EMPLOYMENT TRIBUNALS

Claimants: Mrs M Peel
Mr A Peel

Respondent: Royal Mail Group Ltd

HELD AT: Manchester **ON:** 30 October, 31 October and 1 November 2017

BEFORE: Employment Judge Franey
(sitting alone)

REPRESENTATION:

Claimants: Mr B Culshaw, Solicitor
Respondent: Mr J Gregson, Solicitor

JUDGMENT

1. The complaints of unfair dismissal and of breach of contract brought by Mrs M Peel fail and are dismissed.

2. The complaints of unfair dismissal and breach of contract brought by Mr A Peel fail and are dismissed.

Employment Judge Franey

14 November 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON
17 November 2017

FOR THE TRIBUNAL OFFICE

REASONS

Introduction

1. In a combined claim form presented on 31 March 2016 Mr and Mrs Peel brought a number of complaints arising out of their respective dismissals by the respondent with effect from 22 December 2015. The dismissals came at the conclusion of disciplinary proceedings arising out of an incident on 16 October 2015 in which it was alleged that they had behaved in a way which amounted to gross misconduct. Complaints of discrimination contrary to the Equality Act 2010 were dismissed before the final hearing, as were complaints in relation to holiday pay and arrears of pay. Only complaints of unfair dismissal and of breach of contract in relation to notice pay survived.

2. The response form of 29 April 2016 resisted those complaints on their merits, arguing that there was a fair dismissal by reason of gross misconduct and that no notice pay was due in either case.

Issues

3. I clarified the issues with the parties at the commencement of the hearing. Mr Culshaw said that the issue about the reason for dismissal was whether the respondent should in truth have treated this as a capability issue rather than a conduct issue. He did not pursue, either in cross examination or in submissions, the suggestion made in Mr Peel's witness statement that the claimants were dismissed in order to save further sick pay. There was in effect therefore no challenge to the assertion by the respondent that the reason for dismissal related to the conduct of the claimants.

4. That meant that the sole issue for the Tribunal to determine in relation to liability was whether the dismissals were fair or unfair under section 98(4) Employment Rights Act 1996.

5. In relation to the complaints of breach of contract, the issue was whether the respondent could prove on the balance of probabilities that the claimants had behaved in a way which amounted to a repudiatory breach of their contracts of employment entitling the respondent to dismiss them without notice.

Evidence

6. The parties had agreed a bundle of documents which exceeded 1,000 pages. Any reference in these reasons to a page number is a reference to that bundle unless otherwise indicated.

7. I heard evidence from four witnesses in person, each of whom had prepared a written witness statement on which he or she was cross examined. The respondent called Dave Ware, the Night Shift Manager who dismissed the claimants, and Simon Walker, the Independent Casework Manager who heard the appeals against dismissal. Each of them had prepared a separate witness statement for each of the claimants' cases.

8. Each of the claimants had prepared a witness statement and gave evidence but they did not call any other witnesses.

Relevant Legal Principles

Unfair Dismissal

9. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. The fairness of a conduct dismissal is governed by section 98(4):

> **"Where the employer has fulfilled the requirements of sub-section (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".**

10. In a misconduct case the correct approach under section 98(4) was helpfully summarised by Elias LJ in **Turner v East Midlands Trains Limited [2013] ICR 525** in paragraphs 16-22. Conduct dismissals can be analysed using the test which originated in **British Home Stores v Burchell [1980] ICR 303**, a decision of the Employment Appeal Tribunal subsequently approved in a number of decisions of the Court of Appeal. The "**Burchell** test" involves a consideration of three aspects of the employer's conduct. Firstly, 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? Thirdly, did the employer have reasonable grounds for that belief?

11. The appeal is to be treated as part and parcel of the dismissal process: **Taylor v OCS Group Ltd [2006] IRLR 613.**

12. Since **Burchell** was decided the burden on the employer to show fairness has been removed by legislation. There is now no burden on either party to prove fairness or unfairness respectively.

13. If the three parts of the **Burchell** test are met, the Employment Tribunal must then go on to decide whether the decision to dismiss the employee was within the band of reasonable responses, or whether that band fell short of encompassing termination of employment.

14. It is important that in carrying out this exercise the Tribunal must not substitute its own decision for that of the employer. The band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate: **Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23.** The focus must be on the fairness of the investigation, dismissal and appeal, and not on whether the employee has suffered an injustice. The Tribunal must not substitute its own decision for that of the employer but instead ask whether the employer's actions and decisions fell within that band.

15. In a case where an employer purports to dismiss for a first offence because it is gross misconduct, the Tribunal must decide whether the employer acted reasonably in characterising the misconduct as gross misconduct, and also whether it acted reasonably in going on to decide that dismissal was the appropriate punishment. An assumption that gross misconduct must always mean dismissal is not appropriate as there may be mitigating factors: **Britobabapulle v Ealing Hospital NHS Trust [2013] IRLR 854** (paragraph 38).

Relevant Findings of Fact

16. This section of the reasons sets out the findings of fact relevant to the unfair dismissal complaint. I will address in the discussion and conclusions section any further findings of fact relevant only to the complaints of breach of contract.

Introduction

17. The respondent is a substantial organisation with over 140,000 employees and access to specialist human resources ("HR") support and advice.

18. The claimants, who are married to each other, were both employed in Operational Postal Grade roles ("OPG") at the Cleveleys delivery office. Mr Peel had been employed since 2002 and Mrs Peel since 2005. They were both experienced, hard working and conscientious. They both had clean disciplinary records at the time of the events which gave rise to this case.

Policies

19. Each of the claimants had been provided with a contract of employment which required compliance with the respondent's Code of Business Standards and which made clear that they were subject to the Conduct Code. The Code of Business Standards appeared between pages 891-910. On page 893 it made clear that any breach of the Code could be dealt with under the conduct policy and any finding of misconduct could result in dismissal. Part 2 of the Code was concerned with personal behaviour. Employees were expected to conduct themselves appropriately (page 904) and to refrain from abusing others by speech or otherwise (page 907).

20. The Conduct Policy appeared between pages 930-936. It contained a section on precautionary suspension and said that the outcome of the case would not be affected by whether an employee had been suspended or not. At page 934 there appeared a list of examples of gross misconduct which included:

- " Abusive behaviour to customers or colleagues…
- Deliberate disregard of…instructions."

21. The claimants were aware of the importance of the prompt delivery of mail to ensure that the respondent complied with its universal service obligation. That was reiterated to staff by the Delivery Office Manager at Cleveleys, Sue Whittaker, in a note of 12 September 2015 (pages 1091-1092). It drew attention to the fact that intentional delay of mail was gross misconduct and it set out clearly what was expected of staff if they were unable to complete their delivery. The expectation was that all mail taken out on delivery would be delivered and not brought back to the

sorting office. OPGs were required to speak to their manager once preparation for the delivery had been completed so that a manager could work through the options of getting any excess mail delivered that same day.

