EMPLOYMENT TRIBUNALS

Claimant: **Mr P Bruce**

Respondent: **S J McIntosh (Haulage) Limited**

Heard at: **Nottingham**

On: **7 June and 12 September 2017**

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

Representation
Claimant: **Mr S Purnell (Counsel)**
Respondent: **Mr P Martin (Counsel)**

JUDGMENT

1. The Claimant was not dismissed.

2. His complaints of unfair dismissal and breach of contract are therefore not well-founded.

REASONS

Complaints

1.The Claimant complains of unfair dismissal contrary to section 94 Employment Rights Act 1996 ("ERA") and of breach of contract (wrongful dismissal). Any other complaint expressed or intimated in his ET1 Claim Form was not pursued.

Issues

2. In respect of the complaint of unfair dismissal, the issues to be decided were:

2.1. Was the Claimant dismissed? He relies on section 95(1)(a) ERA only.

2.2. If so, has the Respondent shown the reason for dismissal?

2.3. If it has, was it a fair reason within section 98 ERA? The Respondent relies on conduct or alternatively some other substantial reason of a kind such as to justify dismissal of an employee holding the position which the Claimant held.

2.4. If so, was dismissal for that reason fair in accordance with section 98(4) ERA?

2.5. If the Claimant was unfairly dismissed, he seeks a basic award. The amount of that award is agreed, but it is disputed whether it should be reduced on account of the Claimant's conduct before the dismissal, and if so by how much.

2.6. As to any compensatory award there was by the end of the Hearing substantial agreement as to the heads and measure of loss to the date of the hearing. Whether the Claimant should be compensated for future loss, and if so the amount by which that future loss should be reduced to reflect future earnings is disputed. The Respondent does not contend that the Claimant has failed to properly mitigate his losses.

2.7. Should any compensatory award be reduced in accordance with the principle in **Polkey v AE Dayton Services Ltd [1988] ICR 142**?

2.8. Should any such award be adjusted for either party's failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures ("the ACAS Code"), under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA")?

2.9. Finally, should any such award be reduced under section 123(6) ERA on the basis of the Claimant's conduct?

3. The issues in relation to the breach of contract complaint were:

3.1. Was the Claimant dismissed?

3.2. If so, was the Respondent entitled to dismiss him summarily on account of his conduct?

3.3. If not, what is the measure of the Claimant's loss, it being agreed that his notice period was the statutory minimum 12 weeks?

Facts

4. The parties agreed a bundle of documents. I read statements from the Claimant, Steven McIntosh (a director and owner of the Respondent), Andrew Stephens of John A Stephens Ltd ("JAS") (a building merchant and the Respondent's sole customer), Kelly Turton (employed at a nursery in Radcliffe-on-Trent) and Lucy McCourt whose child attended that nursery, all of whom also gave oral evidence. By consent, before hearing any evidence I viewed various items of video footage taken from the dash-cam in the Claimant's lorry and also listened to an audio recording. Some of the video footage was viewed by witnesses when giving evidence. Having considered all of this material, I make the findings of fact that now follow, with separate findings in respect of wrongful dismissal and contributory conduct. References to page numbers are to pages in the bundle.

5. The Respondent is a haulage company, employing five people at the relevant time – Mr McIntosh, his wife who does clerical work, and three HGV drivers. The Claimant was one of those drivers from January 2003 to 16 September 2016, when he says he was summarily dismissed, and the Respondent says he resigned. The Claimant drove an HGV owned by the Respondent, and was at all times employed by the Respondent, but the lorry was branded as a JAS vehicle. The Respondent has had no other customer for 25 years. The Claimant reported on a daily basis to JAS's premises and had daily contact with its staff, particularly

at the relevant times Mr Stephens.

6. The statement of the Claimant's terms of employment is at pages 24 – 26. The Respondent's disciplinary policy is mentioned in that statement and sets out some very basic features, including, "You will be notified in writing of all accusations made against you. //You can and will be allowed to answer those accusations firstly verbally and secondly in writing".

7. The Respondent referred in its evidence to an incident involving the Claimant in early 2016. Mr Stephens says he received a call from a member of the public saying that a JAS lorry and a local council truck had been driving dangerously, "playing cat and mouse". The caller said he had been "concerned for his life" (paragraph 4 of Mr Stephens' statement). I have no reason to doubt that evidence. Mr Stephens says this was clearly a major issue for the caller but a "moderate issue" for him; he agreed that he would have needed to review dashcam footage to determine its seriousness. I do not need to resolve whether the Claimant informed Mr Stephens of the incident on his return to JAS, or whether Mr Stephens told the Claimant he had received a complaint. Either way, Mr Stephens says that when asked about the matter the Claimant's response was along the lines of, "I am not being cut up by them; I needed to tell them". I accept that evidence on the basis that the last part of that comment is said to have been, and I find was, a turn of phrase the Claimant used on other occasions and not just with Mr Stephens, as I will detail below.

8. The Claimant did not speak with Mr McIntosh about this matter; that follows from Mr Stephens' confirmation that he did not report the matter to Mr McIntosh. Mr McIntosh says Mr Stephens informed him some time later. There is no inconsistency between Mr Stephens and Mr McIntosh in that regard, the Claimant cannot gainsay it, and I therefore accept this evidence. Mr McIntosh chose not to investigate it further because he concluded Mr Stephens had dealt with it and there was not much he could do some time after the event.

9. On 8 March 2016, again whilst driving for the Respondent, the Claimant became embroiled in an argument with a cyclist. I listened to the dashcam recording of this argument, the transcript of which is on pages 26a – b, and will set out more detail of the exchange below in my findings of fact related to the breach of contract complaint. It is however necessary to recount some features of the incident here.

10. The incident began when the cyclist banged on the lorry cab and protested that the Claimant's lorry was "a fucking inch away from me". There were further exchanges, both parties using the f-word. At one point in the exchange the Claimant said, "Call me a peasant again and you'll be wearing your face on the other side of your head". He agrees that this was a serious conduct issue.

11. The cyclist reported the incident to JAS. The Claimant was made aware of this by Mr Stephens, who on the Claimant's return to JAS's premises reviewed the dashcam footage, with the Claimant. Mr Stephens' statement (paragraph 3) describes the Claimant's actions as very aggressive. He agreed in oral evidence that the cyclist was also aggressive, and indeed swore first, though he maintains the Claimant had initiated the altercation by driving too close to the cyclist. Mr Stephens' statement also says the footage shows the Claimant threatening the cyclist with physical violence and "suggesting he should have killed him": he maintained in evidence that the Claimant had an intent to injure.

