THE EMPLOYMENT TRIBUNALS

Claimant: **Mr F M Armstrong**

Respondent: **Ibstock Brick Limited**

Heard at: **North Shields Hearing Centre** **On: 12 & 13 February 2019 & 8, 9 & 10 April 2019**

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

Representation:

Claimant: **Mr G Sydenham, Solicitor**
Respondent: **Ms C Robins, Solicitor**

JUDGMENT

The judgment of the Tribunal is that the claimant's complaint under section 111 of the Employment Rights Act 1996 that his dismissal by the respondent was unfair,

1. being for one or more of the reasons contained in section 101A of that Act was withdrawn by the claimant and is dismissed;

2. being contrary to sections 94 and 98 of that Act, is not well-founded and is dismissed.

REASONS

Representation & evidence

1. The claimant was represented by Mr G Sydenham, Solicitor who called the claimant to give evidence.

2. The respondent was represented by Ms C Robins, Solicitor, who called three employees of the respondent to give evidence on its behalf as follows: Mr D Auchterlonie, Engineering Manager of the respondent's Throckley factory; Mr R

Johnson, Factory Manager of the respondent's Birtley factory; Mr J Lambert, the respondent's Regional Production Director – North.

3. The claimant also provided witness statements from two other employees of the respondent. I did not consider those witness statements. The individuals had failed to attend on any day of the hearing and the claimant had not sought an order that they should despite having followed that procedure in respect of a third employee of the respondent. Further, Mr Sydenham informed me that he had produced a statement of the evidence that he wanted that third employee to give and had sent it to him for approval without actually having taken any evidence from him, but had not heard further from him. In these circumstances I considered that it would be improper to give any weight to those two witness statements that I did have from employees of the respondent.

4. I also had before me an agreed bundle of documents comprising in excess of 250 pages and a separate bundle compiled by the claimant containing the Acas Code of practice on disciplinary grievance procedures, three Acas guides, the Information Commissioner's Office Data Protection document headed "The employment practices code" and the respondent's privacy notices in respect of its handling of data.

The claimant's complaint

5. The claimant's complaint was that his dismissal by the respondent was unfair. He relied upon two separate bases for making this complaint as follows:

    5.1 first, he complained of what might be termed 'ordinary' unfair dismissal contrary to sections 94 and 98 of the Employment Rights Act 1996 ("the 1996 Act");

    5.2 secondly, he complained of what might be termed 'automatically unfair dismissal' by reference to section 101A of the 1996 Act asserting that the respondent had breached that section in respect of working time and his rights to statutory rest breaks..

    During the course of his evidence at the hearing, however, the claimant confirmed that none of the reasons set out in that section 101A applied to him and that he was not pursuing a claim of unfair dismissal on that basis.

The issues

6. In light of the list of issues agreed between the parties' representatives, the issues in this case can be summarised as follows:

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

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

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

6.4 If the reason was a potentially fair reason for dismissal, did the respondent act reasonably or unreasonably in treating that reason as a sufficient reason for the dismissal of the claimant in accordance with section 98(4) of the 1996 Act? This would include whether (taking account of the Acas Code of Practice: Disciplinary and Grievance Procedures (2009) and the guidance in British Home Stores Limited -v- Burchell [1978] IRLR 379, as qualified in Boys and Girls Welfare Society v McDonald [1996] IRLR129) a reasonable procedure had been followed by the respondent in connection with the dismissal and whether (in accordance with the guidance in Iceland Frozen Foods Limited -v- Jones [1982] IRLR 439, Post Office v Foley [2000] IRLR 827) and Graham v The Secretary of State for Work and Pensions (Job Centre Plus) [2012] EWCA Civ 903) the decision to dismiss the claimant fell within the band of reasonable responses of a reasonable employer in such circumstances.

6.5 In this respect, Tribunal would, however, apply the guidance set out in Burchell having regard to the fact that the statutory 'test' of fairness, which is now found in section 98(4) of the 1996 Act, had been amended in 1980 such that neither party now has a burden of proof in that regard.

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

Consideration and findings of fact

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

7.1 As its name implies, the respondent is in the business of manufacturing bricks and similar products. It operates at nineteen manufacturing sites across the UK and employs some two-thousand employees, forty-five of whom are based at the Ibstock Brick Factory at Throckley to the West of Newcastle upon Tyne.

7.2 The claimant was employed at that site as a Maintenance Operative. His employment commenced on 11 April 2011 and ended when he was summarily dismissed for gross misconduct on 16 February 2018.

7.3 The claimant's employment was not without incident. First, in the context of him having received several informal warnings with regard to time-keeping and a Letter of Concern that he had been late on at least eight occasions in twelve months, he was late to work on 11 November 2012 in respect of which he was given a written warning under the respondent's disciplinary procedure on 13 November 2012. That warning had, however, lapsed by the time of his dismissal and was not taken into account.

7.4 Secondly, on 12 November 2016 the claimant was opening a tin of epoxy resin and, while cutting the seal with a Stanley knife, it slipped and he cut his hand. The injury was quite severe and required an operation under general anaesthetic. He returned to work after a period of absence. In this respect an accident investigation report was produced by Andrew Fox (171). He concluded that the immediate cause of the accident was the claimant's failure to follow the respondent's "Stop/Think" procedure compounded by the poor advice given to him by an experienced contractor. This had two consequences that are relevant to these proceedings as follows:

i) A Letter of Concern dated 23 December 2016 was sent to the claimant regarding his failure to follow the "Stop/Think" procedure. That letter stated that it did not form part of the formal disciplinary process but was principally to record an agreed improvement plan and that the claimant's conduct would be monitored for six months with the possibility of more formal action, including dismissal, if the claimant's conduct continued to fall short.

ii) The claimant pursued a personal injury claim against the respondent of which it was notified on 22 February 2017. The respondent admitted liability in April 2017 and the claim was wholly concluded by November 2017.

7.5 The claimant received a second Letter of Concern dated 11 September 2017, this time relating to unacceptable absence levels, he having been absent on seven occasions in twelve months compared with the respondent's 'threshold' of four absences in twelve months contained in its Absent Management procedures. The letter followed the same format as the previous Letter of Concern including that it did not form part of the disciplinary process, his conduct would be monitored for six months and disciplinary action up to and including dismissal would be considered if his conduct fell short of agreed standards.

7.6 Notwithstanding the above three matters there was no suggestion in the evidence before the Tribunal that the claimant was considered to be a poor employee in respect of the work that he did for the respondent.

7.7 The incident giving rise to the claimant's dismissal occurred in the early hours of 29 January 2018, the claimant being engaged on a twelve-hour nightshift commencing at 6.00pm on 28 January 2018. At this time, the Throckley site was "in shut-down" to allow the engineering team of which the claimant

formed part to perform general maintenance in accordance with a rolling programme of work.

7.8 Mr G Pierpoint is the Factory Manager of the respondent's Throckley site. He arrived at the site just before 3.00am. On going to the Fireman's cabin, he discovered an employee ("Mr A") lying across some chairs apparently asleep in respect of which he took issue with the employee. This caused Mr Pierpoint to check on the other two employees on duty that night, one of whom was the claimant.

