EMPLOYMENT TRIBUNALS

Claimant: Mr R Graves

Respondent: Royal Mail Group Limited

HELD AT: Liverpool **ON:** 23 & 24 August 2018

BEFORE: Employment Judge Shotter

REPRESENTATION:

Claimant: Mr P Berry, trade union
Respondent: Mr J McArdle, legal executive

JUDGMENT having been sent to the parties on 31 August 2018 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

Preamble

1. These are the judgment with reasons provided pursuant to a request made on behalf of the claimant following promulgation of the judgment only on 31 August 2018.

2. In a claim form received on the 30 August 2017 (ACAS Early Conciliation Certificate issued 29 August 2017) the claimant complained that he had been unfairly dismissed on the 15 June 2017 for an act of gross misconduct of intentional delay of the mail, when he understood via his manger that he had a 2-week window in which to deliver mail. The claimant also maintained that the respondent had failed to take into account the fact that he had witnesses who could confirm the existence of a 2-week window who were not interviewed as part of the investigation. He further maintained the respondent failed to take into account mitigation including the fact he

never attempted to hide that he did not deliver the mail, his unblemished work record, and as a result the decision to dismiss was disproportionate, unfair and did not fall within the band of reasonable responses.

3. The respondent denies the claimant's claim of unfair dismissal on the basis that the claimant had breached its strict rules on safeguarding the mail, which is an offence. Their procedures made the position clear and the claimant, when he intentionally failed to deliver the "D2D" mail items, had committed an of gross misconduct for which he could be dismissed under their procedures.

4. The Tribunal heard evidence from the claimant on his own behalf, in addition to that of Paul Dugdale, area CWU representative, and David Taylor, trade union representative. Paul Dugdale was found to be credible and cogent witnesses. The claimant was not found to have given entirely credible evidence, he was an inaccurate historian and some of his evidence lacked logic.

5. David Taylor, who gave largely credible evidence, was questioned by the Tribunal as to why the claimant failed to produce his own witnesses and obtain statements from them, as provided by the ACAS Code clause 12: "The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses. Where an employer or employee intends to call relevant witnesses, they should give notice that they intend to do this." David Taylor's response was less than satisfactory; he wanted the respondent to take the evidence to ensure the witnesses had not been prompted by the union. This made no sense, given the fact the witnesses had already spoken to David Taylor, and if the respondent suspected they had been prompted in any way, this could have already taken place. Further, how the witnesses came to their evidence would have been explored by a respondent acting within the bands of reasonable responses when reaching a decision as to which witness if any, could be relied upon. As an experienced union representative, David Taylor was aware of the process and it made no sense that the claimant was unable to produce either the witnesses or witness statements from witnesses he intended to rely upon in relation to a fundamental feature in his case, especially given document "C1" provided to the Tribunal at closing submissions. The Tribunal's observation in this regard is particularly relevant to the appeal hearing.

6. On behalf of the respondent it heard from Kenny Gibson, dismissing officer and plant manger based at Warrington Mail Processing Unit, and Jan Mullin, independent casework manger based in Hoylake delivery office and the appeal officer. There was a conflict in the evidence concerning whether the claimant had been informed by his line manger that he had 2-weeks in which to deliver D2D mail, which the Tribunal has resolved as set out below. Tribunal found Kenny Gibson and Jan Mullin to be credible and cogent witnesses. Kenny Gibson's evidence to the effect that Door-to-Door mail should be delivered not within 2-weeks but between Monday to a Saturday, was preferred to the claimant's evidence, and was supported by contemporaneous documentation.

7. The issues were agreed between the parties, namely – has the respondent satisfied the test set out in British Home Stores Ltd v Birchell [1980] CA; had a fair

procedure been carried out and did the decision to dismiss fell within the band of reasonable responses open to a reasonable employer. If the Tribunal were to find in the claimant's favour, the "Polkey no difference rule" and contribution were issues to be decided and upon which submissions were heard. No other procedural irregularities were relied upon by the claimant other than the respondent's failure to interview a number of witnesses named by him as capable of supporting his understanding of the 2-week rule.