Working Day

22. In very simple terms the claimants shared a delivery round and worked back to back at their sorting frames when preparing to go out on delivery. They would start work at 7.00am and spend about 20 minutes preparing “door to door” leaflets and other material. For the next hour or so Mr Peel would work on “inward primary sorting” (“IPS”), which was a sort of all mail arriving at the delivery office. During that period of an hour or so Mrs Peel would work alone on preparing their joint round.

23. Once the IPS work had been completed Mr Peel would go back to helping to prepare their joint delivery and they would go out in the van to commence deliveries at around 10.00am or shortly thereafter.

24. At the end of each working day the manager would prepare a “prep board” for the following day showing what duties were allocated to each OPG. That was a record for the following day’s managers of who would be doing what tasks.

Route Revision October 2015

25. In mid October 2015 there was a revision of delivery routes. This happened periodically. When a change of that kind was implemented the operation of the new routes would be reviewed at four weeks, eight weeks and twelve weeks before being permanently implemented.

26. When the new routes were issued in early October the claimants were concerned that the addresses to which they were expected to deliver had increased significantly in number and that they would not be able to cope with the work. Although they were not union members, the union became involved and there were some changes made. Mr Peel put in a lot of time updating the walk logs which set out the routes to be followed and the order in which deliveries would be done.

27. The new routes were implemented from Monday 12 October 2015. There was a new layout for the frames used to sort the post to be delivered on each route. It was generally expected that it would take about three days for an OPG to become familiar with a new frame. Mr Peel was not able to work on his new frame on the first two days because he was assisting with the preparation of the walk logs. The claimants had to work two hours’ overtime on Monday and Tuesday that week to deliver all the mail on their new shared round. This meant that the first of Mr Peel’s three days for getting to know his new frame was Wednesday 14 October. That day it still took the claimants an extra two hours to complete their deliveries.

16 October 2015

28. On Friday 16 October 2015 the claimants arrived at work shortly before their shift start time of 7.00am for the fifth day of the new routes. Their line manager, Mr Gittins, was on his day off, and a relief manager, Simon Melling, was in charge. Contrary to the practice over the previous few months, Mr Peel had not been allocated IPS work on the prep board to allow him time to learn his new frame.

29. At approximately 7.20am Mr Melling approached Mr Peel and asked him why he was not on IPS. There followed an exchange between them in which Mrs Peel intervened, telling the claimant to get his coat and that they should leave. There was a dispute about whether she said they should leave to go home or to go to the doctors. The claimants left the building and went into the yard where there was a further exchange with Mrs Whittaker before they left the premises altogether. They had left work by 7.30am.

30. By 10.00am each of them had seen their General Practitioner and had been certified unfit for work due to "stress at work" until 30 October 2015 (pages 205 and 557). The fact that they had these fit notes was made known to management and those fit notes were delivered by hand the following day.

Claimants' Statements

31. When the claimants got home their daughter advised them to make a written record of what had happened that day.

32. Mrs Peel prepared the statement at page 202. She said that Mr Melling had raised his voice first of all, asking them why they had been going over delivery times on the walk, and her statement said:

> **"I was getting stressed due to yet again being intimidated by managers. Making us feel we were unable to do the job in the specified time given. I knew Andrew [**Peel**] was getting extremely stressed due to him raising his voice, the best solution was to remove ourselves from the situation which would only have increased and go to the doctors for some advice and help."**

33. The statement from Mr Peel appeared at page 553. He explained how Mr Melling had approached him and he had enquired if Mr Melling was not aware of the changes that had taken place that week. His statement went on as follows:

> **"I offered to go on IPS but explained I would have to leave four loops of mail. He was unable to understand why. At this point the frustration of the last six months boiled over and I felt like I was going to explode so the safest option was to walk away as it was obvious that nobody had listened to any of my concerns. On leaving the office Mrs Whittaker shouted at me threatening me with unauthorised absence and that there would be consequences. I explained I had to go to the doctors to get help with the stress caused by the way I was being treated."**

Managers' Statements

34. The managers involved also made statements that day of what had happened.

35. Mr Melling's statement appeared at page 548. He recorded how he asked Mr Peel why he was not on IPS as the prep board stipulated. His statement went on as follows:

> **"Andy Peel was shouting and being aggressive towards my questioning. He said 'I will come off my frame and go on IPS if you take four loops off'. It appeared to me as though he had no intention of calming down as I gave him the option to discuss the matter in the office; this was declined.**
>
> **Margaret Peel then intervened saying 'Andrew, get your coat we are going home'.**

> **They immediately put their coats on and walked towards the exit doors. I followed them and said 'please come back, we need to talk about this'. Mr and Mrs Peel ignored me and continued to walk towards the exit.**
>
> **I immediately spoke to Sue Whittaker, Delivery Office Manager, and told her that Mr and Mrs Peel had walked out. Mrs [**Whittaker**] and myself immediately walked out to the loading bay and Mrs Whittaker asked Mr and Mrs Peel to come back to discuss the events. The time was approximately 07:35am and Mr and Mrs Peel were walking through the gate by this time.**
>
> **Mr and Mrs Peel then turned around and crossed the yard towards Mrs Whittaker. They appeared to look angry and aggressive and were shouting at Mrs Whittaker. Mrs Whittaker began to explain the implications of their actions. At this point I walked back into the office to resume my work."**

36. Mrs Whittaker's statement appeared at pages 549-550. Her statement said she heard Mrs Peel tell her husband that they were "going home", and that in return she asked them if they understood the potential consequences of walking out. Her statement went on as follows:

> **"Mr Peel turned round and appeared very agitated and rushed back across the yard towards me, closely followed by Mrs Peel. I was concerned that Mr Peel may use physical violence as he looked so aggressive. I then noticed that a colleague from the security team, Mr Tim Hadfield, had arrived at the gate and he approached where we were all standing and asked if I was ok. I replied that I was ok. His arrival was a planned meeting with me and he then went inside the office."**

37. Mrs Whittaker went on to say that after explaining to the claimants about unauthorised absence, Mr Peel shouted something to the effect:

> **"You know exactly why we are walking out, our walks are too big and you won't do anything about it."**

38. Her statement went on to record that after the discussion ended Mrs Peel shouted:

> **"It's not unauthorised absence because we are both going to the GP today to get a sick note for stress."**

39. The third manager who prepared a statement was Tim Hadfield, a criminal investigator who happened to be at the Cleveleys delivery office on another matter. His statement appeared at pages 551-552. The relevant parts included the following:

