



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4122655/2018**

**Held in Glasgow on 25, 26 and 27 February and 1 March 2019**

**Employment Judge M Sutherland**

**David Malarky**

**Claimant**

**Represented by  
R Milvenan, Solicitor**

**Royal Mail Group Limited**

**Respondent**

**Represented by  
A Hunter, Solicitor**

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The judgment of the Tribunal is the claimant was not unfairly dismissed and the claim is dismissed.

**REASONS**

**Introduction**

1. This is a claim of unfair dismissal.
2. Parties agreed that the reason for the Claimant's dismissal related to his conduct.
3. The claimant gave evidence on his own behalf. The Respondent led evidence from Andrew Hicks (Delivery Office Manager, Respondent), Lee Bannerman (Delivery Office Manager, Respondent), and Collette Walker (Independent Case Work Manager, Respondent).
4. The parties lodged a joint set of documents.

5. The parties lodged an agreed Schedule of Losses subject to any losses attributable to his share entitlement. It was agreed that in the event of a finding

**E.T. Z4 (WR)**

of unfair dismissal parties would be called upon to make additional written submissions on any financial losses arising from the lost opportunity to sell Royal Mail SIP shares without incurring a tax and national insurance liability. The Claimant had 613 shares which would have become tax free on 15 October 2018 and 116 shares which would have become tax free on 9 April 2019.

6. The parties made closing submissions and lodged authorities. 7. The following abbreviations are used in the findings of fact–

<b>Abbreviation</b>	<b>Name</b>	<b>Title</b>
AH, Manager	Andrew Hicks	Delivery Office Manger
AM, Manager	Andrew Mullen	Delivery Manager
CW, Case Worker	Collette Walker	Case Work Manager <b>(Appeal Officer)</b>
DL, OPG	Dennis Liddell	OPG
JB, Union Rep	Joseph Bonner	CWU Rep
JM, OPG	James McMahon	OPG
JS, OPG or JS	Jim Spence	OPG
LB, Manager	Lee Bannerman	Delivery Office Manager <b>(Dismissing Officer)</b>
PM, OPG	Paul McGuire	OPG
WD, OPG	William Donnelly	OPG

**Issues**

8. The issues to be determined by the Tribunal at this final hearing were confirmed with the parties at the start of the hearing to be as follows –

- (i) What was the reason (or, if more than one reason, the principal reason) for the Claimant's dismissal?
- (ii) Was the reason for dismissal potentially fair within the meaning of Section 98 (1) or (2) of the Employment Rights Act 1996?

(iii) Was the dismissal fair having regard to Section 98(4) of the Employment Rights Act 1996 including whether in the circumstances the Respondent acted reasonably in treating it as a sufficient reason for dismissing the employee? Did the decision to dismiss (and the procedure adopted) fall within the 'range of reasonable responses' open to a reasonable employer? *Iceland Frozen Foods Ltd v Jones* 1983 ICR 17

(iv) If the reason for dismissal relates to the conduct of the Claimant –

1. Did the Respondent have a genuine belief in the Claimant's guilt?

2. Did the Respondent have reasonable grounds for that belief?

3. Had the Respondent conducted a reasonable investigation into that conduct?

*British Home Stores Ltd v Burchell* [1978] IRLR 379, [1980] ICR 303

(v) Did the Respondent adopt a reasonable procedure? Was there any unreasonable failure to comply with their own disciplinary procedure and the ACAS Code of Practice on Disciplinary and Grievance Procedures? Did any procedural irregularities affect the overall fairness of the process having regard to the reason for dismissal?

(vi) If the Respondent did not adopt a reasonable procedure, was there a chance the Claimant would have been dismissed in any event? *Polkey v AE Dayton Services Ltd* 1987 3 All ER 974.

(vii) Does the Claimant wish to be reinstated or re-engaged? Is it reasonably practicable? Did the Claimant cause or contribute to his dismissal?

- (viii) To what basic award is the Claimant entitled? Did the Claimant engage in conduct which would justify a reduction to the basic award?
  
- (ix) What loss has the Claimant suffered in consequence of the dismissal? What compensatory award would be just and equitable? Did the Claimant contribute to his dismissal? Has the Claimant taken reasonable steps to mitigate his losses?

### **Findings in fact**

- 9. The Tribunal makes the following findings in fact:
  
- 10. The Claimant was employed by the Respondent as an OPG (Operational Postal Grade) from 18 June 1986 until 11 August 2018. The Claimant has an unblemished disciplinary record.
  
- 11. The Respondent is based throughout the UK and engaged in the business of delivering mail. The Respondent is a large employer with access to significant administrative resources.
  
- 12. The Respondent's Conduct Policy provides that when it is considered that an employee's conduct has not met the required standard the employer's manager will make a prompt and detailed investigation. As a guiding principle "The employee will be made fully aware of the evidence". Following the fact finding meeting the manager should decide whether there is a case to answer. If they decide that the likely penalty if proven is dismissal the matter must be passed to a second line manager of at least Level 2 Grade. Precautionary suspension may be considered where there is an allegation of threatening behaviour, etc. An employee has a right of appeal which will be a re-hearing of the case. Its examples of Gross Misconduct include "abusive behaviour to customers or colleagues".
  
- 13. The Respondent's Code of Business Standards sets out the standards of behaviour that the Respondent expects from its employees. The Code is reissued to employees every few years and is discussed at team meetings. Employees are aware of the importance of The Code. The Code States in its

summary: "It's about doing the right thing: following the law, acting honourably and treating others with respect". It sets out six expectations of employees including that employees should "be present and productive during working hours" and "demonstrate respect for each other". It states that "any breach of our Code: Code of Business Standards may be dealt with under the Conduct Policy, and that any finding of misconduct could result in dismissal". As regards working with colleagues it states employees must "not abuse others in speech, writing, social media or email" and "not engage in, encourage or condone bullying, intimidations, harassment, unlawful discrimination or abuse of any kind".

14. The Claimant was the duty holder for PD1. As duty holder he sorted and delivered the mail for that route. Being out on the route involved working alone and unsupervised. The Claimant as duty holder sometimes had to deal with complaints. He was on holiday at the time of the incident which led to his dismissal and his duty was being covered by JS, OPG.
15. On Tuesday 29 May 2018 AM, Manager happened to observe JS, OPG at his house for about half an hour at a time when should have been undertaking PD1 duties.
16. On 30 May 2018 AM, Manager conducted a fact find interview with JS, OPG in the presence of JB, Union Rep regarding the incident on 29 May 2018. During that interview JS stated that "I had been told not to return before my time by my colleagues as mentioned to you". He accepted having previously told AM, Manager that he had returned to his house because of a dodgy stomach under explanation that he panicked. He also accepted that he then changed his story and said that he had a heavy weekend and wanted a nap and that he had been told not to come back early. He also accepted that he had told him that he was glad he was caught as people are telling him not to return early from his delivery route. He further stated that "On Friday 25 May 2018 it was quite quiet, Ross had asked me to do 5 packets within my time, which I done, [the Claimant] phone me at approximately 11.30, irate, saying

'you better not fuck my duty up' and told me how to cover things up, putting packets out on overtime." He stated that the Claimant said "if you finish early go up the house" and "I'll get you taken off that duty". He stated that the Claimant was ranting and in response he just said "ok, I'll do that". His phone showed that the phone call lasted just under 4 minutes.