8. The Tribunal was referred to an agreed bundle of documents including the additional document married "C1" and having considered the oral and written evidence, the respondent's Skeleton Argument and oral submissions presented by the parties (the Tribunal does not intend to repeat all of the oral submissions, but has attempted to incorporate the points made by the parties within the body of this judgment with reasons), it has resolved the conflicting evidence have made the following findings of the relevant facts.

Facts

9. The respondent is a large national employer, it is of substantial size and resources, employing a number of people at various levels including designated independent casework managers, such as Jan Mullin. In addition to delivering mail such as first and second-class letters, packages and so on, the respondent also delivers Door-to-Door items (referred to colloquially as "D2D's") that consist of cold-calling promotional material targeted at postcodes. The delivery of Door-to-Door material generates valuable income for the respondent who carries out its business in a highly competitive area, and it results in additional pay for postal workers to reflect the additional preparation and delivery involved. It is not disputed that Door-to-Door items are deemed by the respondent to be "live mail" and should be treated as such in respect of their delivery.

10. The respondent issued a Code of Business Standards together with a mandatory Door-to-Door Standards and Procedures for Royal Mail to all employees, including the claimant which provides:

10.1 Door-to-Door items must be delivered within the contract week. The Tribunal heard undisputed evidence that the contract week ran from Monday to a Saturday, and the Door-to-Door items could be delivered on a rolling basis depending on the delivery of other mail to individual addresses, with the result that by the Saturday all Door-to-Door theoretically should have been delivered. The procedure provided that a visual check of each delivery fitting should be made daily to ensure the progressive delivery of the items across the 6-days.

10.2 Employees accurately complete the "walk control sheets" on a daily basis confirming Door-to-Door deliveries.

10.3 Under the heading the following requirement was set out; "Making daily checks – It's important to ensure that D2D is correctly delivered to specification…ensure D2D is delivered progressively across the delivery week...Quickly address any issues."

11. The claimant commenced his employment with the respondent as an Operational Postal Grade ("OPG") based at Warrington Mail Processing unit. He was issued with an unsigned contract of employment that referred to the Code of Business Standards at clause 14, and a Conduct Policy in clause 15.2. Clause 14 provided: You will be expected to comply with the standards of behaviour set out in our Code: Code of Business Standards." Clause 15.2 provided the claimant would be subject to the Conduct Policy, which was non-contractual.

12. The claimant commenced his employment as a part-time postman OPG grade, on 16 December 2013 and at the time of dismissal had a continuous employment of 3 years and 3 months.

13. The claimant was issued with and signed on 30 October 2015 a Personal Declaration confirming his understanding of the high importance of safeguarding the mail. The Declaration provided "It is also an offence to open or delay (contrary to your duty) a letter, parcel, mailbag, or any other postal packet in the course of transmission by post…other misconduct which endangers the safety of a mailbag or postal packet may lead to termination of employment. Under the heading "Code of Business Standards" it was provided that "high standards of personal conduct at work are expected of everyone…"

14. The Royal Mail Group Conduct Agreement provided examples of gross misconduct that included "intentional delay of mail" which constituted "behaviour so serious and so unacceptable, if proven, as to warrant dismissal without notice…"

15. A National Conduct Procedure Agreement Version 3 August 2015 had been reached between the respondent, CWU and UNITE-CMA that applied to all employees and provided a definition of the term mail. The following is relevant:

15.1 Employees were required to accurately complete the "walk control sheets" on a daily basis. The walk control sheets confirmed a Door-to-Door unaddressed item was mail.

15.2 Under the Procedure employees had the right to "make a case in response to any allegations…be treated impartially…previous work record and conduct and other mitigating circumstances will be fully taken into account." The punishment of downgrading was reserved "for the most serious of cases where dismissal is being considered."

