EMPLOYMENT TRIBUNALS

Claimant: Mr M Buckley

Respondent: Alphin Pans Limited

Heard at: Manchester **On:** 18 and 19 September 2018

Before: Employment Judge Franey
(sitting alone)

REPRESENTATION:

Claimant: Mr C Breen, Counsel
Respondent: Mr J Boyd, Counsel

WRITTEN REASONS

Introduction

1. These are the written reasons for the judgment given orally with reasons at the conclusion of the hearing on 19 September 2018 and sent to the parties in writing on 5 October 2018.

2. By a claim form presented on 26 June 2018 the claimant complained of unfair dismissal, of breach of contract in relation to notice, and of a failure to pay him holiday pay arising out of the termination of his employment as a Toolroom/Press Shop Manager with effect from 27 March 2018. The response form of 26 July 2018 defended the complaints on the basis it was a fair dismissal and the claimant had been guilty of gross misconduct.

3. At the start of the hearing Mr Breen confirmed that the complaint in respect of holiday pay was withdrawn. He also confirmed that the claimant accepted that the reason or principal reason for his dismissal related to conduct. That meant that the issues for the Tribunal to determine were as follows:

(a) Was the dismissal fair or unfair under section 98(4) Employment Rights Act 1996?

(b) Could the respondent show on the balance of probabilities that the claimant was guilty of gross misconduct which entitled the respondent to dismiss him without notice?

(c) If either complaint succeeded, what was the appropriate remedy?

Evidence

4. The parties had agreed a bundle of documents exceeding 100 pages, and any reference to page numbers in these reasons is a reference to that bundle unless otherwise indicated.

5. I heard evidence from four witnesses, each of whom had prepared a written statement. The respondent called Zoe Turner, the Works Manager who took the decision to dismiss the claimant; David Hutchinson, the Finance Director, who was present at the disciplinary and appeal meetings; and John Matthew Sykes, the Managing Director who heard the appeal against dismissal. The claimant gave evidence himself but did not call any other witnesses.

Relevant Legal Principles

Unfair Dismissal

6. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996.

7. The primary provision is section 98 which, so far as relevant, provides as follows:

> **"(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 sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this sub-section if it … relates to the conduct of the employee …**
>
> **(3) …**
>
> **(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".**

8. The reason or principal reason for dismissal is derived from considering the factors that operate on the employer's mind so as to cause him to dismiss the employee. In **Abernethy v Mott, Hay and Anderson [1974] ICR 323**, Cairns LJ said, at p. 330 B-C:

> **"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."**

9. 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 which was 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?

10. 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.

11. A fair investigation requires the employer to follow a reasonably fair procedure. By section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 Tribunals must take into account any relevant parts of the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.

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

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.

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).

Notice Pay

16. An employee is entitled to notice of termination in accordance with his contract (or the statutory minimum notice period under section 86 Employment Rights Act 1996 if that is longer) unless the employer establishes that he was guilty of gross misconduct. The measure of damages for a failure to give notice of termination is the net value of pay and other benefits during the notice period, giving credit for other sums earned in mitigation.

Relevant Findings of Fact

17. This section of the reasons sets out the broad chronology of events necessary to put my decision into context. Any disputed facts of significance will be addressed in the discussion and conclusions section.

Background

18. The respondent manufactures and supplies pizza pans and related equipment and accessories. At the relevant time it employed approximately 38 employees. Mr Sykes was the Managing Director, and David Hutchinson the part-time Financial Director. They were the two most senior managers. Next came the Works Manager, Zoe Turner, to whom the Assistant Works Manager, Terry Hunter, reported.

19. The employees were divided into a number of different teams. The claimant was one of three managers of those teams. He had been employed since October 2009. He was an experienced engineer whose skills were valued by the company. His most recent statement of terms and conditions (January 2018 pages 53-56) showed that he was on a salary exceeding £38,000 per annum.

20. The respondent has commissioned external management training in the past.

Disciplinary Procedure

21. The disciplinary procedure appeared at pages 106-107. It made provision for a disciplinary meeting and a right of appeal. Possible disciplinary action ran from a verbal warning up to dismissal. It said that an employee may be dismissed without notice and without pay in lieu of notice if the employee was guilty of gross misconduct.

22. Non-exhaustive examples of gross misconduct appeared in paragraph 7.3 on page 107. They included:

> **"Offensive behaviour…wilful disregard of duties or of instructions relating to the employment; breach of confidence relating to the company's or its customers' affairs; the use for personal ends or the unauthorised publication or communication of confidential information obtained by the employee in the course of his employment;…unlawful discrimination against or harassment of others; failing to work in accordance with instructions."**

Previous Issues

23. Prior to the events which gave rise to this claim there were four issues raised involving the claimant.

24. The first issue was a complaint about his behaviour by a colleague, Ms Bailey, in January 2015 (pages 28-30). She accused him of speaking to her in a sarcastic and aggressive way. Mr Hutchinson interviewed Ms Bailey on 16 January 2015 (page 31) and spoke to the claimant. The matter was not taken any further.

