THE EMPLOYMENT TRIBUNALS

Claimant: **Mr S Campion**

Respondent: **Emsec Security Limited**

Heard at: **North Shields** **On: 20 September 2017**

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

Representation:

Claimant: **Mrs L Campion, the claimant's girlfriend**
Respondent: **Mrs E Harper, the respondent's Managing Director**

REASONS

Representation and evidence

1 The claimant was represented by Mrs Lisa Campion, who called the claimant to give evidence. I record at this point that Mrs Campion explained that she and the claimant are not married rather she is his girlfriend; she had changed her name to "Campion" by deed poll.

2 The respondent was represented by Mrs Emma Harper, the respondent's Managing Director who gave evidence herself and called Mr Michael Carter, who is employed by the respondent as a Team Leader, to give evidence on its behalf.

3 The Tribunal also had before it a variety of documents contained in two separate bundles prepared, respectively, by the parties notwithstanding a clear direction to the contrary. Unless otherwise stated, the page references given below are to the pages within the bundle of documents produced by the respondent.

The claimant's complaints

4 The claimant had presented two complaints to the Tribunal. First, that his dismissal by the respondent had been unfair; secondly, a contract claim on the basis that he did not receive from the respondent the notice of the termination of his contract of employment to which he was entitled.

The issues

5 At the commencement of the Hearing, for the benefit of the parties I briefly summarised the issues in this case, which their representatives confirmed they understood. Those issues are as follows:

Unfair dismissal

5.1 Was the claimant dismissed? The respondent accepted that he had been.

5.2 Has the respondent shown what was the reason for the claimant's dismissal? The respondent asserted conduct.

5.3 Was that reason a potentially fair reason within sections 98(1) or (2) of the Employment Rights 1996 (the "1996 Act")? Conduct is such a potentially fair reason.

5.4 If the reason was a potentially fair reason for dismissal, did the respondent act reasonably or unreasonably in treating that reason as a sufficient reason for the dismissal of the claimant in accordance with section 98(4) of the 1996 Act? This would include whether (taking account of the Acas Code of Practice: Disciplinary and Grievance Procedures (2009)) a reasonable procedure had been followed by the respondent in connection with the dismissal and whether (in accordance with the guidance in Iceland Frozen Foods Limited -v- Jones [1982] IRLR 439, Post Office v Foley [2000] IRLR 827) and Graham v The Secretary of State for Work and Pensions (Job Centre Plus) [2012] EWCA Civ 903) the decision to dismiss the claimant fell within the band of reasonable responses of a reasonable employer.

5.5 In this respect, Tribunal would, however, apply the guidance set out in British Home Stores Limited -v- Burchell [1978] IRLR 379 having regard to the fact that the statutory 'test' of fairness, which is now found in section 98(4) of the 1996 Act, had been amended in 1980 such that neither party now has a burden of proof in that regard.

5.6 With regard to the above questions, in accordance with the guidance in Burchell and Graham, I would consider whether at the stage at which the decision was made on behalf of the respondent to dismiss the claimant its Manager who made that decision had in his mind reasonable grounds, after as much investigation into the matter as was reasonable in all the circumstances of the case, upon which to found a genuine belief that the claimant was guilty of misconduct.

Contract claim

5.7 Was the claimant entitled to any notice of the termination of his contract of employment with the respondent?

5.8 If so, to how much notice was he entitled and did he receive that notice?

Consideration and findings of fact

6 Having taken into consideration all the relevant evidence before the Tribunal (documentary and oral), the submissions made on behalf of the parties at the hearing and the relevant statutory and case law (notwithstanding the fact that, in the pursuit of conciseness, every aspect might not be specifically mentioned below), I record the following facts either as agreed between the parties or found by me on the balance of probabilities.

6.1 The respondent describes itself as a small, family run company working in the security business. That said, it employs 100 staff and has other resources including in HR.

6.2 The claimant commenced his employment with the respondent on 28 March 2014 working as a Security Officer. On appointment he underwent induction by the respondent regarding his role and responsibilities. So far as is material to his claims before this Tribunal, the claimant worked in the stores of a particularly important, large and well-known retail customer ("the Customer"). An aspect of the service level agreement with the Customer is that it can require the removal of poorly performing security officers (page 64).