12. Having viewed the footage, he informed the Claimant he would call Mr McIntosh. The Claimant does not accept he was told JAS had been brought into disrepute as Mr Stephens asserts in his statement (paragraph 5). Again, it is not necessary for me to resolve this factual dispute, not least because of the content of subsequent discussions, which also involved Mr McIntosh.

13. Both Mr Stephens and Mr McIntosh say that Mr Stephens told Mr McIntosh he did not want the Claimant driving for JAS anymore. Mr McIntosh says in his statement (paragraph 5) that Mr Stephens told him the Claimant had brought JAS into disrepute. Naturally the Claimant cannot gainsay that evidence, it is consistent with other surrounding facts, and so I accept it. Mr McIntosh took Mr Stephens' word for what had happened, on the basis that they had a longstanding relationship, and was content to trust what Mr Stephens told him was in the dashcam footage. Mr McIntosh spoke to the Claimant about the matter, informing him that JAS did not want the Claimant driving for them again. The Claimant agrees Mr McIntosh was angry about the incident, consistent with Mr McIntosh's statement (paragraph 5). He does not agree that Mr McIntosh told him it was unacceptable as Mr McIntosh claims. Again, whether that was said does not seem to me material in the context of their exchange as a whole. Mr McIntosh says the Claimant told him it would not happen again – I accept that unchallenged evidence. Mr McIntosh told the Claimant he should apologise to Mr Stephens and to the cyclist. The Claimant refused to apologise to the latter, because he did not think how he had driven was blameworthy, but was willing to apologise to JAS.

14. Mr McIntosh therefore asked Mr Stephens whether the Claimant could be given another chance. The Respondent's case – the evidence of both Mr Stephens and Mr McIntosh – is that Mr Stephens said if anything similar happened again he would not want the Claimant working on their contract. I have no doubt that they had this conversation. The Claimant denies that this, or anything about the consequences of repetition of such behaviour, was said to him. He says that Mr Stephens said no more than that he would leave it for Mr McIntosh to sort out. The Claimant was certainly not given any formal warning, but he seems to me to conflate and confuse his initial discussion with Mr Stephens referred to above and a subsequent discussion to which I now turn.

15. Having agreed to the Claimant continuing to drive for JAS on the basis outlined above, I find that Mr Stephens then spoke with the Claimant at JAS, with Mr McIntosh also present. Mr Stephens is very specific, saying he recalls standing with the Claimant at Mr Stephens' office door, and saying that if something like this happened again, that would be it. Mr McIntosh's evidence (paragraph 5) is similar, namely that Mr Stephens told the Claimant that he was prepared to give him one final chance. In the context of this incident as a whole, as described above, I prefer the combined evidence of Mr Stephens and Mr McIntosh on this point and I accept that words to this effect were said to the Claimant.

16. A further incident took place on what is agreed to have been the effective date of termination of the Claimant's employment, 16 September 2016. Again, further details are set out in my findings of fact for the breach of contract case, but again it is necessary to provide some of the detail here.

17. The Claimant was driving his JAS-branded vehicle for the Respondent on the A52 near Radcliffe on Trent. The Claimant says (paragraph 7), "Because it was wet and because of the volume of traffic I began to slow down as I approached

the lights". A car, it transpired driven by Ms McCourt, pulled in front of him to turn left at those lights. In his Claim Form (page13), the Claimant says Ms McCourt swerved in front of him; he stood by that description in oral evidence. The Claim Form also stated that he had to "perform an emergency stop". The Claimant's oral evidence was that it was an emergency procedure, requiring him to brake sharply in wet weather over a short distance. He flashed his lights at Ms McCourt and sounded his horn.

18. The Claimant agrees he was angry at that point; in his witness statement he says took a deep breath and tried to steady himself (paragraph 8) and he remembers "panting and sweating at the time. I suddenly felt sick [and was] dismayed [at what had happened]" (paragraph 9). He did not pull over however but instead followed Ms McCourt's car. It is agreed that this meant following his designated route, until Ms McCourt turned right at an island; at that point the Claimant diverted from his route in order to continue to follow her. He eventually stopped outside of a day nursery where Ms McCourt had gone to drop off her small child. She was pregnant at the time. The Claim Form (page 13) mentions Ms McCourt pulling in front of him at traffic lights but does not mention that he followed her to the nursery or what happened there; he could not explain this omission.

19. The Claimant does not accept he was angry "as such" when he left his cab, as he had had time to calm down. At paragraph 11 of his statement he says that he "parked behind her in order to see whether she was okay … given how shaken up I was I imagined would also be a [sic] very similar position". He goes on to say in paragraph 13, "I wanted to speak to the driver firstly to see if she was okay". In verbal evidence however, he said he did not follow and speak to Ms McCourt to check on her welfare. He wanted an explanation from her. He therefore does not stand by his statement that he wanted to see whether she was okay, but does stand by the statement that he imagined she would feel shaken up.

20. At paragraph 12 of his statement, the Claimant says he immediately felt sorry for Ms McCourt as she apologised to him. In oral evidence he said he felt sorry for her "to a certain extent" given what could have happened. Also in paragraph 12 he says he told Ms McCourt that they "could have had a very serious accident, which could have resulted in a loss of life" and that "she needed to take more care on the roads … [he] didn't want her to end up having a serious accident". His oral evidence was that he wanted to explain to her the dangers of an HGV.

21. In paragraph 13 the Claimant says, "At no point during the conversation with the driver [Ms McCourt] did I swear or raise my voice". No witness suggests the Claimant swore on this occasion. In oral evidence however he said he was "not shouting as such, just talking loudly", though not as loudly as in the incident with the cyclist in March. Ms McCourt and Ms Turton, who came out of the nursery building to see what was going on, both say that the Claimant was pointing at Ms McCourt, was close to her and was shouting at her. The Claimant denies that account, though he accepts Ms McCourt was visibly upset.