17. On 6 June 2018 AH, Manager conducted a fact find interview with the Claimant regarding the incident on 29 May 2018. AH, Manager explained that he typed up questions in advance of the fact finding meetings and he took notes of the meeting which he typed up later. During that interview the Claimant stated that "I phoned [JS, OPG] to explain how to carry out the duty correctly....the student accommodation had phoned me to say the correct process with delivering the parcels was not being followed so I phoned [JS] to explain this had to be done to help stop customer complaints". He was asked if he telephoned him saying "you'd better not fuck up my duty" to which the Claimant replied "I did not swear at James, I was explaining how to do the job correctly". The Claimant said he explained that the planners had been out to review the duty. He denied saying that the packets should be put out on overtime and not within his duty. The Claimant stated "I told him that if he was carrying out the job correctly he would not have time to do other duties packets". He denied having threatened to get him taken off his duty. The Claimant stated: "if he continued not to follow the correct process and there are a lot of complaints the manager might remove him from covering the duty".
18. On 6 June 2019 the Claimant was suspended by AH, Manager pending an investigation into alleged bullying and harassment on Friday 25 May 2018. He considered that there was the potential for animosity given the nature of the allegations. The Claimant remained on suspension until his dismissal.
19. On 17 June 2018 the Claimant wrote to the Respondent challenging the record of the meeting and noting that he made the phone call to assist him, that he has never had a cross word with JS, OPG, that JS had previously thanked him for his assistance on another occasion, that he had been contacted by the manager of a student village wanting to know why the postman was not completing the parcel delivery sheets and this is why he contacted JS,

that JS advised that he hadn't completed any of the delivery sheets for the student villages.

20. On 23 June 2018 AH, Manager advised the Claimant that following their fact finding the matter has been passed to LB, DM. AH, Manager regarded the allegations as serious and considered that he did not have authority under the disciplinary procedure to issue a major penalty. On 26 June 2018 LB, Manager invited the Claimant to a formal conduct meeting to consider notifications alleging that: "you breached Royal Mail's business standards by threatening/ bullying a colleague [JS, OPG] on Friday 25 May 2018 at 11.33am" and "by telling him not to return early to G11-G12 delivery office once he finished PD1 duty; this result in Royal Mail being fraudulently deprived of valuable resource". The Claimant was advised of his right to be accompanied and was provided with copies of the documents to be relied upon. The Claimant was advised that the formal notifications were being considered as gross misconduct and if upheld, one outcome could be his dismissal.
21. On 2 July 2018 LB, Manager held a conduct interview with the Claimant. The Claimant was accompanied by his union rep. The Claimant stated that: he had been on PD1 duty for 15 years; that it has changed over the years and that it last changed 8 months ago; that it took him 4 hours to complete the second part of the duty; that other OPGs cover the duty including WD, JS and DL; that JS, OPG is only returning early because he is not doing the job correctly – he wasn't doing the paperwork; that he called JS and the phone call lasted only about 90 seconds; it was JS who told him on the phone call that he was delivering 5 parcels; that he denied the version of events stated by JS; that he "asked him to do the job right" and "if you are doing parcels then do it after you've done PD1 correctly," that "at the end of our conversation he agreed with me about how the duty can be done and said 'Davie that's fine'"; that JS has been caught in the house by his manager and that he's had to come up with some excuse; that JS has lied to his line manger on several occasions before he makes these allegations; and that JS, OPG mentions several colleagues which implies more than one person has said this to him. During the interview the Claimant confirmed that he was aware that

threatening or abusive towards, or intimidation of, a colleague was contrary to the Code of Business Standards.

22. The scheduled time for the second part of PD1 was 4 hours. The scheduled time had been determined following consultation with the route planners. During the interview with LB, Manager the Claimant was advised that PD1 has now had an additional 30-45 minutes additional duties added to its delivery span and that the OPG's are still finishing before their time. The Claimant responded that he never finished early and that there is scope for additional time at this time of year because students are away.
23. On 17 June 2018 the Claimant challenged the record of the meeting, stating that he made the phone call to assist JS, OPG, that he has never had a cross word with JS, that JS had previously thanked him his for his assistance on another occasion, that he had been contact by the manager of a student village wanting to know why the postman was not completing the parcel delivery sheets ('the manifest' and "Something for You" cards) and this is why he contacted JS, that JS advised that he hadn't completed any of the manifests for the student villages, and that he made the call to assist JS. The manifest is a sheet of paper with the name of the student village and details which room number has received parcels. Two of the student villages have a manifest and some use "Something for You" cards. It can take up to an hour to do the parcel delivery sheets.
24. On 3 July 2018 LB, Manager held a fact-finding interview with DL, OPG. He stated that he is the regular OPG cover and that he covers it once a week. He advised that he completed the parcel delivery sheets. He initially stated that the second part of PD1 takes 3 hours 45 minutes but he later changed this to 3 hours 40 mins (1 hour 15 mins for Dumbarton Road, 30 mins Balrhagrey Ave, 1 hour 55 mins for student halls (average 25 mins x 4 student halls; 15 mins for Keith St). He initially stated that the second part of PD1 since additional delivery was added was 4 hours and 15 mins. He then stated that with additional duty it takes 4 hours. DL, OPG was not asked whether the Claimant instructed him not to finish the duty early and he did not comment on this.



25. On 5 July 2018 LB, Manager held a fact-finding interview with JS, OPG. JS stated that that he has covered PD1 duty a few times over the years; that the Claimant always told him not to come back early; that the duty often falls short of the finish time; that he doesn't complete the parcel delivery sheets; that he finished PD1 duty early on 29 May because the Claimant told him not to return to the office and he went to the house for a rest; that the colleagues who had told him not to return early were the Claimant and JM, OPG; that he lied twice to AM, Manager during the journey back to the office because "I panicked because I didn't want to drop [the Claimant] in it even though I had no loyalty to him, I suppose the shock of being caught out had an affect"; he did not inform his manager his manager straightaway because "I didn't want a fuss, I thought it could be kept under wraps; I didn't want to rock the boat. I am part time and I have the opportunity to cover full time house, I just wanted to keep my head down and get through it"; in the telephone conversation "[the Claimant] said you better not fuck up my duty, if you're finished go to the house for a cup of tea. It all stemmed for my line manger Ross Cunningham asking me to do additional parcels within PD1's delivery span, someone must have called the Claimant and altered him possibly JM. He was so concerned about his duty he called me while he was on annual leave. Put the parcels on overtime was the message"; that the call made him feel uncomfortable and indignant; that he would not have come forward about the incident if he'd not been caught; and that he told PM, OPG about the call because he was incredulous at the Claimant shouting down the phone. LB, Manager recalled JS as having been edgy and nervous like he was reliving it.
26. On 5 July 2018 LB, Manager held a fact-finding interview with WD, OPG. WD, OPG is a friend of the Claimant. WD, OPG stated that he occasionally covers PD1 duty; it takes about 4 hours to deliver PD 1; he completes the paperwork; and he's not performed PD1 duty since additional delivery was added.
27. On 7 July 2018 the Claimant wrote to LB, Manager challenging the record of the meeting and noting that JS, OPG had said he did not have issues with his duty on 29 May 2018, the accused colleagues have not been named, the JS changes his story three times, that it took JS five days to mention the phone

call, that had he not been caught in his house it would never have been mentioned.