7.9 He looked in the Electrical Workshop and then the Engineering Store. Within that store was an office and Mr Pierpoint observed a bright red light coming through the office window. On looking through that window he could see that a fire had been left on. The door was locked so he went to get his key. As he did so he saw Mr A coming towards him but, when he saw Mr Pierpoint, he turned away into a different office. This caused Mr Pierpoint to stop and return to the office in which he had seen the fire. As he did so he found the claimant approaching him and the door of the office was now open. Mr Pierpoint asked if the claimant had come from the office and he "sheepishly implied he had" (*to quote from Mr Pierpoint*). Mr Pierpoint asked what the claimant had been doing in the office and he replied, "Nothing".

7.10 Mr Pierpoint went into the office and discovered what appeared to be a bed in front of the fire of which he took a photograph (69). He asked if the claimant had been sleeping and he did not reply.

7.11 Mr Pierpoint then sought out the third employee ("Mr E"). Initially, he could not find him and the other two employees (Mr A and the claimant) said that they did not know where he was. Eventually, Mr Pierpoint met up with Mr E who said that he had gone for a walk around the factory.

7.12 Mr Pierpoint then went to check the clock and found that it was 3.30am. He produced a statement of these events that day, 29 January 2018 (67).

7.13 As a consequence of the above events, Mr Pierpoint suspended all three employees from their employments that day. His letter to the claimant (70) records the reason as an allegation of gross misconduct being "sleeping during your contractual working hours" but reserving the right to change or add to that allegation during the investigation. That letter follows the standard format of the respondent and, in my experience, is as used generally in such circumstances. It complies with the Acas Code in stating that suspension does not constitute gross misconduct, that the respondent will keep suspension under review and will aim to make it no longer than necessary. The letter stated that the suspension was to protect the claimant from further allegations during the investigations. There are also what I consider to be fairly standard paragraphs to the effect that the claimant will remain in employment and will be paid but is not required to work and should not attend at work or communicate with other employees etc unless authorised to do so by Mr Pierpoint. The letter explained that matters would be progressed in accordance with the respondent's Misconduct Procedure (a copy of which

was enclosed) and that he would soon be contacted to attend an investigation meeting.

7.14 The claimant's representative, Mr Sydenham, made much of the letter; particularly the paragraph regarding the claimant not communicating with fellow employees. That, he said, was "designed to be Draconian" and that the claimant was "wholly prevented from contacting any person by any means" and was thus denied the opportunity to prepare for the Investigatory Meeting or the Disciplinary Hearing. I repeat that in my experience such a paragraph is fairly standard in a typical letter of suspension. Indeed, in A v B [2003] IRLR 405, the EAT noted that it is "frequently the situation" that the employee "is suspended and has been denied the opportunity of being able to contact potentially relevant witnesses". In any event, that submission ignores the point that the claimant was informed only that he was not to have such contact "unless authorised to do so". The claimant did not seek such authority.

7.15 Mr Sydenham also sought to impugn the fairness of the process on the basis that there is correspondence (69a) from Mr Pierpoint to Mr Gareth Emmonds (the respondent's Group HR Manager) attaching the draft suspension letters and stating that Mr Lambert had asked Mr Pierpoint to forward them to him "for final checking". This, Mr Sydenham suggested, shows Mr Lambert being party to the suspension and therefore he could not be impartial when he subsequently became the manager considering the claimant's appeal. I disagree with that submission. I accept the evidence of Mr Lambert that his involvement had been only that he had been informed of the suspensions (as was right given his position as the Regional Production Manager – North) and suggested to Mr Pierpoint that the draft letter should be sent to Mr Emmonds for final checking.

7.16 Mr Sydenham also submitted that the respondent did not follow the Acas Guidance that suspension should only be imposed "after careful consideration" of which he says there was none. I am satisfied, however, that for any employer to suspend in these circumstances would be acting reasonably for the following reasons:

i) employees on nightshift at the respondent's factory work without management supervision and, as the claimant agreed, the respondent places significant trust in them to perform their duties;

ii) there were only three operatives on duty that night, Mr Pierpoint had a reasonable suspicion that two of them had been sleeping and one of them was missing;

iii) the respondent's Misconduct Policy and Procedure provides "sleeping whilst on duty" as an example of behaviour likely to be regarded as gross misconduct.

7.17 Mr Auchterlonie is the claimant's line manager. Mr Pierpoint appointed him to conduct the investigation. Mr Sydenham suggested that there was something

improper in that in that, first, Mr Auchterlonie was conflicted as he was a potential witness for the claimant and, secondly, Mr Pierpoint (who had reported the incident) was his line manager. Again I disagree. Mr Auchterlonie was the claimant's line manager, as he was of the other two employees who had been suspended, and he had a good knowledge of the factory and the engineering team. I am satisfied that it was reasonable that he should be appointed to conduct the investigation and accept the evidence on behalf of the respondent that for the line manager to be appointed as investigating manager in these circumstances accorded with its standard practice.

7.18 Mr Auchterlonie prepared appropriately for the investigation in which, although having previous experience of conducting disciplinary investigations, he was to be accompanied by Ms Amandeep Rai (Senior HR Business Partner of the respondent). Mr Auchterlonie prepared notes of points that he wanted to cover (79c), inspected relevant locations in the factory and reviewed CCTV footage and the worksheet for that evening (which he had prepared). In this regard, Mr Sydenham repeatedly sought to make the point that a considerable amount of work had been done by the claimant and the other employees on the night in question. As the respondent's witnesses answered and I tried to explain, the amount of work done is not the issue in these proceedings: the issue is whether there had been a reasonable investigation giving rise to reasonable grounds to sustain a belief that the claimant had been guilty of misconduct in resting for longer than his authorised break. Mr Auchterlonie also considered whether he needed to extend his investigation beyond the three employees but identified that the only other people on the site were contractors working for Rapid Cleaning and the security guard. On investigation he discovered that the contractors had left the site at 11.20pm on 28 January and there was no relevant information contained in the security log maintained by the security guard who was based in the guardhouse.

7.19 Each the three employees was called to an investigation meeting on 1 February 2018, all three meetings being digitally recorded. The claimant was interviewed first (72). He described what had happened during the nightshift in question. Amongst other things he described the work he had undertaken, stated that he had stopped for something to eat at about 7.30/8.00pm and then continued to work "til about 2 o'clock". He informed Mr Auchterlonie he had not been feeling very well "all week really", that he had told Mr E of this and only came into work because he had "been threatened with a disciplinary" because of his absence before.

7.20 He explained that he had gone to the stores office to change the battery for the impact wrench that he had been using and "had a sit down" "next to the heater" because he "wasn't feeling too good". He had put spill-kit cushions on the floor "to sit next to the heater, just to have a break for half an hour" to try to pull himself around because he would "keep being sick", which had knocked him a bit. The things he had sat on were just lying about and he put them on the floor because he "wasn't feeling too good and I was feeling faint so I sat down and to be closer to the heater", "I'd been being sick and feeling

faint all night". He denied sleeping and said he thought he had been in the office "About half an hour".

7.21 The claimant accepted, "I understand what it looks like, it's not good at all…..". Mr Auchterlonie asked him whether he had any questions or other comments and the claimant concluded

> "I don't know what to say really but just, but I've told you the truth and I know what it looks like, it doesn't look good, I mean, but, that's what happened, it's not something that occurs normally, the only reason I sat down in there cause I wasn't feeling, I was feeling unwell, I'm just trying to have a bit break"

7.22 The claimant's explanation that he had come into work despite being sick all week surprised Mr Auchterlonie for three reasons:

i) the claimant had not made him aware of this previously;

ii) the shift was overtime and there was no obligation on the claimant to be at work;

iii) Mr Auchterlonie had not threatened the claimant with disciplinary action for absence. He had issued the Letter of Concern of 11 September 2017 in accordance with the respondent's Absent Management procedures and although it made clear that more formal action could result from failure to improve, there was no threat of immediate disciplinary action.