22. The Claimant agrees that he did not ask Ms McCourt if she was ok. It is agreed that she apologised, on her account because she was concerned about his demeanour and the fact he had followed her and just wanted to diffuse the situation. The Claimant's evidence is that Ms Turton "didn't seem particularly interested in what had happened". I will detail her evidence of the incident in my

separate findings.

23. Ms McCourt, or her husband, reported the matter to the police. JAS found out about the matter because of a telephone call from Ms Turton – see the transcript at pages 26c – d. Mr Stephens accepts that his statement (paragraph 6) that Ms Turton was "hysterical" is not accurate, but he insists she was not calm. Ms Turton herself says that "hysterical" is not an accurate description of her manner, but that she was speaking quickly. The transcript records her explaining to Mr Stephens that the Claimant was "shouting and screaming in [Ms McCourt's] face and pointing … she was very apologetic but he was so aggressive". Towards the end of the call she describes what the Claimant did as "not really appropriate".

24. After speaking with Ms Turton, and ascertaining that the lorry in question was the Claimant's, Mr Stephens contacted the Claimant and informed him that he had received a complaint. The Claimant attended the JAS premises about an hour later, at Mr Stephens' request. He gave Mr Stephens and another JAS director his explanation of events and upon request gave them the memory card from his dashcam. They viewed the relevant footage, without the Claimant present. Mr Stephens then discussed the matter with the Claimant who said to him that Ms McCourt had cut him up. Mr Stephens told the Claimant he could not see any fault in Ms McCourt's driving. In his witness statement, he describes the dashcam footage as showing the Claimant "chasing" Ms McCourt (paragraph 7). He also describes (paragraph 8) the Claimant slamming the lorry door. There is no sound on this footage, and it does not actually show the Claimant leaving the cab. Mr Stephens said in oral evidence that he made this comment based on how the Claimant got out of the cab. Mr Stephens says the Claimant told him that he "needed to tell her [i.e. Ms McCourt]". Both Mr Stephens and Mr McIntosh (see below) referred in evidence to this phrase being used on more than one occasion by the Claimant; it is also consistent with the Claimant's own evidence that he told Mr McIntosh he went to have a word with Ms McCourt – see below; I accept Mr Stephens' evidence that it was said on this occasion. Mr Stephens told the Claimant to go home and that he would contact Mr McIntosh. Mr Stephens' unchallenged evidence (paragraph 9) is that the Claimant asked him whether he needed to clear out his cab and that Mr Stephens told him not to and that Mr McIntosh would contact him.

25. Mr Stephens then contacted Mr McIntosh. Mr McIntosh says, and I accept as entirely consistent with the overall picture, that Mr Stephens told him there had been an incident on the Radcliffe Road, whereby the Claimant had aggressively followed a woman to her child's nursery and had verbally abused her in front of various witnesses, pointing at her and shouting. Mr Stephens also outlined to Mr McIntosh what Ms Turton had said when she telephoned JAS. Mr McIntosh told Mr Stephens he would deal with the matter. Mr Stephens' oral evidence is that he told Mr McIntosh he did not want the Claimant driving for JAS again. This is not mentioned in his witness statement, though Mr Stephens insists that he "certainly said it". Given that it is consistent with the rest of Mr Stephens' and Mr McIntosh's evidence, I am on balance prepared to accept that this is what was said. Mr Stephens says he has to run the JAS business on the basis of reputation; they are well-known in Radcliffe, and in his view bad publicity can escalate, particularly on social media. He had not asked the Respondent to remove anyone else from driving before. His evidence was that if the Respondent had not agreed to remove the Claimant from the contract it would have been a very difficult situation – he would have listened to the Respondent's reasons but his view was that the Claimant could not be given any more

chances. Mr Stephens would not have pulled the plug on the whole contract with the Respondent but might have reduced the amount of work.

26. Mr McIntosh accepts that he again took Mr Stephens' word for what he said, according to the dashcam footage, had taken place; if JAS were happy with the evidence, that was sufficient for him. He did not try to persuade Mr Stephens to a different point of view regarding the Claimant. He called the Claimant that morning but got no reply. The Claimant called him around 5.00 pm the same day. Mr McIntosh told the Claimant that JAS had received a complaint from Ms McCourt and her husband. The Claimant briefly gave his account of the incident. He says that he told Mr McIntosh that he went to have a word with Ms McCourt to get an explanation from her of what had happened. Mr McIntosh says that the Claimant recounted how a woman had cut him up very dangerously, and that he had followed her to tell her – she "needed telling" or it might have been "needed to be told". Given the similarity of the Claimant's own account of what he told Mr McIntosh, given Mr Stephens' similar evidence, and because Mr McIntosh was very specific, consistent and adamant about that phrase having been used, I accept his account.

27. Mr McIntosh then informed the Claimant that Mr Stephens had advised him that they did not want the Claimant working for JAS any longer. What was then said was explored in detail in evidence. I find, on Mr McIntosh's own account, that he said, "You do know it's come to the point where JAS will not have you driving for them again". He added, and again I find this to be the case as it was not contested, "What do you expect me to do? There is nowhere else for you to go". Mr McIntosh says he knew from his conversations with JAS that it was the end for the Claimant, that it was finished, and that the Claimant was not going to go back to work for them. As he put it, the Respondent – and more pertinently the Claimant – had used up all their favours with JAS with the cyclist incident. Mr McIntosh alleges that the Claimant then said, "If they don't want me, I don't want them. I resign as from today" or, Mr McIntosh says, it may have been (the difference does not matter to my mind either as to fact or witness credibility) that the second sentence was "I resign as of now". Mr McIntosh says he did not check whether this was really what the Claimant wanted to do, but replied "Ok", that he was sorry it had come to this and that the Claimant would need to collect his personal belongings from his lorry.

28. The Claimant gives a different account. His account is that after Mr McIntosh told him, "JAS does not want you driving anymore", he replied, "What happens now?" to which Mr McIntosh's replied he couldn't employ him elsewhere and, "I think you better go and clear your personal belongings from your truck". Mr McIntosh says it would have made no sense to instruct the Claimant to clear his truck when the yard would have been closed. The Claimant says he remembers quite clearly Mr McIntosh saying, "I am sorry it has to end like this". The Claimant says he was speechless, couldn't formulate a response, and so ended the call.

