EMPLOYMENT TRIBUNALS

Claimant: **Paul Capaldi**

Respondent: **Royal Mail Group Ltd**

Heard at: **London South – by CVP**

On: **29 November 2022 & 2 February 2023**

Before: **Employment Judge Hamour (sitting alone)**

Representation
Claimant: Mr Moosa, CWU Representative
Respondent: Mr J McArdle, Legal Executive

RESERVED JUDGMENT

The Claimant's claim of unfair dismissal is well-founded and succeeds.

The Claimant's claim of automatically unfair dismissal, under ERA S.100(1)(c)(ii), fails and is dismissed.

REASONS

The Parties

1. The Respondent is the Royal Mail service. The Claimant was a postman who was dismissed for gross misconduct for the intentional delay of mail.

2. The Claimant commenced employment on 4 April 2016 and his employment was terminated with effect from 27 April 2021.

3. The Claimant claims that his dismissal was unfair, and/or that it was automatically unfair on grounds of health & safety under ERA S. 100(1)(c)(ii).

Background

Health & Safety

4. It is not in dispute between the parties that:
    a. the Claimant was not a Health & Safety representative of the Respondent;
    b. there was a union representative, Steve Watkins, for the office at which the Claimant was based, and also a CWU Area Health & Safety representative, Tony Cartwright;
    c. the Claimant directly raised a Health & Safety issue, being the Respondent's reinstatement of "lapsing", which is a practice whereby mail officers take sections of other routes in addition to their existing workload. This practice had been suspended during Covid, and the Claimant felt that its reinstatement exposed the employees to additional risk of coronavirus, and he requested a risk assessment;
    d. of the relevant disciplinary decision-makers, Mr Rostron was aware that the Health & Safety issue had been raised by the Claimant.

5. At the beginning of the hearing, it was stated to me to be not in dispute between the parties that, of the relevant decision-makers, Mr Hall was not aware the Claimant had raised a health & safety issue. However, in evidence, the Claimant suggested that Mr Hall may have been aware.

6. The Claimant contends that those who investigated the initial disciplinary allegations against him had knowledge of the Health & Safety issue, which then coloured the investigation which Mr Hall relied upon in dismissing the Claimant.

7. The Respondent contends that the reason for the Claimant's dismissal was misconduct.

Mail Delivery

8. The process for delivery of mail was summarised to me as follows:

9. Each delivery duty (or walk) has a designated area for it to be prepared. Mail is prepared on a frame. There are slots to put mail items into and below these there are street names and house numbers. This allows the mail to be sorted in the order that it will be delivered. Once the mail has been prepared, an OPG (Operational Postal Grade) will remove the mail items in order, place them in a mail delivery bag or bags and the mail will then be delivered.

10. Door to Door (D2D) is an important part of Royal Mail's business When there are D2D items to be delivered for a particular duty, they are placed in every slot of the relevant frame, so that every house on that duty receives the D2D items. The only exception to this is if a house has requested not to receive D2D items. In that case, the D2D item should not be added to that house number slot on the frame. Each delivery route has a control sheet that contains various information, including any houses that have opted out for receiving D2D.

11. The aim is to have D2D items prepared on the frame in time for the Monday delivery. Once the D2D items have been inserted into every slot on the frame, they are then usually delivered over the course of 5 or 6 days.

The Issues

Health & Safety

12. Was the reason or principal reason for dismissal that the Claimant raised the health & safety concern set out above in para 4 c? If so, the Claimant will be regarded as unfairly dismissed.

Unfair dismissal

13. Was conduct the reason or principal reason for dismissal?

14. If so, did the Respondent genuinely believe the Claimant had committed misconduct?

15. At the time the belief was formed, had the Respondent carried out a reasonable investigation?

16. Did the Respondent otherwise act in a procedurally fair manner;

17. Was dismissal within the range of reasonable responses?

18. Did the Respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the Claimant?

The Evidence

19. The Respondent provided a bundle of documents which numbered 498 pages. I was also provided with witness statements of 3 witnesses, being the Claimant, Allan Rostron, Gary Hall.

20. After clarifying the issues with the parties, as above, I heard evidence from all the witnesses, including the Claimant.

21. Both parties provided written submissions which were sent following the end of the hearing.

Findings of Fact

22. The essential facts, being those relevant only to the Claimant's complaints set out in para 3, are as follows:

23. The Claimant was an experienced employee of the Respondent, with 5 years' service. His role included preparing mail for delivery, and delivering mail.

24. The Claimant took great exception to the Respondent's reinstatement of 'lapsing' and he complained about this in a meeting he requested with management on 2 February 2021. The Claimant was accompanied by his union representative, Mr Watkins, also present were the Claimant's line manager Mr T Jacobsen, and Miss A Patel.

25. The Claimant was later accused of 'dumping' mail (as set out below), which is a disciplinary offence under the Respondent's Business Standards. The Claimant was disciplined under the Respondent's disciplinary procedure, and Mr Gary Hall chaired the disciplinary hearing and made the decision to dismiss for gross misconduct.