28. On 17 July 2018 LB, Manager held a fact-finding interview with PM, OPG. JS, OPG and PM, OPG are friends. PM, OPG did recall a conversation with JS on 25 May 2018. PM, OPG stated that; "I asked if he was OK as I was aware there was an issue between him and [the Claimant]. He told me that [JM, OPG] was also involved and must have called [the Claimant] and informed him that he was taking out mail that he wasn't supposed to. [JS] stated that [the Claimant] called and was shouting the odds"; he stated that "[JS] seemed aggravated about the whole situation".
29. On 17 July 2018 LB, Manager held a fact-finding interview with JM, OPG. JM, OPG stated that he did not call the Claimant to advise him that JS, OPG was doing additional work during PD1's delivery span and that he has never advised JS not to return to the office early while covering PD1.
30. On 25 July 2018 LB, Manager, AM, Manager and an OPG together undertook a test of the second part of the PD1. The students were not in residence at the time and the volume of mail was low. The trial erroneously noted that it took 1 minute between arriving at Keith St Student Accommodation and arriving at Thurso Street Accommodation. LB, Manager stated in his investigation that he "found the delivery to be disjointed and fall way below the delivery of 4 hours that was stated by [the Claimant] during his conduct interview and [WD, OPG] during his fact finding interview. The duty on the day without any additional workload was 2 hours 44 minutes and during this time the OPG encountered dead walking and had to double back to customers on several occasions to rectify mistakes. I accept that PD1's delivery span may change due to parcel volumes when the student accommodation is busy but nowhere near the 4 hours that was stated therefore it's reasonable to believe the conversation that took place between [the Claimant] and [JS, OPG] was one of protection towards an easier duty."
31. LB, Manager did not hold a meeting with the Claimant to discuss the investigations which took place between his conduct interview on 2 July 2018 and his dismissal letter of 8 August 2018.

32. On 8 Aug 2018 LB, Manager wrote to the Claimant advising that the allegations were upheld, that his inappropriate/ threatening behaviour towards another employee, and that his suggestion of fraudulently deceiving the company out of hours, amounted to gross misconduct, that he had taken into account his 32 years' service but that the bond of trust was irretrievably broken, and that his decision was to dismiss him without notice effective 11 August 2018. The Claimant was shocked by the decision.
33. The Claimant's date of birth is 14 December 1960 and he was age 58 at the time of dismissal.
34. On 10 August 2018 the Claimant intimated his grounds of appeal which were that: JS, OPG has lied from the very beginning; he chose to go home; he is a manager/driver of a rock band playing 3 to 4 gigs a week until the early hours; he has to go home early for a nap; JS has been caught in the house before; and JS has repeatedly lied and made a personal attack on the Claimant and his managers.
35. On 15 August 2018 CW, Case Worker invited the Claimant to an appeal hearing. (Although her full title refers to her being an Independent Case Worker she is not external to the Respondents but simply geographically remote from relevant delivery office.) CW, Case Worker advised the Claimant of his right to be accompanied; that the Appeal hearing normally takes the form of a rehearing; that this was his last opportunity to put forward reasons why the penalty he was appealing should be reduced or set aside completely; and that his reasons and evidence should be full and complete. The Claimant provided evidence to CW, Case Worker that according to the planners delivery to the student accommodation during part of the second half of PD1 takes nearly 2 hours.
36. On 28th August 2018 CW, Case Worker held the appeal hearing with the Claimant and his union rep. CW, Case Worker advised that she may conduct further investigations and that "You will be made aware of, and given opportunity to comment upon, any new evidence which comes to light as part of my further investigations and which is material to my decision ...I will only

invite you to a further meeting following comments made against the further investigations should I feel it is necessary. If a further meeting is not necessary then I will complete the case following receipt of your comments.” During the appeal hearing the Claimant stated that the Manager of a student village called him on Thursday 24 May advising that parcels had gone missing that week and that manifest sheets were not done; that “it was not a big issue, she just wanted the sheets done”; that the next day he phoned JS, OPG “ I asked him if he had been doing the manifest for the village, and he told me that he had not done. I said to him that the manageress had phoned me and told me that she needed the manifests done. I asked him to start doing the manifests. He said he had not been doing any of them. I asked him why not and he said the manager had asked him to do the packets on his duty. I told him to do PD1 duty first before delivering any packets, and that was that. I told him the planners had been reviewing my duty 9 months before and this was the way it needed to be done. He said back ok that is fine;” that he had a letter from the manager written after his dismissal stating that the student accommodation had problems with parcels during his annual leave; that JS, OPG was coming up with an excuse for getting caught; that he changed his story; that none of the other OPG’s who cover his duty have alleged that he has said anything like this to them; that the other drivers who cover PD1 take 4 hours; that he’s never had a cross word with JS; that JS has been with the business for 15 year; that JS has been caught at home before; that he’s known for telling lies; that JS was previously caught lying about how his windscreen was smashed; that if he’d not been caught at home JS would never have mentioned the phone call; and that he’s had 33 years’ service and an excellent attendance and conduct record.

37. The Claimant produced a letter from the manager of the student village which confirmed that the student accommodation had problems with parcels during his annual leave and stated that “The months following David's suspension have been difficult. The postman/post men who replace him have all failed to provide us with the delivery sheets. We're still receiving incorrect parcels ...we never had any issues with [the Claimant.] He was always went above and beyond for us and especially, for our students”;

38. After the appeal hearing, on 1 September 2018 the Claimant advised CW, Case Worker that he was not advised that JS had been caught at home prior to the Claimant's fact finding interview on 6 June 2018 and was not therefore apprised of all the facts. The Claimant also asked CW, Case Worker to check his PDA/ tracker, his sign in /out sheets and his van sign in/out sheets which would clarify that he worked to his time every day. (There was an agreement with the union that the PDA / tracker could not be used in disciplinary procedures. The sign in/ out sheets would not have shown whether a route had 'opportunities' i.e. was underutilised and whether a driver was 'sitting up' whilst he should have been on duty.)
39. On 7 September 2018 CW, Case Worker telephoned the manager of the student village. She confirmed that she had made a telephone to the Claimant sometime in May when another OPG was covering his duties. She explained that the delivery sheets were not being used by the cover postman and that was causing difficulties.
40. On 18 September 2018 CW, Case Worker interviewed PM, OPG who understood from his conversation with JS that "[The Claimant] was off on holiday and [JS] doing his duty. I understand [The Claimant] was not happy with the way he was doing it and phoned him up angry. He told me he was giving him grief." PM, OPG objected to being dragged into the disciplinary process.
41. On 18 September 2018 CW, Case Worker interviewed JB who was the union rep who had accompanied JS, OPG to his fact finding interview on 25 May 201. (JB was from the same union which was also representing the Claimant in his disciplinary process.) He stated that prior to the fact finding, JS had advised him about the call with the Claimant and asked him if he should bring it up. He advised that JS, OPG "Is a mild man, never seem him get angry, I am sure it affected him". When asked why JS did not either decline to do it or report it to his manager, JB, Union Rep stated: "I think he did not want to rock the boat will. If he had flagged it up it might have been more difficult. The duty had been like that for a while, and I had flagged it up to the previous managers, it's a longstanding thing. Since Andy had come in we have been working

together to equalise the duties...I did flag it up to previous management, so it's a known issue."