29. The Claimant did not appeal against what he says he believed to be his dismissal; he says he was not aware of the procedure for doing so. His oral evidence was that if JAS did not want him driving for them, there was nothing else the Respondent could have done. Mr McIntosh did not follow up the Claimant's resignation – as he asserts it was – with any letter confirming it. He said this was him being "slack with [his] paperwork", but from his point of view he was prepared to let the Claimant go on the basis of a resignation, which he thought was better for the Claimant. He did not consider that the Claimant

should have worked his 5.5 days' contractual notice, as there was no job for him to do.

30. The Claimant gave Mr McIntosh as a potential referee in applying for a new job – page 40 – a week after the effective date of termination. He says that at that time he did not realise he could pursue a complaint of unfair dismissal. His new employer asked about his departure from the Respondent, but he says he did not tell them he'd resigned; he just told them about the incident and that he had been dismissed. The new employer did not contact the Respondent at any time.

31. At page 32 is copy of the first contact between the parties after termination. The Claimant sent Mrs McIntosh an email on 5 October saying, "Hi Sue. //Thanks for sending on my P45, I couldn't help noticing on my final pay slip that there was no holiday pay, can you explain why there wasn't any. //Thanks Paul". The Respondent emailed a reply, explaining the Claimant's final wages, on 9 October.

32. The Claimant's solicitors wrote to the Respondent (pages 27 – 29), two months after termination, on 18 November 2016. The letter asserted that the Claimant had been dismissed, wrongfully and unfairly. It described the incident of 16 September and in doing so referred to the Claimant having pulled up in a lay-by to speak to Ms McCourt. There is no need for me to detail the further correspondence that ensued.

33. Whilst Mr McIntosh wishes the Claimant was still working for him, not least because of how expensive it is for the Respondent to replace a driver, and whilst he accepts he had not seen the dashcam footage as at the date of termination, he stated (paragraph 7 of his statement) that had the Claimant not resigned he would have dismissed him for gross misconduct given the Claimant's behaviour and the relationship with JAS which meant there was no-one else the Claimant could have driven for. Mr McIntosh says that he could not have insisted on JAS allowing the Claimant to continue working for them, as they would have simply refused to accept it, and the Respondent would then have run the risk of losing the business.

34. As noted above, by the end of the Hearing there was a substantial amount of agreement on figures were it to be found that the Claimant was unfairly and/or wrongfully dismissed. A number of payslips from the period since termination were handed to me towards the end of the hearing. The position agreed by counsel was as follows:

34.1. The starting point for the basic award was agreed as £7,903.50.

34.2. The Claimant's net weekly pay with the Respondent was £443.87.

34.3. The loss of earnings over the first 12 weeks following the date of termination, to 9 December 2016, was therefore £5,326.44.

34.4. The Claimant commenced new work, on an agency basis, on 3 October 2016, earning a net weekly wage of £375.87, a net loss of £68.00 per week on his previous earnings.

34.5. There was a further 19 weeks until 13 February 2017, when the Claimant obtained permanent employment. He earns a basic rate of £9 per hour, lower

than his basic rate with the Respondent, but has the opportunity to earn overtime. The Claimant says that he should not have to give credit for the earnings he receives for working more hours than he did with the Respondent, and thus the difference in pay he relies on for loss beyond 13 February is £68 net per week. The Respondent says that the Claimant has no loss from 13 February because of his overtime, but alternatively his net weekly loss when he works 50 hours is £54.40, based on his payslip for 21 April 2017.

34.6. From 13 February to the conclusion of this Hearing was 30 weeks.

34.7. The Claimant seeks future loss of earnings over 26 weeks from the Hearing. The Respondent says there should be no compensation for future loss, not only on the basis of the Claimant's overtime earnings but also because it says he has had sufficient time to replace his income.

34.8. It was agreed that any award for loss of statutory rights should be £300.

34.9. The Recoupment Regulations do not apply.

Facts – breach of contract/contributory fault

35. I have referred to the incident with the cyclist on 8 March 2016 above. The Claimant was in a filter lane for a right turn. The cyclist is not visible on the dashcam footage, but as indicated above and in the transcript at pages 26a – b, banged on the cab and, apparently because the Claimant's lorry was very close to him, shouted: "You were a fucking inch away from me". The Claimant says he was within about 18 inches, which I accept as a more realistic reflection of reality. He accepts that being this close to the cyclist could be dangerous, and perceived by the cyclist as intimidating. The Claimant's response in a firm tone was, "Yeah I know. I might have been closer. Get on the fucking cycle track, that's what it's there for".

36. Both parties then shouted – the cyclist, "You fucking peasant … just to make a point … just to make a point", to which the Claimant replied, "Call me a peasant again and you'll be wearing your face on the other side of your head". The cyclist responded "You just tried to kill me", to which the Claimant replied, "Yeah, you're lucky I didn't. Get on the cycle track". At that point, the cyclist continued to shout, whilst the Claimant's volume reduced but was still a firm, raised voice. At the end of the exchange, after the cyclist said the Claimant was a "peasant" because he was driving a lorry, the Claimant shouted, "Oi fuck off. It's a better job than you fucking have. I don't fucking ride a bike". The Claimant does not believe he drove incorrectly, but agrees he "probably did wrong" in how he spoke, though he says the cyclist was rude first.

37. Although there was dashcam footage of the events of 16 September, there was no sound on this occasion. The full footage begins with Ms McCourt pulling into the lane in which the Claimant was driving, in order to turn left – she moves into a fairly small gap but as far as one can tell the Claimant is not required to brake suddenly, and there is certainly no emergency stop, nor does there seem to be any emergency procedure. The Claimant flashes his headlights and he is close to Ms McCourt's car, although fairly quickly there is in any event a small queue turning left. It is agreed he was also sounding his horn. As both vehicles are positioned to turn left, Ms McCourt is seen to put her hand out of the window. The Claimant's case is that she made an obscene gesture; Ms McCourt says she was trying to say sorry as she was concerned how close the lorry was and was

trying to diffuse the situation. It is not necessary for me to conclude what the hand gesture was, though for the record, having seen Ms McCourt give evidence, I am very much inclined to the view that it was an apology and nothing obscene.

38. Both then turn left. Ms McCourt says she was driving quicker than usual to try to get away and in paragraph 4 of her statement describes the Claimant as at times travelling extremely close to her car. She also says that it was a fairly narrow, windy road – that is not particularly evident from the footage, but Ms McCourt explained her meaning as being that it was a single carriageway and there are often parked vehicles along it. That much is certainly clear from the footage.