26. The Claimant appealed against his dismissal, which was heard by Mr Rostron, who upheld the finding of gross misconduct and the sanction of dismissal.

27. The Claimant does not accept the accuracy of some of the meeting notes relied upon by the Respondent. The Claimant challenged these when provided with them, and some changes were made, but they are still not in an agreed form between the parties. I have taken this into account in attaching weight to the notes, but nothing of substance has turned on this dispute as to wording, as I have also been assisted by the evidence of the witnesses.

28. The matters which led to the Claimant's disciplinary hearing were as follows.

29. Ms Shayla Ash, a relatively new manager at the Respondent, identified the Claimant as having 'removed door to doors' on the Duty 12 frame on 28 January 2021.

30. The Claimant says that he was misidentified and the employee actually seen by Ms Ash was Mr Matt Schembri, who the Claimant said swapped with him to work on Duty 12 during that day The issue of misidentification is relevant, as the Claimant's defence during the disciplinary process included that this point had not been investigated, and/or that he was treated inconsistently with Mr Schembri, who may have been the person seen in relation to the same allegations. The Claimant has consistently maintained that he never worked Duty 12.

31. As a result of the allegations made by Ms Ash, Mr Raman Datta, the 1st line manager, initially kept an eye on the Claimant and then decided to operate covert monitoring to test or catch the Claimant.

32. The monitoring operation set up by the Respondent took place on 4 February 2021 and included the following:

    a. The Claimant was assigned to work on Duty 35;
    b. On 3 February 2021, D2Ds were marked with invisible marker pen, and then placed by Mr Jacobsen in the pigeon-holes of the Duty 35 frame for the Claimant to sort.
    c. Mr Datta photographed the D2Ds in the frame at 4am on 4 February.

d. After the Claimant had left to go on his delivery round sometime after 8:30am or 9am, the Duty 35 frame was checked by Mr Dattta and Miss Patel and was said to be "completely empty".
e. The Respondent waited until all other staff had left, and then, at around 1130am, they carried out a lengthy search of all areas, including bins, shelves, staff locker area IPS and prep frames, and then found 5 D2Ds on a shelf to the left of Duty 35, and 36 D2Ds in a drawer of a unit under the Duty 35 frame.

33. The outcome of the operation was an allegation that the Claimant had dumped or hidden these D2Ds. The Claimant was suspended on 5 February 2021.

34. The quality of the copies of the photographs of the marked D2Ds provided in the bundle was poor, and I relied upon explanations from the witnesses as to what the photographs and the invisible pen were said to demonstrate. The Claimant contended that the photographs shown to him during the investigation were of no better quality, had no date or timestamp on them, and that they did not demonstrate what the Respondent sought to demonstrate.

35. I have found that there were deficiencies in the Respondent's covert operation, being:
    a. The location of the flyers – being put on a Duty frame where employees other than the Claimant were also working on the morning of 4 February 2021;
    b. The failure to see the D2Ds after the Claimant had left, and declaring the frame "completely empty";
    c. Finding them some time later, after having been away from the Duty 35 frame searching other areas, and not being able to explain why they would not have seen them when first checking the Duty 35 frame;
    d. Not being able to confirm that only the Claimant had access to the D2Ds at the relevant time;
    e. Relying on an assumption that only the Claimant had something to gain from the 'dumping' of the D2Ds, whereas Mr Hall accepted that there was no evidence of whether the dumped D2Ds were for live delivery addresses or not.

36. A fact-finding meeting between the Claimant and Mr Datta took place on 11 February 2021. At this meeting, the Claimant was informed of the initial allegation of Ms Ash relating to 28 January, and to the subsequent monitoring operation on 4 February.

37. As part of Mr Datta's investigation, he conducted an interview with Ms Ash on 12 February 2021 and with Mr T Jacobsen on 13 February 2021.

38. On 3 March 2021, Mr Datta wrote to the Claimant to say that the potential penalty for the allegation of "intentional delay of mail" was outside his authority, so the matter was referred to Mr G Hall, who was authorised to conduct this level of the disciplinary process.

39. By an undated letter, Mr Hall wrote to the Claimant inviting him to a formal Conduct meeting on 10 March 2021. The Claimant was informed that the allegation was one of potential gross misconduct, and that summary dismissal was a potential outcome.

40. Although the letter from Mr Hall refers to allegations relating to 28 January to 4 February, Mr Hall accepted in evidence that in fact it only related to 28 January & 4 February, and not the intervening period.

41. The 28 January allegation related to what was observed by Ms Ash, but Mr Hall in evidence stated that what Ms Ash said she had seen did not form part of the allegations he considered against the Claimant and did not form part of his eventual decision. Therefore, the only evidence before Mr Hall supporting the allegations against the Claimant was in relation to 4 February 2021.