6.3 The claimant states that he has learning difficulties and issues with reading and writing. That being so, I assisted him when necessary during the hearing; for example, on referring to certain documents, which I read to him and ensured that he understood. In this regard, I note that on appointment the claimant completed various forms for the respondent; for example, an English grammar test (page 38) and a Civil Recovery Apprehended Individual Report (page 40), and was successful in obtaining a Level 2 NVQ award in examination conditions albeit with some assistance in understanding the questions. I also note that in his claim form he has answered the question that he does not have a disability.

6.4 In June 2014 the respondent received a complaint from the Customer to the effect that the claimant did not seem to know what he was doing. He was therefore given retraining (pages 52-54) after which he scored 75%, which is the minimum required to be employed at a customer's site.

6.5 Another complaint was then received that Mr Carter dealt with by further retraining regarding the claimant's duties, which was completed on 2 October 2014 and which the claimant records as being very helpful (page 56).

6.6 The claimant was then retrained on "SCONE" (Selection, Concealment, Observation, Non-Payment, Exit) (page 57) and put through a Level 2 NVQ Customer Service Course (page 48).

6.7 A further complaint was then received from the Customer that led to the respondent conducting a disciplinary meeting with the claimant on 2 November 2015, which resulted in him being placed on a performance review for three months. He was also removed from the particular store of the Customer at one location to the East of Newcastle to another store near Gateshead. The claimant was then retrained by Mr Carter again and Mr Carter once more took him through the full induction process, which he

said he had never done with any other employee, except of course on initial appointment.

6.8 All employees of the respondent were then appraised, the claimant in April 2016. Although it is right to record that his appraisal form was completed by Mrs Campion rather than by the claimant, it is to be assumed that she did so as directed by the claimant or at the very least in discussion with him. The appraisal form is extremely negative referring to his work experience being bad, having achieved nothing, being critical of the respondent and in answer to the question regarding his interest in the job he responded, "Not very much interested in the job I do. Best part is going home and getting paid. I do my best to my ability even though I have difficulty reading and writing".

6.9 At about this time the claimant's performance again dropped below the required standard when, on 7 April 2016, he was assessed as achieving 67% (page 50) leading to Mr Carter undertaking another full induction on 12 April 2016 (page 51). In May 2016 the claimant's performance increased to 71% and, thanks to Mr Carter's support (which the claimant acknowledged), his performance score had increased to 74% in September 2016.

6.10 In November 2016 an anonymous complaint was received that the claimant was 'turning a blind eye' to shoplifters. At about this time, on 20 November 2016, when visiting the store Mr Carter witnessed the claimant backing away from a shoplifter who had become aggressive saying, "Don't". The claimant had then disappeared off the shop floor to avoid confrontation with the shoplifter and ended up in the toilets. Mr Carter had to intervene to deal with the incident.

6.11 Then, in December 2016, the Customer requested the claimant's removal from their site. Rather than comply with this request immediately, Mrs Harper sought to support the claimant and agreed to investigate the Customer's concerns using a 'mystery shopper' test exercise; the claimant having accepted the use of that procedure as part of the Quality Assurance Process of the respondent on 10 September 2014.

6.12 Another supervisor from a different area, Dave Castellow, (who was referred to during these proceedings only as Dave) was brought in to perform the test by pretending to be a shoplifter. He is said to be very experienced and, during the tests, made his thefts obvious. During the exercise, Dave was in contact with Mrs Harper; for example, asking what he should do next and receiving instructions. A comprehensive statement produced by Mr Castello about his conduct of the 'mystery shopper' exercise is at page 121.

6.13 On the first test the claimant turned away while Dave placed nine beef fillet steaks in his rucksack and left the store setting off the EAS tagging alarm, which the claimant did not attend to. Dave repeated his actions, on this occasion stealing a leg of lamb, and the claimant again looked away and did not challenge him. On his third visit into the store Dave stole six bottles of whiskey and, on his fourth visit, two bottles of tequila. At that point he saw the claimant turn away enabling him to walk casually out of the store. As he did so a staff member rang three bells, which is a security

