is taken to dismiss. Evidence that comes to light subsequently is not taken into account.

13. If the Tribunal is satisfied there is a potentially fair for dismissal, it must then assess whether in the circumstances (which includes the size and administrative resources of the respondent) the decision to dismiss for that reason was fair or unfair. Section 98(4) of the ERA provides that the determination of whether the dismissal is fair or unfair shall be determined in accordance with equity and the substantial merits of the case.

14. This test of fairness is really one of reasonableness and the law recognises that different employers acting reasonably may make different decisions based on the same circumstances. It is not for the Tribunal to decide whether it would have dismissed for that reason. That would be an error of law as the Tribunal would have "substituted its own view" for that of the reasonable employer. Rather the question for the Tribunal is whether the decision to dismiss (and the procedure adopted) fell within the "range of reasonable responses" open to a reasonable employer. If so, the dismissal is fair. It is only if the decision to dismiss falls outside that range that the dismissal is unfair. (See for example, *Iceland Frozen Foods Ltd v Jones 1983 ICR 17*).

15. Inconsistent treatment of employees can render a dismissal unfair but only in certain narrow circumstances, including where the employees are in "truly parallel circumstances" *(Hadjidoannou v Coral Casinos Ltd (1981) IRLR 352*). If they are in truly parallel circumstances, the question is whether the different treatment was so irrational that no reasonable employer could have decided to act in that way (*Securicor Ltd v Smith 1989 IRLR 356*)

16. The Tribunal will also consider the procedure that was followed. A failure to follow a fair procedure may cast doubt on the reason for dismissal or may, in itself, mean that the decision to dismiss was not reasonable. However, the Tribunal must assess the overall fairness of the procedure and not merely whether there was a failure to comply with a contractual procedure or the ACAS Code of Practice.

Wrongful dismissal

17. Wrongful dismissal is a different claim from unfair dismissal. It is a claim of breach of contract – specifically for failure to provide the proper notice provided for by statute or the contract (if more). However, an employer does not have to give notice if the employee is in fundamental breach of contract. This is a breach of contract that goes to the heart of the contract so that the employer should not be bound by its obligations under the contract (including the requirement for notice). This may be a breach of an express term in the contract or it may be a breach of an implied term, such as the term that both parties to an employment contract should conduct themselves in a way that is not calculated or likely to seriously damage or destroy the relationship of trust and confidence between them.

Claimant's Submissions

18. The claimant's submission in summary were as follows:

19. The situation arose because of misunderstanding and poor and unclear instructions. The usual manger was not present, they were dealing with a broken van and a 1 ½ hour delay. It was a chaotic morning.

20. Both the claimant and MD left parcels. It was shared responsibility. They both gave evidence that they did not know they had to take the parcels and they both heard "sort and leave"

21. LB confirmed that the usual process is to contact the person on duty to alert them.

22. GC was a trial support manager with no authority and was sent to the claimant's child's nursery. How did GC know of the nursery's location?

23. GC was prepared to allow the claimant and MD to sort the situation and the claimant put his child back into nursery, eager and willing to rectify the situation.

24. When they returned to work the next day, the claimant and MD were allowed to handle mail. It was business as usual until the claimant was suspended "to safeguard the mail". Why was that allowed?

25. If the claimant had not asked LB why he was the only one sitting there, then the claimant believes that no conduct or warning would have been issued to MD.MD was issued with a lesser sanction, it is believed for "unintentional delay of mail" due to the fact that MD was not investigated to the same degree, he was not suspended and was allowed to return to work. The only difference is that the claimant does not drive. It should be considered that SB did not want to cause disruption to the workforce and it would be easier to replace the claimant with a floating member of staff. There was no fair and consistent treatment of JJ and MD.

26. GN did not fully investigate the points raised by the claimant (21/1 21/2 and 21/3) and did not take into account anything other than how MD might be feeling from reading his notes.

5 **Respondent's submissions**

27. The respondent submissions, in summary, were as follows:

28. The claimant's evidence lacks credibility and was contradictory. The claimant never asked LB or GN to speak to anyone because he knew others would not support his version of events. MD's evidence also lacks credibility and significantly contradicts what he said in his fact-finding meeting.

15 29. Conversely the evidence of the respondent's witnesses was clear and cogent and should be preferred where there is a conflict.

Unfair dismissal

20 30. LB and GN had a genuine belief that charges 1 and 3 were made out. There was no evidence that this was lacking. The claimant admitted knowingly leaving mail behind, not speaking to a manger before doing so, that you would normally speak to a manger before leaving mail behind, finishing his shift at least 50 minutes early, not contacting the office when he finished early to discuss delivering the rest of the mail and going instead to pick up his son from nursery.