39. As they drive along this road, the Claimant starts at a distance and then moves closer to Ms McCourt. The distance varies as the road becomes residential. At one point the Claimant pulls up close to Ms McCourt, who says she jumped forward, believing the Claimant was about to go into the back of her. She was concerned, I accept, that the Claimant was following her, as she did not think he would otherwise be driving along that road. She also maintained her evidence that he was driving too close to her, saying that watching the footage in Tribunal was different to how it appeared to her through her rear-view mirror. She was fearful the lorry would hit her car, and concerned for the safety of her child.

40. After a few minutes, Ms McCourt turns right, and the Claimant does the same – at this point deviating from his route. After about a quarter of a mile (Ms McCourt's car now being out of view), the Claimant stops outside the nursery, it is accepted on double yellow lines. One can see him walk in front of the lorry, there is then a gap in the footage, the Claimant walks back, looks back to where he's come from, shakes his head, enters his cab and drives off. The rest of the footage is not relevant.

41. Ms McCourt says in her statement that the Claimant was "thundering up the nursery drive" – she said in her evidence he was red-faced and angry and his arms were swinging. She also says the Claimant stood about a foot away from her once he was in the car park, wagging his finger "literally right in my face", and that he was louder than he was on the 8 March footage given he was so close to her. She agrees that she was apologetic to the Claimant, saying "I'm really sorry, I hate it when people do that" and "I think I must have misjudged it", saying that she thought this the best way to deal with the situation in order to to try to disarm the Claimant.

42. Ms McCourt does not accept the Claimant's evidence that he said, "What do you think you were doing?", nor "Given the size of my lorry we could have had a very serious accident", nor that he told her she put his life at risk, nor that she should "take more care on the roads", nor that he said he did not want her to have a serious accident (paragraph 12 of the Claimant's statement). Her evidence is that the Claimant shouted that she could have killed three people and that she shouldn't be on the roads. Ms McCourt says (paragraph 7) that when she pointed out to the Claimant that she was pregnant and said he needed to get back into his lorry he replied that he "didn't care" and got "very close to [her] face".

43. Ms Turton was in the nursery kitchen when Ms McCourt pulled into the car park. She accepts she could not see the Claimant's lorry approaching the nursery, as her view was obscured, but looked up as it stopped, as in her view it

came to a halt quite suddenly. In her statement (paragraph 2) she says the Claimant walked into the car park aggressively; her verbal evidence is that this is what she saw, though she accepts the dashcam footage suggests the Claimant was "just walking". She says that how he was walking got her attention, so that she moved to see where he was going. She saw him until he got to where Ms McCourt's car was parked. She heard shouting, which led her to go out into the car park, and saw the Claimant "standing very close to Lucy, pointing in her face and wagging his finger … Lucy was crying". She accepts the Claimant said something like he describes in paragraph 12 of his statement, "Given the size of my lorry we could have had a very serious accident, which could have resulted in a loss of life", though not in those words. She does not agree however that he said that the Claimant needed to take more care. Her evidence is he said "You could have caused three deaths – you could have killed yourself, your baby and your son". She describes the Claimant as "angry and loud" – very similar to what can be heard on the footage of 8 March. In paragraph 3 of her statement she says, "The Claimant continued to shout in Lucy's face". Ms McCourt says (paragraph 8) that the Claimant continued to shout and point at her.

44. Ms Turton then called JAS – the transcript is at page 26c – d, and I do not need to add much to what I noted above. She is calm during the call, though speaking quickly, and although she thinks Mr Stephens' description of her as "hysterical" is wrong, she was angry with what had happened. Ms McCourt describes the impact the incident had on her (paragraphs 11 and 12 of her statement), saying it caused her "great distress" and has taken away her enjoyment of driving.

45. As can be seen from this account, much of what happened is undisputed. I will deal with and resolve the remaining conflicts of evidence in my analysis below.

Law

Unfair dismissal

46. Section 95(1) ERA says that for unfair dismissal purposes, "*an employee is dismissed by his employer if … and only if: (a) the contract under which he is employed is terminated by the employer (whether with or without notice) …*". Given that there is a dispute about whether the Claimant was dismissed or resigned, the burden is on him to establish dismissal.

47. Where words of claimed dismissal, or claimed resignation for that matter, are arguably ambiguous, an objective test must be applied in order to determine whether they were in fact words of dismissal. In other words, it is for the Tribunal to judge the effect of the words by looking at all the relevant circumstances of the case, the events before they were spoken and the events after, asking how the words would be understood by a reasonable listener, taking them in context not in isolation. It is also relevant in some cases to consider whether the words may have been said in the heat of the moment.

48. Where words of claimed dismissal or resignation are unambiguous, the language used is to be taken at face value and the person speaking those words must take the consequences; the natural meaning of the words and how they were understood by the recipient should not be affected by considerations of how a reasonable person might have interpreted them, or the subjective intention of the party speaking them – **Sothern v Franks Charlesly & Co [1981] IRLR 278**.

There may however be special circumstances in which the recipient of the notice, before accepting or otherwise acting upon it, may be required first to satisfy himself that the giver of the notice did in fact really intend what he had apparently said. In other words, in the case of resignation, the employer must be satisfied that the employee really did intend to give a notice of resignation – **Willoughby v CF Capital Ltd [2011] IRLR 985**. There is no positive duty on an employer to investigate an employee's intentions but if there are special circumstances, or if facts suggesting such circumstances arise within a reasonable period, the employer may risk dismissal if this is not investigated. Where an employee is effectively invited to resign, in the absence of which he will be dismissed, that will very likely be a dismissal – **East Sussex CC v Walker 1972 ITR 280**. That is to be contrasted with the position in cases such as **Birch and Humber v University of Liverpool 1985 IRLR 165**, where a warning of possible dismissal has been given and an employee resigns on a truly voluntary basis in that context.

49. Section 98 ERA says, "*(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) [which includes a reason related to the conduct of the employee] or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee 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".