> **"As I parked on the street and walked towards the … yard I became aware of shouting coming from the yard area. As I got closer I saw a male and a female arguing, both were wearing Royal Mail uniform and were in full view of any passing members of the public. The female was behaving in a particularly aggressive and abusive manner. Whilst no physical violence was apparent the attitude was such that it suggested she could have become violent. As I entered the yard I heard the female says, 'they can't sack me for that…let them sack me, I don't fucking care'. The male stated, 'it's not worth losing our jobs over'. As I entered the yard they continued their verbal exchange, however it became apparent that the male was trying to calm the female down, however he was matching the female with volume and tone."**

40. His statement went on to say that Mr Melling told him that the claimants were not likely to become violent but were just "sounding off", and that Mrs Whittaker appeared to have the situation under control and was speaking to the claimants in a

calm and clear tone attempting to explain the situation to them. His statement concluded with the following:

> **"I could not tell from the shouting what the argument was about but it was clear that the female in particular was upset. She was directing her anger towards the managers and was waving her hands and pointing. I do not know what the cause of the frustration was. However I can say that the behaviour displayed in full view of the public is not one that showed Royal Mail in a good light. Staff and managers are our colleagues and at no time was this an appropriate manner to behave towards another colleague."**

Letters 15 October 2015

41. Mrs Whittaker issued letters to the claimants that same afternoon (pages 203 and 555). She invited the claimants to meet Mr Gittins on 19 October 2015 at 10.00am to discuss sickness. Until such a meeting she could not be satisfied that the absence was necessary and due to genuine illness so sick pay would be withheld. The letter was delivered the same day and the claimants responded that afternoon at page 204. They said they had been advised to refrain from contact with work until the end of the month but would want to meet on 29 October.

42. By letters of 19 October (pages 205 and 558) Mrs Whittaker invited them to meet Mr Gittins on 22 October. A stress risk assessment would be undertaken.

Absence Review 22 October 2015

43. That absence review meeting on 22 October was in fact conducted by Mrs Whittaker. The notes of the meeting with Mrs Peel appeared at pages 209-210 and the stress risk assessment she completed at pages 211-216. The notes for Mr Peel's meeting were at pages 561-562 and his stress risk assessment at pages 563-565. The notes were not provided to the claimants until January 2016, but the notes recorded Mrs Whittaker saying that their behaviour on 16 October 2015 had been unacceptable and a breach of the required standards and would be addressed separately. The discussion was about the health position, not whether there would be any disciplinary consequences.

OH Referral and Correspondence

44. The following day there was a referral to Occupational Health for each of the claimants. Mrs Peel's form appeared at pages 217-219 and Mr Peel's form at pages 567-569. The Occupational Health adviser was asked to advise amongst other things on whether the claimants were fit enough to attend a disciplinary hearing. The claimants were informed of this by letters of 23 October 2015 from Mrs Whittaker at pages 222 and 566 which said:

> **"I am now considering conduct action due to events which led to you walking out from your job on 16 October 2016 and I have asked OH Assist to decide whether you are fit to attend a disciplinary hearing to discuss this."**

45. The claimants responded by a letter of 26 October 2015 at page 223. They expressed their concern that sick pay was still being withheld. They were also concerned to find out from the subsequent letter that in fact the intention was to take them down the conduct code route. They did not accept this had been said at the meeting.

46. Mrs Whittaker responded on 27 October 2015 (pages 224-225 and 573-574) to say that she had explained at the meeting that the conduct matter would be considered separately.

Fact Find Interviews

47. The same day each of the claimants was invited to a fact find meeting with Mr Gittins. The letters appeared at pages 226 and 575. They were accompanied by notes explaining what would happen: they would be shown notes from witnesses which would then be discussed and they would have the opportunity to explain their position.

48. On 29 October 2015 Mrs Whittaker emailed some details about the claimants to Mr Ware in an email of which the subject was "conduct info". The email appeared at pages 234-235.

49. The claimants were certified unfit for work until 12 November 2015.

50. The fact finding interviews with Mr Gittins took place on 30 October 2015. Neither claimant was accompanied. They were not permitted to accompany each other because they were connected with the case. The notes of the meeting with Mrs Peel appeared at page 237 and those for Mr Peel at page 582. Each of them was shown the signed statements of Mr Melling, Mrs Whittaker and Mr Hadfield. Mrs Peel disagreed with parts of Mr Melling's statement. She said her husband had not raised his voice or been aggressive. She did not accept all of Mrs Whittaker's statement either. She said she had been verbally abusive in the past but not on the day in question. She gave Mr Gittins a copy of her statement of 16 October 2015.

51. For his part Mr Peel denied having shouted or being aggressive. He did not agree that Mrs Whittaker's statement was a true reflection of what happened but said he trusted that Mr Hadfield had given a true reflection of what he observed as an independent witness. Mr Peel provided a copy of his statement to Mr Gittins and the note recorded the following:

> **"Mr Peel replied that his stress levels had built up over a period of time and the events which took place on Friday 16 October led him to having to walk away from a mental and stressed situation."**

52. The fact finding interview notes were issued to the claimants on 30 October and returned with comments on 2 November 2015. The comments appeared at pages 242-244. They emphasised that Mr Melling had not included a full account of the conversation between himself and Mr Peel, and that neither of them had acted aggressively.

Disciplinary Allegations 5 November 2015

53. Mr Gittins decided very quickly that he would pass the case up for formal action. He wrote to the claimants in early November (pages 245 and 595) saying that Mr Ware would consider what further action to take.

54. Mr Ware wrote to the claimants on 5 November 2015 inviting each of them to a disciplinary interview. The letter to Mrs Peel appeared at page 246. The allegations against her were put as follows:

> **"Following your initial fact finding interview I now wish to hold a formal conduct code interview with you concerning your comment to Andrew Peel when you said 'Get your coat, we are going home' following his refusal to carry out a reasonable instruction. You walked away from your place of employment without an acceptable reason putting Royal Mail's universal service obligation at risk. You behaved in an inappropriate manner by swearing and behaving in an aggressive manner at the office gates in earshot of the general public. Tim Hadfield, Security Manager, commented on this and heard you say 'They can't sack me for that, let them sack me, I don't fucking care'."**

55. The allegations faced by Mr Peel were put as follows (page 596):

> **"Following your initial fact finding interview I wish to hold a formal conduct code interview with you concerning insubordination, as you refused to carry out a reasonable instruction to go on sorting when asked by Simon Melling your line manager. You behaved in an inappropriate manner by shouting and being aggressive towards him. You walked away from your place of employment without an acceptable reason putting Royal Mail's universal service obligation at risk."**

56. Both letters informed the claimants of their right to be accompanied and that dismissal could be an outcome. Copies of the relevant documentation were attached.