42. On 18 September 2018 CW, Case Worker interviewed AM, Manager. He stated that on 14 May 2018, his first day in the relevant delivery office, he had a 20 minute meeting with the Claimant about his duty during the scheduled delivery time - "That made me wonder about the duty, and I already had my own plans to equalise the walks, there had been a revision about a year earlier and there were problems with duties over their time. So I had agreed the action with the union rep JB to equalise all workload to make everyone start and complete on time and have the workload distributed fairly." He stated that on 23 May 2018 he had observed another OPG (neither the Claimant nor JS, OPG) parked up for over 1 ½ hours whilst on PD1 duty and that had highlighted to him the need to tackle PD1 duty. He also stated that on 29 May 2018 he observed a post van parked for over half an over whilst on duty. JS returned to the van and "He told me that he had a dodgy tummy and had to return home, then he changed it and told me he had had a heavy weekend and went home for a nap. I asked him to think about it and to be honest. Then we went in the van back to the office. I told him to think long and hard and be honest. When we came into the office we seen the union rep JB and asked him to come into the office with JS. I told them both straight that every week we were sitting trying to equalise the workload to make it fair and that day...I had just caught JS at his house whilst on PD1 duty...I told JS that there would be a formal conduct case in relation to his actions, I will be carrying out the fact finding the next day...In the fact finding he was very honest" and told him about his conversation with the Claimant.
43. On 18 September 2018 CW, Case Worker interviewed JS, OPG who advised that he had previous issues with the Claimant who tried to off load work onto him. He advised that "I thought of a few excuses, I was stuck in the middle not wanting to rock the boat or drop someone in it. I told him I had a bad stomach and he was saying stop lying tell me the truth." He further stated that "[The Claimant] did maybe ask me if I was doing the sheets, I had not at the time." JS came across to CW, Case Worker as nervous, worried and credible.

44. On 18 September 2018 CW, Case Worker provided the Claimant with copies of the notes of her investigation meetings and asked him for comments within 5 days. CW, Case Worker did not ask the Claimant whether he considered that a further meeting was necessary to discuss the implications of the investigation meetings she had conducted. The Claimant did not seek a further meeting.
45. On 19 and 21 September 2018 the Claimant wrote to CW, Case Worker providing a copy of the planners' estimate of the times taken to do the student villages. He noted that the planners' estimate exceeded the time taken by the JB, Manager's test of the duty by 52 minutes; that the students were away when the duty was tested; that the test of the duty was wrong when it noted only 1 minute for a duty that the planners had allocated 15 minutes; that the PDA and timesheets would show that he worked up to his time; that JS, OPG had discussed with AM, Manager the alleged conversation prior to the fact finding interview; that during the fact find he was not informed that JS had been caught at home; that PN, OPG had never given the phone call from JS a second thought which suggested there was nothing malicious relayed in the call; that the conversation with AM, Manager on 14 May 2018 had lasted 5 minutes and not 20 minutes; when JS was asked by LB, Manager if he told anyone about the call he only mentioned PM, OPG and only much later did he mention JB, Union Rep; he asked why did JB, Union Rep not come forward sooner; that JS did not mention the part of conversation regarding the delivery sheets to AM, Manager; that he was not aware of any management issues with PD1 delivery time; that the allegation of fraudulent acts was only added when JS said the Claimant was finishing early.
46. CW, Case Worker also made enquiries with management who advised that JS, OPG has never previously been discovered at home whilst on duty and that the incident with the van had been accidental. The Claimant was not advised of these enquires until after the appeal outcome and was not therefore afforded the opportunity to comment on the outcome of these enquiries. (The Appeal decision document notes that JS initially lied when he advised management that a stone had hit the windscreen but he later admitted

that he had hit the windscreen with his PDA. CW, Case Worker advised that she disregarded that information in making her decision.)

47. CW, Case Worker did not re-interview DL, WD, JM (all OPGs).
48. On 24 September 2018 a manager with the Respondent erroneously advised the Job Centre that the Claimant had admitted his responsibility for the incidents that led to his dismissal.
49. On 27 September 2018 CW wrote to the Claimant advising that the original decision of summary dismissal was appropriate in this case. She concluded that the Claimant had motive because PD1 was underutilised, that the Claimant had been aware that JS, OPG had agreed to take additional packets to deliver within his duty time span, and the Claimant did not want that to be highlighted to management. She also concluded that the Claimant had spoken to JS in a threatening manner because that is what he had conveyed to PM, OPG and JB, Union Rep. She concluded that his behaviour was a factor in JS's decision to go home early and that the Claimant was partly responsible for depriving the Royal Mail of a valuable resource. CW, Case Worker noted that as a long serving employee he would be well aware of the Respondent's Code of Business Standards and that his conduct amounted to bullying and harassment; that he had broken the bond of trust that is core; that a lesser penalty was considered and discounted because it would condone and therefore allow further opportunity for such conduct and that she had lost confidence in his continued employment.
50. Since his dismissal the Claimant has registered with an online recruitment agency. He has applied for hundreds of jobs including delivery, driving and labouring jobs but has not received any job offers apart from 6 weeks temporary work with Scotrail. He had applied for work with Hermes, Amazon Euro, City Sprint. He had not applied for work with DPD, UPS or FexEx Some prospective employers have lost interest when he has had to disclose that he was dismissed for gross misconduct. He is age 58 and believes that his age counts against him.



51. JS, OPG faced disciplinary proceedings in respect of his decision to go home early but was not dismissed and continues to work for the Respondent. It would be difficult for the Claimant and JS to work together given that JS made allegations against the Claimant which resulted in his dismissal for gross misconduct.
52. The Claimant was in receipt of Job Seekers Allowance from 10 October 2018 until 14 November 2018.
53. The Claimant suffered wage and pension losses to the date of the hearing in sum of £22,221.72. The Claimant's ongoing weekly wage and pension losses from the date of the hearing were £451.36. The Claimant lost 'locked in' Royal Mail SIP shares as a consequence of his dismissal valued at £626.70. The Claimant lost the opportunity to sell shares without incurring a tax and national insurance liability. The Claimant had 613 shares which would have become tax free on 15 October 2018 and 116 shares which would have become tax free on 9 April 2019.
54. The Dismissing Officer and the Appeal Officer both asserted that there would be a difficulty in allowing an employee who had engaged in bullying and harassment to return to the work place since this was contrary to the Code and the relationship of trust had broken down.

**Observations on the evidence**

55. The standard of proof is on balance of probabilities, which means that if the tribunal considers that, on the evidence, the occurrence of the event was more likely than not, then the tribunal is satisfied that the event did occur.
56. AM, Manager's notes of the fact finding interview state that he asked the Claimant if he telephoned him saying "you better not fuck up my duty" to which the Claimant replied "I did not swear at James, I was explain how to do the job correctly". On 17 June 2018 the Claimant asserted that he was not asked this. At the final hearing before this tribunal the Claimant accepted that AH, Manager took notes of the meeting but that he had not done so and that he may not have remembered correctly. It is considered likely that this question was asked and answered as noted by AH, Manager.

57. The note of the trial of the second part of the PD1 stated that it took 1 minute between arriving at Keith St Student Accommodation and arriving at Thurso Street Accommodation. That entry was obviously inaccurate given the requirement to park, enter reception, deliver to mail boxes, return to the vehicle, and drive to Keith St (which entailed crossing of a major intersection). The Dismissing Officer would not accept that this was plainly wrong, but these were not his notes of the trial of the duty. That error did not render the start and finish times unreliable. The Claimant asserts that the Dismissing Officer's refusal to accept that the 1 minute entry in the duty trial was erroneous rendered his evidence neither reliable nor credible. These were not his notes of the trial and it was apparent that in these circumstances he felt unable to accept that the entry was inaccurate. There was adequate explanation for his refusal and accordingly it did not render his evidence neither reliable nor credible. The Respondent witnesses gave their evidence in a measured and consistent manner and there was no reasonable basis upon which to doubt the credibility and reliability of their testimony under oath.
58. The Claimant asserted that there would be no difficulty in him being reinstated to the same role. JS, OPG continues to work for the Respondent. Notwithstanding the Claimant's assertions to the contrary, it is likely to be difficult for the Claimant and JS to work together given that JS made allegations against the Claimant which resulted in his dismissal for gross misconduct.