50. As the section makes plain it is for the Respondent to show the reason, or principal reason, for dismissal if the fact of dismissal is established. The question is what reason the Respondent relied upon. **Abernethy v Mott, Hay and Anderson [1974] IRLR 2013** is long-established authority to the effect that the reason for dismissal is "a set of facts known to the employer or as it may be of beliefs held by him, which cause him to dismiss the employee". If there was a dismissal, then the reason or principal for dismissal is therefore to be determined by assessing the facts and beliefs which operated on the Respondent's (in this case Mr McIntosh's) mind, leading him to act as he did in effecting it.

51. If the Respondent shows the reason and establishes that it was a reason falling within section 98, the Tribunal must then go on to consider section 98(4) ERA in order to determine whether the dismissal was fair. The burden is no longer on the Respondent at this point. Rather, having regard to the reason or principal reason for dismissal, whether the dismissal is fair or unfair requires an overall assessment by the Tribunal, and depends on whether in the circumstances, including the size and administrative resources of the business, the Respondent acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the Claimant. This is something which is to be determined in accordance with equity and the substantial merits of the case. This overall assessment is in part concerned with the steps taken by the Respondent to effect dismissal. In all respects, the question is whether what the

employer did was within the band of reasonable responses of a reasonable employer.

52. In assessing these requirements in connection with a conduct dismissal, a Tribunal ought to have regard to the test in **British Home Stores v Burchell [1980] ICR 303** as to whether the Respondent believed the Claimant to be guilty of misconduct (on the basis of a reasonable suspicion), had reasonable grounds to sustain that belief, and when forming that belief had carried out a reasonable investigation in the circumstances.

53. As to the Respondent's alternative case that this was a dismissal for "some other substantial reason", it relies on the view expressed by JAS that the Claimant could not drive for it again. In assessing the requirements of section 98(4) in this context, the Tribunal should look at what was said by the third party, the importance of the customer for the employer, and how serious or definite the customer's stated position was. The case of **Dobie v Burns International Services (UK) Ltd [1984] ICR 812** made clear that section 98(4) also requires consideration of any injustice to the employee. This point was emphasised as important in **Greenwood v Whiteghyll Plastics Ltd EAT/0219/07**, though that was a case of an employer with several large customers, only one of which had required the employee's removal from their work. Whether attempts were made to dissuade the customer from its stated position is also a potentially relevant factor, as may be – as one would expect – the consideration of alternatives to dismissal.

54. In respect of any unfair dismissal compensatory award, I would be bound to consider whether it should be reduced because even if a fair procedure had been followed, dismissal would have taken place fairly in any event – **Polkey**. This is part of the Tribunal's obligation under section 123 ERA to award compensation only for such loss as flows from the dismissal. As was made clear by the EAT in **Software 2000 Ltd v Andrews [2007] ICR 825,** this entails asking how long the Claimant would have been employed but for the dismissal, based on the evidence presented. The EAT acknowledged that in any such judgment an element of speculation is involved.

55. The Tribunal also has a responsibility to consider a reduction in the basic and compensatory awards, on the basis of the principle commonly known as "contributory fault". Any basic award should be reduced on this basis under section 122(2) of the ERA "*where the Tribunal considers that any conduct of the complainant before the dismissal … was such that it would be just and equitable to reduce … [it] to any extent*". Section 123(6) dealing with the compensatory award is in somewhat different terms: "*Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding*". In either case, unlike the test the Tribunal must apply in determining whether any dismissal was fair or unfair, if reducing compensation because of contributory fault the Tribunal must find as a fact that the Claimant has actually acted in such a manner as (in relation to the basic award) to render it just and equitable to reduce compensation, and (in relation to the compensatory award) to have contributed to his dismissal. Importantly, his conduct must be in some sense blameworthy. In **Hollier v Plysu Ltd [1983] IRLR 260** the Court of Appeal set out a familiar (though not prescriptive) range of the degree of blameworthiness that will lead to various percentage reductions – 100% when the employee was wholly to blame, 75% where he was mainly to blame, 50% where the parties

were equally to blame, and 25% where the employee was slightly to blame.

56. Finally in relation to compensation, under section 207A TULRCA, which applies to both unfair dismissal and breach of contract complaints, where, "*(2) it appears to the employment tribunal that //(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies [this includes the ACAS Code], //(b) the employer has failed to comply with the Code in relation to that matter, and //(c) that failure was unreasonable, //the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%*". In relation to unfair dismissal, this applies only to the compensatory award.

Breach of contract

57. In relation to the complaint of breach of contract, again the burden is on the Claimant to establish that he was dismissed. If he was, I then have to consider all of the documentary and witness evidence that was put before me, and decide whether the Respondent has discharged the burden of establishing that the Claimant was in repudiatory breach of contract such that it was lawful to dismiss him without notice. Unlike in the unfair dismissal case, I have to decide therefore what in fact happened on 16 September 2016. If I find that the Claimant was dismissed in breach of contract, as noted the measure of loss is essentially agreed, though I also have to determine whether any loss should be increased under section 207A TULRCA as above.

Analysis

Witness evidence

58. There are two remaining, and crucially important, conflicts of evidence for me to resolve: first, what happened on 16 September between the Claimant and Ms McCourt and Ms Turton, and secondly what was said between Mr McIntosh and the Claimant later on the same day. The first is relevant to the breach of contract complaint (and to questions of contributory fault if relevant), and the second is relevant to both complaints. It is important of course not to conflate the two complaints, in that each requires a different analysis, but the reliability of the evidence is, as Mr Purnell pointed out, important in this case, in relation to both. It is therefore necessary for me to say something about the credibility of the various witnesses.

59. Mr Purnell submitted that the evidence of both Mr Stephens and Mr McIntosh was not reliable in that both said things in their statements about the incidents in March and September 2016 that went beyond the evidence that can be gleaned from the dashcam footage. Mr Stephens' testimony is not directly relevant to the two key conflicts of evidence, but I deal with it nevertheless as Mr Purnell submitted that the Respondent's case generally had painted an unfair picture of the Claimant's conduct.

60. I accept Mr Purnell's submission only to a limited extent. Mr Stephens said that the Claimant suggested he should have killed the cyclist, that the September footage shows the Claimant "chasing" Ms McCourt and on arrival at the nursery slamming his cab door, and that Ms Turton was hysterical when she called him. As for Mr McIntosh, he described how the Claimant deliberately drove close to the cyclist, and that the cyclist can be seen to be distressed. Both thus overstate

the facts in limited respects, colouring what the evidence actually demonstrates, though as I will make clear below that does not diminish the seriousness of what the Claimant actually did.