31. LB did not believe that eth claimant had misheard the instruction. Every other postman in G52 apart from the claimant and MD had taken all the mail. He did not accept that a postman with the claimant's experience would have misjudged the position to that extent. GN also believed that , taking account of the fact that no one else in G52 had left mail and that the claimant turned up at the nursery at the time that GC alleges he said he was

going to. There was no reason for GC to go to the nursery if the claimant had not said that.

32. The belief was reasonable because the claimant had 17 years' experience and 4 years on that route. The security procedure states that if a postman has any concerns about the volume of mail or anything affecting their delivery, they should speak to a manager before commencing delivery. The claimant signed for recipe of this procedure. The National Conduct Agreement also says what should happen if a postman does not think he can deliver all the mail. There are regular briefings about mail integrity.

33. SB and GC said during the disciplinary process that they had not given the instruction to "sort and leave". K McW also confirmed this. SB said he had told the staff they needed to speak to a manager if they were not able to deliver the mail.

34. The claimant and his partner were the only ones in G52 who did not take the parcels.

35. The claimant said he misjudged the amount of mail but he didn't phone the office when he finished early. He confirmed in his appeal hearing that he had not left the office later than normal. MD said it would only have taken about 5 minutes extra to deliver the parcels. The claimant confirmed in his appeal that he finished about 12.50 and that he could have been more productive.

36. The investigation was reasonable in the circumstances. SB interviewed GC and MD, It was not suggested to him by the claimant that he should interview anyone else. LB relied on the reasonable investigation carried out by SB and also interviewed K McW and took a statement from SB by way of further investigation. GN undertook a full rehearing of the case. He reviewed the investigations of SB and LB and re-interviewed the claimant and SB. He

also emailed GC with further questions. GN fully tested the claimant's appeal points.

37. It was suggested that GN should have met GC and SB face to face. The claimant came close to suggesting some sort of conspiracy between SB and GC. This was unsupported by the facts. There was also no evidence that the statement that was unsigned was not an accurate reflection of what GC told SB.

38. It was suggested that GN should have interviewed MD. 2 interviews had already been held with MD and his position had not changed.

39. It was suggested that GN should have spoken to Paul McBride who carried out MD's disciplinary. GN said in evidence that he did review the sanction and the conclusions although he could not remember exactly what they were. This does not man he did not carry out a reasonable investigation.

40. It is suggested that GN could have spoken to others in the delivery office. GN did not think this was necessary as everyone else had taken the parcels and he concluded therefore they had herd the instruction which SB and GC said they gave,. The claimant did not ask LB or GN to speak to others.

41. The decision to dismiss was within the band of reasonable responses. The offence of intentional delay of mail is clearly classed as gross misconduct under the respondent's conduct policy. This offence can lead to criminal prosecutions and fines can be imposed on the respondent by the regulator. GN said that ensuring mail is delivered on time is one of the most important duties of a post man. The claimant accepted this in evidence but he had finished his shift at least 50 minutes early when he had knowingly left maul behind. This led LB and GN to conclude that he had failed to be present and productive.

42. The tribunal may have sympathy for the respondent given his length of service but it must not substitute its view.

43. The claimant alleged disparity of treatment between him and MD. It is only in exceptional circumstances that differential treatment will make a dismissal unfair (*Hadjioannou v Coral Casinos Ltd (19810 IRLR 352*). The evidence of LB and GN is that they were not in truly parallel circumstances as MD indicated he had wanted to take the parcels and had grabbed as many as he could. He had also said that was coming back for the parcels and that he was always planning to do so. He said he should have been more forceful and if he had been working on his own he would have taken them. MD did return to the office and started getting the parcels ready for delivery. The claimant did not and had no intention of delivering the parcels until GC met him at the nursery. It seemed that the claimant was the controlling mind. MD was subjected to disciplinary action although not dismissed. GN gave this point due consideration. The question is whether the differential treatment is so irrational that no reasonable employer could have taken that decision

44. The procedure was fair and was compliant with the ACAS code of Practice.

<u>Wrongful dismissal</u>

45. Based on the evidence the claimant did intentionally delay mail and failed to be present and productive during working hours. The claimant may deny making the comment to GC but the fact that this is what in fact he did suggests it was a comment that the claimant made and clearly shows his intention not to deliver the mail. The claimant accepted that normally a postman would need permission to leave mail behind. It was highly unlikely that an experienced postman would have accepted an instruction to “sort them and leave them” at face value. Such an instruction would have seemed very odd. LB said he would have expected the claimant to clarify that. It was also relevant that the other pairings in G52 and G53 followed the

instruction which SB said he had given. The claimant finished early and did not contact the office to explain that he could now deliver the parcels.