25. The second matter was a complaint about the claimant from a colleague, Ms Siddall, in August 2016 (pages 36-37). She alleged that he had threatened her with getting "every rubbish job from now until Christmas" because she was working slowly. Ms Turner interviewed the claimant (page 38) and invited him to a disciplinary hearing in September 2016. She provided him with a copy of the disciplinary procedure and he did a statement about what had happened (page 42). The upshot was a letter of 8 September 2016 at page 46 which said that the available evidence did not support any formal disciplinary action. The letter ended, however, as follows:

> **"I must, however, stress you must ensure you are always courteous and polite to fellow work colleagues and support members of your team where they need help."**

26. The third issue was a complaint about the claimant in October 2017 from his colleague, Mr Riley. He accused the claimant of being increasingly more aggressive in the way he was speaking to him, and of physically pushing him out of the way. He gave examples of what he considered to be verbal abuse by the claimant. An email from Mrs Turner of 11 October 2017 to Mr Hutchinson indicated that the claimant had apologised to Mr Riley, and that his apology had been accepted.

27. The fourth issue arose in February 2018. By a letter at page 57 the claimant was invited to a disciplinary hearing to deal with two matters relating to production: a failure to complete calibration information correctly in readiness for an ISO accreditation audit, and a repeated failure to log onto the Progress Plus system to account for his time. The disciplinary hearing was conducted by Mrs Turner and Mr Hutchinson on 28 February 2018. The notes appeared at pages 58-59. The claimant accepted that he had not done the calibration spreadsheet properly and asked for training, but the view was that he was able to use an Excel spreadsheet because he had used one in other areas of his work. There was a discussion about the Progress Plus system in which the importance of recording time was reiterated to the claimant. Mrs Turner offered him help in completing spreadsheets. The outcome was a written warning which was first set out in an undated letter at page 60. The warning was to remain on record for six months, and the letter said:

> **"During that time, we expect to see a noticeable improvement in your performance and attitude."**

28. The letter also said that if there was an appeal the outcome could be more severe, including dismissal.

29. After the events of 8 March 2018 (see below) the claimant pointed out that the letter had been unsigned and undated, and it was reissued to him on 9 March 2018 (page 73).

Trackers

30. In December 2017 the company installed trackers on its vehicles. The drivers were aware that this was being done.

7 and 8 March 2018

31. On 7 March 2018 the claimant was in a meeting with Mrs Turner when a colleague, Mr Avison, interrupted their meeting to ask how long Andy Wright would be delivering to a particular customer as the customer had rung concerned he was going to be late. The claimant supplied the registration of Mr Wright's vehicle and Mrs Turner checked the tracker information and could see that the vehicle was parked up. The claimant heard Mrs Turner convey this information to Mr Avison. Mrs Turner later prepared a note of this event which appeared at pages 61-62.

32. The following morning Mr Avison approached Mrs Turner and told her that Mr Wright had just confronted him in the kitchen. He told Mrs Turner that the claimant had told Mr Wright about the events of the previous day and that Mr Wright was quite angry about it. Mrs Turner kept a personal note of these events at page 63. It confirmed that she spoke to Mr Sykes and took legal advice, and was advised to get statements from Mr Wright, Mr Avison and the claimant.

Turner Investigation

33. Mrs Turner spoke to Mr Wright, who apologised for confronting Mr Avison but said he was a bit upset about the claimant giving him information about his driving the previous day. He was asked to write a statement.

34. Mrs Turner then spoke to the claimant in the presence of Terry Hunter. According to her personal note at page 63 she told the claimant she had been asked to look into an accusation that he had given information about Andy Wright being tracked on the tracking system the previous day. The claimant later said in the disciplinary hearing on 27 March 2018 (page 87) that he had been told there could be gross misconduct. Mrs Turner denied having used that phrase.

35. Mr Avison signed a statement at page 64. He gave an account of how Mr Wright had confronted him on 8 March 2018. Mr Wright told him that the claimant had approached him and mentioned Mr Avison's name.

36. Mr Wright did his own statement at page 65. The relevant parts read as follows:

> **"I was working on Red Ring when Mick Buckley asked me about driving the transit van. When I asked why he said, 'did you stop at Manatowak?'. I said 'yes' then he said, 'did you switch the engine off for a minute?'. When I asked why he said, 'you had stopped then started again'. I then said, 'what do you mean?'. He said, 'Corey [**Avison**] had you on tracker to see if you had got there'. I said, 'yes, made delivery then set off'. He then said, 'why did you stop before?'. I had to think and said I stopped for a wee – was less**

> **than a minute then set off back to base. I then said, 'why all this?'. He said, 'they are watching you so be careful!'."**

37. It was clear from the written statements that Mr Wright had apologised to Mr Avison, and that Mr Wright did not want the claimant to lose his job over this.