call to checkouts. The claimant ran to the checkout area but did not investigate Dave's whereabouts. Dave therefore returned to the store another four times, on each occasion, taking items of high-value in the claimant's presence. After approximately an hour of Dave first entering the store he spoke to the store manager and asked him to tell the claimant to keep an eye on him while he was in the store as staff did not recognise him, they had been alerted to a number of thefts happening within the hour and this was the seventh time that he had been in that store in an hour. Dave saw the claimant at the warehouse door and "blatantly concealed" a bottle of tequila and a bottle of vodka into his jacket. Knowing that the claimant had seen him Dave proceeded to the exit but could not see the claimant. Dave asked a member of staff to call for security. The claimant acted on the alarm call but failed to stop or challenge Dave who then stood outside waving the bottle of vodka at the claimant through the window. The claimant then did something Dave states he had never witnessed before in that he ran in a totally different direction and got two male members of staff to confront Dave while the claimant stood back and observed. At the end of the exercise Dave had more than £200 of goods in the boot of his car comprising fillet steaks, a leg of lamb and 10 bottles of vodka, tequila and malt whiskey (page 66).

6.14 I interject at this stage that there was a dispute in the evidence as to whether Dave had entered the store six times, as the respondent asserted or, as the claimant said, four times or three times. In fact, the written statement of Mr Castellow (page 121) seems to record nine separate visits. I am not satisfied that anything turns on the number of times Dave entered the store; the point is he did so on a number of occasions and was able to steal a significant quantity of valuable goods while making his thefts extremely obvious, and the claimant did not intervene until the very last incident when he did so by asking two male staff members, in effect, to do his job for him.

6.15 Mrs Harper contacted the claimant and suspended him from work on full pay. She then followed that by writing accordingly on 23 December 2016. Regrettably that letter was sent to the claimant's previous address and was not received by him. He was nevertheless aware of his suspension as a result of the initial contact he had had with Mrs Harper.

6.16 By letter of 3 January 2017, the claimant was invited to attend an investigatory meeting on 6 January 2017. This letter was sent to the correct address. The claimant says he never received it but, in any event, he was informed of the meeting by SMS on 5 January (page 17) and the meeting was confirmed to Mrs Campion by e-mail at 6:55am on 6 January (page 112), and the claimant did attend the meeting that day.

6.17 As Mrs Campion had stressed that the claimant had learning difficulties (page 112), at the meeting, the investigation statements were read to him and he was given copies. He was told he would need to attend a disciplinary hearing and he asked for extra time to prepare. He was given two weeks.

6.18 Mrs Campion e-mailed the respondent on 12 January 2017 at 11:14pm (page 124). She criticised the process and the allegations, accused Dave

of lying, made representations on behalf of the claimant and asked, "Why he should put himself at risk as well as customers also over a bottle of vodka?".

6.19 By letter of 27 January 2017 the claimant was invited to a disciplinary hearing (page 1). The claimant states that he did not receive that letter either but the respondent has produced a certificate of posting (page 20) and also sent a copy of the letter by e-mail (page 6). Mrs Campion confirmed the claimant's awareness of the meeting by e-mail of 27 January (ie. the same day) when she asked if she could accompany him (page 6). That request was refused, it being explained that the claimant could be accompanied by a fellow employee or a trade union representative (page 7). In evidence the claimant volunteered that his father is a trade union representative. In the event he chose not to be represented by a fellow employee or a trade union representative and the meeting went ahead on 27 January. It was conducted by Mr Colin Harper with Mr Carter taking notes. That day, after the meeting, Mrs Campion e-mailed the respondent at 1:45pm (page 7), again being critical and accusing Dave of lying.

6.20 The claimant states that at the conclusion of the disciplinary meeting he asked what happens now and Mr Harper answered to the effect, "I'll get back to you in 24 hours", but he did not. The claimant then sent a text message to Mr Harper on 6 February 2017 (which was in the claimant's bundle of documents that I shall refer to as being page C12) asking what was happening and only then, the claimant says, did Mr Harper telephone to say that he had two choices, those being either to walk away from the respondent's employment or move to a site of a different customer in Doncaster.