7.23 During Mr E's investigation meeting he was asked about the claimant's sickness. He said that the claimant was "alright" on that shift although he looked a bit tired but he had been bad with sickness and diarrhoea on the previous shift, a few shifts before. This information did not support the claimant's explanation that he had been sick on the shift in question, had "kept being sick" and had told Mr E about this.

7.24 Mr Auchterlonie considered whether to extend his investigation further but decided not to: there were no other individuals who could provide direct information and although he had checked through the worksheet of 28/29 January and previous worksheets, the extent of work carried out did not assist in determining whether the employees had been sleeping on duty.

7.25 Mr Auchterlonie produced a summary of his investigations with the three employees (80). In respect of the claimant he noted, amongst other things, that he had given an acceptable account of the night up until 2.00am but then had gone to the office, set up a 'bed', closed the door which locked and was there until 3.00am when Mr Pierpoint arrived. He concluded,

> "Whether he was sleeping or resting it is clear he was not performing the tasks laid out for that night".

"The question of whether they were caught sleeping or resting may be unclear but it is clear none of the three were behaving as we would have expected and trusted them to do".

"In Frankie's (*ie. the claimant)* case, the effort put in to setting out a bed indicates a more premeditated effort to sleep".

"As the situation of what happened on the morning of 29 became clearer, from Glen's (*ie. Mr Pierpoint*) statement, photographs and interviews, my confidence in them and their attitude to work has waned."

7.26 As a result Mr Auchterlonie recommended that all three employees should face disciplinary hearings. Although supported by Ms Rai I accept Mr Auchterlonie's evidence that that was his decision. In particular, contrary to assertions by the claimant as part of these proceedings, I am satisfied on the basis of Mr Auchterlonie's evidence before me that he was not directed or in any way influenced by Mr Pierpoint as to what his decision should be.

7.27 Mr Auchterlonie's recommendation, along with relevant papers, was considered by Mr Johnson who decided that the matter should proceed to a disciplinary hearing in respect of the claimant and, likewise, in respect of the other two employees.

7.28 By letter of 8 February 2018, sent by recorded delivery, the claimant was invited to attend a disciplinary hearing on 16 February 2018 (84). The allegations contained in that letter were

- "Wasting Company time, namely, on 29th January 2018 failure to devote the whole of your working hours to the correct performance of your duties, specifically sleeping whilst on duty,
- Serious breach of trust and confidence whilst on the nightshift"

7.29 In that letter the claimant was informed that his suspension would continue, that a disciplinary sanction from a written warning to dismissal could result and that he could be accompanied at the hearing. Enclosures to that letter were:

- Statement from Mr Glen Pierpoint dated 29th January 2018
- Photographic evidence taken 29th January 2018
- Maintenance Worksheet dated 28th January 2018
- A copy of the Investigation Voice Recording
- Misconduct Policy and Procedure

7.30 The disciplinary hearing duly took place on 16 February 2018. Again it was recorded (86). In accordance with the respondent's practice, the hearing was

conducted by a manager from a different site; Mr Johnson who is manager at the Birtley site. He was accompanied by Kate Whyte, HR Business Partner. The claimant was not accompanied and confirmed that he was happy to proceed without a companion.

7.31 Near the start of the hearing, Mr Johnson provided the claimant with certain evidence as follows:

i) his absence record over the year,

ii) the Letter of Concern dated 11 September 2017 and

iii) the jobsheets that Mr Auchterlonie had produced on a Gantt chart.

The claimant was asked if he would like an adjournment to give him time to go through the information but he replied that he had seen it before and, if questions were to be asked in respect of it, he was fine with that. Both in his claim form (ET1) and at the hearing the claimant asserted that he was "ambushed" by the production of this evidence. I do not find that he was. At his investigation meeting, the claimant had raised matters of sickness, concern about future absence and the amount of work done and Mr Auchterlonie had produced this evidence in the context of him having done so. Importantly, the claimant was invited to take time to go through the information but he did not take that opportunity and confirmed that he had seen the information before and was content to deal with questions arising from it.

7.32 The claimant was asked to explain what had happened on the night in question and he stated, amongst other things, that he had been feeling quite unwell but came in as normal. He had stopped "for something to eat about seven, half seven, eight o'clock, something like that" then had "worked through til about half two, two o'clock" and then stopped for a little break. He had gone to the stores to change a battery and sat down where the heater was on to try to pull himself around as he was feeling unwell, feeling sick. He had been in there for "about half an hour, just sitting next to the heater, trying to get warm" when Mr Pierpoint came in. Later he confirmed that he and Mr E had agreed, at 2 o'clock, to take the same break together. Given when the claimant started his break and having said "about two o'clock" at the investigation meeting, Mr Johnson put to him that he had gone into the stores at two o'clock and the claimant confirmed that.

7.33 Regarding the make-up of the 'bed', he explained that he had brought the cushions into the office from shelves outside it but that the tarpaulin was on the shelf in the office. He maintained that he was not asleep.

7.34 The claimant was twice asked whether there was anything else that he wanted to add to the case or put forward or wanted Mr Johnson and Ms Whyte to consider at all. On the first occasion he responded by emphasising that he had always been trusted on nightshift and confirmed his understanding that an awful lot of trust was required on nightshift. On the

second occasion, which was sometime later, he said that he did not know what else to say.

7.35 The hearing was adjourned for consideration during which Mr Johnson interviewed two fitters employed at Throckley to check the break practice at that site. He was satisfied on the information they provided to him that the claimant's statements that he could take two breaks of up to thirty minutes each was correct. He also checked that it was not a breach to sleep while at work.

7.36 Nevertheless, Mr Johnson found the claimant's explanation that he had taken a thirty minute break to be implausible. He considered that the claimant was vague as to the start time, which he would need to know if it was to end thirty minutes later and, if it started at 2.00am he had taken a break of more than thirty minutes by the time he came out of the office, Mr Pierpoint having checked the door a short while before.

7.37 Mr Johnson looked into the claimant's statement that he had come to work ill because he had been threatened with disciplinary action before. He checked with HR and found that there was no such threat recorded although there was the Letter of Concern referred to above but that only said that formal disciplinary action might result. He also noted that the claimant had taken a day's absence on 23 December 2017 (ie. after the Letter of Concern) without disciplinary action arising. Mr Johnson also noted that the claimant had failed to mention any illness when questioned by Mr Pierpoint at the time as to what he was doing in the stores and had simply replied, "Nothing".

7.38 As to the make-up of the 'bed' Mr Johnson noted that at the investigation meeting the claimant had said that all the "things were just lying about" and he had just put them on the floor, which compared with the fuller picture given at the disciplinary hearing that he had taken tarpaulin from the shelves in the office and cushions from the shelves outside. He was satisfied that this indicated that the claimant had deliberately made a bed.

7.39 Mr Johnson also noted that the door to the office had been open when the claimant entered and remained open while he went out to fetch the cushions but that he had then shut the door behind him whereupon the Yale lock had closed. He considered this to be indicative of a deliberate attempt to conceal that he was sleeping while he should have been working.