42. The meeting between the Claimant and Mr Hall took place on 10 March 2021. The Claimant was accompanied by Mr Watkins. Mr Hall accepted in evidence that, at the Conduct Interview, he:

    a. Did not at any point directly ask the Claimant whether he had dumped any D2Ds on 4 February 2021, so the main allegation was not put to the Claimant;

    b. Did not break down the detail of the photographs of the D2Ds, to which postal addresses they are thought to correspond, or cross-reference them with addresses on Duty 35 for the Claimant to respond to.

    c. Did not have a note-taker present.

43. The Claimant raised, in his defence, the inconsistency of treatment with Mr Schembri, who the Claimant said had in fact been the person observed on 28 January. The Claimant's case was that he had been seen doing the same thing the Claimant was accused of, but no monitoring operation was established to investigate that employee.

44. At the meeting of 11 March 2021, the Claimant made the point that several other delivery officers also worked on the Duty 35 frame, and that he had not prepped Duty 35 on that day, and that all staff members present should be interviewed.

45. Mr Jacobsen subsequently confirmed to Mr Hall that Mr Steven Potter prepped Duty 35 on 4 February 2023 and Mr Kevin Randall was responsible for delivery part of the Duty 35 route on that day, being Lower Hill Road.

46. Mr Randall and Mr Potter were interviewed on 19 March 2021. Both confirmed they had access to the Duty 35 frame. Neither statement provides any evidence against the Claimant. Mr Potter described the busy state of Duty 35 on 4 February as having "a million people around there". Mr Potter also says "someone could have taken the D2D out to help Paul".

Mr Hall asks no further questions about this comment. Although two of the 'dumped' D2Ds related to Mr Randall's route, not the Claimant's, he was interviewed only as a witness.

47. A further interview with the Claimant's line manager, Tommas Jacobson, was held on 14 April 2021.

48. The Claimant was not given sight of the statements that arose from the investigatory interviews, was not asked for comment upon them, and the Conduct hearing was not reconvened so as to give the Claimant an opportunity to address any matters arising from the evidence of these three people.

49. The Claimant only saw these statements for the first time when he received the disciplinary decision letter.

50. By an undated letter, Mr Hall informed the Claimant that he had concluded his investigation and invited the Claimant to attend a decision meeting on 27 April 2021.

51. The decision meeting took place on 27 April 2021. At that meeting, Mr Hall handed the Claimant a decision letter dated 23 April 2021, which reflected the date that Mr Hall had written it.

52. The decision letter stated that the Claimant had been found guilty of gross misconduct in intentionally delaying contracted mail (D2D) on 4 February 2021. The sanction imposed was summary dismissal. A disciplinary report was also enclosed.

53. Mr Hall did not look into the Claimant's allegations of inconsistent treatment compared with that of Mr Schembri, or make any investigation of Mr Schembri, or direct that any investigating officer should make any investigation of Mr Schembri.

54. The Claimant appealed against his dismissal on a number of grounds. These included, but were not limited to:

    a. that Mr Datta had pre-judged his guilt;
    b. insufficient investigation;
    c. failure to provide the Claimant with the notes of Mr Datta's interview of Mr Jacobsen, in which he stated that the Claimant had not worked Duty 12 on 28 January;
    d. failure to provide the Claimant with any of the statements of Mr Jacobsen, Mr Randall and Mr Potter, prior to his dismissal;
    e. misidentification, and allegations of inconsistent treatment as compared with Mr Schembri and Mr Randall (whose route included some of the removed D2Ds);
    f. the Respondent's reason for categorising the allegations against him as the highest disciplinary penalty category of "Intentional Delay to Mail" was because the health & safety matter which he had raised;
    g. the penalty of dismissal was too severe, and was pursued due to his health & safety complaint.

55. The appeal was to be heard by Mr Rostron, an experienced Independent Case Manager who states he has heard 350 appeals. The Claimant's appeal took place on 10 May 2021.

56. Mr Rostron also carried out further investigations of his own after receiving the Claimant's written grounds of appeal. Notes of his enquiries of Mr Hall and Mr Datta were provided to the Claimant on 16 June 2021, and the Claimant's comments on them were sought.

57. Mr Rostron's enquiries of Mr Hall and Mr Datta included raising with them the Claimant's contention of a health and safety element to his disciplinary and dismissal.

58. In the Claimant's evidence, he accepted that there were health and safety officers available. However, he said that he would not speak to them directly, but would instead speak to his union representative first, and leave it to the union rep to raise it with the health and safety officer if it was necessary to do so. There was no evidence or submission that he did so in this case, or asked for this to be done.

59. The notes of Mr Datta's meeting show that he said the Claimant "never raised any concerns about lapsing". He also confirms that the Claimant did not work Duty 12.

60. The notes of Mr Rostron's meeting with Mr Hall also confirms that the Claimant had not worked Duty 12.

61. The Claimant provided further written comments to Mr Rostron, addressing the new interview notes. These are undated, but said by Mr Rostron to have been received on 21 June 2021.