46. Was this a material breach? The respondent submits that this conduct amounts to a material breach of contract as it undermines the relationship of trust and confidence. The claimant admitted he could have been more productive. The claimant remained suspended. This supports the view that the bond of trust was irretrievably broken. Taking deliberate action to delay mail is a repudiatory breach of the employment contract.

Discussion and decision

Unfair Dismissal

47. Dealing first with the claim of unfair dismissal, the Tribunal has to consider whether the respondent has established a potentially fair reason for dismissal. The charges were that the claimant had intentionally delayed mail and that he had not been present and productive during working hours. The question at this stage in the consideration is whether the dismissing officer (and appeal officer) genuinely believed these charges were made out and whether he had reasonable grounds for that belief having carried out a reasonable investigation.

48. I am satisfied that LB and subsequently GN did believe that the claimant had left parcels in contravention of a management instruction meaning that the parcels failed delivery and that this was intentional delay of mail. I am also satisfied that they believed that the claimant had not been present and productive during working time. It was not in dispute that the claimant had finished his shift at least 50 minutes early and that he had picked up his son from nursery before his shift was due to finish and while there were parcels that had not been delivered.

49. Did they have reasonable grounds for that belief having carried out a reasonable investigation? I consider that they did have reasonable grounds.

The evidence of two managers was that the instruction was given to work overtime if necessary to deliver all the mail and that they should speak to the manager if this was not possible. K McW had also confirmed that an instruction similar to this had been given. This appeared to be in accordance with the expectation of both LB and GN as to what would happen. The actions of the others at the delivery office was consistent with that instruction having been given.

50. It was reasonable for them to believe that the claimant had intended to pick his son up before his shift finished as this is what GC said the claimant had told him he was going to do and what in fact he did do. LB and GN had reasonable grounds to believe that the claimant had intended to finish early and, having concluded that an instruction had been given in terms described by SB and GC, that he would not be present and productive during his shift. They had reasonable grounds to believe that the claimant with his experience of the route, would know that he would have had time to deliver the parcels. The claimant suggested in interview that he had misjudged the length of time. It was reasonable for the managers to be sceptical about this in light of the claimant's experience on this route and the fact that MD said it would have added about 5 minutes to the route to deliver his parcels.

51. The investigation carried out by the respondent was reasonable. The relevant people were interviewed. While the claimant says that more could have been done in this respect, this was not raised at the time and I consider that what was done was sufficient. Both LB and GN carried out additional investigation into points raised by the claimant. The claimant raised issues about a conflict in SB interviewing in GC and that the notes were not signed. I do not consider these to be significant points. LB was the person who made the decision to dismiss, not SB. GC was asked further questions by GN, albeit by email. That was a reasonable investigation in my judgment. The elements of the *Burchell* test were met and the respondent had a potentially fair reason for dismissal – a reason relating to conduct,

specifically that the claimant had intentionally delayed mail and that he had not been present and productive during working hours.

52. I then considered whether dismissal for that reason was fair having regard to s 98 (4) of the ERA including the procedure which was adopted. It is not for me to consider whether I would have dismissed the claimant either at the time or having heard all the evidence. What I have to consider is whether a reasonable employer in the respondent's position with the information it had at the time would have done so.

53. It was clear from all the witnesses and the various policies and procedures that were referred to that delay of mail is taken very seriously by the respondent and that this is known by the staff. This was not disputed by the claimant. In extreme cases this can constitute a criminal offence; the respondent may also suffer consequences and reputational damage. LB and GN believed that the claimant had known he would be finishing early but had still left parcels behind. Such action would be a very serious matter and I cannot say that it would be unreasonable for an employer in respondent's position with their legal obligations to dismiss for that conduct. This offence would not be mitigated by long service. On the contrary that could be seen as aggravating the offence.

54. The claimant raises an issue of inconsistent treatment between himself and MD. This caused me some concern as I do not think there was in fact <u>any</u> difference between the cases on the evidence before me. However, that is not the test. The issue is whether the employees were in truly parallel circumstances and if so, whether different treatment was irrational. The issue was reasonably explored by GN. He made enquiries about what had happened to MD. He found that he had been disciplined but had received a lower sanction. On the papers before GN it was not unreasonable to conclude that MD was less culpable, that he had been persuaded by the claimant not to take parcels, that he did in fact take some and that he was

coming back to deliver the rest of the parcels. From the evidence before me, it is clear that neither the claimant nor MD intended to deliver the parcels, that MD was going back only to drop off the van and the only reason he went to get the parcels was because the claimant had phoned him. I don't believe that in fact, the claimant had persuaded MD to leave parcels behind or was a "controlling mind" as suggested by the respondent. However, I conclude that it was not unreasonable for the respondent, on the material that was before it at the time, to draw a distinction between them based on what MD had said in his interview and apply different sanctions. Either this means that the claimant and MD were not in truly parallel circumstances (on the material available to GN) or there was a rational explanation for different treatment. Either way, it does not of itself, render the dismissal of the claimant unfair. I can understand why the claimant feels aggrieved about this. If it is of any consolation to the claimant, I consider that the respondent, had it truly understood the position as it was before me, would also have dismissed MD. It would not have changed the decision for the claimant.