Disciplinary Hearings 10 November 2015

57. The disciplinary interviews took place on 10 November 2015 before Mr Ware. Neither claimant was accompanied.

58. Mr Peel was interviewed first. The notes of his interview appeared at pages 598-602. He had prepared some notes for that meeting at pages 603-605. After some preliminary matters Mr Ware summarised the evidence and asked Mr Peel to present his case. Mr Peel said he was not well but would continue with the interview. He then read out his statement. The statement was not a further factual account of what happened on the day in question but a list of discrepancies in the evidence against him. He emphasised that what he was doing on the day was as required by the prep board. He maintained that his wife had said that they were going to the doctors, not going home. He said in the yard his wife had not been abusive but she was shouting. He did not challenge what Mr Hadfield said he had heard.

59. The notes of the interview with Mrs Peel appeared at pages 248-251. The statement she had prepared for the interview appeared at pages 252-253. Her written statement (which she read out during the meeting) made clear that neither of them was in a fit state to continue with their duties on 16 October 2015. She knew the situation was escalating and they had to leave because they did not want to lose their jobs. Any foul language was used in a private conversation with her husband and was not directed at anyone else. She emphasised there had been a number of changes and inappropriate treatment which had subjected them both to very high levels of stress and that they had made this known to management but nothing had been done. At the foot of page 249 the notes recorded Mrs Peel saying the following:

> **"Simon [**Melling**] said Andrew should go on sorting to which Andrew replied if he went on sorting he would have to leave mail in. Simon raised his voice first so Andrew raised his voice. She could see the frustration in Andrew's face and could see the situation escalating and felt that if she didn't do something he could lose his job so she knew the best thing to do was to leave the situation by leaving the building."**

Further Enquiries by Mr Ware

60. After the formal conduct interviews Mr Ware carried out some further investigations of his own. He spoke to two OPGs who wished to remain anonymous and who would not sign a statement. They refused to comment on how Mr and Mrs Peel had behaved but told him that Mr Melling had not raised his voice. There was no written record kept of this information.

61. In addition he interviewed Mr Melling for himself (pages 254-257). Mr Melling explained that whatever the prep board said, getting through IPS was the key thing to do in the morning and he needed Mr Peel on IPS as he was a regular sorter. The note recorded Mr Melling saying the following:

> **"I needed his experience on IPS so I asked him to go on. He raised his voice in an unacceptable way and made a threat that if he had to go on IPS he would have to leave four loops in. This all took up valuable IPS time but he still didn't do as he was reasonably asked. Then Margaret said 'get your coat, we're going home' and they left."**

62. Mr Ware questioned Mr Melling as to whether Mrs Peel had actually said they were going to the doctors, not going home, but he was adamant that she said they were going home. He said that on a scale of 1-10 Mr Peel had raised his voice to 7 or 8 which was "pretty loud and unacceptable".

63. On 12 November 2015 both of the claimants were certified unfit for work by their GP until 3 December 2015. The fit note for Mrs Peel at page 262 diagnosed a "mild depressive episode". That for Mr Peel at page 617 diagnosed a "severe depressive episode with psychotic symptoms". A letter from the mental health practitioner about Mrs Peel of 11 November 2015 at page 261 diagnosed depression and anxiety and said that a low intensity Cognitive Behavioural Therapy ("CBT") programme was in place. An equivalent letter for Mr Peel at page 616 also diagnosed depression and anxiety but said he was undergoing high intensity CBT.

64. On 12 November 2015 Mr Ware emailed Mrs Whittaker about the prep board. The exchange appeared at page 282. Mrs Whittaker explained that a copy of the prep board from 16 October 2015 could not be provided because it was just a board with labels which are moved around each day. Her email said that Mr Peel was always allocated to be on IPS while Mrs Peel prepared their walks.

65. The claimants were authorised to be away on annual leave for two weeks from 16 November 2015, and on their return they wrote to Mr Ware (page 270) thanking him for conducting a thorough and professional interview with each of them. They enclosed copies of their fit notes. On 3 December 2015 they were each certified unfit for work for a further 21 days (pages 331 and 695).

66. One of the matters raised by the claimants was that they had had a meeting with Mr Gardiner some four months earlier at which it was discussed that the walk they were being allocated would be too big. Mr Ware pursued this by email with Mrs Whittaker and received a response from Mr Gardiner (page 273) saying that there was no formal meeting and that what the claimants had wanted at that time had been approved by Mrs Whittaker. Mr Ware then posed some further questions about delivery points and how long the new routes took, which were answered by Mr Gardiner on 11 December 2015 (page 279). The thrust of his input was that the

revision to routes which took effect in October 2015 actually reduced the number of deliveries to be made by the claimants.

67. Mr Ware also enquired into whether the claimants had ever reported mental health symptoms. He sent a series of emails on 14 December 2015 at pages 284-290 to Mr Melling, Mrs Whittaker, Mr Gittins and Mr Barritt. Over the next couple of days each of them responded to say that the claimants had never raised mental health issues. Mrs Whittaker's reply of 15 December 2015 at page 288 said that there had been no mention of such issues until the stress risk assessment conducted on 22 October 2015.

Dismissals 22 December 2015

68. Mr Ware did not go back to the claimants with the results of these further enquiries but instead invited them to a decision meeting on 22 December 2015 at which he confirmed his decision that they would be dismissed without notice.

69. His rationale for Mrs Peel was set out in a letter at page 293 and a note of his deliberations at pages 294-298. He concluded that whether Mrs Peel had said they were going home or to the doctors, she had instructed Mr Peel to leave the workplace without a suitable and acceptable reason. He suggested there were numerous alternatives to doing that including calming Mr Peel down or asking Mrs Whittaker for help. He set out what he had been told by Mr Gardiner about the workload following revision and rejected the contention that the claimants had been bullied or humiliated by the new routes. He recorded that no issues of mental health had been previously raised and said that Mrs Peel had behaved in an inappropriate manner by swearing and behaving in an aggressive manner at the office gates in full uniform and in earshot of the general public. He concluded that Mr and Mrs Peel had discussed losing their jobs during the incident and said:

> **"It is therefore my opinion that Mrs Peel was well aware that what she had just done was so serious that she could lose her job. Even though she was well aware she could lose her job, she still did not return to work, and went after the incident to [**the**] doctors to gain a sick note and was signed off with stress at work…Her stress levels prior to attending the doctors would have been high as she had just walked out of her place of work and from the comments made she was aware her job was at risk."**

70. Taking account of her length of service and clean conduct record he nevertheless considered that dismissal was warranted because Mrs Peel had shown a total disregard for policies and procedures.