6.21 That is inconsistent with the respondent's letter of 6 January (page 2), which is signed by Eve Carlile above the job title "Emsec Security", and states that at the meeting:

> "You were given two choices. Colin explained to you that you are no longer able to work in any [Customer] stores. The nearest available non-customer site is [another customer] in Doncaster.
>
> The alternative option is to end your contract with Emsec. You will be given 2 weeks notice pay which will be paid to you on the usual pay date(s) along with any holiday pay due to you.
>
> We tried to contact you on Thursday and Friday of last week without success. You have spoken to Colin today and confirmed you are choosing to end your contract with Emsec.
>
> Your employment with Emsec therefore ceased as at 31 January 2017. Your suspension therefore ended on that date.
>
> If you wish to appeal our decision please contact Emma Harper, Director, within 7 days".

6.22 Thus it became apparent that there was a clear conflict of evidence between that of the claimant and that letter upon which the respondent

relied. I therefore recalled Mr Carter. I asked him the questions and received the answers as set out below:

> "Did you attend the disciplinary hearing with the claimant on 31 January 2017? – Yes.
>
> Who led that meeting? – Colin Harper.
>
> At that meeting did Mr Harper mention the two choices referred to? – Not to my knowledge.
>
> Was Doncaster mentioned? – No.
>
> Did Mr Harper say that he could not work at the Customer? – No.
>
> Did he say anything about the end of his employment? – No because we were still investigating.
>
> Did he say that the company would be in touch? – Yes."

6.23 This exchange obviously supports the claimant's version of events, which is also supported, at least by inference, by the evidence in the witness statement of Mrs Harper who refers, first, to the disciplinary hearing on 31 January and then to Mrs Campion's e-mail later that day after the hearing. Having set out those two events in that chronological order Mrs Harper then states as follows:

> "Mr Campion was then contacted to discuss the possibility of relocation to another contract. Mr Campion declined this offer. It was explained to Mr Campion that the client requested that he be removed from their sites. Mr Campion was informed that the company found that all the complaints to be upheld".

I repeat that that chronological order of events in Mrs Harper's witness statement (the hearing, Mrs Campion's email later that day and the claimant "then" being contacted to discuss the possibility of relocation and being informed that the complaints were upheld) satisfies me that the claimant's evidence as to what occurred at the conclusion of the disciplinary hearing, supported as it is by the evidence of Mr Carter, is the correct version of the events and that the letter of 6 February is significantly inaccurate. That is obviously troubling.

6.24 In respect of any complaint of unfair dismissal the evidence of the disciplinary hearing is crucial. In this case, uniquely in my experience, I have not heard any evidence from the decision maker, Mr Harper, have not seen a record of the disciplinary hearing that Mr Carter says he took, and was read back to and agreed by the claimant, and have not heard any evidence from the author of the letter of 6 February, which is said to be the decision letter. I repeat that in the above circumstances I prefer the evidence of the claimant that he was not made aware of the outcome of the disciplinary hearing at its conclusion on 27 January; rather I accept that he was not made aware of that or of his dismissal until, in reply to the claimant's text message, Mr Harper telephoned him on 6 January ultimately saying words to the effect "Well Shaun your contract ceased on the 31 January 2017. You no longer work for Emsec".

6.25 I interject at this stage that whilst I accurately recorded Mr Carter's answers above to my questions it is right that in re-examination Mrs Harper asked him whether the claimant was told, at the disciplinary meeting, that he could not go back to the Customer, to which his answer was "I can't recall".

6.26 The claimant appealed against his dismissal by letter of 11 February 2017. Mrs Harper reviewed the case but informed the claimant by e-mail dated 15 February that his appeal had been unsuccessful.

6.27 In conclusion I record a general point regarding the communication between the respondent and the claimant. He says he never received correspondence from the respondent until he did so via Acas. The respondent argues that he received everything albeit that the suspension letter was wrongly addressed and was not given to him until his attendance at the meeting on 6 January. The respondent further states that even if hard copies of the letter were not received, e-mail copies were sent albeit to the email address of Mrs Campion. I accept that the claimant did receive everything either by hard copy or e-mail, albeit that he did not receive the suspension letter until he attended the meeting on 6 January. I do not accept Mrs Campion's submission that the claimant did not receive the emails because the e-mail address used by the respondent was not the claimant's and that they lived apart, she being in Gateshead. I accept the respondent's evidence, which was not disputed by the claimant, that that was the e-mail address that the claimant had used in the past regarding various aspects of his employment including holiday requests, reporting sickness, receipt of payslips, etc and, as such, it was reasonable for the respondent to write to him at that address. In any event the claimant did attend all the meetings and had his say as is appropriate.