7.40 Mr Johnston's conclusions included as follows:

i) He believed that the claimant was sleeping when he should have been working.

ii) The claimant did not dispute that he had made the bed and deliberately brought in items from outside to do so.

iii) The claimant did not dispute that he had shut the door behind him and was using the bed to rest when Mr Pierpoint arrived.

iv) Mr Johnson was unconvinced that the claimant was taking a legitimate break. The claimant was uncertain when it had started, which was inconsistent with taking a break for a fixed number of minutes; further, the bulk of the evidence was that the break started at 2.00am meaning that the claimant had taken significantly more than thirty minutes when he was met by Mr Pierpoint at around 3.00am

v) While the claimant subsequently claimed to be sick, he did not mention that to Mr Pierpoint on the night and, even if sick, it did not explain why he had remained in the office rather than calling his line manager and going home, which he had confirmed he understood to be the usual procedure.

vi) Inherent in the above, the claimant had breached the trust and confidence the respondent placed in him as a nightshift worker

7.41 Mr Johnson was satisfied that individually and cumulatively the allegations, as found, amounted to gross misconduct. He considered whether dismissal was an appropriate sanction and decided it was. The claimant had been wasting company time by sleeping on duty while being paid at the overtime rate, which was unacceptable.

7.42 When the hearing recommenced, Mr Johnson informed the claimant as follows (99a):

i) “we don’t find your evidence convincing.”

ii) “we believe that you took more than 30 minutes. You would have taken longer if you weren’t disturbed by Glen.”

iii) “Your story has developed with regards to your sickness. You didn’t mention being sick at all when Glen disturbed you in the storeroom.”

iv) “From the picture, it’s clear to us that you’ve made a bed. That it’s been made up. You did take items from outside the room to act as pillows. We don’t believe the heater was left on all night, because it would have been a fire hazard in there.”

v) “You were on an overtime shift, so therefore you didn’t have to go to work, you weren’t required to go to work, especially if you were so ill, and so unwell.”

vi) “Therefore with the information we have and believed it is an act of gross misconduct due to the fact of wasting company time and sleeping whilst on duty. Therefore we are dismissing you from the company with immediate effect without notice pay.”

7.43 Mr Johnson advised the claimant that he had a right of appeal and, before producing and sending the claimant his formal decision letter, he received

notice of appeal dated 20 February 2018 (100), which he passed to Mr Lambert. In that letter the claimant requested a copy of the Investigation Report that had been produced by Mr Auchterlonie and which had not been previously provided to him.

7.44 Mr Johnson's letter confirming the outcome of the disciplinary hearing was sent to the claimant on 21 February 2018 (101). I accept that his decision was solely based on the above issues. When coming to his decision Mr Johnson had no knowledge of the claimant having brought a personal injury claim against the respondent in 2017 and any suggestion that the respondent was in breach of the Working Time Regulations was not raised by the claimant during the disciplinary process.

7.45 For completeness, I record that Mr A resigned before the disciplinary procedure got underway while, after timings had been fully considered, Mr E was found not be guilty of misconduct and he had returned to work. In particular, his evidence was accepted that he had continued his work after roughly 2.00am when the claimant had left until 3.05am when CCTV footage showed him about to go for a walk (as he said he had). Thus his explanation that he took a break of only some twenty minutes to walk around and stretch his legs was accepted.

7.46 As mentioned, the claimant had given notice of his intention to appeal in his letter of 20 February 2018 (100). Mr Lambert was to conduct that appeal. He wrote to the claimant on 13 March 2018 (108) inviting him to attend an appeal hearing on 27 March 2018. The claimant responded to that letter by e-mail of 16 March (110) sent from Mr Sydenham (and by its appearances having been written by him) to Mr Emmonds but addressing Mr Lambert. The claimant informed Mr Lambert that he would not be accompanied at the appeal hearing as he was not in a trade union and believed that his colleagues would be in fear of retribution. Indeed he would not be attending the hearing himself "due to family issues". Mr Emmonds responded to the claimant (at the email address of Mr Sydenham from which he had received the letter) confirming that the respondent was happy to deal with the appeal by letter but offering a telephone conference instead. By e-mail sent from Mr Sydenham the claimant replied that he did not think he could "add anything via a telephone conference as I answered all the questions honestly and as accurately as I could recall at the two interviews" (123). I am satisfied that Mr Lambert thoroughly prepared for considering the appeal (126a).

7.47 Lengthy grounds of appeal running to some eleven pages were attached to the e-mail of 16 March (112). Those grounds of appeal are a matter of record and it is disproportionate to set them out in these Reasons as they are summarised and addressed in Mr Lambert's response of 10 April 2018 (127). In that letter Mr Lambert addressed the following points:

i) He was satisfied that the points raised by the claimant that he had not been accompanied during the disciplinary process did not represent a procedural failing as he had the opportunity to be accompanied but had chosen not to be.

ii) The claimant had alleged that the investigation was "fundamentally and procedurally flawed", had been conducted "in the most superficial manner" and "without seeking even the most basic evidence" (113). He asserted that the investigation was not impartial as Mr Auchterlonie may have been influenced by Mr Pierpoint. Mr Lambert was satisfied, however, that it was usual and appropriate for Mr Auchterlonie to carry out the investigation and the claimant had not provided any evidence of influence by Mr Pierpoint. He noted that these concerns had not been raised by the claimant during the investigation or disciplinary hearings; neither had the claimant raised the suggestion that he now made that Mr Auchterlonie could have been a witness for him or asked Mr Auchterlonie to provide any information in support. As to the question of any other evidence, the Rapid Cleaning contractors had left the site and the other two employees, Mr A and Mr E, had been interviewed. Mr Lambert suggested that details of their evidence "are not relevant to your hearing and it was appropriate that these were not shared with you" (129). The fundamental point, as far as Mr Lambert was concerned, was that the claimant was in the stores office with the door locked within which there was a bed that he had made up to rest. Furthermore, the evidence of timings demonstrated that the claimant was not on a legitimate break. Given these details, he could not see how Mr Pierpoint could have influenced the matter.

iii) The claimant had stated that he believed that Mr Pierpoint had acted out of bad faith in making the complaint against the claimant as a result of his personal injury claim (114), had intended to have him dismissed (117) and had undue influence over employees at Throckley (118), and that the case had been prejudged (115 and 117). Mr Lambert noted, however, that the claimant had not raised any grievance about Mr Pierpoint's behaviour previous to this and neither had any other employees. I accept Mr Lambert's conclusion that he was satisfied that Mr Pierpoint had not exerted influence in the decision to dismiss that had been taken by an independent senior manager from a different factory who had no prior knowledge of the claimant or of his personal injury claim. I also note that the fact that Mr Pierpoint instigated potential disciplinary proceedings in respect of three employees and not just the claimant militates against him seeking to have the claimant dismissed.

iv) The claimant had complained that Mr Johnson had conducted further investigation after the decision to dismiss had been communicated to him but Mr Lambert found nothing to support that assertion.

v) The claimant had also complained of a lack of awareness of those involved in the disciplinary process regarding his entitlement to rest breaks and the position in respect of overtime. Mr Lambert found, to the contrary, that the situation had been investigated and the claimant was entitled to only one thirty-minute break although the practice at the Throckley site was different. In this respect I find that Mr Lambert was wrong, as he accepted in oral evidence. The claimant was contractually

entitled to two breaks: “one thirty-minute break each day” and a “period to be taken for lunch break” (42).

