THE EMPLOYMENT TRIBUNALS

Claimant: **Mr S Barrie**

Respondent: **Erwin Hymer Group UK Limited**

Heard at: **North Shields Hearing Centre** **On: 9 & 10 January 2020**

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

Representation:

Claimant: **Mr D Robinson-Young of Counsel**
Respondent: **Mr M Dulovic, Employed Barrister**

RESERVED JUDGMENT

The judgment of the Employment Tribunal is as follows:

1. The claimant's complaint by reference to Section 94 of the Employment Rights Act 1996 that his dismissal by the respondent was unfair contrary to Section 98 of that Act is not well-founded and is dismissed.

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

REASONS

Representation and evidence

1. The claimant was represented by Mr D Robinson-Young of Counsel who called the claimant to give evidence. The respondent was represented by Mr M Dulovic, Barrister, who called Mr G Jones, Production Director to give evidence on its behalf.

2. The Tribunal had before it an agreed bundle of documents comprising in excess of 200 pages that was supplemented at the commencement of the hearing. The numbers shown in parenthesis below are the numbers of the pages in that bundle.

The claimant's claims

3. The claimant's claims, are as follows:

   3.1 His dismissal by the respondent was unfair contrary to Section 98 of the Employment Rights Act 1996 ("the 1996 Act").

   3.2 The respondent had breached his contract of employment by not giving to him the notice of termination of that contract to which he was entitled.

Issues

4. As discussed with the representatives at the outset of the hearing, the issues in this case were as follows:

   Unfair dismissal

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

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

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

   4.4 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.

   4.5 In this respect, the 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.

   4.6 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 mind reasonable grounds, after as much investigation into the

matter as was reasonable in all the circumstances of the case, upon which to found a genuine belief that the claimant was guilty of misconduct.

Contract claim

4.7 Does the respondent prove that it was entitled to dismiss the claimant without notice because he had committed gross misconduct?

4.8 If not, to how much notice was the claimant entitled, and did he that receive notice?

Findings of fact

5. 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.

5.1 The respondent's business is the manufacture and supply of leisure vehicles at premises at Consett, County Durham. It is a very large employer operating in the UK as part of an international group of companies and has significant resources. At the Consett site it employs some 570 employees and has an HR department comprising three HR officers.

5.2 The claimant was employed by the respondent as a general labourer from May 2015 until he was dismissed summarily for gross misconduct on 14 March 2019.

5.3 Apart from one incident relating to the claimant not wearing ear plugs there were no issues of unsatisfactory conduct or performance on the part of the claimant throughout his employment until the matters giving rise to his dismissal that arose towards the end of 2018; indeed he was considered to be "a good worker".

5.4 Another of the respondent's employees at its Consett site (whom I shall refer to as "W") was the partner of a man whom the claimant had known for more than 33 years and was his best friend. The claimant and W were therefore also friends (indeed she had been instrumental in the claimant securing his employment with the respondent) and they would all socialise outside work such as attending two concerts in October 2018.

5.5 In the latter part of 2018, however, the relationship between the claimant and W began to break down. Around this time the claimant wrote a short note to W; he thinks it was on 26 October 2018 (56a). In the note, he apologised to W for what had happened the day before commenting that it was wrong but there had been a lot to take in and he had hit self-destruct. He expressed his hope that she could find a way to forgive and forget (56a).

5.6 The claimant's case is that W began to bully and harass him without any cause: for example she made him a friendship bracelet and then ripped it from his arm with some force; she responded dismissively and unpleasantly when he required a lift because his bike tyre had a puncture; she would find any opportunity to argue with him and would shout angrily at him; she declined to put a word in for him to help him to secure a better job with the respondent. For these reasons the claimant states that he decided to distance himself from W and did not speak to her for some eight weeks leading up to the Wednesday before Christmas, 19 December 2018. [*Note: there is some confusion in the evidence as to whether the incident referred to below occurred on that day or actually occurred on Thursday 20 December but that matters little.*]

5.7 On that day, the claimant decided to speak to W. He asked for a word outside whereupon she became angry and shouted at him in front of others saying that he was accusing her of having an affair. The claimant was shaken at what had happened and asked if he could go home, which his manager agreed. There was then the Christmas break.