Claimant's emails 8 March 2018

38. After speaking to Mrs Turner the claimant sent an email at 10:33 on 8 March (page 66). He copied it to Mr Sykes, Mr Hutchinson, Mr Hunter and two other members of staff. His email said in its entirety:

> **"I don't know what you are looking for regarding the van trackers, but I feel you are once again picking on me for something everyone else has spoken about. I have felt for some time now that you are bullying me. Please stop this, it is making me feel ill and there is no reason for it."**

39. Mrs Turner replied at page 67 and confirmed that she had instructed the claimant to let her have a statement giving his account of the conversation with Mr Wright. Her email said:

> **"This is required for the purpose of investigating the apparent disclosure of confidential information to Andrew [**Wright**], which it appears you overheard when you were in the office with me the other day. You are a manager and are expected to behave as one, and if you do not you must expect action to be taken. This is not bullying; it [**is**] what a manager has to do.**
>
> **For some reason you have seen fit to copy your email not only to Matthew [**Sykes**] and David [**Hutchinson**] (which is fair enough) but to others in the business, who have no involvement in the matter at all. This would appear also to be a breach of confidence. I instruct you again to let me have your written account of your conversation with Andrew [**Wright**] without delay. I expect to have it before 12 noon, and it must not be shown to anyone else."**

40. The claimant replied shortly after noon (page 68). In its entirety his email said:

> **"I have not given any information to another member of staff to my knowledge. Once again it is public knowledge that the vans have trackers on them (they were fitted in the car park here at Alphin Pans). I do not recall giving anyone information. Once again please stop this constant harassment. I just want to do my work."**

Invitation to Disciplinary Hearing 8 March 2018

41. Later that day the claimant was handed a notice of a disciplinary meeting. The letter of 8 March appeared at page 69. The witness statement from Mr Wright was enclosed, but not the witness statement from Mr Avison, or the personal notes of Mrs Turner. The letter set out the allegations as follows:

> **"The allegation against you is that on 7 March 2018 you spoke to Andrew Wright and disclosed to him confidential communications which you had overheard in my office on 6 March 2018. In particular, it is alleged that you informed Andrew Wright that Corey Avison had him on tracker and that you said, 'they are watching you so be careful'.**
>
> **It is also alleged that despite my instructing you to provide a statement giving your account of the conversation which it was reported that you had yesterday with Andrew**

> **Wright, when you eventually responded you told me that you did not recall giving anyone information. It appears that this is untruthful…**
>
> **The allegations against you will be considered at a disciplinary meeting, which could result in further disciplinary action or even the termination of your employment, on 13 March 2018 at 9.00am. The allegations that you have untruthfully stated that you did not recall speaking to Andrew Wright could amount to gross misconduct and justify your immediate dismissal."**

42. The letter suggested that it was the untruthful denial of having spoken to Andrew Wright which might amount to gross misconduct, not the disclosure of confidential information. The letter did not spell out exactly what confidential information had been disclosed by the claimant.

43. After being given the letter the claimant left work during the afternoon. Mr Sykes found him in the local pub later that afternoon and asked him to come in the following morning for an informal chat to resolve matters. The claimant did not take him up on this offer. On 9 March 2018 he was certified unfit for work until 23 March by reason of stress at work (page 74).

Before the Disciplinary Hearing

44. The claimant asked for the disciplinary hearing to be postponed until after the expiry of his fit note (page 75). Mrs Turner agreed only to postpone it to 19 March because the fit note did not say that the claimant was not fit to attend the hearing. The claimant provided a letter from his GP of 16 March at page 78 and the hearing was then postponed to 27 March.

45. On 21 March the claimant wrote to Mrs Turner asking for a copy of all the evidence that would be provided by the company at the disciplinary meeting (page 80). The reply of 21 March at page 81 enclosed a further copy of the witness statement of Mr Wright, and a copy of the email at 12:22 on 8 March in which the claimant said he could not recall giving anyone any information. It said that David Hutchinson and Mrs Turner would deal with the meeting and that Mr Hutchinson would keep a note.

46. The claimant responded on 22 March (page 82) asking for evidence of the breach of confidential information. He also repeated his assertion that he was entitled to be accompanied by anyone he chose.

47. Mrs Turner responded on 23 March at page 83. She confirmed that the right to be accompanied was restricted to work colleague or union representative only. As to the queries raised, she said the following:

> **"The points which you have raised can, if needs be, be discussed at the disciplinary meeting and I do not propose to debate them in correspondence before then. As you have already been informed it is alleged that you disclosed confidential communication which you overheard in my office and told Andrew Wright that he was being watched."**

48. Pausing there, it was clear that the confidential information which it was said had been disclosed was not that the trackers had been fitted to the vehicles. It was that Mr Wright was being watched. That point appeared to be lost on the claimant.

By a letter of 26 March 2018 at page 84 he said the information that there were trackers was not confidential.

49. Mrs Turner responded on 26 March at page 86. Her letter said:

> **"The purpose of the disciplinary meeting is to allow us to discuss the allegations against you. However, for the avoidance of doubt, it is not confidential that trackers are fitted. This is well known, as you acknowledged in your email of 8 March 2018. The discussions between a colleague and me which you overheard while in my office are alleged to be confidential. In any event, it is alleged that you have no business saying what you appear to have said to Andrew Wright. You will recall that the other allegation against you is that you untruthfully told me that you did not recall giving anyone information."**

Disciplinary Hearing 27 March 2018

50. The disciplinary hearing took place on 27 March. The notes kept by David Hutchinson appeared at pages 87-88. The claimant was not accompanied. Mrs Turned explained the purpose of the meeting. The claimant confirmed that he had heard Mr Avison ask Mrs Turner to use the vehicle tracker to find out when Mr Wright was likely to arrive at the customer. A copy of Mr Avison's statement was handed to the claimant. He pointed out he had not seen it before, but he did not ask for an adjournment of the meeting.