vi) As to overtime, having reviewed the Letter of Concern and related matters Mr Lambert found it unreasonable for the claimant to suggest that he had had no alternative other than to work even though he was ill due to a fear of disciplinary action being taken because of his level of absence.

vii) The claimant had complained of being ambushed (118) at the disciplinary hearing when documents regarding his absence had been introduced but Mr Lambert was satisfied that the production of the documents was simply in response to the claimant having raised his illness and fear of being disciplined for further absence.

viii) Finally, the claimant had asserted that the decision to dismiss him had been made in advance of the disciplinary hearing because he had found that his job had been advertised on 16 February 2018 (117). The claimant had, however, provided no further details of this assertion and, on investigation, Mr Lambert identified that although a job had been advertised at Throckley, that was to fill a vacancy caused by an employee who had retired and was not related to the claimant’s post. On a similar point, Mr Lambert was aware that an Authority to Recruit (“ATR”) form (99f) to replace the claimant had not been raised until after the claimant’s dismissal. That ATR shows Mr Pierpoint making the request on 16 February 2018. It was sent by him to Mr Lambert for signature that day at 15:13 (99e). That form shows “Date of leaving” as “15 February 2018”. That date was, of course, prior to the claimant’s dismissal on 16 February. The respondent suggests that is a typographical error. Although clearly a significant (and no doubt embarrassing error), on the basis of the contemporaneous documents (99di, 99e and 99g) I accept that the ATR was not raised until after the claimant’s dismissal and, given the delays caused by gaining further authorisation in accordance with the respondent’s practices (107) and then actually recruiting an individual into the vacant post, it was necessary to act swiftly.

7.48 For the reasons stated in the “Summary” to Mr Lambert’s letter (131) including:

- the claimant giving little detail of how he felt unwell and not having informed Mr Pierpoint of that on the night,
- the claimant admitting making up the bed,
- the claimant being unable to verify the start time of his break,
- Mr Lambert having rejected assertions of fault in the disciplinary procedure,

he believed,

> "it is reasonable to conclude that you were in fact sleeping when you should have been working and your actions also destroy the trust and confidence the company has in you."

7.49 As such, Mr Lambert dismissed the claimant's appeal and upheld the decision to dismiss him.

Submissions

8 After the evidence had been concluded the parties' representatives made submissions by reference, in the case of the claimant, to 29 pages of written submissions and 18 authorities (not all of which are reported) and, in the case of the respondent to 12 pages of written submissions and, again, 18 authorities; all of which, along with their oral submissions, I have duly considered. It is not necessary for me to set out those submissions in detail here because they are a matter of record and the salient points will be obvious from my findings and conclusions below and comments that I have made above. Suffice it to say that I fully considered all the submissions made and the parties can be assured that they were all taken into account into coming to my decision.

The Law

9. The principal statutory provisions that are relevant to the issues in this case are to be found in the 1996 Act and are as follows:

"94 The right.

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

"98 General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

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

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

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

(3) In subsection (2)(a)—

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

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

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

Application of the facts and the law to determine the issues

10. The above are the salient facts relevant to and upon which I based my judgment. I considered those facts and submissions in the light of the relevant law and the case precedents in this area of law upon which I was addressed by the representatives in submissions.

11. Despite the length of the hearing and, indeed, of these Reasons thus far, as I was at pains to point out throughout the hearing, this is not a complex case in terms of the legal issues which, helpfully, the parties had agreed in advance. At one stage, Mr Sydenham (perhaps irritated at my encouragement to make progress and focus on the issues) asked me if I had read them. I assured him that I had but, in any event, that they are fairly standard in a case of this nature and arise from law that is relatively settled. In that regard while bringing into my consideration the decision of the EAT in Burchell (which has obviously stood the test of time for over forty years) I also took into account more recent decisions of the Court of Appeal, which reviewed and indorsed those authorities: ie. Fuller v The London Borough of Brent [2011] EWCA Civ 267, Tayeh v Barchester Healthcare Limited [2013] EWCA Civ 29 and Graham, particularly at paragraphs 35 and 36 where Aikens L.J. stated as follows:

    "In Orr v Milton Keynes Council [2011] ICR 704, all three members of this court concluded that, on the construction given to section 98(4) and its statutory predecessors in many cases in the Court of Appeal, section 98(4)(b) did not

permit any second consideration by an ET in addition to the exercise that it had to perform under section 98(4)(a). In that case I attempted to summarise the present state of the law applicable in a case where an employer alleges that an employee had engaged in misconduct and has dismissed the employee as a result. I said that once it is established that employer's reason for dismissing the employee was a "valid" reason within the statute, the ET has to consider three aspects of the employer's conduct. First, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; secondly, did the employer believe that the employee was guilty of the misconduct complained of and, thirdly, did the employer have reasonable grounds for that belief.

If the answer to each of those questions is "yes", the ET must then decide on the reasonableness of the response by the employer. In performing the latter exercise, the ET must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to the ET's own subjective views, whether the employer has acted within a "band or range of reasonable responses" to the particular misconduct found of the particular employee. If the employer has so 1996 Acted, then the employer's decision to dismiss will be reasonable. However, this is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse. The ET must not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The ET must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which "a reasonable employer might have adopted". An ET must focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any internal appeal process) and not on whether in f1996 Act the employee has suffered an injustice. An appeal from the ET to the EAT lies only in respect of a question of law arising from the ET's decision: see section 21(1) of the Employment Tribunals 1996 Act 1996."

12. The issues arising from the statutory and case law referred to above that are relevant to the determination of this case are summarised at paragraph 6 of these reasons. They fall into two principal parts, which I shall address in turn.

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

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

14. The claimant has asserted that the real reason for his dismissal was that he brought a claim for personal injuries against the respondent: "My dismissal was simply as a result of the fact that I instructed a solicitor in 2017 to bring a civil claim against Ibstock Brick Company for personal injuries sustained at the Ibstock factory as a consequence of negligent and dangerous working practices".

15. In ASLEF v Brady [2006] IRLR 576 it was said,

    "*Dismissal may be for an unfair reason even when misconduct has been committed. The question is whether the misconduct was the real reason for dismissal and it is for the employer to prove that ….*

    It does not follow, therefore, that whenever there is misconduct which could justify dismissal a tribunal is bound to find that that was indeed the operative reason, even a potentially fair reason. For example if the employer makes the misconduct an excuse to dismiss an employee in circumstances where he would not have treated others in a similar way, then the reason for the dismissal – the operative cause – would not be the misconduct at all, since that is not what brought about dismissal, even if the misconduct merited dismissal.

    Accordingly, once the employee has put in issue with proper evidence a basis for contending that the employer dismissed out of pique or antagonism, it is for the employer to rebut this by showing that the principal reason is a statutory reason. If the tribunal is left in doubt, it will not have done so."

16. In this case, the facts and beliefs of the respondent, as personified by those persons who took the decision to dismiss the claimant and reject his appeal (Mr Johnson and Mr Lambert) are clearly set out in their respective contemporaneous decision letters from which I have summarised as above; principally, but without limitation, at paragraph 7.35 in relation to Mr Johnson and paragraph 7.42 in relation to Mr Lambert.