71. The decision in respect of Mr Peel appeared in a letter at page 654 and reasons between pages 655 and 660. Mr Ware concluded that Mr Peel had refused to carry out a reasonable instruction from Mr Melling to go on IPS, that he had raised his voice towards Mr Melling in a way which was inappropriate in the workplace, and that in doing so he was behaving in an aggressive manner towards Mr Melling. He recorded what the anonymous OPGs had said about Mr Melling not having raised his voice. He reiterated his conclusions about the stress of work from the revised route, and to the statements in the evidence that the claimants had said they were walking out because the routes were too big. He concluded this showed a clear lack of respect for management and the Royal Mail process. He reached the same conclusion about the value of the fit note: it reflected the stress Mr Peel was under

after the incident because he knew his job was at risk. He concluded that despite the length of service and clean record dismissal was the only appropriate option.

Appeals

72. The claimants immediately signalled their intention to appeal this decision on 23 December 2015 and by a letter of 4 January 2016 they were invited to an appeal meeting before Mr Walker. The initial date of 18 January 2016 was postponed due to Mr Walker's illness but the appeal meetings took place on 26 January 2016.

73. Each of the claimants prepared documentation for the appeal. Mrs Peel prepared a chronology at page 314, a record of her sickness absence at pages 319-320, comments on Mr Ware's decision at pages 344-352, and some additional notes at pages 365-377. The notes of her appeal meeting appeared at pages 308-313. There was a detailed discussion during which Mrs Peel put her points across and answered questions from Mr Walker. She made clear that Mr Hadfield's statement was not challenged but denied there had been any aggression or any refusal to follow a reasonable management instruction by Mr Peel. She accepted that Mr Melling might have thought she said they were going home (page 312).

74. Prior to the appeal Mr Peel prepared a chronology (pages 678-681), a note on his sickness record (pages 683-684), comments on Mr Ware's decision (pages 708-718) and some additional notes at pages 733-745. The notes of his appeal hearing appeared at pages 672-677. He had the opportunity of putting his case and answered questions from Mr Walker. Mr Peel denied having been angry with Mr Melling but said he was frustrated. He suggested there had been a previous occasion when Mr Melling shouted at a colleague, Mr Greenhall.

75. The notes of the appeal meetings were sent to the claimants and they returned them with amendments on 27 January 2016. Mr Walker then carried out come further investigations of his own. He interviewed Mr Melling. The notes appeared at pages 410-412. Mr Melling said once again that Mrs Peel had said "get your coat, we are going home". He said that neither had said they were ill and both ignored his request for Mr Peel to work on IPS.

76. Mr Walker also interviewed Mrs Whittaker on 4 February 2016. The notes appeared at pages 413-421. She said that the claimants had probably said the amount of work they were performing was excessive or causing them stress, but denied it had ever been personally raised to her as workplace stress. She made clear (page 417) that Mr and Mrs Peel only said they were ill after she said that she may have to stop their pay. She said:

> **"At that point Margaret said, 'right, I will get a sick note'. I said 'you are only responding to my comment, to me making you aware that I may stop your pay'. I thought it was a reasonable action to stop their pay. It was my clear belief they were not sick on entry to work or on leaving work and they just went to get a sick note to receive pay."**

77. Mr Walker also put some questions to Mr Gittins about the changes to deliveries by email, and Mr Gittins responded on 9 February 2016 (page 433). He said neither of them had ever told him they were suffering from stress at work and confirmed that the prep board was just a guide and that a manager could move someone to IPS if the need arose.

78. On 9 February 2016 Mr Walker wrote to the claimants (pages 435 and 791) sending them copies of the new information he had gathered and inviting any comments. Their comments were provided the following day (pages 437-449). The claimants raised their concern that Mr Melling had not been asked about the incident where he shouted at Mr Greenhall, and reiterated a number of other concerns about Mr Melling's evidence. They suggested he had given three different accounts of what the prep board said on the day in question. They suggested that Sue Whittaker had simply made derogatory comments about them which were not true.

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79. Mr Walker made his decisions on the appeals and communicated them by letters of 26 February 2016.

80. The letter to Mrs Peel appeared at page 510 and his reasons were set out at pages 511-524. He addressed the points raised in some detail. He rejected the contention that for a number of years the claimants had been given unachievable workloads and had been treated differently to their colleagues. He asked himself whether their actions on 16 October 2015 had been borne out of anger or as an unavoidable consequence of ill health. Given the good attendance records, the absence of any request to management for support and the absence of any GP information he concluded that they had been angry rather than ill on the day in question. For Mrs Peel he concluded that she had walked away from her place of employment without an acceptable reason and should be dismissed for that, and that she had behaved in an inappropriate manner by swearing and behaving aggressively at the office gates and could be dismissed for that. Taking into account her length of service and clear conduct record he still considered that dismissal was the appropriate punishment, given that Mrs Peel not only left work herself but was also the instigator of Mr Peel's leaving work.

81. His letter and conclusions for Mr Peel appeared at pages 866-878. He reached the same conclusion about the medical position. He did not consider there had been gross misconduct by Mr Peel in the way he spoke to Mr Melling, rejecting the contention that it had been done in an aggressive manner. That was regarded as misconduct only. However, he concluded that there had been gross misconduct in the refusal to carry out a reasonable instruction to go onto IPS work. His conclusion said:

> **"I do believe that the charge against Mr Peel has been substantiated in part as rather than engaging with Mr Melling he took offence at the request, which is noted by his disrespectful response to Mr Melling, and thereafter followed Mrs Peel's instructions to leave his place of work. I believe that this charge could on its own merits be considered to be gross misconduct."**

82. He also concluded that walking away from the place of employment without an acceptable reason was gross misconduct. Despite the length of service and clean disciplinary record h e concluded that dismissal was appropriate. The appeals were therefore rejected and the dismissals stood.

Submissions

83. After the evidence each representative made an oral submission.

<u>Claimants' Submission</u>

84. Mr Culshaw submitted that this was a simple case which in relation to unfair dismissal turned on the proposition that the respondent acted outside the band of reasonable responses in characterising the issue as misconduct when in truth it was an issue of ill health/capability. Whilst accepting that there was no medical opinion before the respondent that the health issues affected behaviour on 16 October 2015, he submitted that was the only reasonable conclusion from the evidence that was available. He emphasised the diagnosis of a mild depressive episode for Mrs Peel and of a severe depressive episode with psychotic symptoms for Mr Peel made less than a month after the incident (the fit notes of 12 November 2015). That was consistent with the letters from the medical health practitioners at the same time.

85. Further, he emphasised the fact that by 10.00am on the morning of the incident the claimants had both been certified unfit for work by their GP because of stress at work, and yet the approach taken by the respondent was based on the premise that they were entirely fit some three hours earlier. That was not a reasonable conclusion. In particular, the view of Mr Walker that the claimants only got sick notes from their GP to cover themselves was untenable and outside the band of reasonable responses.