61. I then turn to Ms McCourt and Ms Turton. It is unusual for people who are not employed by a respondent to give evidence in the Employment Tribunal in a case such as this. In this instance, there were three such witnesses: I have already referred to Mr Stephens. Mr Purnell accepted that Ms Turton was a reliable witness, and I agree with that. By contrast, he suggested Ms McCourt's evidence should not be relied upon as she had to come to the Tribunal to give her particular account of events because she had to follow through on having reported the matter to the police. I reject that submission. It does not follow from having spoken to the police that Ms McCourt would feel compelled to give evidence to an employment tribunal as an act of self-protection, and in any event, I found her to be an impartial, straightforward, convincing and honest witness. Mr Purnell also said she criticised the Claimant's driving but refused to accept any criticism of her own. That is no more than a small side-point, as I will outline below, but I am wholly satisfied that she gave evidence of the events as she recalled experiencing them at the time. In short, both she and Ms Turton gave evidence in this case with no vested interest in doing so.

62. I then turn to the Claimant. His evidence, from what he wrote in his Claim Form onwards, was in part manifestly inaccurate, was subject to material change, was at times selective, and was therefore in significant respects unreliable. I need only list that evidence here, the detail having already been stated. First there is his description in his Claim Form of having to swerve and perform an emergency stop. Secondly, there is the fact that the Claim Form makes no mention of what took place at the nursery. Thirdly, there is the statement that he followed Ms McCourt to see if she was okay – as he admitted, he clearly did not. Mr Purnell suggested the Claimant deserved credit for retracting that evidence, as though it suggested his reliability and honesty, but as I have already indicated it is in fact merely one example of his unreliability. Fourthly there is the comment in his witness statement that he "immediately felt sorry for [Ms McCourt]", whereas in fact he only felt sorry for her to a certain extent. Fifthly in his statement he said that he did not raise his voice when in the nursery car park, whereas in oral evidence he admitted he was talking loudly. Sixthly, he claimed that Ms Turton showed no interest in what was going on in the nursery car park when she clearly did. Seventhly, there was the solicitors' letter to the Respondent which again omitted the crucial fact of the Claimant having followed Ms McCourt to the nursery.

63. As I have indicated, there are parts of the Respondent's case that in emphasis and degree are not borne out by the contemporaneous evidence. Compared to the issues with the Claimant's evidence however, they are not significant. For the reasons given, I have no hesitation in preferring in particular the evidence of Ms Turton and Ms McCourt over that of the Claimant as to what happened between them on 16 September. And I am clear that on the balance of probabilities it is right to prefer Mr McIntosh's evidence that the Claimant did speak the words of resignation referred to in paragraph 27 above – though of course that is not determinative of either complaint, as Mr Purnell's case is that whatever the Claimant said he had already been dismissed.

Unfair dismissal

64. The first issue to determine in relation to the unfair dismissal complaint is

therefore whether Mr Purnell is correct: was the Claimant dismissed?

65. For clarity, I find that the words spoken between Mr McIntosh and the Claimant were as follows. Mr McIntosh stated, "You do know it's come to the point where JAS will not have you driving for them again". The Claimant then said, "What happens now?", to which Mr McIntosh replied, "What do you expect me to do? There is nowhere else for you to go". The Claimant then stated, "If they don't want me, I don't want them, I resign as from today (or as of now)". Mr McIntosh then said, "Ok, I am sorry it's come to this", and informed the Claimant that he would need to collect his personal belongings from his lorry – clearly on another occasion, given it was by then after 5.00 pm.

66. Mr Purnell says that the words spoken by Mr McIntosh were words of dismissal. Any words of resignation, he says, were therefore ineffective and irrelevant. Mr McIntosh's words certainly cannot be said however to be unambiguous words of dismissal. Accepting of course that the words "dismissal" or "termination" do not have to be used in order to effect a dismissal, there were no clear words informing the Claimant his employment was terminated. An objective test must therefore be applied to what was said, judging the effect of the words by looking at all the relevant circumstances, both before and afterwards, asking how the words would be understood by a reasonable listener in that context. What Mr McIntosh was thinking is perhaps one of the contextual factors, but as Mr Martin pointed out it is what he actually said that is crucial.

67. Assessing his words in that way, I find that what Mr McIntosh said were not words of dismissal. First, the words themselves. "JAS will not have you driving for them again … what do you expect me to do? There is nowhere else for you to go". Objectively assessed, those words explained to the Claimant the severity of the situation Mr McIntosh believed the Claimant's actions had created. They confronted him with the fact that from the Respondent's perspective it was difficult to see a workable way forward, but they did not cross the line to actually amount to termination of the Claimant's employment. Secondly, the surrounding circumstances. The Claimant had been told several months before that JAS did not want him working for them, and although Mr McIntosh did not use the words at that time, it is clear given that JAS was and is the Respondent's sole customer that at that point too there was nowhere else for the Claimant to go. And yet he was not dismissed, even though Mr McIntosh was no less serious on that occasion about the situation he believed the Claimant had created. Putting it another way, as Mr Martin suggested, it was open to the Claimant – in response to what Mr McIntosh said on 16 September – to again ask for a final chance, offer mitigating circumstances, or something similar.

68. The other background circumstance of note is that the Claimant had asked Mr Stephens earlier in the day whether he should clear his cab. That shows that he understood the seriousness of the situation in my view, but it also suggests a mindset of someone ready to leave his employment. After Mr McIntosh's alleged words of dismissal were spoken, the Claimant immediately used unambiguous words of resignation. I accept that they would have been inconsequential if a dismissal had already been effected, but on the facts of this case as just analysed they are strongly suggestive of what Mr McIntosh asserted, namely that here was an employee who saw the writing on the wall and decided to resign as the better option to facing probable dismissal. This was not a heated debate, nor was it a forced resignation situation where, in the **Walker** line of cases, the Respondent had effectively said, "Resign or I will dismiss you". It was closer to the situation in **Birch**, albeit on very different facts, in that the Claimant knew of

the distinct possibility of dismissal and resigned voluntarily in that – altogether very difficult – context. He clearly had this possibility in mind when speaking with Mr Stephens, his words of resignation were unambiguous, and he must take the consequences. He was a mature man and a long-serving, experienced employee, such that there was no obligation on the Respondent to satisfy itself that he intended to resign. As Mr McIntosh said in evidence, given the difficult situation understood by both parties, he believed it was better for the Claimant to do so – and in my judgment, the Claimant knew that was the case as well.