17. In essence, the claimant was discovered in the office within the stores building with the door closed and being incapable of being opened from the outside without a key. He did not dispute that the respondent made a heated canteen available to him and others to use for the purpose of their breaks. In that office, in front of a fire, the claimant had assembled what has been described as a bed. I can understand why that description has been applied to it. As the claimant explained it to me he had assembled one or more tarpaulins that he had taken from shelves in the office and then brought in two cushions from outside the office, one containing granular material the other containing softer material both of which are used for soaking up drips or leaks at the factory (hence the description "spill kit"). The claimant told me that he had placed the softer cushion on top of the harder granular cushion. The claimant's evidence regarding assembling the bed contrasts with his original account that things had just been "lying about". The claimant stated that he had sat upright on the 'bed' and that he needed to sit on something as the concrete floor was cold. The respondent could not understand why so much material was needed for this simple purpose if the claimant was only to sit upright as he had said and why, if that was the case, he did not sit on the chair in the office but went to the trouble of assembling the 'bed'. I have to say (while noting that this is not a complaint of wrongful dismissal, where my own opinion would be relevant, but of unfair dismissal) that I cannot understand either why the claimant went to that trouble in these circumstances and I was not persuaded by his evidence, even on balance of probabilities, that the reason he chose to sit on the floor was so as to be more directly in front of the fire.

18. The claimant puts forward a defence/mitigation of being ill, feeling sick, etc. If that is right, it possibly supports the conclusion that he did make a bed. I do not find, however, that the claimant was sick to the level that he said in cross-examination of approximately six or seven on a scale of one to ten. That is not borne out by the evidence of him continuing to work even though feeling like that, eating pizza at 8.00pm on 28 January or by what Mr E told Mr Auchterlonie at his investigation meeting that the claimant "was alright" that night and although he "seemed a bit tired", he attributed that to the claimant looking after his child (164). Mr E continued that the claimant had been bad previously with sickness and diarrhoea, not on the night in question but a few shifts before. Further, I accept the evidence on behalf of the respondent that when challenged by Mr Pierpoint at the time (and indeed for the remainder of that shift on 29 January) the claimant did not put forward his not feeling well as an explanation.

19. Also in this respect, I find the Letters of Concern that were sent to the claimant to be appropriate in the respective circumstances and, in those circumstances, to be quite innocuous. In respect of the more recent dated 11 September 2017, the trigger point of four absences had been reached and it was therefore appropriate that the letter was sent to him. The letters clearly stated that they were not part of the disciplinary process and although disciplinary action could result from a failure to improve, no such action had been taken or threatened against the claimant. In this respect I reject his evidence that Mr Auchterlonie told him orally that he would be dismissed. That does not appear in his claim form and the claimant did not raise the point as a grievance at any time and neither did he challenge Mr Auchterlonie during the course of the investigatory meeting that he had said to him that he would be dismissed.

20. In these circumstances, I do not accept the claimant's assertions that the real reason for his dismissal was retaliation, principally by Mr Pierpoint for the claimant having brought a personal injury claim against the respondent. That claim had been concluded come months before, apparently without the need for the litigation to be pursued, and although I accept that grudges can be borne for a while the important point is that the dismissing manager, Mr Johnson, was unaware of the claim. I accept that evidence on which he was not challenged. For completeness in this respect, the claimant had never raised any grievance or a whistle blowing complaint (in respect of which his anonymity would have been preserved) about Mr Pierpoint to the effect that he was being bullied or subjected to aggressive management by him, and I accept Mr Auchterlonie's evidence that he had not witnessed that behaviour by Mr Pierpoint towards the claimant. On the specific point made by the claimant that Mr Pierpoint had allegedly said to him in this respect, "If you want a war, I will give you a fucking war", I find that the claimant has failed to satisfy me that it was said. The claimant did not raise these general points or this specific point at either the investigation meeting or the disciplinary hearing. They were first raised in the appeal in which it is clear that Mr Sydenham had a significant input. Finally in this regard, I note that in cross-examination the claimant accepted that he had no evidence to support these contentions and simply "felt" that his dismissal was connected to his personal injury claim.

21. On those bases, I have little hesitation in finding that the respondent has discharged the burden of proof upon it to show that the reason for the claimant's dismissal was

related to his conduct, that being a potentially fair reason. I reject the claimant's assertion that his dismissal was simply as a result of his personal injury claim. That assertion is not borne out by the evidence before me; not least, I repeat, that Mr Johnson, who made the decision to dismiss him, was not aware of the personal injury claim. On the contrary, the evidence is clear that the reason for the claimant's dismissal related to his conduct, which is a potentially fair reason in accordance with section 98(1) of the 1996 Act.

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

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

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

    b. secondly, the size and administrative resources of the respondent;

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

23. In addressing 'the section 98(4) question', I am alert to two preliminary points. First, I must not substitute my own view for that of the respondent. In UCATT v Brain [1981] IRLR 224 it was put thus:

    "Indeed this approach of Tribunals, putting themselves in the position of the employer, informing themselves of what the employer knew at the moment, imagining themselves in that position and then asking the question, "Would a reasonable employer in those circumstances dismiss", seems to me a very sensible approach – subject to one qualification alone, that they must not fall into the error of asking themselves the question "Would we dismiss", because you sometimes have a situation in which one reasonable employer would and one would not."

    This approach has been maintained over the years in many decisions including Iceland Frozen Foods (re-confirmed in Midland Bank v Madden [2000] IRLR 288) and Sainsburys v Hitt [2003] IRLR 23.

24. Secondly, I am to apply what has been referred to as the 'band' or 'range' of reasonable responses approach. In respect each of these two preliminary points, reference is again made to the excerpt from Graham above.

25. In this context, I now turn to consider the basic question of fairness as more fully set out in the three elements in Burchell and Graham. In that regard it is important to note that in the first of those decisions it is recorded that the Tribunal has to decide

whether the employer "entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time".

26. For the reasons set out more fully above, I am satisfied that Mr Johnson and Mr Lambert both believed that the claimant was guilty of misconduct. That is abundantly clear from the evidence recorded above and was clear from their oral evidence before me. They were both good witnesses and gave compelling evidence. As such, the first element in Burchell, the fact of belief of misconduct, is satisfied.

27. The second element in Burchell is that the respondent must have in mind reasonable grounds upon which to sustain that belief. In this regard even the claimant had the honesty to accept that the photograph of his 'bed' "doesn't look good". That notwithstanding, I am satisfied that the evidence that was collated by Mr Auchterlonie and Mr Johnson gave rise to reasonable grounds to sustain that belief. I consider elements of that evidence below in relation to the issue of the sufficiency of the investigation.

28. The third element in Burchell is that at the stage that Mr Johnson formed that belief on those grounds and Mr Lambert maintained that belief, the respondent must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

29. In this connection, from time to time Mr Sydenham made reference to the rules of natural justice. In Khanum v Mid-Glamorgan Area Health Authority [1978] IRLR 215 it was stated that there are only three basic requirements of natural justice which have to be complied with during the proceedings of a domestic disciplinary inquiry; first, that the person should know the nature of the accusation against him; secondly, that he should be given an opportunity to state his case; and thirdly, that the tribunal should act in good faith.