55. The claimant raises some issues about the procedure which I have referred to above. I do not consider that there were any significant procedural issues in this case. The claimant was accompanied by his trade union representative at all stages of the procedure, he had a full opportunity to present his case. Where he raised issues these were explored by LB ad GN who appeared to me to have approached their tasks in good faith and with open minds. The claimant complains that the respondent could have interviewed other employees but equally, the claimant could have asked for those employees to be brought as witnesses. The claimant also suggests that GC could have been interviewed by LB or GN face to face and that MD should have been re-interviewed by GN. These were possible courses of action but a disciplinary hearing is not like a criminal court. The standard is one of reasonableness and fairness. I consider that the procedure was fair although I accept that the claimant does not believe that the outcome was.

56. For these reasons, the claim of unfair dismissal is dismissed.

Wrongful Dismissal

57. The claimant was dismissed without notice and the claimant has a separate claim for that. This is technically a breach of contract claim and the question for the Tribunal is whether the claimant was in fact in fundamental breach of contract. The alleged breach of contract is the relationship of trust and confidence. The onus of proof is on the respondent to establish there has been a fundamental breach of contract that entitles them to dismiss without notice.

58. I have accepted on the balance of probabilities that, whatever instruction was in fact given, the claimant believed that the instruction given was to "sort and leave" the parcels. I accept the respondent's submission that the responsibility for avoiding delay to mail and for giving it prompt and correct treatment is one of the most important duties of all the respondent's employees. This was an unusual instruction and it would have been better if the claimant had queried it (as SB said to GN that some employees had don) However, on this unusual day, where the situation was quite chaotic, the claimant believed that his manager had made a decision about the mail that the parcels were to wait till tomorrow. As far as he understood, the decision about the parcels was made and he was following instructions. I do not therefore accept that there was, in fact, intentional delay of mail.

59. The respondent submits that the requirement to be present and productive during working hours self-evidently goes to the root of the contract. However, the evidence was that the claimant often finished early but that this was acceptable on a normal day. This practice was described as "job and finish". He was therefore able to pick his son up regularly at nursery. This may raise issues about how the mail was allocated between walks and whether the claimant and MD had enough work to so on a regular basis. However, this is not the charge and there is no suggestion that the claimant and MD had sought to conceal this is in any way. On the contrary, it

appeared to be a standing joke that the claimant was able to pick up his son from nursery early.

60. Having accepted that the claimant misunderstood the instruction (and therefore had not considered whether he would have time to deliver the parcels) , the narrow question seems to be, whether having finished early on this particular day, it was then incumbent on the claimant to take any positive steps such as contacting the office for instructions or returning to the office to collect and then deliver the parcels that had been left. If it was, then was it a fundamental breach of contract that he had not done so?

61. On balance, having considered this at length, I do not consider that it was. This was an unusual situation and of course, the claimant (and MD) could have alerted the office and said they could now deliver the parcels. However, I accept that they genuinely believed that the decision in relation to the parcels had been made and that this was a normal day. That being so, they believed there was no issue with finishing early as they did on a regular basis. There was no intention to damage the trust of their employer and, had the situation been as they understood it to be, there would not have been such damage.

62. I am not therefore satisfied that the respondent has established that there was a fundamental breach of contract by the claimant and he was therefore entitled to his statutory notice period which would be 12 weeks or pay in respect of that period. His net pay was £287.03 so this gives an award of £3,444.36.

Fees

63. In *R (on the application of UNISON) v Lord Chancellor [2017] UKSC 51*, the Supreme Court decided it was unlawful for Her Majesty's Courts and Tribunal Service (HMCTS) to charge fees of this nature. HMCTS has undertaken to repay such fees. If the claimant has paid any fees in respect of this claim, I shall draw to the attention of HMCTS that this is a case in which fees have been paid and are therefore to be refunded to the claimant. The details of the repayment scheme are a matter of HMCTS.

Employment Judge: Susan Walker
Date of Judgment: 18 August 2017
Entered in register: 22 August 2017
And copied to parties