Submissions

7 After the evidence had been concluded, the parties' representatives made submissions. It is not necessary for me to set out those submissions in detail here because they are a matter of record and the salient points will be obvious from my findings and conclusions below. Suffice it to say that I fully considered all the submissions made and the parties can be assured that they were all taken into account in coming to my decisions. That said, I record the key aspects of the representatives' submissions below.

8 On behalf of the claimant, Mrs Campion made submissions including the following:

8.1 The claimant was not given a fair disciplinary hearing. He could not explain and there was nobody there to defend what he said.

8.2 He had worked for the company two and half years.

8.3 He was not given either his P45 or P60.

8.4 He was still pursuing his claim for his notice pay. He accepted that the payment had been made into his bank but was not sure what it was for.

9 On behalf of the respondent, Mrs Harper made submissions including the following:

9.1 The respondent had always treated the claimant fairly. They had retrained him and followed the disciplinary procedure, and did pay his notice pay.

9.2 They had nowhere else to offer the claimant to work. He was offered Doncaster but did not want to work there.

9.3 Events leading to the claimant's dismissal had not been quick but had been done over a period. It was not an option that the respondent jumped onto straight away to dismiss him.

The law

10 The principal statutory provisions that are relevant to the issues in this case relating to the claim of unfair dismissal are to be found in the 1996 Act and are as follows:

"94 The right.

(1) An employee has the right not to be unfairly dismissed by his employer."

"98 General.

(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—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(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."

Application of the facts and the law to determine the issues

11 The above are the salient facts and submissions relevant to and upon which I based my Judgment. I considered those facts and submissions in the light of the relevant law and the case precedents in this area of law.

Unfair dismissal

12 I consider first the claimant's complaint that his dismissal by the respondent was unfair. In this regard I obviously considered section 98 of the 1996 Act as set out above and the relevant precedents including those that are also set out above to each of which I had regard. I also took into account more recent decisions of the Court of Appeal, which had reviewed and indorsed those authorities: ie. Fuller v The London Borough of Brent [2011] EWCA Civ 267, Tayeh v Barchester Healthcare Limited [2013] EWCA Civ 29 and Graham, particularly at paragraphs 35 and 36 where Aikens L.J. stated as follows:

"In Orr v Milton Keynes Council [2011] ICR 704, all three members of this court concluded that, on the construction given to section 98(4) and its statutory predecessors in many cases in the Court of Appeal, section 98(4)(b) did not permit any second consideration by an ET in addition to the exercise that it had to perform under section 98(4)(a). In that case I attempted to summarise the present state of the law applicable in a case where an employer alleges that an employee had engaged in misconduct and has dismissed the employee as a result. I said that once it is established that employer's reason for dismissing the employee was a "valid" reason within the statute, the ET has to consider 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 ET must then decide on the reasonableness of the response by the employer. In performing the latter exercise, the ET must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to the ET's 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 the employer has so acted, then the employer's decision to dismiss will be reasonable. However, this 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. The ET 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 ET 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". An ET must focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any internal appeal process) and not on whether in fact the employee has suffered an injustice. An appeal from the ET to the EAT lies only in respect of a question of law arising from the ET's decision: see section 21(1) of the Employment Tribunals 1996 Act 1996."

13 The issues arising from the statutory and case law referred to above that are relevant to the determination of this case are summarised at paragraph 5 of these reasons. I address the key questions in turn below.

What was the reason for the dismissal and was it a potentially fair reason?

14 The first questions for me to consider are what was the reason for the dismissal of the claimant and was that a potentially fair reason within sections 98(1) and (2) of the 1996 Act? It is for the respondent to show the reason for the dismissal and that that reason is a potentially fair reason for dismissal. By reference to the long-established guidance in Abernethy v Mott Hay and Anderson [1974] IRLR 213, the reason is the facts and beliefs known to and held by the respondent at the time of his dismissal of the claimant.