### **Relevant Law**

59. Section 94 of Employment Rights Act 1996 ('ERA 1996') provides the Claimant with the right not be unfairly dismissed by the Respondent.
60. It is for the Respondent to prove the reason for his dismissal and that the reason is a potentially fair reason in terms of Section 98 ERA 1996. At this first stage of enquiry the Respondent does not have to prove that the reason did justify the dismissal merely that it was capable of doing so.

61. If the reason for his dismissal is potentially fair, the tribunal must determine in accordance with equity and the substantial merits of the case whether the dismissal is fair or unfair under Section 98(4) ERA 1996. This depends whether in the circumstances (including the size and administrative resources of the Respondent's undertaking) the Respondent acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee. At this second stage of enquiry the onus of proof is neutral.
62. If the reason for the Claimant's dismissal relates to the conduct of the employee, the tribunal must determine that at the time of dismissal the Respondent had a genuine belief in the misconduct and that the belief was based upon reasonable grounds having carried out a reasonable investigation in the circumstances (*British Home Stores Ltd v Burchell [1978] IRLR 379, [1980] ICR 303*).
63. In determining whether the Respondent acted reasonably or unreasonably the tribunal must not substitute its own view as to what it would have done in the circumstances. Instead the tribunal must determine the range of reasonable responses open to an employer acting reasonably in those circumstances and determine whether the Respondent's response fell within that range. The Respondent's response can only be considered unreasonable if the decision to dismiss fell out with that range. The range of reasonable responses test applies both to the procedure adopted by the Respondent and the fairness of their decision to dismiss (*Iceland Frozen Foods Limited v Jones [1983] ICR 17 (EAT)*).
64. In determining whether the Respondent adopted a reasonable procedure the tribunal should consider whether there was any unreasonable failure to comply with their own disciplinary procedure and the ACAS Code of Practice on Disciplinary and Grievance Procedures. The tribunal then should consider whether any procedural irregularities identified affected the overall fairness of the process in the circumstances having regard to the reason for dismissal.
65. Any provision of a relevant ACAS Code of Practice which appears to the tribunal may be relevant to any question arising in the proceedings shall be taken into account in determining that question (Section 207, Trade Union and

Labour Relations (Consolidation) Act 1992). The ACAS Code of Practice on Disciplinary and Grievance Procedures provides in summary that –

- (i) Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions.
- (ii) Employers and employees should act consistently
- (iii) Employers should carry out any necessary investigations, to establish the facts of the case.
- (iv) Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.
- (v) Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.
- (vi) Employers should allow an employee to appeal against any formal decision made

66. Compensation is made up of a basic award and a compensatory award. A basic award, based on age, length of service and gross weekly wage, can be reduced in certain circumstances.

67. Section 123 (1) of ERA provides that the compensatory award is such amount as the Tribunal considers just and equitable having regard to the loss sustained by the Claimant in consequence of dismissal in so far as that loss is attributable to action taken by the employer. Subject to a Claimant's duty to mitigate their losses, this generally includes loss of earnings up to the date of the Final Hearing (after deducting any earnings from alternative employment), an assessment of future loss of earnings, if appropriate, a figure representing loss of statutory rights, and consideration of any other heads of loss claimed by the Claimant from the respondents.

68. Where, in terms of Section 123(6) of ERA, the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the Claimant, then

the Tribunal shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

69. An employer may be found to have acted unreasonably under Section 98(4) of ERA on account of an unfair procedure alone. If the dismissal is found to be unfair on procedural grounds, any award of compensation may be reduced by an appropriate percentage if the Tribunal considers there was a chance that had a fair procedure been followed that a fair dismissal would still have occurred (*Polkey v AE Dayton Services Ltd* [1987] IRLR 503 (HL)). In this event, the Tribunal requires to assess the percentage chance or risk of the Claimant being dismissed in any event, and this approach can involve the Tribunal in a degree of speculation.
70. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (“TULRCA”) provides that if, in the case of proceedings to which the section applies, it appears to the Tribunal that the claim concerns a matter to which a relevant Code of Practice applies, and the employer has unreasonably failed to comply with the Code in relation to that matter, then the Tribunal may, if it considers it just and equitable in all the circumstances, increase the compensatory award it makes to the employee by no more than a 25% uplift. The ACAS Code of Practice on Disciplinary & Grievance Procedures is a relevant Code of Practice.

### **Respondent’s submissions**

71. The Respondent’s written submissions were in summary as follows: -
72. It is not the function of the tribunal to substitute its own view for that of the employer
73. The issue to be determined is not whether the conduct complained of actually took place but whether the employer held a genuine belief
74. Any suggestion that the Claimant exercised the PD1 “opportunities” and had been ‘sitting up’ when he should have been working did not form part of the allegations against him. The fact that PD1 had “opportunities” was used to infer motive to protect that duty.

75. The Dismissing and the Appeal Officers both had a genuine belief that the Claimant had committed the misconduct alleged and there was no evidence to the contrary.
76. The Dismissing and the Appeal Officers had genuine grounds upon which to sustain that belief – it is not for the tribunal to examine the quality of the material which the Respondent had before them (*Burchell*)
77. The case was neither one of only direct evidence (where the employee is virtually caught in the act) nor solely one of pure inference (where there is no direct evidence). The Respondent had two conflicting versions of the phone call and required to draw inferences and a conclusion from the surrounding evidence
78. JS, OPG's version was consistent and he had not disclosed the call initially to avoid rocking the boat
79. PM, OPG confirmed that JS, OPG was upset following the call and had said that the Claimant was shouting the odds and giving him grief.
80. The Claimant lied about length of the phone call
81. The duty was being underutilised and the Claimant had motive to protect an 'easy' duty. The Appeal Officer did not place great emphasis on the Dismissing Officer's test of the PD1 duty in reaching that view since additional time had been added.
82. The completion of the parcel delivery sheets/ manifests was a red herring – DL, OPG and WD, OPG both completed them
83. The Claimant's behaviour had been a factor in JS, OPG's decision to go home depriving the Respondent of a valuable resource
84. The fact that JS, OPG later mentioned the manifests was not contrary to his earlier testimony - there had been time for both matters to be raised
85. The Appeal Officer's investigation regarding JS, OPG's alleged history of lying showed a consistent history of being caught, panicking, covering up but ultimately telling the truth. In any event, in their interviews with him, both the

Dismissing Officer and the Appeal Officer found JS, OPG to be credible. The tribunal must have logical and substantial grounds for concluding that no reasonable employer could have made that assessment (*Linfood Chase and Carry Ltd v Thomson* [1989] IRLR 235).