15.3 Fact finding formed part of the process, and under the Appeal Procedure it was provided the case would be reheard in its entirety and "It is the employee's opportunity to state their case…in some cases, further investigation will be required…"

15.4 "Delay to mail" could be treated in 3 ways; unintentional, unexcused and intentional. Intentional delay was defined as "gross misconduct which if proven, could lead to dismissal. The test to determine whether actions may be considered as intentional delay is whether the action taken by the employee knowingly was deliberate with an intention to delay mail. Where proven, such

breaches of conduct can lead to dismissal, even for a first office; indeed, intentional delay is a criminal office and can result in prosecution."

15.5 Unintentional delay is defined as "genuine mistakes and misunderstanding. The Procedure provided that "it is not our intention that such cases should be dealt with under the conduct policy beyond discussions for isolated incidents."

15.6 Under the question "how can an employee ensure any witnesses they would like interviewed are included as part of the investigation" the answer was; "During any meeting with the manager relating to the conduct case…the employee or their representative should tell the manager about any witnesses they would like to be interviewed. If it is considered that they can provide further evidence that will assist the investigation, they will be included in the investigation." This clause is particularly relevant to the claimant's case as it was ignored by the dismissing and appeal officer.

The incident

16. On Friday 17 March 2017 the claimant intentionally took the decision not to deliver any Door-to-Door items on his round that day, which he left behind undelivered. The claimant did not inform any managers of his intention not to deliver all of the post allocated to him on his round in breach of the respondent's procedures. That day, the claimant worked with his colleague Tom Roberts and they shared a delivery van. Both were responsible for their own deliveries. On return to Warrington the claimant completed his Walk Control Sheet that reflected no Door-to-Door delivery had taken place that day. The claimant had not attempted to hide this fact, however, he failed to inform a manager on his return and there was no saying when a manager would come to review the completed Walk Control Sheet. Tom Roberts completed deliveries of his Door-to-Door mail.

17. Mike Cooke, OPG who had worked for the respondent for some 15 years, turned into work on the Saturday after the claimant's shift and discovered the Door-to-Door items left by the claimant too late for delivery that day, and their delivery was put back to the following Monday. A manager was informed.

18. Anthony Jones, the claimant's line manager, carried out a fact-finding interview with the claimant on 20 March 2017. Notes of the meeting were taken. A copy was provided to the claimant who inserted hand-written amendments. The Tribunal considered the amended note that reflected the claimant asking Neil Peacock, a manager who had "grassed" on him. The claimant offered to pay back the additional wages received for Door-to-Door deliveries and said, "you can conduct or sack me." The claimant did not dispute this had been said; he did dispute that he had allegedly sworn at the same time.

19. It is notable the claimant did not at the initial interview stage remind Anthony Jones as he had personally confirmed the 2-week window for delivery of Door-to-Door items it could not have been a disciplinary offence, and he need not offer to repay any wages. The Tribunal took the view that the claimant's attitude at the 20 March 2017 fact finding meeting reflected (a) he anticipated being subjected to a disciplinary process that could result in a dismissal and (b) his actions were

sufficiently serious to justify an offer to repay wages, which would not have been the case had the 2-week window of delivery existed as alleged by the claimant later during the disciplinary process. It is notable the claimant was aware from an earlier conversation with Neil Peacock that there was an issue with the non-delivery of Door-to-Door and thus a follow-up fact-finding meeting (attended by Mr Taylor the claimant's union representative), would not have taken him by surprise. In short, the claimant had Anthony Jones before him, and to nip the process in the bud, it would have been a straightforward matter for him to remind his line-manager that he had earlier confirmed not the one but the 2-week window for the delivery of door-to-door mail. The fact the claimant did not raise this defence until much later, and before another manager, was evidence from which the Tribunal concluded on the balance of probabilities Anthony Jones had not given the claimant such an instruction. The Tribunal's finding on this point is relevant to contributory conduct when it has to assess, from the evidence before it, whether the claimant committed the alleged offence or not. As set out below, the Tribunal found that he had and was guilty of culpable and blameworthy conduct

20. A second fact finding meeting was held with Anthony Jones and the claimant in the presence of his union representative, Mr Taylor. A record of the meeting was provided to the claimant, and the Tribunal has taken into account his written amendments to it. The note confirmed the claimant had provided reasons for not approaching a manger on the 17 March. The explanation he gave was less than plausible; "I had no intention of not delivering them, if I wasn't going to deliver them I would have just thrown them in a tray…I had the intention to do them." The claimant was questioned about not speaking with Anthony Jones, unlike pervious occasions when he was struggling with workload he had approached his line manager and it was put to him that it was the manager's decision, which the claimant did not dispute was correct.