15 I have no hesitation in finding that the respondent has discharged that the burden of proof to show that the reason for the claimant's dismissal was related to his conduct, that being a potentially fair reason. It might have been argued that the reason related to his capability (ie. the performance of his responsibilities) but the respondent did not rely upon that reason and, given that the claimant's performance was so clearly far below what he knew was expected of him, I am satisfied that this was an issue of conduct rather than of capability.

16 I then turn to consider the three elements in Burchell, which have been indorsed in the decision in Graham as set out above albeit in the reverse order.

17 I am satisfied that Mr Harper did believe that the claimant was guilty of misconduct and, therefore, the first element in Burchell (and the second in Graham), the fact of belief in guilt of misconduct, is satisfied.

18 The second element in Burchell (and the third in Graham) is that the respondent must have in mind reasonable grounds to sustain that belief. In this case meeting that element is made easier for the respondent given the conduct and results of the 'mystery shopper' test exercise and the statement of Mr Castellow, which formed part of the disciplinary investigation and was not disputed by the claimant except as to the number of times that Mr Castellow had entered the store. For these reasons I accept that the second element of Burchell is met. Mr Harper did have in mind reasonable grounds to sustain his belief that the claimant had been guilty of misconduct.

19 The third element in Burchell (and the first in Graham) is that at the stage Mr Harper formed that belief on those grounds, the respondent must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case. I am satisfied that it did: that investigation involving the investigatory meeting on 6 January, consideration of the report of Mr Castellow and the disciplinary meeting on 31 January at which the claimant has not suggested he was not given the opportunity to answer the allegations that had been made against him and say whatever he wished in support of his position. All that in the context of the history of the Customer making four complaints against the claimant and, on the fifth occasion requiring his removal from their stores as is provided for in the service level agreement between it and the respondent; the training that was undertaken, in particular by Mr Carter, which included the claimant's initial induction that was then fully repeated on two subsequent occasions, and five other forms of training; the claimant being seen in a disciplinary meeting and being placed on a three-month performance review.

20 In summary, by reference to the three elements in Burchell and Carter, on the evidence available to me and on the basis of the findings of fact set out above, I find that:

20.1 Mr Harper "did believe" that the claimant was guilty of misconduct;

20.2 he had in his mind reasonable grounds upon which to sustain that belief that the claimant was guilty of misconduct; and

20.3 at the stage at which he formed that belief on those grounds the respondent had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

In all the circumstances (including the size and administrative resources of the respondent's undertaking) and considering equity and the substantial merits of the case, did the respondent act reasonably or unreasonably in treating the reason for the dismissal of the claimant as a sufficient reason for dismissing the claimant?

21 I now turn to consider the question of whether (there being no burden of proof on either party) the respondent acted reasonably in treating the reason for the dismissal of the claimant as a sufficient reason for dismissing him as is required by section 98(4) of the 1996 Act. That is a convenient phrase but the section itself contains three overlapping elements, each of which the Tribunal must take into account:

21.1 first, whether, in the circumstances, the employer acted reasonably or unreasonably;

21.2 secondly, the size and administrative resources of the respondent;

21.3 thirdly, the question "shall be determined in accordance with equity and the substantive merits of the case".

22 In addressing 'the section 98(4) question', I am alert, first, to the fact that I must not substitute my own view for that of the respondent and, secondly, that I am to apply what has been referred to as the 'band or range of reasonable responses' approach: in both respects, see the excerpt from Graham above.

23 The third of the elements in the Burchell guidance (whether the respondent's managers had "carried out as much investigation into the matter as was reasonable in all the circumstances") has a bearing upon both the reason for the dismissal and whether the respondent acted reasonably. As explained above I am satisfied that the respondent did carry out as much investigation as was reasonable.

24 A further important aspect of reasonableness relates to the process followed by the respondent. There are two matters that concern me in this connection. First, I deprecate the fact that the respondent has produced, in evidence, the letter of 6 February 2017, the content of which I find is not supported by the evidence before me. I make the obvious point that I cannot say with complete certainty whether the letter is completely false, has been fabricated to an extent or, in fact, it is true but given that it is not supported by the evidence before me, as explained more fully above above, I am satisfied that it has been fabricated. It is impossible for me to say whether that fabrication was by the author of the letter who perhaps was attempting to set out what she acknowledged should have happened as if it did happen or whether she was instructed by one or other of the respondent's managers to write the letter with that content and, innocently, thought that what she was told was accurate.