86. In support of that proposition he drew attention to the discrepancies in Mr Melling's evidence about what the prep board said. That meant that his evidence about whether Mrs Peel had said they were going home or going to the doctors was not reliable and should have been discounted.

87. The conclusion that Mr Peel had been guilty of refusing to follow a reasonable management instruction was not a tenable one. The conclusion reached by Mr Walker was that he had not engaged. That was not the same thing. Both this allegation and the allegation about behaviour overlapped with the allegation about leaving work without permission. There had been no aggressive behaviour by Mr Peel and if he had raised his voice it was only to the level to which Mr Melling had already raised his own voice.

88. As to the allegation that the claimants left work without permission, that was based upon a view by Mr Walker that the medical position was only relevant if those actions were an "unavoidable consequence" (see page 872) of the medical position. He did not consider the possibility that those medical conditions substantially contributed to how the claimants behaved. Overall the conclusion that the claimants were guilty of disciplinary misconduct was outside the band of reasonable responses.

89. Mr Culshaw confirmed that on sanction he was not pursuing an argument based upon inconsistency with other cases. There was insufficient evidence about what those other cases were. However, he confirmed that he was not abandoning the procedural points made in the course of the claimants' witness statements, although he emphasised that the primary case was based on substantive unfairness in characterising this as misconduct at all.

90. As to the notice pay claims, Mr Culshaw submitted that on the evidence presented to me in this hearing I should conclude that the claimants had not been guilty of gross misconduct and therefore were entitled to notice pay.

Respondent's Submission

91. For the respondent Mr Gregson agreed that it was essentially a simple case. There had been no challenge to the genuineness of the belief that the claimants were guilty of misconduct, and he submitted that there were reasonable grounds for that belief. There was evidence that the claimants acted as alleged, not only from the three people who made statements at the time but also from some aspects of what the claimants themselves had said. He emphasised that the evidence from Mr Hadfield was not challenged by the claimants and it was reasonable to rely on it. The statements from the claimants made on the day did not deal with the yard incident and it did not feature much in what they subsequently said. The conclusion that there was disciplinary misconduct was within the band of reasonable responses.

92. As to the process followed he submitted that seen in context this was a reasonable investigation and any flaws at the dismissal stage (such as Mr Ware failing to go back to the claimants with his new information) were corrected at the appeal stage by way of the re-hearing conducted by Mr Walker.

93. Mr Gregson went on to deal with what he described as the two main issues affecting unfair dismissal. The first was the effect of stress on their actions on the day. There was no evidence before the respondent that this was the cause of how the claimants acted. That case was not advanced in the dismissal process. The workload issues were investigated by Mr Ware. The claimants had come into work that morning and accepted that they had been fit to do their jobs. They did not seek permission and unilaterally walked out. Although it is accepted that they were under some degree of stress and their health had been affected, this was not good cause for taking that course of action. The treatment of this was within the band of reasonable responses.

94. The second main issue was in relation to sanction. Mr Gregson reminded me of the examples of gross misconduct in the Conduct Code and that breach of the business code would be a disciplinary issue. The claimants had acknowledged in cross examination that if they had acted as alleged it would have been gross misconduct. Overall the dismissal was fair.

95. In relation to the notice pay claims, Mr Gregson submitted that there was enough evidence before the Tribunal to justify the conclusion that the events occurred as alleged. Mrs Peel accepted in the risk assessment that her actions had been "totally inadequate". Mr Peel accepted he did not go onto the IPS as requested. Both of them walked out. There was no challenge to Mr Hadfield's evidence. Mrs Peel feared for their jobs. That was all material which established on the balance of probabilities that there had been gross misconduct and no notice was due.

Discussion and Conclusions – Unfair Dismissal

The Legal Test

96. The unfair dismissal complaint was governed by section 98 of the Employment Rights Act 1996. Once the employer shows a potentially fair reason for dismissal the general test of fairness appears in section 98(4). That requires the Tribunal to consider whether the employer acted reasonably or unreasonably in

treating that reason as sufficient for dismissal, taking into account the size and administrative resources of the employer. In this case the respondent was a very large employer with substantial resources. The Tribunal must also take into account equity and the substantial merits of the case.

97. Three key points emerge from the legal framework summarised above. Firstly, the test is the band or range of reasonable responses. It is an error of law for the Tribunal to substitute its own view on whether the claimants should have been dismissed. That is a particular danger in cases where two long-serving employees with clean disciplinary records have lost their jobs over a single incident. Secondly, that test applies to all aspects of the disciplinary process. Thirdly, the appeal is part and parcel of the disciplinary process, particularly where as in this case it occurs by way of a substantive re-hearing rather than simply a review of the decision to dismiss.

Reason

98. A reason for dismissal is a set of facts or beliefs in the mind of the decision maker causing him to reach the decision he does. In this case there was no challenge to the respondent's assertion that the reason related to the conduct of the claimants on 16 October 2015. No other reason was put to Mr Ware and Mr Walker in cross examination and suggestions made by Mr Peel in his witness statement were not pursued. I was satisfied that the respondent had shown that the reason was the conduct of the claimants on that occasion.

Fairness - Genuine Belief

99. The tool for applying section 98(4) which is conventionally used in cases of this kind is the **Burchell** test. The first part of the test is whether the managers had a genuine belief the claimants were guilty of misconduct. That was not challenged in this case. I was satisfied they genuinely believed it.

Fairness – Reasonable Investigation

100. The second part of the test is whether the respondent had carried out such investigation into the matter as was reasonable.

101. In broad terms the investigation in these cases was reasonable. At the outset the three members of staff involved did written statements, and the claimants did their own witness statements the same day which they supplied at the fact find meeting. The points raised by the claimants at the disciplinary interviews before Mr Ware were investigated by him. He interviewed Mr Melling for himself; he made enquiries about the prep board for the day in question; he investigated the workload issues with Mr Gardiner and he checked with the managers to see if any mental health issues had ever been raised.

102. Similarly, the points raised with Mr Walker on appeal were investigated by him. He interviewed Mr Melling and Mrs Whittaker himself. He contacted Mr Gardiner again and he let the claimants comment on what he had found through those enquiries before he made his decision.

103. However, the claimants made two criticisms of the investigation. The first was the failure to get medical advice, which will be considered below (see paragraphs 119 – 130).

104. The second criticism was that there were two witnesses not interviewed, Mr Greenhall and Mr Cherry.

105. It was suggested in Mr Peel's appeal that Mr Melling had shouted at Mr Greenhall in an incident some four months earlier. Mr Peel believed that this supported his case that Mr Melling raised his voice first on the occasion in question. Mr Ware had relied on two anonymous OPGs who told him that Mr Melling had not been shouting on 16 October 2015. The failure to interview Mr Greenhall did not in my judgment take the investigation outside the band of reasonable responses. Even if Mr Melling had shouted on a different occasion that did not override direct evidence about what happened on 16 October 2015. It would have been of limited value even if pursued.