21. The claimant allegedly handwrote on the note of the meeting "I know you say people have 2 weeks to do the D2D. I am on a different frame everyday if I miss…next time I am on is week after" inserted after the claimant confirmed he had no intention of not delivering them. There is no response to the hand-written insertion in the original typed note that makes sense. Anthony James is recorded as saying; "Just to note for the interview, Ryan has approached me about concerns with workload previously." Despite the claimant maintaining he had referred to the 2-week window, surprisingly, there was no discussion of this at all during the meeting and so the Tribunal found. The claimant's hand-written reference to "D2D" was an afterthought on the claimant's part, inserted in an attempt to set out a defence to the allegation which the claimant was aware, could result in his dismissal. The Tribunal took the view that at the very least, had the claimant genuinely believed he had a 2-week window in which to complete the delivery of two-hundred and twenty-four Door-to-Door items, this would have been mentioned during the hearing and it is more likely than not, Mr Taylor could have queried why the claimant was being interviewed when the time for delivery was within a 2-week frame and therefore he had done nothing wrong.

22. The matter was referred to Kenny Gibson, a manager, and the claimant was invited to a formal conduct meeting to consider whether he had committed an act of

gross misconduct for "intentional delay of the mail in that you failed to deliver 224 items D2D on the 17 March 2017."

The disciplinary hearing

23. The hearing took place on 8 June 2017 before Kenny Gibson, the claimant was accompanied again by David Taylor and a note was taken. The Tribunal has taken into account the claimant's amendment to the note of the hearing. The claimant explained that he did not have the time to deliver the items due to the amount of mail, and it was not an issue as he had 2 weeks to deliver them. Unlike the contents of the claimant's witness statement before this Tribunal, the claimant did not inform Kenny Gibson that he was unable to take a break that day due to the volume of work. The claimant confirmed Tom Roberts had delivered all the D2D items he had prepared on the day in question.

24. The claimant has no issue with the process adopted by Kenny Gibson at the disciplinary hearing, save for his refusal to hear evidence from seven members of staff the claimant wished to hear from, namely Wayne Fernely, David Graves (the claimant's father), Gary Lawton, Neil Burrows, David Conway, Lee Caldwell and Martin Ince as suggested by Mr Taylor, who had spoken previously to the men but not taken witness statements. The minutes record Mr Taylor stating the "majority of staff on the North and East Section thought D2D was delivered over 2 weeks and this was because the manager Anthony Jones quoted this several times to numerous members of staff." Kenny Gibson replied to this observation "the control sheet that was used for the D2D was a one week and nowhere did it mention 2-weeks," and he did not accept Anthony Jones had quoted two-weeks for delivery of Door-to-Door to staff, a view arrived out without any additional investigation being carried out. When asked by Kenny Gibson why the claimant had not seen a manager the notes reflect the claimant response; "he didn't feel he had to as he thought he had two weeks to deliver the items" and with reference to the positional impact on the business when D2D was not delivered to specification the claimant responded, "he did not have [any] thought on this…he was not going to get punished for doing something a manager says."