25 My second concern is that it is clear from the use of the phrase "appeal hearing" in the Acas Code of Practice: Disciplinary and Grievance Procedures (2015), which I have taken into account, that a reasonable procedure in relation to any dismissal will involve an appeal hearing. The respondent failed to offer the claimant a hearing in this case. Instead his appeal was determined by Mrs Harper, apparently alone, on or shortly before15 February 2017. That said, although a Code of Practice it is to be taken into account by a Tribunal, it contains guidance as to best practice and does not, directly, have the force of law.

26 Importantly, I do not consider that either of the above aspects makes the dismissal of the claimant unfair for two principal reasons. First, the decision to dismiss the claimant was taken by Mr Harper on, or shortly after, 31 January 2017. That date obviously precedes the date of the letter of 6 February and the date upon which it was determined that the appellant would not be granted an appeal hearing. Although what occurs at an appeal hearing can be relevant to the question of fairness of the dismissal, the essential principle is that events occurring after the date of dismissal do not directly impact upon the preceding decision to dismiss and, importantly, directly affect whether the dismissal as a result that decision is fair or unfair.

27 Secondly, this is perhaps one of the few cases where what is often referred to as 'the Polkey exception' applies. In that regard Lord Bridge in the then House of Lords said as follows:-

> "It is quite a different matter if the Tribunal is able to conclude that the employer himself, at the time of the dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness under s.57(3) may be satisfied".
> [*That section 57(3) has now been replaced by section 98(4) referred to above.*]

28 All in all, despite my misgivings as to the two points mentioned above, I am satisfied that the disciplinary process conducted by the respondent was reasonable: it could have been better but the question is was it reasonable? I am satisfied that it was. The claimant was invited to attend a disciplinary hearing on appropriate notice, which was properly extended given Mrs Campion's representations regarding the claimant's learning issues, and he was aware of the matters to be considered at the hearing. Additionally, he was invited to be accompanied at that hearing by a trade union representative fellow employee but declined that invitation.

29 I am therefore, satisfied that the respondent did act reasonably in the process that culminated in its decision to dismiss the claimant. In this regard, it is to be remembered that the band or range of reasonable responses approach applies not only to the decision to dismiss but also to all aspects of the process.

30 The final issue is, given the above, the reasonableness or otherwise of the sanction of dismissal. Referring to established case law such as Iceland Frozen Foods (again as indorsed in Graham) there is, in many cases, a range or band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another view. My function is to determine in the circumstances of this case whether the decision of this respondent fell within the band of reasonable responses that a reasonable employer might have adopted.

31 In this case I am quite satisfied that in the circumstances known to Mr Harper as a result of the respondent's investigation, the dismissal of the claimant was a decision that fell within the band of reasonable responses of a reasonable employer in these circumstances.

32 There is a further important consideration in these respects. As indicated above, one of the elements of section 98(4) of the 1996 Act is that the question of reasonableness "shall be determined in accordance with equity and the substantive merits of the case". I have no hesitation in finding that given the enormity of the claimant's failings during the course of the 'mystery shopper' exercise, considering equity and the substantial merits of the case, the respondent did act reasonably in treating the claimant's conduct as a sufficient reason for dismissing him.

33 In summary, therefore, I am satisfied, as is required of me by section 98(4), that the respondent acted reasonably in treating the reason for the dismissal of the claimant as a sufficient reason for dismissing him.

34 In conclusion, my judgment is that the reason for dismissal of the claimant was conduct and that in that regard the respondent did act reasonably in accordance with section 98(4) of the 1996 Act. I have to be satisfied that there was a sufficient investigation, reasonable grounds and a reasonable belief allowing the managers, on the evidence available to them, to form a decision which fell within the range of reasonable responses. I am so satisfied.

35 For the above reasons the claimant's complaint under section 111 of the 1996 Act that his dismissal by the respondent was unfair, contrary to section 94 of that Act, is not well-founded and is dismissed.

36 I add one concluding point for completeness. I have referred above to my concerns and misgivings about, first, the letter of 6 February 2017 and, secondly, the fact that the appellant's appeal was determined without giving him the opportunity of a hearing. For the reasons stated above I have not found that those matters, either individually or cumulatively, rendered the dismissal of the claimant unfair although I did consider that alternative approach during my deliberations. Had I found to the contrary (whether with regard to those or any other matters) a finding that the claimant's dismissal was unfair might have followed.