86. The investigation was reasonable in the circumstances and the allegation was not career ending. The investigation should be considered as a whole when assessing reasonableness (*Shrestha v Genesis Housing Association Ltd* [2015] IRLR 399)
87. The Respondent is prevented through agreement with the union from using trackers in conduct cases and the time sheets which showed the time of signing in and out would not have been relevant
88. The decision to dismiss summarily was within the band of reasonable responses (*Iceland Frozen Foods*). There is always an area of discretion within which an employer may decide upon a range of disciplinary responses. The Tribunal must not substitute its own view as to what it would have done. Instead the process must be conducted by reference to the objective standards of the hypothetical reasonable employer. If a reasonable employer might reasonably have dismissed the Claimant, then the dismissal is fair (*British Leyland (UK) Ltd v Swift* [1981] IRLR 91)
89. In assessing the reasonableness of the decision to dismiss there are a number of factors which a tribunal should take into account including –
  - (i) The seriousness of the conduct should be determined by considering the character of the employer, the nature of the business, the position held and the role played by the employee, and the degree of trust required (*Neary v Dean of Westminster* [1999] IRLR 288)
  - (ii) The Respondent's Code of Business Standards is of fundamental importance and employees are expected to live by the standards. The Respondent has a zero tolerance approach to bullying and

harassment. Abusive behaviour towards colleague is expressly identified as gross misconduct.

- (iii) The overall gravity of the offence
- (iv) Consistency but the Claimant accepted that he was not arguing inconsistency on the basis that JS, OPG was not dismissed
- (v) Mitigation – the appeal officer considered a suspended dismissal (akin to a final written warning) but discounted this due to the gravity of the offence

90. The procedure was fair and was compliant with the Respondent's procedure and the ACAS Code of Practice. Any flaw should be considered as a whole in light of all the facts and circumstances. Further any flaw can be cured on appeal (*Taylor v OCS Group Limited* [2006] IRLR 613).
91. The Claimant has failed to properly mitigate his loss by not making applications to DPD, CitySprint, UPS and FedEx and any compensation should be reduced accordingly. The Claimant is likely to find employment within 24 weeks following the hearing and his losses should be reduced accordingly.
92. Any compensatory award should be capped at 1 year's gross salary being £22,589.33.
93. Any basic and compensatory award should be reduced by 100% because the Claimant was wholly to blame for his dismissal (*Hollier v Plysu Limited* [1983] IRLR 260)
94. If the dismissal is procedurally fair the Claimant would have been dismissed in any event if a fair procedure had been followed and the compensation should be reduced to nil (*Polkey*)
95. It is not reasonably practicable to re-instate or re-engage the Claimant. The Respondent has legitimate concerns about him returning to work with JS, OPG. The bond of trust between the Respondent and the Claimant is now gone and that is essential to the nature of the Respondent's business. The Claimant has contributed to his own dismissal.



96. The Claimant's written submissions were in summary as follows: -
97. The Respondent's witnesses framed their answers to suit the circumstances rather than honestly - the Dismissing Officer's refusal to accept that the 1minute entry in the duty trial was erroneous rendered his evidence neither reliable nor credible.
98. The Dismissing Officer did not have a genuine belief that the Claimant had committed the alleged misconduct. The allegations have not been proven. There was an absence of evidence. JS, OPG was untruthful and evasive having changed his story twice. Only when he was aware he was facing disciplinary proceedings did he change his story to the third version which implicated the Claimant.
99. The Respondent failed to obtain sufficient information to establish the facts and did not therefore have reasonable grounds for belief of guilt. This is not a case where the employee was caught in the act and the true facts were not readily apparent. The amount of enquiry and investigation required to increase. AH, Manager did not provide any information from his fact finding that established what had been said during the call and his fact finding did not establish a basis for a genuine belief.
100. The Dismissing Officer relied upon his test of the second part of PD1 duty and his inference that it was "full of opportunities" that the Claimant had motive to protect. The Dismissing Officer failed to consider the time-consuming exercise of completing route paperwork (manifests) (which JS, OPG also did not complete) and the extra end of delivery duties that the Claimant had to complete. (The Claimant accepted during oral submissions that the other OPG's (with the exception of the Claimant) did complete the route paperwork (manifests).)
101. The test of the duty was not a true reflection of PD1: it was tested on only 1 day and failed to establish a pattern; the number of parcels was lower than forecast; the student villages were quiet because the students were away on summer holiday; no manifests were completed; it did not allow for any over

run from the first part of the PD1 duty; and the erroneous 1 minute entry in the duty trial rendered the test unreliable.

102. Information on the actual duration of PD1 was available in the form of PDA / trackers which record the time of individual deliveries. The Dismissing Officer ought to have sought permission to obtain and use this information.
103. The Dismissing Officer ought to have obtained and considered the time allocated by the route planners
104. The Respondent had the administrative resources to make these further reasonable enquiries. There were not therefore reasonable grounds for the Dismissing Officer to sustain his belief that the route was full of "opportunities".
105. The Dismissing Officer said that JM, OPG must have advised the Claimant of the additional parcels but there was no evidence to support that conclusion
106. There was no direct evidence of the call other than the statements of the Claimant and JS, OPG. The Claimant provide a good reason for making the call namely that he had been contacted by the manager of a student village about the manifests not being completed and that he called JS, OPG to assist him.
107. The tribunal must apply the objective standard of the reasonable employer as to what is a reasonable investigation and not substitute their own opinion  
(*Sainsburys Supermarkets Limited v Hitt* [2003] ICR 111, CA)
108. The tribunal should take into consideration the ACAS Code of Practice in so far as relevant. An employee should be allowed to set out their case; answer any allegations; pose questions; present evidence; and call relevant witnesses. The Claimant had no opportunity to respond to the further investigation undertaken by the Dismissing Officer after the disciplinary hearing and before his decision to dismiss. The decision to dismiss was procedurally unfair and the Respondent cannot invoke a no difference rule (*Polkey*).
109. No employer acting reasonably would have dismissed the Claimant for the reasons given. The decision to dismiss was out with the band of reasonable responses. The Claimant had over 32 years' service with no disciplinary

record. This ought to have been given significantly greater weight. Length of service is a factor which can properly be taken into account when deciding whether dismissal was reasonable (*Strouthos v London Underground Limited* [2004] IRLR 636, CA). The band of reasonable responses is not infinitely wide and consideration is not a matter of procedural box-ticking and a tribunal is fully entitled to take into account length of service (*Newbound v Thames Water Utilities Limited* [2015] EWCA Civ 677, CA)

110. The decision to dismiss was out with the band of reasonable responses due to the failure to establish the alleged misconduct took place
111. The Appeal Officer effectively undertook a new disciplinary process. She disregarded the Dismissing Officer's conclusion, conducted her own investigation and made a decision on the merit of that.
112. Whether the defects of a first hearing can be cured on appeal do not depend upon whether the second hearing can be categorised as a rehearing or a review but rather whether the appeal was thorough and comprehensive such that the whole process was to be found as fair. In considering whether the dismissal was fair the tribunal must consider what happened throughout the disciplinary process (*Taylor*).
113. The Appeal Officer did not have a genuine belief in the Claimant's guilt because the Claimant lied and changed his story twice and only changed his story to the third account because he was facing disciplinary action. PD1 was not underutilised and the Claimant did not have motive to protect his duty. She failed to take into account the student village manager's comments that the manifests were not being completed by the replacement OPGs. She failed to take into account the planners' time estimates. She failed to take into account that JS, OPG had previously lied to the Respondent on an entirely separate matter. She relied upon second hand accounts of the call. She ought not to have relied upon the test of duty which was unreliable and inaccurate because it took place on 1 day only, the volume of parcels was low, this was a student holiday and the manifests were not completed. This was evidence that PD1 was not underutilised.