106. The second witness was Mr Cherry. This was raised in paragraph 19 of Mr Peel's witness statement for this hearing. Mr Peel suggested that Mr Cherry could have confirmed that Mr Peel's delivery frame had not been updated in the week that the new routes came into effect. In my judgment that was not a significant issue. The question was about how Mr Peel responded to Mr Melling asking him to go to IPS. Pursuing an enquiry of Mr Cherry would not have taken matters any further. It was reasonable not to have done it.

107. Overall, therefore, I was satisfied that the respondent carried out an investigation which was within the band of reasonable responses.

<u>Fairness - Procedure</u>

108. Allied to that question was whether the respondent followed a reasonably fair procedure. The ACAS Code of Practice on Disciplinary and Grievance Procedures is relevant. Mr Culshaw did not suggest any breach of the ACAS Code of Practice but he did make clear in submissions that the procedural criticisms made in the claimants' witness statements remained valid. I will therefore address each of the four main complaints of procedural unfairness.

109. First was the complaint that the claimants had short notice of the fact finding meetings on 30 October 2015. That was factually correct. The letter inviting them to those meetings was issued on 27 October 2015. The fact finding guide on page 391 said that those meetings should be held on the same day if possible and within two working days of the matter coming to light. Short notice may be unavoidable. In this case no postponement of those meetings was requested and the claimants had the chance to have their say on paper and in person. There was no material unfairness caused by the short notice.

110. Second was the complaint that the fact finding meetings were delayed. Here those meetings occurred about two weeks after the incident, well beyond the timescale envisaged by the fact finding guide. However, the claimants had gone off sick the same day with stress at work and their letter that day at page 204 said they had been advised to refrain from communications with work and suggested that a meeting about a return to work be held at the end of the month. Further, Mr Peel

accepted in cross examination that this delay in the fact find meetings caused no unfairness. That was my conclusion too. This point did not take the respondent outside a reasonably fair procedure.

111. Third was the complaint that the decision of Mr Gittins to escalate the matter to Mr Ware was prejudged. The claimants relied on two matters. Firstly, on 29 October 2015 before the fact find meetings Mrs Whittaker sent an email at page 579 to Mr Ware providing conduct information about the two claimants. This clearly indicated an expectation on her part that the matter would be escalated to him. Secondly, Mr Gittins made his decision to escalate the matter (communicated at pages 245 and 595) very quickly after the fact find meeting and possibly even before the claimants' letters of 2 November with their comments on the notes of those meetings had been received. However, I concluded there was no material unfairness in this point. This was obviously a serious incident. The managers involved considered the claimants had left without permission (see, for example, Mrs Whittaker's statement at pages 198-199). It was unsurprising that it was anticipated that it would be referred upwards after the fact finding stage. It was reasonable of Mr Gittins to decide that very quickly once he had spoken to the claimants.

112. Fourth was the complaint that Mr Peel had been denied a companion at his disciplinary interview on 10 November 2015. The notes at page 599 showed that Mr Peel wanted to continue with the hearing. There was no request to postpone or any request for a delay to let him arrange a companion. I was satisfied there was no material unfairness in this.

113. Overall despite the cumulative effect of these points I was satisfied the respondent followed a reasonably fair procedure. The claimants knew the allegations against them; they saw the written evidence which had been gathered; they had their say at three meetings; they supplied a considerable amount of documentary evidence themselves, particularly at the appeal stage, and those points were considered and investigated at both stages and they were given a detailed, reasoned decision at each stage. There was no procedural unfairness in these cases.

Fairness – Reasonable Grounds

114. The next element of the **Burchell** test is whether there were reasonable grounds for the conclusion that the claimants were guilty of disciplinary misconduct. I approached this by considering the allegations separately for Mr and Mrs Peel and then considering for both of them the allegation that they left work without good reason.

115. The first allegation against Mr Peel was that he refused the instruction to go onto IPS that morning for Mr Melling. In the letter inviting him to a disciplinary hearing of 5 November 2015 at page 596 the allegation was put as follows:

> **"You refused to carry out a reasonable instruction to go on sorting when asked by Simon Melling, your line manager."**

116. There were reasonable grounds to conclude Mr Melling did ask Mr Peel to go on IPS and that it was effectively an instruction; those grounds were found in Mr Melling's own witness statement at page 197, and to be inferred from the fact that in his own note at page 553 Mr Peel said he did offer to go on IPS subject to four loops

being taken off the walk. It is also a fact that Mr Peel did not go onto IPS that morning. The prep board issue featured because Mr Peel maintained that it did not show him as on IPS duties that morning. However, it was reasonable for Mr Ware and Mr Walker to conclude that that was not significant. As Mr Melling explained at page 254 the prep board was only a guide and the manager on the day had the authority to override it. There were reasonable grounds to conclude that Mr Peel refused to carry out a reasonable instruction.

117. The second allegation against Mr Peel was that he was shouting and being aggressive. Ultimately Mr Walker concluded that Mr Peel had not been aggressive, although he thought Mr Peel had acted inappropriately by challenging Mr Melling about the instruction rather than simply complying with it. However, Mr Walker concluded at the end of the disciplinary process that this was not gross misconduct. It was not part of the reason that Mr Peel was dismissed, because it was clear that the other two charges on their own were sufficient to warrant dismissal.

118. The allegations against Mrs Peel appeared in her invitation letter of 5 November 2015 at page 246. The first allegation was that she had been swearing and behaving in an aggressive manner at the office gates. There were plainly reasonable grounds for this conclusion. The contents of Mr Hadfield's statement were not seriously challenged by the claimants. At page 200 he said that Mrs Peel had been behaving in a particularly aggressive and abusive manner and said, "Let them sack me, I don't fucking care". He described her as aggressive and threatening in tone. At page 201 he described how she was directing her anger towards the managers and was waving her hands and pointing, and he said that she was doing this in full view of the public. The managers acted reasonably in accepting this account of what had happened.

119. The final allegation was faced by both claimants. It was that they left work without an acceptable reason. It hinged on the conclusion that the claimants were not compelled to leave by their medical position but rather chose to leave without permission to do so. At the heart of their case, as Mr Culshaw made clear, was the contention that it was outside the band of reasonable responses to reach this view. I considered whether that argument was well founded.