51. Mrs Turner asked the claimant about his email saying he had not given any information to another member of staff. She said she had repeatedly asked for a statement from the claimant which had not been forthcoming. The claimant then gave for the first time his account of what he had discussed with Mr Wright. It was recorded in Mr Hutchinson's notes as follows:

> **"[**The claimant**] says he did speak to [**Mr Wright**] to ask him if he had managed to make the delivery to Welbilt in time. He said that [**Mr Wright**] told him he had stopped for a wee and in response to that comment [**the claimant**] said you want to be careful. [**The claimant**] denied saying 'they are watching you' and said that some of the comments in Mr Wright's statement had been taken out of context by Mr Wright. He said that Mr Wright had made the comments under duress. [**Mrs Turner**] asked what he meant by this and [**the claimant**] suggested [**Mrs Turner**] look in the dictionary."**

52. The note recorded the claimant going on to say that his contact with Mr Wright was meant as a joke, and he had spoken to Mr Wright because he was concerned about components being late for the customer and stopping their production line. He said these were "trumped up" charges and that he did not agree with the conclusion of the previous disciplinary meeting where he received a written warning.

Dismissal

53. No decision was made at the meeting. Mrs Turner formed the view that the claimant should be dismissed. She spoke to Mr Sykes and Mr Hutchinson about this and they agreed to support her decision. It was communicated to the claimant by a letter of 27 March 2018 at page 89. The relevant parts of the letter read as follows:

> **"I am satisfied that you spoke to Andrew Wright and asked him about information relating to his driving a company vehicle which you only knew by reason of your presence in my office when you overheard my conversation. I am satisfied that you**

knew (or should have known) that this conversation was confidential. I am also satisfied that you did not have any valid reason for discussing the matter with Andrew Wright.

I am also satisfied that I instructed you to give an account of what you said and that you said that you did not recall giving anyone information. I am satisfied that this was untrue, and that you knew it to be. I am satisfied that your intention was probably to cause mischief.

Rather than apologise, or indicate that you understood or accepted that your conduct was wrong and not what is expected of someone in your position, you suggested that the charge against you had been 'trumped up'. If you had shown any regret or apologised, then it might have been possible to give you the benefit any doubt. However you did not do so.

Having given the matter careful thought I am satisfied that your conduct amounts to gross misconduct and that you should be dismissed for this reason with immediate effect."

54. The letter gave the claimant the right of appeal to Mr Sykes. It did not tell him that Mr Sykes had already supported the decision to dismiss him.

Appeal

55. The claimant appealed by a letter of 29 March 2018 (page 93). He disputed that there was any misconduct or any breach of the disciplinary policy. He said it was outside the band of reasonable responses. He said that what he spoke to Mr Wright about was not confidential but common knowledge. There had been no evidence of gross misconduct and the witness statement of Mr Avison should have been disclosed to him before the hearing. He said that no alternatives to dismissal had been considered.

56. The appeal hearing was arranged for 10 April. The claimant wrote to Mr Sykes on 9 April (page 95) to ask about being accompanied by someone from outside the company, and about who would be taking notes. The response the same day at page 96 reiterated that he could be represented only by a union official or a colleague, and said David Hutchinson would take notes.

57. On 5 April 2018 the company issued the claimant's P45 (page 105).

58. Mr Hutchinson's notes of the appeal hearing on 10 April appeared at pages 97-100. Mr Sykes responded in turn to each of the nine numbered points in the appeal letter. He said that he claimant had been dismissed for elements of offensive behaviour, breach of confidence and harassment. There was a discussion about what the claimant had said to Andrew Wright. Again the claimant denied using the words "watching you" but agreed he had used the words "be careful" as stopping for a toilet break had delayed Mr Wright's journey.

59. In dealing with the reasonableness of the dismissal, Mr Sykes pointed out that the matter arose shortly after the written warning. He also said the claimant had been telling other members of staff that the toolroom was going to close, which was untrue but which had caused trouble among staff. Mr Sykes also accused the

claimant of spreading rumours that the company was going to be sold which had caused unrest. The claimant denied these allegations.

60. Mr Sykes told the claimant he was missing the point about the confidential information: it was not that there were trackers on the vehicles, but the fact that he had relayed a confidential conversation in Mrs Turner's office to Mr Wright in an attempt to frighten Mr Wright. Finally, it was clear that alternatives to dismissal had been considered but the claimant had been given the benefit of the doubt on past occasions. Mr Hutchinson said he was aware of the complaints by Ms Bailey, Ms Siddall and Mr Riley where in each case the claimant's word had been accepted.