62. Mr Rostron gave evidence that he conducted the appeal as a full-rehearing. His decision letter of 25 June 2021 also refers to it as a "re-hearing". He notes that the results of Mr Hall's investigations should have been shared with the Claimant for comment before the original decision had been made.

63. However, in respect of the Claimant's complaints of inconsistent treatment, Mr Rostron made no attempt to investigate this, and said in evidence that it would not be appropriate for him to look into whether another employee had committed an act of misconduct the same or similar as that of which the Claimant was accused. Mr Rostron's position was that, due to his seniority and position, he may be called upon at appeal stage in respect of other employees, so he could not involve himself in initial allegations.

64. Mr Rostron accepted in evidence that, unlike himself, Mr Hall was in a position to explore the matter of inconsistent treatment with other employees, as he could direct that the 1st line managers who dealt with the initial fact-find should look into this. Therefore, given that this was a ground of the Claimant's disciplinary defence, in this regard the appeal hearing was not a full re-hearing, as it was constrained by not being able to address a matter which could have been addressed as part of the first hearing.

65. The outcome of the appeal was that Mr Rostron upheld the original decision and sanction of summary dismissal. Although the appeal decision letter is dated 25 June, the appeal decision date is recorded in Mr Rostron's report as being 24 June, which appears to be the day on which he made his decision.

66. The appeal decision report makes clear that Mr Rostron accepted that the Claimant was misidentified on 28 January, and that it was "established that [the Claimant] was not on duty 12". Despite this, during cross-examination of the Claimant it was put to him that he may have worked some of the morning of 28 January on Duty 12, before then swapping with Mr Schembri. In light of all the investigatory statements from Mr Jacobsen, Mr Datta and Mr Hall, I do not find that this was the case. I find that the Claimant was mis-identified by Ms Ash on 28 January 2021, and was not working on Duty 12.

67. As Mr Hall said that he did not consider this allegation as part of his decision, and as Mr Rostron's decision was based on there having been a mis-identification on 28 January, nothing directly turns on this finding. However, it is relevant insofar as:

    a. The Claimant says that the Duty 35 surveillance would not have taken place if he had not been mis-identified on 28 January;

    b. the Claimant alleged in evidence that Mr Datta, the investigating officer, approached the investigation from the perspective of confirming the Claimant's guilt, and that this was because of Ms Ash's allegations about 28 January,

    c. The Claimant alleges inconsistent treatment with that of Mr Schembri.

68. The above points will be addressed in my analysis below.

The Law

Health & Safety

69. Section 100 of the Employment Rights Act 1996 (ERA) provides so far as relevant:

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—

(a) …

(b) being a representative of workers on matters of health and safety at work or member of a safety committee—
(i) in accordance with arrangements established under or by virtue of any enactment, or
(ii) by reason of being acknowledged as such by the employer,

the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee,

(ba) the employee took part (or proposed to take part) in consultation with the employer pursuant to the Health and Safety (Consultation with Employees) Regulations 1996 or in an election of representatives of employee safety within the meaning of those Regulations (whether as a candidate or otherwise),

(c) being an employee at a place where—
(i) there was no such representative or safety committee, or
(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

Unfair Dismissal

70. Section 98 of the Employment Rights Act 1996 ("ERA") provides so far as relevant:

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show -

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—
…
(b) relates to the conduct of the employee …
…
(4) … where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

1. In **Orr v Milton Keynes Council** [2011] ICR 704 at [78] Aikens LJ summarised the correct approach to the application of section 98 in misconduct cases (a summary which incorporates the well-known test described in **British Homes Stores Ltd v Burchell** [1978] IRLR 379):

"(1) The reason for the dismissal of an employee is a set of facts known to an employer, or it may be a set of beliefs held by him, which causes him to dismiss an employee.

(2) An employer cannot rely on facts of which he did not know at the time of the dismissal of an employee to establish that the "real reason" for dismissing the employee was one of those set out in the statute or was of a kind that justified the dismissal of the employee holding the position he did.

(3) Once the employer has established before an employment tribunal that the "real reason" for dismissing the employee is one within what is now section 98(1)(b), ie that it was a "valid reason", the tribunal has to decide whether the dismissal was fair or unfair. That requires, first and foremost, the application of the statutory test set out in section 98(4)(a).

(4) In applying that subsection, the employment tribunal must decide on the reasonableness of the employer's decision to dismiss for the 'real reason'. That involves a consideration, at least in misconduct cases, of three aspects of the employer's conduct. First, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; secondly, did the employer believe that the employee was guilty of the misconduct complained of; and, thirdly, did the employer have reasonable grounds for that belief.

If the answer to each of those questions is 'yes', the employment tribunal must then decide on the reasonableness of the response of the employer.