25. Kenny Gibson did not carry out any additional investigation on the basis that he believed the employees listed by Mr Taylor would "tow the union line" and give evidence in favour of the claimant on the two-week rule, when it was clear from the documentation such a rule did not exist. Kenny Gibson did not open his mind up to the possibility that the witnesses could have been told by Anthony James that Door-to-Door mail was deliverable in a 2-week window. This evidence was fundamental to the claimant's defence, and even if Kenny Gibson's concerns were genuine, nevertheless the issue should have been explored. Had the claimant's version of events been correct, this would have provided him with a full defence to the allegation. Kenny Gibson's role was to consider all the evidence, including that which supported the claimant's case. Kenny Gibson's failure was a substantive and procedure unfairness; and so, the Tribunal found. The respondent had the resources to conduct a full and proper investigation to include those witness the claimant wished to rely upon, in accordance with the respondent's Conduct Agreement which provided an employee or their representative should tell the manager about any witnesses they would like to be interviewed. A reasonable employer acting within

the band of reasonable responses would have interviewed the witnesses cited by the claimant as their evidence could have assisted the investigation, even if it was discounted in preference to the witness statements eventually obtained by Jan Mullin on appeal.

26. The outcome was confirmed in writing that included a report setting out how the decision had been arrived at. The claimant's effective date of termination was 15 June 2017 and he was advised of his right to an appeal. Kenny Gibson did not accept the claimant was too busy to deliver the Door-to-Door mail having checked the traffic for that day and found it to be the "lightest Friday in 3-wereks." He took into account the fact the claimant had not, in accordance with the respondent's procedures, spoken to a manager concerning the issues he was having with completing his work and he did not find the claimant's "mitigation…that he had 2-weeks to deliver…not viable…this was not raised on the first fact finding interview nor was it on the notes of the second fact finding interview…in the notes before where Ryan amended them, he says I was going to throw them in the day after. The day after was a Sat, he did not throw them in…he was not on this walk." Kenny Gibson formed a genuine belief the claimant "took a conscious and deliberate decision…thereby intentionally delaying the delivery of D2D items." In arriving at this decision Kenny Gibson ignored the witnesses listed by the claimant; no evidence was taken from them despite the possibility of the claimant being cleared had they confirmed the 2-week rule existed as far as Anthony Jones was concerned.

Appeal

27. The claimant appealed and the appeal hearing took place on 11 July 2017 before Jan Mullin, following which she interviewed Neil Peacock, Mike Cooke, Tom Roberts, Anthony Jones and Kenny Gibson. Witness statements were taken and provided to the claimant. Neil Peacock, a manager, confirmed he had approached the claimant concerning the "D2D's…and he went on to say he didn't care about D2D's and if I wanted to dock his pay for this to do so…and if I needed to conduct him to do so..." He gave evidence that Door-to-Door mail have one week not two in which to be delivered and that he worked with Anthony James running the section together. Mike Cooke and Tom Roberts also confirmed the Monday to Saturday delivery; the line manager was Anthony James and they had never been told by him there was two weeks in which to deliver the Door-to-Door items in. Anthony Jones denied he had never given employees on his section authorisation for "two weeks unless the items have come in late and so I have given them a few days the next week to clear." He also commented that "Dave Taylor (CUW rep) I heard saying in a loud voice around 2-3 weeks ago "you all get two weeks for D2D don't you I said no and he made a comment and walked off." He confirmed that the claimant knew the correct process "which had bene the same for many years…he has raised issues with me in the past but didn't in this case." The claimant was provided with the new evidence by a letter dated 25 July 2017 on which he made a number of written comments in a 5-page document, which was taken into account at appeal stage. The appeal was dismissed on 2 August 2018 by an outcome letter and an 18-page appeal decision document setting out he reasons. In short, Jan Mullin took the view having considered all of the claimant's appeal points that he had "failed to deliver 224 D2D items…I do not accept the mitigation put forward…" She took into account service and the claimant's clean employment record.

28. In oral evidence on cross-examination Jan Mullin explained how she had selected those employees to be interviewed, stating she knew nothing of the claimant's list of witnesses and took the view that her list was relevant, and the names set out in the claimant's list were not. The issue for the Tribunal was in deciding the relevance of witnesses on the basis that they were the employees who worked the most closely with the claimant, Jan Mullins ignored Lee Caldwell, who had also worked with the claimant and was named as one of the claimant's chosen witnesses. In closing submissions today, Mr McArdle explained that it may have been the case Lee Caldwell, who did not work Thursdays, was not at work the Thursday on which Jan Mullin's carried out her interviews. The Tribunal was of the view the fact that Lee Caldwell may not have been available on a certain day is not a good reason for failing to interview him as requested by the claimant and his union representative.