61. The decision to reject the appeal was confirmed by Mr Sykes in the letter of 11 April 2018 at page 101. The note of the meeting was enclosed. The appeal letter said:

> **"I am satisfied that you deliberately told Andrew Wright that he should be careful, that the company was watching him. This was as a result of the confidential conversation which you overheard in Zoe's office. I am also satisfied that you did this in order to upset Andrew [**Wright]**.**
>
> **I am also satisfied that although you were instructed to provide an account of what you said, you said that you did not recall giving any information. I am satisfied that this was untrue, and that you were deliberately uncooperative and obstructive.**
>
> **It was a feature of our meeting (as appears throughout this process) that you have failed either to apologise for your conduct or to show regret for your conduct. I agree with Zoe [**Turner**] that if you had, then it might have been possible to give you the benefit of any doubt.**
>
> **With regret, I am satisfied that the decision to dismiss you for gross misconduct was correct and it should stand."**

Submissions

62. At the conclusion of the evidence each representative made an oral submission.

Claimant's Submission

63. On behalf of the claimant Mr Breen submitted that elements of the **Burchell** test had not been met. There was no reasonable suspicion of misconduct, no reasonable investigation and dismissal was outside the band of reasonable responses. He suggested there had been an "ever-changing landscape" as to the reason for dismissal, but ultimately the real reason was given by Mr Sykes in cross examination: the claimant had a conversation with Mr Wright designed to intimidate him. This was the "harassment" element. That allegation had not been put in the disciplinary invitation letter and he did not know that this was what was being considered. The consequence was that there was a fundamental failure in not going back to Mr Wright after the claimant's disciplinary hearing (or the appeal) to put to him what the claimant had said.

64. As to the allegation in relation to not providing a written statement, the claimant had good reasons for not complying with that instruction because he felt

under threat. Nevertheless he had given his account of events to Mrs Turner at the disciplinary hearing. Mrs Turner failed properly to investigate the matter, and at the appeal stage Mr Sykes did not put that right by carrying out his own investigation.

65. The respondent's reliance on the earlier matters was just an attempt to undermine the claimant by portraying him as aggressive and unreasonable. If that had been the case there would have been more disciplinary action at an earlier stage. He had been deterred from appealing the written warning by the threat that if he did so he might be dismissed. Overall Mr Breen submitted that it was an unfair dismissal, even if I were to conclude that the principal reason was the passage of confidential information to Mr Wright and the claimant's response to the instruction regarding a written statement.

66. As to unfair dismissal remedy, Mr Breen argued there should be no reduction because of **Polkey** and that there was no basis for a reduction due to contributory fault. The claimant had a legitimate reason to speak to Mr Wright about the delivery he had been making a day or so earlier.

67. Mr Breen invited me to dismiss the notice pay complaint on the basis that the respondent had failed to prove the claimant had been guilty of gross misconduct.

Respondent's Submission

68. On behalf of the respondent Mr Boyd began by emphasising that the respondent was a small company, and reiterating that the correct band of reasonable responses test meant that the respondent acted unfairly only if no reasonable employer would have acted as it did. It was important to look at whether there was any unfairness visited on the claimant, not simply to assume that there was unfairness simply because there was no separation of the investigatory, dismissing and appeal roles.

69. Mr Boyd invited me to conclude that the claimant had a tactic of saying he did not understand something in order to distract or delay matters, and that I should take this into account in assessing the fairness of the process.

70. More broadly he submitted that all aspects of the **Burchell** test were met. The charges were clear and the claimant accepted he understood them. He was clear it was not confidential information about the existence of the trackers, but rather that Mr Wright was being watched. There was a separate charge about the response to the instruction to provide a written statement, and this encompassed both the failure to do such a statement and the allegation that he was untruthful in saying he had not disclosed any information.

71. As to the historic matters, Mr Boyd submitted that even on his own case the claimant was culpable to some degree and therefore there were genuine and reasonable concerns about his attitude and behaviour which encompassed the written warning.

72. Further, there were reasonable grounds for concluding that the claimant spoke to Mr Wright with mischievous intent, because he had no interest in the

delivery in question. The customer had already rung Mr Avison about it. It was reasonable not to go back to Mr Wright when the claimant gave his account in the disciplinary hearing. Mr Wright had given a clear written account. It was reasonable to prefer that to the claimant's account.

73. As to the reason for dismissal, Mr Boyd denied that there was any “shifting landscape”. He said there was a consistency between the charge letter, the disciplinary hearing, the dismissal letter and the appeal. It was about the conversation with Mr Wright in which the claimant disclosed confidential information, and about his response to the instruction to do a written statement. It was necessary to take a realistic view of the words on the page rather than conduct a semantic deconstruction.

74. As to the appeal, he acknowledged that paragraph 27 of the ACAS Code of Practice said that wherever possible an appeal should be dealt with by somebody not previously involved, but the test remained whether the way this respondent dealt with it fell outside the band of reasonable responses. Although many employers might have ensured Mr Sykes had no involvement, or would have allocated the appeal to an external person, those were not the only reasonable ways of dealing with it. Fundamentally no substantive unfairness had arisen from the involvement of Mr Sykes at the appeal stage. He had only sanctioned a decision which Mrs Turner had made.

75. As to remedy issues if the dismissal was unfair, Mr Boyd argued that there were grounds for a **Polkey** reduction based on the fact the claimant would have been dismissed within a period in any event given the concerns about his behaviour, or failing that if dismissal was unfair only for procedural reasons there was a 100% chance he would have been dismissed anyway if a fair procedure had been followed. As for contributory fault, it was culpable and blameworthy for the claimant to speak to Mr Wright, and although 100% might not be appropriate, a high reduction could still be just and equitable.