(5) In doing the exercise set out at (4), the employment tribunal must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to its own subjective views, whether the employer has acted within a 'band or range of reasonable responses' to the particular misconduct found of the particular employee. If it has, then the employer's decision to dismiss will be reasonable. But that is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse.

(6) The employment tribunal must not simply consider whether *they* think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The tribunal must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which 'a reasonable employer might have adopted'.

(7) A particular application of (5) and (6) is that an employment tribunal may not substitute their own evaluation of a witness for that of the employer at the time of its investigation and dismissal, save in exceptional circumstances.

(8) An employment tribunal must focus their attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any appeal process) and not on whether in fact the employee has suffered an injustice."

2. In **Turner v East Midlands Trains Ltd** [2013] ICR 525, Elias LJ at [16]-[17] added:

"The band of reasonable responses test does not simply apply to the question whether the sanction of dismissal was permissible; it bears upon all aspects of the dismissal process. This includes whether the procedures adopted by the employer were adequate: see *Whitbread plc (trading as Whitbread Medway Inns) v Hall* [2001] ICR 699; and whether the pre-dismissal investigation was fair and appropriate: see *J Sainsbury plc v Hitt* [2003] ICR 111."

Conclusions

71. I now apply the relevant law as I have set it out to my findings of fact.

Conclusions on Health & Safety

72. Having been given time to consider at the beginning of the hearing, the Claimant's representative confirmed that his health and safety claim was specifically under ERA S.100(1)(c)(ii), only.

73. It is not in dispute between the parties that there was a health and safety representative in place.

74. Therefore, the requirement under S.100(1)(c)(ii), that there be a health and safety representative or safety committee, is satisfied.

75. For the Claimant to succeed in his claim, S.100(1)(c)(ii) requires that he demonstrate that:

    a. it was not reasonably practicable to raise his health and safety concern or complaint with the health and safety representative; and

    b. that the reason for his dismissal was that "he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety".

76. In respect of the first limb of the test, other than a bald statement from the Claimant that he would not go directly to the health and safety representative, no evidence was put before me as to any reason why it was not reasonably practicable for him to have raised the lapsing issue with the health and safety representative.

77. In subsequent written submissions, the Claimant's representative stated that the health and safety representative is based off-site, and visits the Claimant's Epsom delivery office once every three months, and that it would not be reasonably practicable to wait three months. He further submitted that health and safety matters would be raised through the on-site union representative, for him to escalate to the health and safety representative.

78. The Claimant gave no evidence as to the availability or unavailability of the health and safety representative.

79. No evidence was put before me that the Claimant raised his concern about lapsing with the on-site union representative for onward escalation to the health and safety representative. The Claimant raised his concern directly with management, at a meeting at which he was accompanied by his on-site union representative, but no evidence was given that the union representative was present in any capacity other than as a companion to the Claimant.

80. There is no evidence that the Claimant made any attempt to contact the health and safety representative, whether by telephone or email, or through the CWU office, or via the on-site union representative.

81. I find that it was reasonably practicable for the Claimant to have raised his concern about lapsing with the health and safety representative, whether directly or by asking that the on-site union representative escalate the complaint accordingly. The Claimant did not do this because he preferred to raise the matter directly with management, and not because of any issue of reasonable practicability.

82. Given the finding I have made in respect of reasonable practicability under S.100(1)(c)(ii), the Claimant's claim of automatically unfair dismissal must fail. Therefore, for the purpose of S.100, it is not necessary for me to consider the second limb, being whether his complaint about "lapsing" was the reason or principal reason for his dismissal.

83. However, for the ordinary unfair dismissal claim under S.98 ERA, I also need to determine the reason for dismissal, and therefore shall go on to consider whether the complaint about lapsing was the reason or principal reason for the Claimant's dismissal, although I have determined that such a claim does not, in the Claimant's case, fall within S.100(1)(c)(ii).

84. The dismissal decision was made by Mr Hall. Mr Hall maintains that he was not aware of the Claimant's health and safety complaint until it was raised by the Claimant in his appeal. Despite the concession at the beginning of the hearing (para 5 above), the Claimant suggested in evidence that he may have informed Mr Hall of it, or that Mr Watkins, the union representative, may have informed Mr Hall of it, but he was unable to put his assertion any higher than this. Further, the Claimant accepted that there is no written evidence of this in his disciplinary submissions, the meeting transcripts, or his written corrections to those transcripts.

85. I prefer the evidence of Mr Hall, which is consistent with what he said to Mr Rostron during the appeal process, and accept that he was not aware of the health and safety complaint at the time he made his decision to dismiss.

86. I have also considered the submissions made with regard to Mr Datta, and whether he was aware of the complaint. There was no direct evidence from Mr Datta for this hearing, but I had the benefit of his statements for the disciplinary process, which, when asked, by Mr Rostron, say that he was not aware of any complaints about 'lapsing' by the Claimant. Further, the Claimant's case is that Mr Datta, if he knew of the complaints, may have escalated the disciplinary complaint against the Claimant as a result. There

is no evidence that he knew of the complaint, and, even if he did, once the complaint was referred to Mr Hall, it was a matter for Mr Hall as to how he dealt with it, and I do not find that the referral from Mr Datta had a bearing on Mr Hall's decision to dismiss.