30. As to the first requirement, I am satisfied that, from the letters sent to the claimant (and the information provided to him orally) by Mr Auchterlonie and Mr Johnson, he knew the nature of the accusation against him. As to the second requirement I am satisfied that the claimant was given an opportunity to state his case. I have recorded above that at both the investigatory meeting and the disciplinary hearing all relevant matters were put to the claimant and he was given ample opportunity to provide his explanations and otherwise to state his case. Moreover, at both meetings he was asked if there was anything else that he wanted to add. At the investigatory meeting he was asked, "have you got anything else to say" (79) and, at the disciplinary hearing, the claimant was twice asked if there was anything else he wanted to say. He responded on the first occasion to emphasise that he had always been trusted on nightshift (96) but, on the second occasion simply answered that he did not know what else to say (99). The third requirement is that the respondent should act in good faith. In the circumstances of this case I am satisfied that the managers did so and, specifically, I repeat that I am not satisfied that the dismissal arose from any antagonism from the respondent and Mr Pierpoint in particular as a result of the claimant having made a personal injury claim against the respondent.

31. Considering the sufficiency of the investigation, I have explained above the preparation undertaken by Mr Auchterlonie and the matters considered by him as part of the investigation stage, and I will not repeat them here. Suffice it to say I am satisfied that a sufficient investigation was conducted beginning with the preparation he undertook and then involving the collation of the evidence of Mr Pierpoint, Mr E and the claimant and the consideration of whether anyone else could provide relevant evidence.

32. There was then the investigation meeting and the disciplinary hearing and ultimately the appeal. I am satisfied that both meetings were thorough (as was Mr Lambert's consideration of the claimant's appeal) and it is disingenuous for the claimant to have given evidence in his witness statement that the disciplinary hearing lasted "a matter of minutes" when it is clear from the transcribed record that runs to 15 page that it must have lasted longer than that. Mr Johnson is evident, which I accept, is that it had started "about 10 o'clock and went on for about 2½ hours", which is consistent with the note (99a) that the meeting ended at 12:41. As to what constitutes an investigation in the context of a disciplinary matter, I do not accept the submission of Mr Sydenham to the effect that a 'bright line' is to be drawn between what might be described as the 'pure' investigation conducted by Mr Auchterlonie and the remainder of the disciplinary process. All aspects of such a process can be said to be part of investigation as matters can emerge during, for example, the disciplinary hearing, that will influence the decision as to whether or not to dismiss the employee.

33. On a discrete point in this connection, in respect of both the disciplinary hearing and the appeal hearing the claimant was advised of his right to be accompanied but chose not to exercise that right; indeed, he did not attend the appeal hearing and declined the suggestion made to him by Mr Emmonds that, if family circumstances prevented him from attending, he could engage in the appeal process by way of a telephone conference call.

34. As to the product of the investigation, Mr Sydenham repeatedly stated during his cross examination of the respondent's witnesses and at least three times in submissions that the information that Mr E had provided to Mr Auchterlonie and Mr Johnson exonerated the claimant as to the timing of his second break. He suggested that this evidence demonstrated that their breaks (ie. the breaks taken by Mr E and the claimant) had been "exactly the same", that they took their breaks "at the same time" and they "had taken their second break together". Those submissions are not borne out by the evidence at pages 164(d)(e) and (f) at which (to summarise the findings already made) Mr E is quite clear that although the claimant left for his break at roughly two o'clock he had worked on until he went for his walk at 03.05. Likewise, Mr Sydenham submitted that the CCTV footage was "proving the claimant took only an appropriate break and proving the time of that break". It did not. The CCTV footage related to the break at 8.00pm on 28 January not 2.00am the next morning. Neither do I find anything in the point Mr Sydenham made to the effect that the CCTV footage being timed at 8.00pm when the employees said that they had taken a break at 7.30pm shows that they were thirty minutes out in their estimation of the time of their second break. I find that simply to be a non sequitur. In any event the evidence of the employees was not that they took their break at precisely 7.30pm; their evidence varied as to cover the period 7.00pm, 7.30pm and 8.00pm. It would appear that that last estimate of 8.00pm is

the more correct; that said I note that the still image from the CCTV camera (236) shows the claimant carrying two boxes of pizza, which it is reasonable to assume he must have ordered earlier.

35. During the course of the Tribunal hearing a number of procedural failings on behalf of the respondent were either asserted or identified. Given the lengths to which Mr Sydenham went to explore these matters and, I accept, their potential importance, it is appropriate that I should address each of them, which I do in no particular order.

Entitlement to breaks

36. It is clear from the contemporaneous documents and the witness statements of the respondent's witnesses that there was a significant misunderstanding of the contractual and Working Time Regulations entitlement of the claimant and his colleagues to breaks during their twelve-hour nightshift. I am satisfied that that misunderstanding clearly influenced the line of questioning of the claimant at both his investigatory meeting and disciplinary hearing: I quote only one example of Mr Johnson asking at the disciplinary hearing, "So why do you think it's acceptable to go and have another thirty minute break….". I am satisfied, as was accepted in oral evidence by the witnesses, that the claimant (as indicated above) was entitled to a thirty minute break plus a lunch break and that the line of questioning to which I have just referred was wrong. I am further satisfied, however, that the misunderstanding was corrected by Mr Johnson when, during the adjournment of the disciplinary hearing, he interviewed two other employees who worked at the Throckley site before he made his decision to dismiss. In this respect I do not find it wrong that Mr Johnson made his enquiries of other employees at Throckley during what Mr Sydenham referred to as his "retirement", indeed I consider it to be to his credit he did so rather than blundering on in a position of ignorance.

Input of HR advisers

37. Mr Sydenham submits that the advisers' role was only to advise on law and procedure and that they (Ms Rai and Ms Whyte) overstepped the mark. In this respect he relies upon the decision of the EAT in <u>Ramphal v Department of Transport</u> UKEAT/0352/14 and drew to my attention that decision it is recorded in respect of the role of HR advisers that "such advice should be limited to matters of law and procedure". Mr Sydenham has overlooked, however, or at least did not draw to my attention, that that quoted phrase continues "….and to ensuring that all necessary matters have been addressed and achieved clarity. <u>Chhabrav West London Mental Health NHS Trust</u> [2014] ICR194 applied". Further, I find no evidence in the case before me to suggest as was the case in <u>Ramphal</u> that the advisers in this case before me gave advice on the claimant's "credibility and level of culpability" or that, "Favourable and exculpatory findings were removed…." or that the managers were "inappropriately lobbied by Human Resources". That said, I consider that the respondent should discuss with its HR Department the scope of the role of their advisers in such meetings as it seems that Ms Rai and to a lesser extent Ms Whyte might have exceed what might be described as a 'safe' role for HR officers in these circumstances. I note, for example repeated references in the transcripts of both meetings to "we" and "us" by both the respective managers and the HR advisers and the remark of Ms Rai to the claimant, "So you say", (77) is, in my opinion, quite inappropriate.

Acas code and guidance

38. An important focus of Mr Sydenham was on the various Acas guides and the code of practice to which he referred. I accept that they are important but the majority are mainly guidance although there is of course the Acas code of practice which I am required to bring into account: see section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992. Nevertheless, it has been well-established that my focus must be on the statutory provisions and, in these respects, section 98(4) of the 1996 Act.

39. On points of detail in these respects I do not accept the submission made on behalf of the claimant that it was inappropriate for Mr Auchterlonie to be appointed as investigator. As indicated above, he was the claimant's line manager and had knowledge of the factory, its practices and of the employees who worked there. It is right, however, that Mr Auchterlonie had no terms of reference and no investigation plan, which would have accorded with the Guidance on Conducting workplace investigations of October 2015 but I am satisfied that the terms of reference for his investigation were clear: in simple terms, three employees working nightshift were away from where they were expected to be working and two of them might have been sleeping. That was what he had to investigate. Further, even if there was no formal written investigation plan it is clear from what Mr Auchterlonie did (which I have summarised above) that he had a plan in mind.