76. In relation to breach of contract he invited me to conclude that the claimant had been guilty of gross misconduct in both of the disciplinary allegations.

Discussion and Conclusions – Unfair Dismissal

77. The first matter I addressed was the unfair dismissal complaint.

Reason

78. The claimant accepted that in this case the reason related to conduct, but there was a dispute about precisely which conduct. It was necessary to make a finding about the reason or principal reason for dismissal because that was relevant to fairness.

79. Mr Breen argued that there was a changing landscape but that ultimately the true reason the claimant was dismissed was because of the perception that he had harassed Mr Wright. Mr Boyd argued that in fact there had been a consistency about the reasons from the initial disciplinary invitation to the conclusion of the appeal.

80. A reason for dismissal is a set of facts or beliefs in the mind of the decision maker. That raises the question about who made the decision. In this case I was satisfied that it was Mrs Turner who took the decision to dismiss the claimant even though she ran her decision past Mr Hutchinson and Mr Sykes. They both supported the decision, but it remained hers.

81. The dismissal letter at page 89 set out two reasons for Mrs Turner's decision: firstly, that the claimant had discussed confidential information with Mr Wright for no valid reason; secondly, that she had instructed the claimant to give an account of his discussions with Mr Wright and that the claimant had untruthfully said he did not recall giving any information.

82. In cross examination Mrs Turned accepted she knew of the previous issues involving the claimant, not all of which appeared in the bundle of documents for this hearing, but she emphasised that she had to make a separate decision on these allegations alone. She said that she would have regarded the claimant's conduct as gross misconduct even for a new employee with no history of issues. Nevertheless she did go on to say that harassment would have played a part, and explained that by "harassment" she meant that the claimant had passed on confidential information in a poisonous way, not just as banter. In her view there was no good reason for the claimant to speak to Mr Wright, although she denied that this was the main reason for dismissal.

83. Putting these matters together I was satisfied that the principal reason in Mrs Turner's mind was a combination of the two allegations in the disciplinary invitation letter: discussing confidential information with Mr Wright for no valid reason, and then falsely denying having passed information on when instructed to do a statement about it. I rejected Mr Breen's argument that the perception there had been harassment or the claimant acting in a poisonous way was the principal reason for the dismissal.

84. On appeal Mr Sykes set out his conclusions in his outcome letter at page 101, and again he mentioned the same two matters. But the harassment element was also there. The letter said the claimant told Mr Wright that he was being watched in order to upset him. In cross examination Mr Sykes said he had decided the claimant approached Mr Wright in a poisonous way not as banter, and that the history of previous allegations about the claimant was in the back of his mind. Nevertheless it was clear to me that they were subsidiary factors in his thought process, and again I was satisfied that Mr Sykes had as a principal reason for upholding the dismissal the claimant's conduct on the two allegations: disclosing confidential information to Mr Wright and responding untruthfully to the instruction to do a statement about it.

85. I therefore rejected the claimant's case that this was a dismissal in truth because of harassment or poisonous behaviour towards Mr Wright. The reasons given in correspondence were the principal reasons even though those other factors played a minor part.

Fairness - General

86. Having made that finding I turned to the question of fairness under section 98(4. I applied the well-known test set out in **Burchell** but noted that the statute requires me to take into account the size and administrative resources of the employer as well as equity and the substantial merits of the case.

87. Importantly the Tribunal must not substitute its own view of what would have been appropriate for the view taken by the respondent: the test is whether the respondent fell within the band of reasonable responses, and that applies to all aspects of the dismissal and appeal process.

88. As to the respondent's resources, it is a relatively small employer with no dedicated HR function or indeed managers with formal HR qualifications. Nevertheless it was able to commission management training and it had access to legal advice at the relevant time.

89. Against that background I considered the various elements of the Burchell test.

Fairness – Genuine Belief

90. I was satisfied there was a genuine belief in the minds of Mrs Turner and Mr Sykes that the claimant was guilty of misconduct in relation to both allegations.

Fairness – Reasonable Grounds

91. The next question was whether that belief was based on reasonable grounds. I considered each of the two allegations.

92. In relation to allegation one, the decision makers had the statement from Mr Wright at page 65 in which he recorded the claimant as saying that, "Corey had you on tracker to see if you got there" and "they are watching you, be careful". The claimant's denial that he said these things and his different account of his conversations with Mr Wright in my judgment could reasonably be rejected. Firstly, the claimant was not forthcoming with his version despite clear instructions for him to provide it, and repeated attempts informally by Mrs Turner to get him to do so. He only gave his account of events at the last possible moment, namely at the disciplinary hearing. Secondly, Mr Wright did not appear to have any reason to invent or exaggerate what the claimant told him, and indeed on page 65 in his statement he made clear he did not want the claimant to lose his job. Thirdly, it was clear that Mr Wright had been upset by what the claimant told him because he approached Mr Avison the next day in an angry fashion. There were reasonable grounds for the conclusion the claimant was guilty of allegation one.