87. Finally, with regard to the appeal decision to uphold the dismissal of the Claimant. The Respondent accepts that Mr Rostron was aware of the Claimant's health and safety complaint. I have heard no evidence that Mr Rostron upheld the Claimant's dismissal because of his health and safety complaint, nor has the Claimant suggested this. The Claimant put his case on this point no more strongly than that Mr Rostron did not "take account" of his complaint or did not "look into it". The Claimant appears to contend that Mr Rostron should have considered whether the health and safety complaint was a motivating factor for the earlier parties, rather than contending that it was a factor for Mr Rostron himself. As I have found that it was not a motivating factor for the earlier parties, being Mr Datta and Mr Hall, such "taking account" would have made no difference. However, as Mr Rostron conducted a re-hearing, he was the ultimate decision-maker in respect of the Claimant's dismissal, and I find that this was not on grounds of the Claimant's health and safety complaint.

88. I therefore find that the Claimant's health and safety complaint regarding lapsing was not the reason, or the principal reason, for the Claimant's dismissal.

Conclusions on unfair dismissal

89. Taking into account the facts as I have found them, and as I have found that the Claimant's health and safety complaint was not the reason or principal reason for the Claimant's dismissal, I am satisfied that conduct was the reason for the Claimant's dismissal. in particular, it was the Claimant's conduct on 4 February 2021, in relation to Duty 35, which was the reason for his dismissal.

90. I am satisfied that the Respondent, in the person of Mr Hall, in deciding to dismiss, did so because he genuinely believed that the Claimant had committed misconduct. This was the reason, and the only reason, for dismissal.

91. However, I conclude that, at the time Mr Hall's belief was formed, the Respondent had not carried out a reasonable investigation, and therefore Mr Hall's belief was not held on reasonable grounds. Before I address the deficiencies in the investigation, I will first address the issue of the mis-identification of the Claimant on 28 January 2021, and the issue of unfair disparity in treatment when compared with that of Mr Schembri.

92. I have found, as set out in para 66 above, that the Claimant was mis-identified. The Claimant put forward, as a defence to the disciplinary proceedings, the fact that, were it not for the mis-identification, he would not have been subject to monitoring on Duty 35 on 4 February and would not have faced disciplinary proceedings. I find that nothing turns on this. The allegation of 28 January did not form part of the decision to dismiss, by

either Mr Hall or Mr Rostron. The made their decision based on the events of 4 February, which they were entitled to do. If there was sufficient evidence of serious wrongdoing (which I will address below) on 4 February 2021, then it is not a defence for the Claimant to say that the Respondent would never have known of it had the Claimant not previously been mis-identified. However, the matter of how the mis-identification affected Mr Datta's conduct of the investigation is of relevance, as set out in para 67.b.

93. The Claimant also says there was an unfair disparity in treatment between himself and Mr Schembri. Once Mr Jacobsen confirmed the swap between the Claimant and Mr Schembri in relation to Duty 12 on 28 January, there was no attempt by the Respondent to investigate Mr Schembri, or even any interview conducted with him. There was potential evidence that Mr Schembri was guilty of the same misconduct of which the Claimant was accused. However, the fact remains that the Claimant was not dismissed due to the allegations of 28 January, and a failure by the Respondent to investigate Mr Schembri does not disentitle the Respondent from addressing the allegations of misconduct against the Claimant which arose out of the investigation of 4 February. In short, if the Claimant's dismissal would otherwise have been fair, I do not accept that there was a disparity in treatment such as would render the dismissal unfair.

94. The deficiencies in the investigation were as follows:

    a. The mis-identification of the Claimant on 28 January. Although this did not form part of the decision to dismiss, it coloured to some extent Mr Datta's approach to the investigation, which was to seek confirmation of the Claimant's wrongdoing. This was not an approach taken by Mr Hall, but did mean that in the investigatory evidence provided to Mr Hall by Mr Datta, other explanations for the D2Ds were not pursued

    b. The deficiencies in the covert operation that I have identified in para 35 above.

    c. The failure of the Respondent, accepted in evidence, to check the machine to see if the dumped D2Ds related to "live" addresses. This would have provided information to support or refute the contention that the Claimant had something to gain from the dumping of the D2Ds.

    d. The failure to investigate the Claimant's claim of difference in treatment between him and Mr Schembri. Although a failure to investigate Mr Schembri does not itself make the investigation of the Claimant unreasonable, it does show a focus on the Claimant as a perpetrator, rather than an open and even-handed investigation.