114. The Appeal Officer did not have sufficient information to reasonably uphold the findings. She should have investigated whether the manifests were being completed and whether the Claimant had extra responsibilities at the end of his deliveries. She ought to have sought permission to use the PDA/ trackers which would have provided evidence on route timings.
115. No appeal hearing took place after the Appeal Officer's investigations and the Claimant was denied the opportunity to respond to her investigations in person rendering the procedure unfair.
116. It is reasonably practicable for the Respondent to comply with an order for reinstatement or re-engagement. The Claimant confirmed that he would have no issue returning to work for the Respondent.
117. An uplift of 25% should be applied for unreasonable failure to comply with the ACAS Code.
118. The Claimant has taken reasonable steps to mitigate his losses. The Claimant does not reasonably expect to obtain new employment in the near future because of the stigma of having been dismissed.
119. There should be no reduction for contributory fault the Claimant having called JS, OPG for a legitimate purpose

**Decision**

120. The initial allegations ("notifications") which ultimately resulted in the Claimant's dismissal were that "you breach Royal Mail's business standards by threatening/ bullying a colleague JS, OPG on Friday 25 May 2018 at 11.33am" and "by telling him not to return early to G11-G12 delivery office once he finished PD1 duty; this resulted in Royal Mail being fraudulently deprived of valuable resource". The reasons given by the Respondent on termination for the Claimant's dismissal were his inappropriate/ threatening behaviour by an employee towards another, and that his suggestion of fraudulently deceiving the company out of hours.

121. It was accepted by the Claimant that the Respondent's reason for dismissing the Claimant related to his conduct, and that reason was a potentially fair reason for dismissal, in terms of Sections 98(1) and 98(2) (b) ERA 1996.
122. AM, Manager conducted a fact find interview with JS, OPG. AH, Manager conducted a fact find interview with the Claimant. The Claimant asserted that he was not aware that JS, OPG had been caught at home when he was first interviewed regarding the phone call. However any motive on the part of JS was not relevant to ascertaining the Claimant's version of the phone call.
123. The Dismissing Officer then held a conduct interview with the Claimant. The Dismissing Officer subsequently held a fact-finding interview with the other OPG's who covered PD1 duty (WD, JS and DL) and with PM, OPG. The Dismissing Officer also undertook a test of the second part of the PD1. The Claimant asserted that he had no opportunity to respond to the further investigation undertaken by the Dismissing Officer after the disciplinary hearing but before his decision to dismiss. However such information was made available to the Claimant for comment prior to the appeal hearing and considering the process as a whole this failure was remedied on appeal.
124. The findings from these investigations were –
  - (i) The Claimant was the duty holder for PD1 and had been performing that duty for 15 years.
  - (ii) The Claimant was absent on holiday throughout the relevant time and JS, OPG was covering the Claimant's PD1 duty.
  - (iii) On Tuesday 29 May 2018, JS, OPG had been caught at home when he should have been undertaking PD1 duty. JS provided changing reasons for his unauthorised absence from having a dodgy stomach, to wanting a nap, to the Claimant having called him up irate on 25 May saying 'you'd better not fuck up my duty', etc. JS stated he had given the initial reasons because he panicked and didn't want to rock the boat.

- (iv) On Friday 25 May 2018, 4 days earlier, JS, OPG had been asked by his manager to do additional packets within his duty time and the Claimant had called JS around that time. JS, OPG and the Claimant provided different versions of the phone call.
- (v) According to JS, OPG, the Claimant had called him up irate saying 'you'd better not fuck up my duty', had explained how to cover things up and to put packets on overtime, had told him to go home if he finishes early, and had threatened him to remove him from that duty.
- (vi) The Claimant denied JS, OPG's version of the phone call. According to the Claimant he had phoned JS because the manager of the student accommodation had phoned him to say that the correct process was not being followed, to explain how to carry out the duty correctly, and to inform him that if he was carrying out the job correctly he would not have time to do parcels, and that he did not swear but instead called to assist him, and the call only lasted about 90 seconds. The Claimant stated that JS is a manager/driver of a rock band playing 3 to 4 gigs a week until the early hours and has to go home early for a nap.
- (vii) The phone call lasted just under 4 minutes
- (viii) PM, OPG stated that on Friday 25 May 2018, JS, OPG had advised him that the Claimant had called him, had been shouting the odds and had informed him that he was taking out mail that he wasn't supposed to. PM, OPG stated that JS had seemed aggravated about the situation.
- (ix) The regular cover for PD1 duty was DL, OPG but other OPGs covered the duty including WD, JS and DL.
- (x) The scheduled time for the second part of PD1 was 4 hours. The scheduled time had been determined following consultation with the route planners.

- (xi) The Claimant stated that it took 4 hours to complete the second part of the duty including completion of the paperwork. DL, OPG stated that it took him 3 hours 40/45 minutes to complete the second part and he completed the parcel delivery sheets. WD, OPG stated that it took about 4 hours to deliver the second part and he completed the parcel delivery sheets. JS, OPG stated that the duty often falls short of the finish time and that he doesn't complete the parcel delivery sheets.
  - (xii) The test of the second part of the PD1 took 2 hours 44 minutes without the additional duty added. The students were not in residence at the time and the volume of mail was low.
  - (xiii) Additional duty of between 30 – 40 minutes was added after the Claimant's suspension. DL, OPG advised that with the additional duty it takes 4 hours to complete.
125. The Dismissing Officer believed JS, OPG's version of the phone call over the version advanced by the Claimant. JS had motive to lie about the reason for his unauthorised absence because he was facing disciplinary proceedings. However, JS had no such motive when he advised PM, OPG about the call with the Claimant on the same day (i.e. before he had been caught at home). PM, OPG stated that the Claimant had been shouting the odds and JS was aggravated. This was directly contradictory to the Claimant's version which was that he had been calling to assist him and had not shouted. JS had initially stated that he was at home because he had a dodgy stomach which would have justified an unauthorised absence. Accordingly, JS had nothing to gain from changing this reason unless perhaps motivated to tell the truth. The Dismissing Officer had believed him when he said he had panicked and didn't want to rock the boat. PD1 duty could still be completed on time despite additional duties of 30-45 minutes having been added. There was scope to infer that PD1 duty was underutilised and therefore had 'opportunities' which the Claimant was seeking to protect. The Dismissing Officer therefore had a reasonable basis upon which to believe JS's version of the telephone call over the Claimant's version.

126. The Dismissing Officer appeared entirely genuine and sincere in his belief that the Claimant had in summary shouted and sworn at a colleague and told him to go home early and do additional parcels in overtime. There was no evidence that he had any other reason in mind and that his belief was not genuine. There was a reasonable basis for that belief based upon a reasonable investigation. The tribunal therefore concludes that the Dismissing Officer held a genuine belief in the Claimant's misconduct.
127. The Appeal Officer held an appeal hearing interview with the Claimant. The Claimant asked the Appeal Officer to check his PDA/ tracker, his sign in /out sheets and his van sign in/out sheets which would clarify that he worked to his time every day. The Appeal Officer refused because there was an agreement with the union that the PDA / tracker could not be used in disciplinary procedures. Further, the sign in/ out sheets would not have shown whether a route had 'opportunities' and whether a driver was 'sitting up' whilst he should have been on duty.
128. The Claimant asserted that the route planners should have been interviewed but the Claimant provided information from the route planners. In any event the scheduled delivery time had been determined following consultation with the route planners.
129. The Appeal Officer then interviewed the manager of the student village PM, OPG; JB, Union Rep; AM, Manager; and JS, OPG. The Claimant was provided with copies of the additional interviews undertaken by the Appeal Officer and given 5 days to comment. The new material findings arising from these interviews was that AM, Manager stated that he had plans to equalise the duties which he'd discussed and agreed with JB, Union Rep and that JB, Union Rep had stated that immediately prior to JS's fact finding, JS had advised him about the phone call with the Claimant. The Claimant asserted that he had no opportunity to meet with the Appeal Officer to comment in person on the further investigation undertaken by the Appeal Officer after the appeal hearing but before she upheld the decision to dismiss. As a guiding principle the Respondent's Conduct Policy states that "The employee will be



made fully aware of the evidence”. Whilst a face to face meeting would have been preferable it was not unreasonable to seek comment in writing only.