5.8 Early on the morning of the first day back at work, 2 January 2019, W met with her Team Leader and the HR manager and made them aware that she was having issues with the claimant. She explained that it had started 2 to 3 months ago when the claimant had told her that he needed to keep away from her and that he loved her. She said that that was resolved but the claimant then started pestering her throughout the workday. She had asked him to stay away but he did not and they had argued. He had accused her of having an affair with another employee, which she said was untrue, and she had begun to feel uncomfortable as the claimant was watching and following her. (54)

5.9 The managers immediately interviewed the claimant. He explained that on the Wednesday before Christmas he had asked for a word with W. He had intended to say that he knew about her and another employee (whom I shall refer to below as "M") and that he would not say anything. Before he could do so, however, W had reacted angrily as described above. It was put to the claimant that before Christmas he had told W that he had feelings for her and that he loved her. He responded, "I do love her, I did love her she was my best friend in this place until now and it all changed". The managers asked the claimant if there was anyone else that they should speak to and he named a fellow employee (54). When the managers met him they asked if he knew if there was anything going on with the claimant, W and M and he responded, "If I'm honest it's all in Shaun's head there is nothing going on." (55)

5.10 The managers met with the claimant the following day, 3 January 2019, and informed him that they would like to move him temporarily to the Machine Shop as it would be good to put some distance between him and W (55). Despite that, when the claimant had needed to go to the Motorhome line, where W worked, he had tried to speak to her. As working in the Machine Shop was affecting the claimant's asthma he was moved from there to the

Warehouse but his skill-set was not suitable and he was moved on to Despatch. The claimant was made aware of this move at a meeting with the same managers on 11 January 2019. He did not want to work in Despatch, which he said was awful and cold, but he was told that this was to allow things between him and W to heal and settle as they would not have to see each other. The claimant was advised not to go into the factory where she worked. The claimant complained that they were sending him as far away as possible and it was W's fault and not his due to the affair with M (55).

5.11 According to the claimant (there being no corroborative evidence of these matters having been conveyed to the respondent at the time) on 16 January 2019 he attended a medical with the nurse. She told him that his blood pressure was "through the roof" and she was concerned about his weight loss. She said that he had the lungs of the 73 year-old man. They also discussed how the claimant's 'white finger' was. The claimant maintains that the pain in his hands was made worse by working in the cold on Despatch. On 6 February 2019 he visited his doctor who was also concerned about his blood pressure and his chest and gave him medication. The claimant states that he raised concerns many times with management and the health and safety officer but they were dismissive.

5.12 Despite it having been made clear to the claimant that the managers were seeking to put some distance between him and W and the advice that he should not go into the factory, he wrote a short note to W on 11 (or possibly 8) February 2019 (58). He did so because he was worried about his health and nobody would tell him when the temporary move would finish. He asked for her help and said that she needed to undo what she had done and help him get his job back, which only she could do; how she chose to spin it was up to her. He asked W to telephone or text him that day and gave her his phone number. The claimant asked another employee to give the letter to W. He received no reply from W.

5.13 On 25 February 2019 the claimant discovered that interviews were to be held for what he referred to as his job: i.e. the original job from which he had been moved on 3 January. This caused the claimant to write a second letter to W that day (57), which he again passed to her through another employee. In that letter the claimant told W that he had known about her and M from the start but as she had not wanted him to know he had pretended not to. He said that he had never told anyone and that she did not need any lookouts who had been chasing him. He was never jealous and would never have told his friend/her boyfriend. He had never hurt her as he thought the world of her but she had bullied and abused him, lied and engaged in a character smear campaign. That was shocking as he had been her best ally not enemy. He suggested that she should be mortified now that she had left him with nothing, no job and no friends, and that if he had lost her then he had nothing left to lose. He had helped her more than anyone and she owed him. He concluded in the following terms:

> "If you do not know what to do next then I'm sorry. I will do it my way. I have evidence, emails, people. You can phone [*your*

boyfriend] now and have him down here. Tomorrow I will tell him the truth with no option but to believe it. I hope you're my friend."

5.14 W found the content of this letter to be alarming and passed it to the respondent's managers. Mr Mullen, who was the Despatch Manager, wrote to the claimant that day, 25 February 2019, (59) requiring him to attend an investigation interview with him, accompanied by an HR assistant, the following day.

5.15 At the meeting (60) the claimant explained that about half a year ago he found out that W was cheating on his best friend with M every day at lunchtime. The claimant went into some detail of how they arranged to meet, where they went and how W had friends looking out for her and chasing him around the building. He accepted that the bottom bit of the letter was quite offensive but explained that she had been bullying and attacking him saying that he was jealous of her. She had gone from being his friend to a narcissist. He did not accept that W had been intimidated by the letters; it was she who was crazy. He accepted, however, that the top part of one of the letters could have caused more harm than good. Although Mr Mullen asked him several times, the claimant could not accept that whether W and M were having an affair was nothing to do with him. He was reminded that he had been told not to approach W and communicate with her and answered that he had not been near her as the letter had been given to her by someone else. He maintained that he done nothing wrong but was told that the continued communication had to stop. At the end of the meeting the claimant was told that he needed to go home and try understanding the other point of view.