93. In relation to allegation two, there were reasonable grounds for the conclusion the claimant had not responded as he should have done to the written instructions from Mrs Turner. The claimant's email at page 68 saying he did not recall giving information to anyone was wrong. He had spoken to Mr Wright and indeed he was able to recall that discussion in the subsequent disciplinary hearing. It was reasonable, in my judgment, for the respondent to reject the claimant's argument

that he meant confidential information in that email, not least because that phrase was not used in the email itself.

94. It therefore followed that there were reasonable grounds for the conclusion the claimant was guilty of misconduct on both allegations.

Fairness – Reasonable Investigation

95. The next question was whether the respondent carried out such investigation of the matter as was reasonable in all the circumstances.

96. Paragraph 6 of the ACAS Code says that where practicable different people should carry out the investigation and deal with the disciplinary hearing. In this case Mrs Turner performed both functions. However, I concluded it was within the band of reasonable responses for that to be the case in the particular circumstances facing her. The first allegation was a simple question of what the claimant had said to Mr Wright. Mrs Turner was not a witness to that. The second allegation was one where Mrs Turner was herself involved as a witness, but in reality it was simply based on the exchange of emails alone, and in those circumstances, bearing in mind the size and resources of the respondent's management, I was satisfied it was reasonable for her to fulfil both roles.

97. As for the investigation itself, it was limited but in my judgment within the band of reasonable responses. Mrs Turner sought written statements from all three people involved in the discussions on 7 and 8 March, and the allegations were put to the claimant and he had a chance to respond at the disciplinary hearing where he finally gave his account.

98. Mr Breen was strongly critical of the failure to go back to Mr Wright after the disciplinary hearing to put to him what the claimant had said. It is certainly true that many employers would have taken that step. There was an important difference between the claimant's account and Mr Wright's account, namely whether the claimant had told Mr Wright that "they are watching you". Nevertheless, I concluded it was within the band of reasonable responses not to take that step in these circumstances. Firstly, it was clear that the claimant must have told Mr Wright of Corey Avison's involvement in the discussion in the office the previous day because Mr Wright went to confront Mr Avison about it. Secondly, Mr Wright had done a clear written statement. Thirdly, the claimant did not give his account freely but only at the last possible moment in the disciplinary hearing. Fourthly, the claimant's suggestion that Mr Wright's witness statement had been taken under duress could reasonably be regarded as not a credible assertion by the respondent.

99. I was therefore satisfied the investigation also fell within the band of reasonable responses.

Fairness - Procedure

100. I considered whether the respondent had followed a reasonably fair procedure.

101. The charge letter was reasonably clear. The claimant knew that the two issues were (a) his discussion with Mr Wright, telling Mr Wright that Mr Avison was involved and telling him, “they are watching you, be careful”, and (b) his claim when he was instructed to do a witness statement that he gave no-one any information.

102. The disciplinary investigation letter was accompanied by a copy of Mr Wright’s witness statement, which was the key piece of evidence on allegation one. The claimant did not get Mr Avison’s witness statement until the hearing and he did not get Mrs Turner’s notes at any stage in the internal procedures, but in my judgment they did not go to the heart of allegation one, and the claimant was unable to identify anything he would have done differently if he had received Mr Avison’s witness statement any earlier.

103. On allegation two the key documentation was the email exchange. Mrs Turner provided the claimant with a copy of his own email from 12:22 on 8 March with her letter of 21 March 2018 at page 81.

104. The claimant was afforded the right to be accompanied by a union representative or a colleague as the legislation and the ACAS Code requires. At the hearing he had a fair opportunity to give his version of events and explanations. It appeared from page 88 that he had done a statement but it was not produced to this hearing, and I inferred that he did not provide a copy of it to the respondent after the disciplinary hearing.

105. Finally, the decision to dismiss him was adequately explained in the dismissal letter.

Fairness - Appeal

106. The appeal was part of the procedure to be considered too. Paragraph 27 of the ACAS Code of Practice says that an appeal should be dealt with impartially and wherever possible by a manager who has not previously been involved in the case. Mr Sykes had been involved at two stages.

107. Firstly, Mrs Turner spoke to him on 8 March and he had said she should get legal advice: that was recorded in her note at page 63. That was not a big issue and did not affect his ability to deal with the appeal.

108. Secondly, after the hearing Mrs Turner told him of her decision and he agreed with it and supported it. In my judgment that was something which on the face of it disqualified him from hearing the appeal as he was most unlikely to overturn a manager whose decision he had endorsed before it was communicated to the employee.

109. To avoid that situation there were broadly two options open to the respondent. The first was to ensure that a senior manager, whether Mr Sykes or Mr Hutchinson, would not be involved in the dismissal so that he would be able to hear the appeal. The second was to get an outside person to hear the appeal and recommend a decision, for example via the respondent’s solicitors. Mr Boyd argued that it was within the band of reasonable responses to do neither, but I rejected that argument.

The respondent does have a small management team but its resources are sufficient to bring in an external person if all of the managers have previously been involved. Either course of action would have been reasonable, but in a case involving allegations of gross misconduct against an employee who has been employed for broadly ten years, to do neither was outside the band of reasonable responses. It follows that the claimant was denied a fair appeal, and on that ground alone the dismissal was unfair.