Law

29. Section 94(1) of the Employment Rights Act 1996 ("the 1996 Act") provides that an employee has the right not to be unfairly dismissed by her employer. Section 98(1) of the 1996 Act provides that in determining whether the dismissal is fair or unfair, it is for the employer to show the reasons for the dismissal, and that it is a reason falling within section 98 (2) of the 1996 Act. Section 98(2) includes conduct of the employee as being a potentially fair reason for dismissal.

30. Section 98(4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal if fair or unfair (having regard to the reasons shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the respondent's undertaking) the employer acted unreasonable or reasonably in treating it as a sufficient reason, and this shall be determined in accordance with equity and the substantial merits of the case.

31. Where the reason for dismissal is based upon the employee's conduct, the employer must show that this conduct was the reason for dismissal. For a dismissal to be procedurally fair in a case where the alleged reason for dismissal is misconduct, Lord Bridge in Polkey –v- A E Dayton Services Limited [1981] ICR (142) HL said that the procedural steps necessary in the great majority of cases of misconduct is a full investigation of the conduct and a fair hearing to hear what the employee has to say in explanation or mitigation. It is the employer who must show that misconduct was the reason for the dismissal, and must establish a genuine belief based upon reasonable grounds after a reasonable investigation that the employee was guilty of misconduct – British Home Stores Ltd v Burchell [1980] CA affirmed in Post Office v Foley [2000] ICR 1283 and J Sainsbury v Hitt [2003] C111. In short, the Tribunal is required to conduct an objective assessment of the entire dismissal process, including the investigation, without substituting itself for the employer.

32. The question for the Tribunal is the reasonableness of the decision to dismiss in the circumstances of the case, having regard to equity and the substantial merits of the case. The Tribunal will not substitute its own view for that of the respondent. In order for the dismissal to be fair, all that is required is that it falls within the band of

reasonable responses open to employer. It is necessary to apply the objective standards of the reasonable employer – the "band of reasonable responses" test – to all aspects of the question of whether the employee had been fairly dismissed, including whether the dismissal of an employee was reasonable in all the circumstances of the case.

33. The test remains whether the dismissal was within the range of reasonable responses and whether a fair procedure was followed. Section 98 (4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal if fair or unfair (having regard to the reasons shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the respondent's undertaking) the employer acted unreasonable or reasonably in treating it as a sufficient reason, and this shall be determined in accordance with equity and the substantial merits of the case.

Conclusion

34. With reference to the first and second issue, namely, had the respondent satisfied the Burchell test, the Tribunal found it had for the reasons set out above. Misconduct is potentially a fair reason for dismissal under S.98(2) ERA, and it was reasonable for the respondent to treat that reason as a sufficient reason to dismiss in the circumstances under S.98(4) ERA. The central issue in this case was whether the decision to dismiss fell within the band of reasonable responses taking into account the procedural and substantive unfairness cited above, and the Tribunal found it did not on the basis that there was a real issue whether Anthony Jones had informed the claimant and a number of his colleagues of a 2-week window, and further, the fact that Anthony Jones had carried out the initial investigation. An employer acting within the band of reasonable responses would have arranged for an independent investigation of this issue; it was a key to the claimant's defence although he did not make the position clear at the first investigation meeting with Anthony Jones thus the respondent was not put on notice at that early stage of the process. Once the claimant and his union representative had made the position clear, an independent investigation was necessary. The investigator could clearly not have been Anthony Jones.

35. Whilst the dismissing and appeals officers both held a genuine belief that the claimant was guilty of misconduct, this was not based upon reasonable grounds after a reasonable investigation in accordance with Birchell and Hitt. In short, the Tribunal having conducted an objective assessment of the entire dismissal process, including the investigation, without substituting itself for the employer, found the investigation to have been deficient.