95. Once the investigation and disciplinary were passed to Mr Hall, he carried out further investigations. In light of the deficiencies I have identified, it was reasonable that he sought to investigate further, but there were further deficiencies with Mr Hall's own investigation:

a. He did not, until after his dismissal decision, provide the Claimant with copies of the statements and/or interview notes arising out of his own investigation or Mr Datta's investigation;

b. He did not put to the Claimant the content of the statements made by Mr Jacobsen, Mr Randall, and Mr Potter, so that the Claimant could comment on them;

c. He did not have regard to the Claimant's complaint of disparity in treatment between him and Mr Schembri.

d. He did not, in his own investigation, explore avenues which tended to exculpate rather than implicate the Claimant. For example, he did not follow up on:

   i. Mr Potter's comment that there were "a million people" around Duty 35;
   ii. Mr Potter's comment that someone else could have taken out the D2Ds to help the Claimant; or
   iii. Interview Mr Randall as a potential perpetrator of the D2D dump, rather than a witness, given that it was identified that two of the dumped D2Ds related to Lower Hill Road on his route.

e. The deficiencies identified in para 42 above.

96. I also conclude that there were a number of deficiencies in the procedure followed, which mean that the Respondent did not operate in a procedurally fair manner. Some of the investigatory deficiencies I have identified also constitute procedural deficiencies:

    a. The failure to provide the Claimant with all evidence gathered, including copies of all statements;

    b. Not giving the Claimant a right of reply to the further investigation carried out by Mr Hall.

97. For the allegation of which the Claimant was accused, being 'gross misconduct – the intentional delay of mail', dismissal was within the range of reasonable responses. The Respondent described this as one of the most serious offences, and the Claimant did not dispute this.

98. However, the Claimant contended that the Respondent's policy allows for the 'delay to mail' to be treated in 3 ways, with two lower categorisations being available: 1) "unintentional", 2) "unexcused", and then 3) "intentional", which was the most serious.

99. The Claimant had asserted that the reason the offence was categorised as "intentional" was because he had raised a health & safety complaint. For the reasons I have given above, I do not find that this was the case. However, it is of note that the Claimant put forward no evidence that he had delayed the mail for "unintentional" or "unexcused" reasons. The disciplinary

documentation provided also does not show any such argument or evidence by the Claimant. The Claimant did assert, during the disciplinary process, that a lower-level categorisation should be considered, but did not put forward any evidence or basis to support this. The Claimant's factual case has consistently been that he did not delay the mail, at all. That it was not the Claimant who 'dumped' the D2Ds. In that case, there is no factual basis upon which a case of "unintentional" or "unexcused" delay could be considered in relation to the Claimant. The only remaining allegation was one of intentional delay.

100. Therefore, in light of the allegations against the Claimant, dismissal was within the range of reasonable responses.

101. Not all of the flaws in the procedure or investigation would, alone, have been sufficient to render the dismissal unfair. However, taken together, they were sufficiently serious that the investigation was not a reasonable one. I therefore find that Mr Hall did not hold his belief on reasonable grounds. In respect of Mr Hall's decision at the initial disciplinary stage, I therefore find that the Respondent did not act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the Claimant.

102. In light of the flaws in the Respondent's investigation and procedure which I have set out, were I considering the matter without regard to the appeal outcome, I would have concluded the dismissal was an unfair dismissal.

103. The Respondent is a large employer with access to human resources advice, and there were serious flaws in the Respondent's process leading to Mr Hall's decision. However, I have to consider not just the process leading up to the dismissal, but the process as a whole including the appeal process and the outcome of that appeal: Taylor v OCS Group Ltd [2006] IRLR 613. I therefore turn to the matter of the Claimant's appeal, and the dismissal decision of Mr Rostron.

104. Mr Rostron treated the Claimant's appeal as a re-hearing. I have therefore considered whether this was sufficient to correct the previous deficiencies such as to make the dismissal of the Claimant a fair dismissal.

105. I have found, in para 64 above, that there was one aspect in which the appeal did not constitute a re-hearing. This was in relation to the failure to investigate Mr Schembri. However, given the further findings I have made regarding this in para 93, I find that, if the appeal would otherwise have cured the deficiencies of the earlier process, then this particular disparity would not prevent that.

106. I am satisfied that the Respondent, in the person of Mr Rostron, in deciding to uphold the dismissal, did so because he genuinely believed that the Claimant had committed misconduct. This was the reason, and the only reason, for dismissal.

107. I now consider whether, at the time Mr Rostron's belief was formed, it was held on reasonable grounds, after a reasonable investigation.

108. The initial investigation was inadequate, but Mr Rostron carried out further investigations of his own, which included:

a. Interviews with Mr Hall and Mr Datta;

b. Explored the issue of the mis-identification of the Claimant on 28 January 2021;

c. Made enquiries regarding the Claimant's health and safety complaint regarding lapsing, and any impact it may have had on the management or decision of the initial investigation and disciplinary process;

d. Provided the Claimant with copies of all statements and evidence in relation to the appeal;

e. Sought comments and input from the Claimant in respect of any evidence or statements provided, before reaching a decision in respect of the appeal.