120. It depended in part on what had been said by the claimants at the time. I noted that there was a significant factual dispute before Mr Ware and Mr Walker over the words used when Mr Peel intervened and said to her husband "get your coat, we're going". Did she say they were going home or did she say they were going to the doctors? The claimants consistently maintained that she had said they were going to the doctors, but in my judgment it was reasonable for Mr Ware and Mr Walker to reach the opposite view. Mr Melling had three occasions to deal with this: his initial statement of 16 October 2015 at page 197; his interview with Mr Ware on 11 November 2015 at page 255 and his interview with Mr Walker on 3 February 2016 at page 611. On each occasion he was very clear that Mrs Peel said they were going home, not to the doctor's.

121. That was also consistent with the way in which Mrs Whittaker became involved, because it was clear she was told they had walked out and she was looking to tell them of the consequences of such action. That would have been unlikely to have been the situation had she been informed that they had said they were ill and going to see the doctor.

122. It is right to say that Mr Melling did contradict himself in his different accounts on the position in relation to the prep board. However, he explained at page 254 why the prep board was not significant and it was reasonable for Mr Ware and Mr Walker to take the view that the inconsistencies in his evidence about the prep board did not undermine his clear and consistent evidence on the words used by Mrs Peel.

123. Further, it was reasonable for those managers to conclude that Mrs Whittaker's account was correct and that there was no mention of the doctor until after she told the claimants that their absence would be treated as unauthorised. Therefore the finding that the claimants said at first they were leaving to go home was a reasonable finding for these managers to make.

124. As to the medical position, in my judgment it was within the band of reasonable responses to conclude that this was misconduct rather than an issue of medical incapability. The view that matters in this case was the view reached by Mr Walker because he conducted a re-hearing, thereby superseding Mr Ware's conclusions. A combination of factors made his conclusion reasonable.

125. Firstly, Mr Walker was entitled to make his factual finding that the GP or the doctor was only mentioned after Mrs Whittaker raised the question of unauthorised absence.

126. Secondly, he was entitled to conclude that the claimants were fit for work that morning; they had not said otherwise to their managers and were doing their job when the incident occurred.

127. Thirdly, the managers confirmed that there were no reports of any mental health problems in the past and it was reasonable for Mr Walker to accept this.

128. Fourthly, the view that this was in truth an expression of anger and frustration at what the claimants perceived as unfair management was consistent with the words used, especially Mrs Whittaker's evidence (page 198) that Mr Peel said that they were walking out because the walks were too big and management would not do anything about it.

129. Fifthly, and importantly, there was no medical evidence produced by the claimants in the disciplinary or appeal process to support the contention that on 16 October 2015 they were so ill that walking out was their only option. The initial fit notes that day from their GP simply said "stress at work". By mid November 2015 the diagnosis was more precise and for Mr Peel in particular it was a severe diagnosis, but it was still reasonable in my judgment for Mr Walker to conclude that the awareness of the disciplinary consequences had contributed to that medical position by mid November. Although the respondent did not seek its own medical evidence it did investigate this by making enquiries of managers about whether mental health issues had been raised in the past. It was reasonable for Mr Ware and Mr Walker to conclude that it was for the claimants to supply medical evidence if it was part of their defence to the allegations.

130. Accordingly on the core point in this case it was within the band of reasonable responses to treat this as an incident of misconduct not capability, and to conclude that even if they were under stress and ill at the time, the claimants left work without permission because of anger and frustration at the instruction for Mr Peel to go onto

IPS despite the pressures of their new walk, not because they were too ill to continue. It was reasonable to consider that if the illness had been the real issue the claimants would have acted differently and would have asked if they could go and see their doctor because they were too unwell to carry on working.

131. The fact that the claimants were not suspended did not undermine that conclusion. There was no need to suspend them given that they had started sick leave on the day in question. The conduct policy (page 934) made clear that whether an employee was suspended or not would not affect the outcome of the case.

132. Overall, therefore, I was satisfied there were reasonable grounds for the conclusion reached by Mr Walker at the end of the appeal that both claimants were guilty of disciplinary misconduct. All elements of the **Burchell** test were satisfied.

<u>Fairness - Sanction</u>

133. The last question was whether the decision to dismiss the claimants rather than impose a lesser disciplinary sanction was within the band of reasonable responses. The arguments raised in the witness statements about consistency were not pursued by the claimants and Mr Culshaw recognised there was insufficient evidence about those other cases for a meaningful comparison to be drawn. Further, the claimants candidly and to their credit accepted in cross examination that if they had acted as alleged then dismissal could fairly have followed. That was a sensible concession. It was consistent with the discussion with Mrs Whittaker in the yard on the day. The Conduct Policy at page 934 identified deliberate disregard of instructions and abusive behaviour to colleagues as gross misconduct. In my judgment it was reasonable to conclude that Mr Peel was guilty of gross misconduct in disregarding Mr Melling's instruction and in leaving without permission, and reasonable to conclude that Mrs Peel was guilty of gross misconduct in swearing and behaving aggressively in the yard and in leaving without permission.

134. It does not follow that in every case of gross misconduct dismissal must automatically ensue, but here other options were considered and discounted by both Mr Ware (pages 298 and 660) and Mr Walker (pages 523 and 877). The claimants' conduct in my judgment could reasonably be viewed by Mr Ware and Mr Walker as a complete repudiation of the authority of the respondent's managers, given their reasonable conclusions that the medical position and the workload history provided no significant mitigation.

135. Therefore it followed that both dismissals were fair and the complaints of unfair dismissal were dismissed.

Discussion and Conclusions – Notice Pay

136. I turned to the two breach of contract complaints in relation to notice pay. These complaints required a completely different legal test. I had to make my own decision on whether gross misconduct had been proven, and I could take account of information before me which was not before Mr Ware and Mr Walker. That information included Mrs Whittaker's note from September 2015 and the evidence which the claimants gave to this hearing.

137. It was clear to me that Mr and Mrs Peel were ill at the time of this incident. I accepted their evidence about how their health was being affected by the cumulative stress in the months and weeks leading up to this incident. I was also satisfied that the stress on them was particularly acute in the first week of the new arrangements. The claimants genuinely believed they were being treated unfairly by management.

138. However, I was satisfied that the respondent had proven that there was gross misconduct in the decision to walk out and in the behaviour observed by Mr Hadfield in the office yard. The state of health that day of both claimants was not such that they were unable to control themselves or make decisions. They provided no medical evidence to my hearing to that effect. I found as a fact that the primary reason they walked out was not because they were too ill to continue, but because of their anger and frustration at what they saw as yet another unreasonable instruction from management. This incident was a tipping point that appears to have triggered quite a long period of ill health, but the underlying health issue was effectively a mitigating factor at best. As a matter of contract law, their decision to walk out without permission repudiated their contracts and the respondent was entitled as a matter of law to treat that as gross misconduct and to dismiss them without notice. The notice pay claims failed and were dismissed.

Employment Judge Franey

14 November 2017