36. Despite the factJ an Mullin attempted to put right the shortcomings of the disciplinary process, she carried out a further investigation and yet failed to interview the claimant's colleague and witness. It was encumbrant on Jan Mullin, who was carrying out a re-hearing by way of an appeal, to at the very least question Lee Caldwell, and the Tribunal finds a reasonable employer acting within the band of reasonable responses, would have interviewed the claimant's witnesses who on the face of it, could have provided evidence key to the investigation. Had Jan Mullin the evidence of the claimant's witnesses before her at the appeal hearing, and had those

witnesses given the same evidence to her as that what Mr Taylor says was reported to him, her role as appeal decision maker would have been to objectively assess that evidence, balancing it against that of Neil Peacock, Mike Cooke, Tom Roberts (who described himself as the claimant's friend and this was not disputed) Anthony Jones (who gave evidence that the claimant should have raised the issue with him and "everyone is fully aware that D2D must be delivered within the week it is received") and Kenny Gibson, all of whom gave evidence that the standard in the office was not two weeks but one. It may have been the case that Jan Mullin would have preferred the evidence of those witnesses to the claimant's, but without listening to it and carrying out an exercise of checks and balances, it is not possible to say what the outcome would have been given the respondent's failure went to heart of a procedural and substantive unfairness.

37. As indicated above the test remains whether the dismissal was within the range of reasonable responses and whether a fair procedure was followed in accordance with Section 98(4) having regard to the reasons shown by the respondent and the considerable size and administrative resources of the its undertaking. On the balance of probabilities, the Tribunal found the respondent in dismissing the claimant had acted unreasonable in accordance with equity and the substantial merits of the case. In arriving at its decision that the dismissal did not fall within the bands of reasonable responses the Tribunal is aware it must not substitute its views for the respondent.

Polkey and contribution

Polkey

38. S.123(1) ERA provides that the compensatory award shall be 'such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal'. Under this subsection the Tribunal can reduce the compensatory award (but not the basic award) to reflect general considerations of fairness.

39. With reference to the "no difference rule" in Polkey v AE Dayton Services Ltd [1988] ICR 142 HL, the Tribunal found the substantive and procedural unfairness went to the heart of the case and it was impossible to reconstruct a scenario where a fair dismissal could have taken place. The Tribunal is not satisfied on the balance of probabilities that the claimant could have been fairly dismissed later or if the respondent had followed a proper procedure, taking into account the mitigation including his unblemished long length of service. It submissions it has been conceded by the respondent Polkey cannot be relied upon. The Tribunal agreed; it is not possible to envisage what the outcome would have been had the witnesses cited by the claimant taken part in an investigation not carried out by Anthony Jones in accordance with the ACAS Code.

S.122(2) ERA

40. Under the ERA, the provision for reduction of the basic award is contained in S.122(2). The statutory language used in respect of that particular reduction differs from that used in S.123(6) regarding reductions in the compensatory award. In the light of this difference of wording, the EAT held in Optikinetics Ltd v Whooley [1999]

ICR 984, EAT, that S.122(2) gives Tribunals a wide discretion whether or not to reduce the basic award on the ground of any kind of conduct on the employee's part that occurred prior to the dismissal and that this discretion allowed a Tribunal to choose, in an appropriate case, to make no reduction at all. This contrasts with the position under S.123(6) where, to justify any reduction at all on account of an employee's conduct, the conduct in question must be shown to have caused or contributed to the employee's dismissal.

41. With reference to the issue of contribution, the Tribunal found the claimant was aware from the respondent's process and procedures, management instructions and training of the importance of delivering the mail on time, and in relation to Door-to-Door within the contract week. The Tribunal was satisfied on the contemporaneous evidence before it, including the oral evidence of Kenny Gibson, that the respondent required delivery within a contract week being Monday to Friday. The claimant produced no persuasive or independent evidence of a two-week agreement, and there was no contemporaneous independent evidence to confirm the position. He did not call any witnesses and the Tribunal was unable to rely on the hearsay evidence of David Taylor concerning what some of the claimant's colleagues may have said. On balance, the Tribunal was satisfied the claimant's actions were culpable and blameworthy. A Tribunal may reduce a basic award where the employee's conduct before dismissal makes a reduction just and equitable — S.122(2) ERA. For the reasons set out below, the Tribunal found it was just and equitable to reduce the basic award by 50%.