130. The Appeal Officer made enquiries with management regarding issues raised by the Claimant namely that JS, OPG had previously been discovered at home whilst on duty and that he had previously lied about his van windscreen. The Claimant was not advised of these enquires until after the appeal decision and was not therefore afforded the opportunity to comment on the outcome of these enquiries. However, her findings in this regard were not material to the reason for dismissal and the failure to afford the Claimant the opportunity to comment was not unreasonable.

131. The additional findings from the Appeal Officer’s investigations were that –

- (i) The Claimant stated that the manager of the student accommodation called him on Thursday 24 May 2018 advising that “it was not a big issue” but that some parcels had gone missing and the paperwork was not done
- (ii) The manager of the student accommodation stated that she had telephoned the Claimant sometime in May when another PG was covering his duties. She stated that the postmen who replaced him have all failed to do the paperwork but she never had any issues with the Claimant who always went above and beyond.
- (iii) PM, OPG objected to being dragged into the disciplinary process.
- (iv) AM, Manager stated that on 14 May 2018 he’d had a 20 minute meeting with the Claimant about his duty during the scheduled delivery time and this made him wonder about the duty. AM, Manager stated that he had plans to equalise the duties and have all workload distributed fairly which he’d discussed and agreed with a union rep.
- (v) The Claimant stated that the meeting with AM, Manager had actually lasted 5 minutes and that he was not aware of any management issues with PD1 delivery time

- (vi) AM, Manager stated that on 23 May 2018 he had observed another OPG (neither the Claimant nor JS, OPG) parked up for over 1 ½ hours whilst on PD1 duty and that had highlighted to him the need to tackle PD1 duty.
- (vii) AM, Manager stated that on 29 May 2018 JS, OPG initially told him that he had a dodgy tummy and had to return home but then he changed it to needing a nap. He stated he had asked JS to think long and hard about it and had encouraged him to be honest.
- (viii) JB, Union Rep had accompanied JS, OPG to his fact own finding interview. He stated that immediately prior to the fact finding, JS had advised him about the phone call with the Claimant and asked him if he should bring it up. JB, Union Rep stated that he'd previously flagged the issue with PD1 to management and that he's been working with AM, Manager to equalise the duty since he arrived.
- (ix) The route planners' estimate of the times it takes to do the student villages exceeded the time taken by test of the duty by 52 minutes (and if added would have increased the test time to 3 hours 36 minutes)
- (x) In relation to a previous incident involving his van JS, OPG had initially lied when he advised management that a stone had hit the windscreen, but he later admitted that he had accidentally hit the windscreen with his PDA.

132. The Appeal Officer believed JS, OPG's version of the phone call over the version advanced by the Claimant. The PD1 duty was underutilised and had 'opportunities' which were being exercised. The Claimant as PD1 duty holder would have motive to protect those 'opportunities'. JS had advised the Respondent about the call having been encouraged by his manager to be honest. In a prior and separate difficult situation, JS had initially panicked and been dishonest. (The Appeal Officer advised that she disregarded this evidence but in any event this evidence was not contrary to her belief.) JS

asked his union rep whether he should tell his manager about the call. Having regard to this and the previous evidence, the Appeal Officer had a reasonable basis upon which to believe JS's version of the telephone call over the Claimant's version.

133. The Appeal Officer also appeared entirely genuine and sincere in her belief that the Claimant had in summary shouted and sworn at a colleague and told him to go home early and do additional parcels in overtime. There was no evidence that she had any other reason in mind and that her belief was not genuine. There was a reasonable basis for that belief based upon a reasonable investigation. The tribunal therefore concludes that the Appeal Officer also held a genuine belief in the Claimant's misconduct.
134. The Respondent complied with their own disciplinary procedure and the ACAS Code of Practice on Disciplinary and Grievance Procedures. The Respondent carried out a reasonable investigation to establish the facts of the case. There was no material line of enquiry that was not pursued with a materially relevant witnesses. The Claimant was informed of the basis of the problem and given an opportunity to put his case in response before any decision was made. The Claimant was accompanied by his union rep to the Disciplinary and Appeal Hearings. The Claimant was allowed to appeal against the decision to dismiss. There was no evidence of any unreasonable delay or inconsistent treatment. Considering the disciplinary process as a whole, and having regard to the reason for dismissal, the procedure adopted fell within the range of reasonable responses open to an employer acting reasonably in the circumstances.
135. The Claimant had 33 years' service and an excellent attendance and conduct record. The conversation with JS, OPG on the Friday lasted about 4 minutes and around half of that time was taken up with discussing the route paperwork. The Respondent concluded that for about 2 minutes the Claimant had: shouted and sworn at JS; told him to go home rather than finish the duty early; told him that additional parcels should be done during overtime; and threatened to get him removed from that duty. The Respondent concluded that this was threatening and intimidating behaviour which made JS

uncomfortable and indignant. The Respondent concluded that the phone call had been a factor in JS's decision to go home early on the following Tuesday and that the Claimant was partly responsible for depriving the Respondent of a valuable resource.

136. The findings of threatening and intimidating behaviour and the demand not to be present and productive during working hours fell short of the express standards of expected behaviour set out in the Code of Business. The Claimant as a long serving employee ought to have been fully aware that this conduct, albeit brief and isolated, fell short of standard of behaviour expected and risked disciplinary action including dismissal. Furthermore "Abusive behaviour to customers or colleagues" is an express example of Gross Misconduct within the Respondent's Conduct Policy. The role of OPG involves working alone and unsupervised and a significant degree of trust is required. The Respondent concluded that the bond of trust had been irretrievably broken.
137. The penalty of dismissal was a harsh one (given the brief isolated event and the Claimant's excellent and lengthy service record) and some employers acting reasonably would not have taken the decision to dismiss in the circumstances. However, it was not unduly harsh (given the intimidating behaviour and inappropriate demands which were contrary to standards of expected behaviour) and some employers acting reasonably would have taken the decision to dismiss in the circumstances. It cannot therefore be said that no reasonable employer acting reasonably would have taken the decision to dismiss. Accordingly, the penalty of dismissal fell within the range of reasonable responses.
138. The tribunal therefore determined in accordance with equity and the substantial merits of the case that the Respondent acted reasonably (including the procedure adopted) in treating the reason given as a sufficient reason for dismissing the Claimant in the circumstances (including the size and administrative resources of the Respondent's undertaking).

**Employment Judge**

**M Sutherland**

**Date of Judgment**

**22 March 2019**

**Entered in register  
parties**

**26 March 2019 and copied to**

*I confirm that this is my judgment in the case and that I have signed the judgment  
by electronic signature.*