40. In this regard Mr Sydenham put to the respondent's witnesses on several occasions that such matters of procedure upon which he relied were "required by law". That was not always accurate and I intervened when I considered that he was being unfair to lay witnesses who would not and could not reasonably be expected to know better.

Disclosure of documents

41. First the claimant relies upon the fact that the investigatory report of Mr Auchterlonie was not disclosed to him. In this respect I accept, as did the respondent's representative, that the Acas Code at paragraphs 9 and 12 refers to the provision of copies of any written evidence and that at the meeting the employer should go through the evidence that has been gathered. I am satisfied that many employers would have disclosed such parts of the report of Mr Auchterlonie that was relevant to the claimant and cannot understand why the respondent did not do so especially when requested in the initial notification of the claimant's appeal (100).

42. That said, I am not satisfied that for the respondent not to have disclosed this report renders the process flawed to the extent of rendering the dismissal unfair. As the claimant accepted during the hearing, it only revealed matters of which he was already aware (for example the heater, why he had gone to the office and why he had made up the 'bed') and, in respect of all those matters he had had the opportunity to comment at both the investigatory meeting and the disciplinary hearing. In any event, as already explained above, I am satisfied that the claimant was aware of the allegations that he had to address: Hussain v Elonex Plc [1999] IRLR420.

43. The second document in respect of which the claimant complains that he did not receive a copy is the transcript of the interviews conducted with Mr E. Again many employers would have provided at least those parts that were relevant to the claimant's claim. This is especially so in this case given that it is clear that the respondent's employees (Mr Auchterlonie and Ms Rai) were discussing the claimant's position with Mr E and relied upon what he told them when considering the position of the claimant. As such, I am satisfied that it would probably would have been better to disclose relevant extracts and I am surprised that Mr Emmonds (especially as he is the respondent's Group HR Manager) apparently advised Mr Lambert to the contrary s. That said, I again do not find that the failure to do so was so unreasonable as to render the dismissal unfair not least because, as explained above, the evidence contained in the transcript does not constitute exculpatory information (as Mr Sydenham suggested it did) as it does not demonstrate that the claimant was taking an authorised break of appropriate duration.

Provision of documents at the disciplinary hearing

44. The claimant complains that three documents (his sickness absence, the Letter of Concern and the worksheet) were provided to him only at the beginning of the disciplinary hearing and not with the invitation to that hearing. Factually, that is correct but, as noted above, the claimant had himself raised at the investigation meeting the points that the documents addressed and he was offered an adjournment to consider them, which he declined; and he confirmed at the disciplinary hearing and in cross-examination at the Tribunal hearing that he had seen before or was aware of all three items. As did Mr Lambert, I repeat that I reject the claimant's complaint that in this regard he was "ambushed".

Review of suspension

45. The claimant complains that, contrary to the Acas Code, the respondent did not keep his suspension under review. As that is a provision of the Code I give due weight to it and accept that the respondent's managers did not actively review his suspension. That said, the letter of 8 February inviting the claimant to the disciplinary hearing states that his suspension is to continue. I am satisfied that it can be inferred from that that a decision in that respect had been taken. More generally, I am satisfied that it was reasonable for the respondent to suspend the claimant and his colleagues in the circumstances and that it was not unreasonable to maintain the suspension of the claimant facing such allegations of gross misconduct during the relatively short period of 29 January to 16 February 2018: eighteen days.

Mitigation

46. The claimant complained that the question of mitigation was not explored with him. It is right that mitigation should be explored by any employer in circumstances such as this not only in respect of the finding of gross misconduct but also in respect of the sanction of dismissal. I did not accept, however, the suggestion by Mr Sydenham that that finding of misconduct and the consideration of the sanction must form two distinctly separate stages of any fair disciplinary hearing and that between those two stages the claimant ought to have been given the opportunity of making representations as to the sanction.

47. More particularly, is clear from the notes Mr Auchterlonie made in preparation for the investigation meeting, "Do you have any mitigation circumstances that should be considered…." (79i) that this issue was in his mind. It is also clear that he had heard the claimant's account of feeling unwell etc, which would constitute mitigation and asked if the claimant had any more you wished to add (79). Equally, if not more importantly, at the disciplinary hearing Mr Johnson had also heard the claimant's account of not feeling well (95), which I repeat would go to mitigation. Additionally, Ms Whyte asked if there was "anything" that the claimant wanted to "add to the case or put forward" (96). I am satisfied that that question is wide enough and general enough to enable the claimant to introduce any further evidence or representations including as to mitigation over and above him feeling unwell. Indeed, he replied in the following terms:

    > "Just to say I, like, I've always been trusted on nightshift, in every job I've been left in it in the seven years I've worked here I've done to me best ability and I've tried to complete and, unless I physically cannot do the job or the ports aren't in to do the job and I've never, never had a problem with us not completing any new work or anything like that."

    Moreover, at the end of the disciplinary hearing Ms Whyte asked again, "Is there anything else that you wanted us to consider at all? I mean you forward your case." (99) Once more, that is a very general question in response to which the claimant could have introduced further mitigation but he did not and replied only "I don't know" …. "I don't know what else to say really."

48. In the above circumstances therefore I am satisfied that the claimant had the opportunity raise points of mitigation and that any mitigation he wished to put forward, first, as to the allegation of sleeping and, secondly, as to the allegation of a breach of trust and confidence were advanced by him and considered by Mr Johnson. The fact that Mr Johnson did not use that word "mitigation" does not mean that he did not consider it.

49. In this latter respect Mr Sydenham sought to broaden the trust and confidence allegation to embrace the claimant's employment generally but, as I pointed out during the hearing, it is very clear that this allegation relates solely to the trust and confidence invested in any employee working a nightshift without management supervision, as the respondent's witnesses confirmed.

Questioning of Mr Pierpoint

50. A further point advanced on behalf of the claimant was that he had not been allowed to question Mr Pierpoint at the disciplinary hearing. It is established, however, that it is not unreasonable for an employer not to agree to such a course and, therefore, I do not accept that for this respondent not to have done so is a failing: <u>Ulster Bus v Henderson</u> [1989] IRLR251.

51. In summary as to process, while things might have been done better (for example providing to the claimant relevant parts of Mr Auchterlonie's investigatory report and Mr E's transcripts and the role of the HR advisers might have been curtailed, the standard to be applied is not of perfection but whether the process is reasonable; and in that regard it is established the band or range of reasonable responses

approach applies to all aspects of the process and not just to the sanction of dismissal.

52. Stepping back and considering all the evidence before me in the round, I am satisfied that the respondent did act reasonably in the process that culminated in its decision to dismiss the claimant.

53. In summary, by reference to the elements in Burchell, on the evidence available to me and on the basis of the findings of fact set out above, I accept that:

    a. Mr Johnson and Mr Lambert "did believe" that the claimant was guilty of misconduct;

    b. they had in their minds reasonable grounds upon which to sustain their belief that the claimant was guilty of misconduct; and

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

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

55. In this case I am quite satisfied that in the circumstances known to Mr Johnson and then Mr Lambert as a result of the respondent's investigation (including the claimant's input at the disciplinary and appeal stages), the dismissal of the claimant was a decision that fell within the band of reasonable responses of a reasonable employer in these circumstances.

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

Conclusion

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

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

EMPLOYMENT JUDGE MORRIS

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON

16 May 2019

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