Fairness - Sanction

110. It was still appropriate, however, to consider the substantive question of the reasonableness of the dismissal because it will impact on remedy. The question could be put as follows: having formed the view on reasonable grounds after a reasonably fair investigation that the claimant was guilty of misconduct on allegations one and two, was it within the band of reasonable responses to dismiss him instead of imposing a lesser disciplinary sanction?

111. That question involved a two stage test. In my judgment it was reasonable to characterise the claimant's actions as gross misconduct. There were two allegations, not just one. The claimant was a manager who had for no apparent valid reason disclosed to an employee information of a confidential nature to which he was privy only as a manager. That was a serious matter and the respondent was entitled to take account of the fact that breach of confidentiality was one of the examples of gross misconduct in the disciplinary procedure at page 107. In addition, the conclusion that the claimant had misled Mrs Turner when he said there was no information disclosed, and that that showed dishonesty, was also a reasonable conclusion. He had wilfully disregarded the instruction to give an account of his conversation with Mr Wright, and wilful disregard of such instructions was also an example of gross misconduct on page 107.

112. The second stage, however, was to consider whether dismissal itself was a reasonable sanction. It is not an automatic consequence of any act of gross misconduct, and a fair employer must still consider whether that is the appropriate sanction even once gross misconduct has been established. Here, however, there were no real mitigating features. The claimant did not admit his error or show any remorse. He continued to deny any wrongdoing. He sought to say that the charges were “trumped up” and he also challenged the validity of the recent written warning on the same basis. He asserted that Mr Wright must have been put under duress. In my judgment those matters were enough to enable a reasonable employer to say enough is enough and to dismiss the claimant for gross misconduct.

113. In summary, therefore, I concluded this was an unfair dismissal, but only because the claimant was denied an appeal to an impartial person.

Discussion and Conclusions – Remedy for Unfair Dismissal

114. There were two matters going to remedy which were canvassed in the evidence and submissions.

Just and Equitable Reduction

115. The first issue was whether there should be any reduction to the compensatory award because it is just and equitable to make such a reduction pursuant to the principle established in **Polkey v A E Dayton Services Limited [1988] ICR 142**. Inherently this involves some degree of speculation by the Tribunal.

116. I was satisfied that the claimant would have had a very limited chance of success if he had been given the right of appeal to a genuinely independent person. The case against him was pretty strong. His conduct in the disciplinary hearing did not help him. In my view it was very likely the appeal would have been rejected and dismissal confirmed. Nevertheless there was still a small possibility his appeal might have been successful, and an external person might have recommended to Mr Sykes that he be reinstated. I also bore in mind what Mr Sykes very fairly said about his positive view of the claimant's abilities in terms of his work as an engineer; he was ready to acknowledge the quality of that work.

117. I therefore concluded that there was an 80% chance that if the claimant had been given a fair appeal he still would have been dismissed, and therefore the compensatory award should be reduced by 80%.

Contributory Fault

118. The second issue was whether the claimant was guilty of “contributory fault” justifying a reduction under section 122(2) for the basic award and section 123(6) for the compensatory award. This is to be assessed on the basis of the Tribunal’s own view not the reasonableness of the respondent’s view.

119. I applied the principles set out in **Nelson v BBC (No 2) [1980] ICR 110.** The test was whether I am satisfied that the claimant was guilty of culpable and blameworthy conduct which, for the compensatory award, contributed to his dismissal, and that it would be just and equitable to make a reduction. The same test broadly applied in relation to the basic award but without the same requirement for a causal link.

120. I was satisfied that the claimant did act in a way which was culpable and blameworthy. It was plain that at the very least, even on his own account, he made Mr Wright aware that Corey Avison had been involved. That in itself was a breach of managerial confidence. It was also plain from the exchange of emails that the claimant was obstructive and uncooperative when asked for his account. In my judgment that was culpable and blameworthy conduct and it is just and equitable to reduce compensation.

121. Overall I considered that the basic and compensatory awards should both be reduced by 75% to reflect that conduct on the part of the claimant which was at the root of this dismissal.

Discussion and Conclusions – Notice Pay

122. The legal test was whether the respondent had proven on the balance of probabilities the claimant was guilty of gross misconduct. This too was to be

assessed on the basis of the Tribunal's own view, not the reasonableness of the respondent's view.

123. I was satisfied that the respondent had discharged that burden. In my judgment, based on the evidence before me, the claimant was guilty of gross misconduct in speaking to Mr Wright about a matter he knew was confidential to managers, and in failing to cooperate with the enquiry which Mrs Turner then sought to pursue. I was satisfied that the claimant deliberately sought to avoid giving details to Mrs Turner because he knew that there would be adverse consequences once he did so.

124. The complaint of breach of contract in relation to notice pay failed and was dismissed.

Unfair Dismissal Awards

125. Once the Tribunal had given judgment with oral reasons the parties were able to reach agreement on the appropriate awards, and therefore no order was made in relation to the basic or compensatory awards.

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Employment Judge Franey

29 October 2018

REASONS SENT TO THE PARTIES ON

8 November 2018

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FOR THE TRIBUNAL OFFICE