S.123(6) ERA

42. Section 123(6) ERA provides: 'Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.' Unlike a reduction to the basic award, the conduct in question must be shown to have caused or contributed to the employee's dismissal. Once the employee's conduct has been shown to have caused or contributed to the dismissal a Tribunal has no option but to make a reduction, and its discretion lies only in the amount of the reduction, which must be 'such proportion as it considers just and equitable' having regard to the finding that the employee caused or contributed to his or her dismissal. Only the blameworthy conduct of the employee is relevant when considering whether compensation should be reduced under S.123(6) ERA, not that of the employer or other employees.

43. A reduction on the ground of the employee's conduct must be made where 'the Tribunal considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent.' The conduct should be 'culpable or blameworthy' — Nelson v British Broadcasting Corporation (No.2) 1[980] ICR 110, CA. The Court of Appeal said that three factors must be satisfied if the tribunal is to find contributory conduct:

(i) the relevant action must be culpable or blameworthy

(ii) it must have caused or contributed to the dismissal

(iii) it must be just and equitable to reduce the award by the proportion specified.

44. For conduct to be the basis for a finding of contributory fault under S.123(6) ERA, it has to have the characteristic of culpability or blameworthiness and the Tribunal found this was the case for the claimant for the reasons set out above . Lord Justice Brandon in Nelson cited above, explained that, in view of the wording of what is now S.123(6), it could never be just and equitable to reduce a successful complainant's compensation unless the conduct on his or her part was culpable or blameworthy. The claimant was aware he was required to personally deliver the Door-to-Door mail, he failed to do so and was aware dismissal for misconduct could result due to the seriousness of breaching the contractual agreement between the respondent and its client in a highly competitive business. It was so important that the claimant was paid extra when Door-to-Door mail was delivered by him, and the claimant acknowledged his failings when he offered to repay that part of his salary; an offer that would not have been forthcoming had not the claimant believed himself to be in the wrong. The Tribunal is satisfied the claimant was both culpable and blameworthy, taking into account the fact that the 6/7 witnesses relied upon the claimant have given no evidence whatsoever in this hearing. All the Tribunal has before it is the claimant's evidence, which was not entirely credible, given his responses at the fact-finding meetings, and the evidence of Mr Taylor concerning what he thinks those witnesses would have said, although no written statement were taken at the time or indeed, at any stage. The respondent had produced an overwhelming amount of evidence, including contemporaneous documents, which points to there being no practice of a 2-week window for Door-to-Door mail deliveries, not least the form signed by the claimant which shows clearly a 6-day delivery pattern.

45. The Tribunal found all of the factors set out in Nelson have been met by Mr Graves; he had been provided with the respondent's proceeds and procedures, was fully aware of the consequences of not delivering mail, had completed the sheet as required that reflected a week and not 2 weeks, had not informed his manager before he took the decision not to deliver Door-to-Door mail (in contrast to earlier situations when he had spoken with Anthony Jones over workload) and he had not spoken to a manager after his delivery shift concerning his decision not to deliver the mail. It is notable both the dismissing and appeals officer relied upon the claimant's lack of remorse, concluding the trust and confidence it had in the claimant was lost. The claimant at this liability hearing continued to take the view that he had done no wrong. Taking into account the claimant's culpable and blameworthy conduct, the Tribunal concluded it is just and equitable to reduce the basic and compensatory award by 50%.

46. In conclusion, the claimant was unfairly dismissed and his claim for unfair dismissal is well-founded. The claimant contributed to his dismissal and it is just and equitable to reduce the basic and compensatory award by 50%.

47. After judgment with reasons were orally given remedy was considered and the parties reached a settlement. By consent, the respondent is ordered to pay to the claimant agreed damages in the sum of £7054.98.

Employment Judge Shotter

15.10.18

REASONS SENT TO THE PARTIES ON

26 October 2018

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FOR THE SECRETARY OF THE TRIBUNALS