37 In those circumstances, however, I would have had no hesitation in also finding as follows:

37.1 by reference to section 122(2) of the 1996 Act that the claimant's conduct before his dismissal was such that it would be just and equitable to reduce the amount of the basic award payable to him by 100%;

37.2 by reference to section 123(6) of the 1996 Act that the claimant's dismissal was wholly caused or contributed to by his own actions such that it would be just and equitable to reduce the amount of the compensatory award payable to him by 100%;

37.3 that if, as is probable in the above circumstances, the reasons for finding the claimant's dismissal to be unfair were what are often conveniently described as being "procedural" rather than substantive, he would certainly have been dismissed had a fair procedure without any procedural failings being followed such that any compensation payable to him should be reduced to nil in accordance with the case law contained in Polkey v AE Dayton Services Ltd [1987] UKHL 8.

Wrongful dismissal

38 I now turn to consider the claimant's complaint of wrongful dismissal: that the respondent was in breach of the claimant's contract of employment in dismissing him without giving him the notice of that dismissal to which he was entitled.

39 Here the question is not whether the respondent acted reasonably but whether I am satisfied that the claimant's conduct entitled the respondent to take the view that he was guilty of a fundamental, repudiatory breach of his contract of

employment thus removing his entitlement under that contract to receive notice of termination. I so find for the following reasons.

40 The claimant does not deny that while he was employed at the store of the Customer to ensure, so far as was reasonable, security at that store he spectacularly failed to prevent Mr Castellow stealing relatively high value goods from the store, not once but on numerous occasions, despite the fact that he made it very obvious to the claimant what he was doing and staff at the store summoned the claimant using the alarm system, and ultimately, when Mr Castellow taunted him through the shop window, the claimant resorted to asking two members of the store staff to challenge him while the claimant looked on.

41 All this in the context of this important Customer having made repeated complaints to the respondent about the claimant's conduct of his responsibilities in relation to which the respondent hesitated to take disciplinary action (short of placing the claimant on a three-month performance review), which probably would have been justified, and instead endeavoured to bring the claimant up to required standards by repeated training of the claimant, which he said he found helpful.

42 The claimant has offered no explanation as to his woeful conduct in this respect and focused his attention on what he considers to be procedural failures on the part of the respondent in, for example, posting the letter of suspension to his former address and writing to him by email at the email address of his girlfriend. Especially given the claimant's lack of explanation, I am satisfied that his conduct breached the term of trust and confidence that is implied into all contracts of employment.

43 As such, I am satisfied that the respondent was entitled to dismiss the claimant without notice. Thus his complaint of breach of contract is also not well-founded and is dismissed.

44 The respondent states that the claimant was dismissed on 31 January. I do not accept that but repeat that I prefer the claimant's evidence that the dismissal took place on 6 February 2017 when he was so advised by Mr Harper. Obviously there is a period between 31 January and 6 February when the claimant's contract of employment was continuing and in respect of which, on the face of it, he was entitled to receive his wage.

45 That is more than covered, however, by the two weeks' notice pay that the claimant accepts was paid into his account although he maintains that he did not know it was notice pay. I repeat that the dismissal was for gross misconduct and therefore, in fact, the claimant was not entitled to notice pay at all and the two weeks' pay that he did receive covers the period in which it was thought that he was dismissed: ie. from 31 January until he was actually dismissed on 6 February 2017.

46 In summary and conclusion, therefore, judgment of the Tribunal is as follows:

46.1 The claimant's complaint under section 111 of the Employment Rights Act 1996 that his dismissal by the respondent was unfair by reference to sections 94 and 98 of that Act is not well-founded and is dismissed.

46.2 The claimant's contract claim that the respondent dismissed him in breach of his contract of employment by not giving him the notice of termination of that contract to which he was entitled is not well-founded and is dismissed.

EMPLOYMENT JUDGE MORRIS

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON

2 November 2017

JUDGMENT SENT TO THE PARTIES ON

6 November 2017

AND ENTERED IN THE REGISTER

G Palmer

FOR THE TRIBUNAL