109. Whilst more thorough than the initial process, and curing some of the deficiences, Mr Rostron's investigation did not cure all of the deficiencies in the original investigation. Those remaining are:

a. Those set out in paras 94.b and 94.c (both of which relate to the monitoring on 4 February);

b. Those set out in para 95.d.

110. In respect of para 95.d.i and 95.d.ii, which relate to the comments of Mr Potter, Mr Rostron did attempt to address these by considering them in his detailed appeal report, however, he did not extend the investigation into those points. In particular, he:

a. Did not make any enquiries of Mr Potter as to who else he was referring to as being around Duty 35 on 4 February;

b. He refers to it as the Claimant's suggestion, rather than a comment from Mr Potter that "someone could have taken out the D2Ds" to help the Claimant;

c. He does not explore whether Mr Randall could have removed the D2Ds, he accepts the position previously stated, that only the Claimant had something to gain.

111. The Respondent is not required to have a flawless investigation, only a reasonable one. It is a finely balanced point as to whether, with the improvements made by Mr Rostron, the overall investigation carried out by the time of the appeal decision was reasonable. My concern is particularly

in relation to the initial surveillance of Duty 35 on 4 February 2021, and the deficiencies I identified at para 35, none of which have been cured by any of the subsequent investigations. These deficiencies were not purely procedural, but go to the substance of the allegations faced by the Claimant. As this surveillance was the foundation of the allegations for which the Claimant was dismissed, I find that, despite Mr Rostron's improvements, the overall investigation was still not sufficiently reasonable for me to find that Mr Rostron held his belief of the Claimant's misconduct on reasonable grounds.

112. In light of the steps taken by Mr Rostron, which I have set out in para 108 above, I find that the appeal was otherwise conducted in a procedurally fair manner. I have also already found that dismissal was in the range of reasonable responses. However, as I have found that there was no reasonable investigation, and that Mr Rostron's belief was therefore not held on reasonable grounds, the requirements of ERA S.98(4) are not met, and the dismissal of the Claimant is a substantively unfair dismissal.

113. The question of whether the Respondent, by Mr Rostron's appeal decision, acted reasonably in all the circumstances in treating his belief as a sufficient reason to uphold the dismissal of the Claimant, does not therefore fall to be considered, as the requirement for a reasonable investigation and a belief held on reasonable grounds have not been met. However, due to the failings in the surveillance operation, I would have found that it was not reasonable in all the circumstances to treat this as sufficient reason to dismiss the Claimant.

Summary

114. For these reasons, the Claimant's claim of automatically unfair dismissal on health and safety grounds under ERA S.100(1)(c)(ii) therefore fails.

115. For these reasons I find that the dismissal of the Claimant was on grounds of conduct in accordance with ERA S.98(2)(b), but does not meet the S.98(4) requirements for a fair dismissal. The Claimant's claim of unfair dismissal therefore succeeds.

Remedy

116. In respect of remedy for unfair dismissal, I have considered the following:

Polkey (**Polkey v AE Dayton Services Ltd** [1987] UKHL 8)

117. The Respondent submitted, in the event of a finding of a procedurally unfair dismissal, that any compensatory award should be reduced by 100% on the basis that the Respondent would have dismissed the Claimant in any event.

118. The appeal carried out by Mr Rostron was intended, in part, to correct the previous procedural deficiencies. I have found that, to some extent, it did, but not entirely. What the appeal did not and could not cure, were the

flaws in the monitoring operation of 4 February 2021, which was what led to the allegations against the Claimant. The reason that the dismissal of the Claimant was substantively unfair is because, as a result of the deficiencies I found in the monitoring investigation, the decision-maker could not make a reasonable decision on the Claimant's guilt based upon that investigation. This was a substantively unfair dismissal, and not a dismissal that was only procedurally unfair, and therefore Polkey does not apply and no reduction can be made on this basis.

Contributory fault

119. Section 123(6) ERA provides that where the tribunal finds that the Claimant's dismissal was to any extent caused or contributed to by any action of his, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

120. The Respondent submitted, in the event of a finding of unfair dismissal, that the Claimant's conduct contributed to his dismissal and any award should be reduced on the basis he caused his dismissal and it would be just and equitable to do so.

121. S.123(6) requires that I consider blameworthy or culpable conduct of the Claimant. I have not made any findings of any such conduct by the Claimant. The Claimant may, or may not, have committed blameworthy conduct on 4 February 2021, but, because of the deficiencies in the monitoring investigation, it cannot reasonably be determined whether he did. I cannot make a finding of contributory fault based on speculative conduct, and therefore I make no reduction on this basis.

Conclusion

122. The Claimant's claim of automatically unfair dismissal under ERA S.100(1)(c)(ii) fails and is dismissed.

123. The Claimant's claim of unfair dismissal is well-founded and succeeds.

Employment Judge Hamour
Date: 10 May 2023