69. My conclusions are further supported by what happened post-termination. I read nothing at all into the Respondent's failure to follow up the resignation in writing; many employers, particularly small employers with no HR department, would not do so. The absence of an appeal is suggestive, though no more than that, of the Claimant understanding that he had resigned. More telling is the single piece of correspondence in the first two months after the Claimant's employment terminated, which clearly to my mind evidences a state of mind consistent with a resignation and not a belief that he had been dismissed, and that unfairly.

70. The Claimant was thus not dismissed, and his complaint of unfair dismissal is therefore not well-founded. Had I decided that the Claimant was dismissed, I would have concluded that the reason for dismissal was related to the Claimant's conduct, as the Respondent asserted, and would have found that dismissal for that reason was unfair, principally because the Respondent did not comply even with its own very basic disciplinary procedure, accepted Mr Stephens' word as to what had happened and thus assumed the Claimant's guilt having made only the most minimal enquiries. Even a small employer with one customer risks acting unreasonably in effectively – as Mr Martin put it himself – delegating the investigation of misconduct to a third party.

71. Nevertheless, it is clear that Mr McIntosh would have dismissed the Claimant in any event. Had I been required to consider whether he would have done so had he acted fairly, I would have found that dismissal would inevitably have taken place within a matter of a week or two at most, i.e. the time it would have taken to conduct a reasonably fair investigation and hold a fair disciplinary hearing. Once Mr McIntosh had reviewed the dashcam evidence himself and taken due account of the complaints from both Ms Turton and Ms McCourt, particularly in the light of what had happened in March 2016, a decision to dismiss would clearly in my judgment have been within the band of reasonable responses for the reasons given by Mr Martin, being principally the size of the Respondent's business, its relationship with JAS and the warning – informal as it was – after the incident with the cyclist. Mr Stephens said he would not have pulled the plug on the contract with the Respondent but the reduction in work he said might have happened was clearly an intolerable risk for the Respondent, which I have no doubt would have been firmly – and reasonably – in Mr McIntosh's mind even had he been willing to speak to JAS as part of following a formal disciplinary procedure. As the Claimant himself said, the Respondent could not do anything else in a situation where JAS did not want him driving for them.

72. All of that would have left the Claimant with a very small compensatory award. Regardless of any increase under TULRCA section 207A, that – and any basic award – would have been extinguished in their entirety as in my judgment the Claimant was wholly to blame for his dismissal. It would thus have been just and equitable to reduce the basic award to zero and would not have been just and equitable to make a compensatory award. I briefly outline the reasons for

that conclusion in finishing this judgment with an analysis of the breach of contract complaint.

Breach of contract

73. It follows from my conclusion that the Claimant was not dismissed that his complaint of breach of contract must also fail. I add for completeness that even had I found that he was dismissed, I would have gone on to find that the Respondent was entitled to dismiss him summarily on account of his conduct, for the following reasons.

74. The Respondent cannot be fairly criticised in my view, when defending a breach of contract case, for leading evidence on the incidents with the lorry and the cyclist, given its assertion that what happened on those occasions is both an indication of what happened on 16 September and important context to that occasion. JAS had made clear that it did not want the Claimant driving for them after the cyclist incident, consistent with the position it took on the later occasion. That is very relevant to consider, because it was knowing this that the Claimant behaved as he did on 16 September. He was clearly on his last chance, as I conclude he knew, not least given his question to Mr Stephens about whether he should clear his cab.

75. I accept entirely that I saw no evidence that the Claimant drove his lorry improperly or dangerously on 16 September. Although I equally accept how his following her appeared to Ms McCourt, there was no blameworthy conduct in my judgment, still less any repudiatory breach of contract, in this respect. That said, Ms McCourt's evidence of the journey to the nursery is not the main issue; it is what happened in the nursery car park that matters, and on that Ms McCourt was both clear and consistent with Ms Turton. What was clearly blameworthy conduct was that the Claimant deliberately followed Ms McCourt, to a nursery – that of itself was completely inappropriate behaviour. It is also clear that he followed her to tell her what he thought – that repeated phrase I have referred to in relation to both earlier incidents. As he told Mr McIntosh, he went to get an explanation from her. He then parked illegally, which is itself consistent with his state of mind that he had to tell Ms McCourt what he thought, and consistent with how Ms McCourt and Ms Turton say he then behaved. As I have indicated, I accept their consistent evidence that whilst there was no foul language, he shouted at Ms McCourt, pointed at her, and was close to her whilst doing so. He also refused to leave when asked to do so. Yes, Ms Turton was calm when she reported this to JAS, but although Mr Purnell focussed on her comment that what the Claimant had done was "not really appropriate", one has to read the totality of what she said, and what she describes is very aggressive behaviour.

76. Objectively assessed, the Claimant's behaviour in both March and September 2016 was reprehensible. One has to remember that he was at work, representing his employer to JAS and JAS to the world. Mr Purnell described the cyclist incident as "simply a heated conversation". It was in my judgment far more than that. The cyclist, Ms McCourt and Ms Turton – anyone who encountered the Claimant – could see that he represented JAS. And of course, as far as the Respondent was concerned, he was one of its representatives to its only customer. Referring to 16 September, Mr Purnell said that it cannot be gross misconduct to shout at a member of the public and that what the Claimant did was thus not particularly serious. First, as just outlined, the incident involved more than that. Secondly, I disagree. As Mr Martin put it, a JAS-liveried lorry followed a member of the public, walked into a nursery car park, and with a child

present, shouted and pointed whilst standing close to that member of the public. One can of course imagine worse misconduct, such as if the Claimant had been physically violent, but that is not the point. This was without question in my judgment conduct which struck at the heart of the employment relationship, destroying the Respondent's trust and confidence in the Claimant. The Claimant showed by his deliberate actions, knowing what the Respondent and JAS thought of his previous behaviour, that he did not intend to be bound by the contract. On that basis too, I would have dismissed this complaint.

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Employment Judge Faulkner

Date: 13 October 2017
JUDGMENT SENT TO THE PARTIES ON

11 November 2017

FOR THE TRIBUNAL OFFICE