5.16 The day after the meeting Mr Mullen told the claimant that he was banned from entering any part of the factory buildings during his working day.

5.17 On 27 February 2019, Mr Mullen interviewed three other employees whom the claimant had mentioned. They all had some knowledge of the above matters including the rumours of the affair between W and M and the claimant having written to her. The first two employees denied that they had been W's lookouts to facilitate the affair. The first employee was clear that W was upset and the third stated that he felt a little sorry for the claimant as he had been moved.

5.18 In the above circumstances, Mr Jonathan Fenton, Process Manager wrote to the claimant on 1 March 2019 requiring him to attend a disciplinary interview on 6 March. He was informed that the question of disciplinary action against him would be considered with regard to, "Potential Gross Misconduct – Specifically the harassment of a colleague". (70)

5.19 At the commencement of the disciplinary hearing the claimant elected not to be accompanied. Mr Fenton suggested to the claimant that he had been asked not to contact W but had continued going to the Motorhome line and had written letters to her. He responded that "I was trying to communicate with her, I asked one of the drivers to deliver it to her". He mentioned that a

female employee (who he asked to be spoken to) had passed messages to him from W. It was suggested by Mr Fenton that the claimant had been asked not to communicate with W and to keep some distance under the circumstances and he replied that he wanted to go on to the Motorhome line.

5.20 Mr Fenton formed the view that the claimant considered that he had done nothing wrong although he did admit that he would not react well should such a communication have been sent to his own partner. Mr Fenton considered that the level of detail that the claimant had given, as recorded in the notes of the investigatory meeting with Mr Mullen, was of great concern and this had been backed up by the notes of the meetings with the other three employees. He believed that the claimant had shown no remorse or empathy and that it was extremely unlikely that he could ever let go of the personal issues he had had with W and return to a normal working life in the factory but would continue in a similar manner as he could not seem to understand the effect his actions had had on his colleagues. Thus he decided to recommend the claimant's immediate dismissal on grounds of gross misconduct.

5.21 On 12 March 2019, as the claimant had asked if he would, Mr Fenton interviewed the female employee whom the claimant said had given him a message from W (76). She confirmed that W had asked her to tell the claimant that she was gutted about what was going on. In addition, the employee told Mr Fenton that she thought it was over the top that the claimant was suggesting that W had spies about her and that he was obsessed with this. She had told him that he should keep his head down and get on with his job. She informed Mr Fenton that W had been saying that she locked the door if she is in on her own now as she is scared. She told Mr Fenton that the claimant was obsessed with W and was not going to let this go.

5.22 Mr Fenton met with W, accompanied by her father (who is also an employee of the respondent), on 13 March 2019 (77). She told him that she felt anxious and nervous as the claimant was always coming into the Motorhome line and it scared her. He seemed to have an obsession with her. She advised Mr Fenton that she had contacted the police about this. She denied having passed any messages to the female employee for the claimant although she might have said that she hoped that he is okay because she genuinely did not know how it came to this.

5.23 The disciplinary meeting was reconvened on 14 March when the claimant was informed that he was summarily dismissed on the grounds of gross misconduct with immediate effect: no notice or pay in lieu notice would be applicable. This was confirmed to the claimant by letter of 14 March 2019 (79) when he was advised that he had a right of appeal.

5.24 The claimant exercised that right in a letter to Mr Jones which, although undated, is thought to have been written on 18 March 2019 (80). The appeal letter fully explained the events, as the claimant saw them, that had

led to his dismissal, which he considered to be unfair and he asked to be reinstated.

5.25 In connection with the appeal Mr Jones initially met the claimant on 29 March 2019. The claimant had asked that one of two colleagues should accompany him but neither wanted to. The claimant asked if there was anyone Mr Jones could recommend and it was ultimately agreed that he would be represented by Stephen Green who was an experienced trade union representative.

5.26 The adjourned appeal meeting took place on 1 April 2019 (84). Mr Jones was accompanied by the HR manager and the claimant by Mr Green. Mr Jones explained that his role was to reinvestigate matters after which he would come to his own decision. The claimant explained recent events (much of which repeating what is set out above) including as follows:

5.26.1 He had had a friendly relationship with W. This had included them, her boyfriend and others going to gigs together but that had deteriorated and she had bullied him from September to Christmas 2018. He then asked her for a word outside because he wanted to tell her that “anything what happens in the motorhomes stays in the motorhomes”. He wanted to say that whatever happens he would not say anything to her boyfriend but she went mental and told people that he was saying that she was having an affair. This led to the claimant being moved to Despatch, “I was just told to give her space”.

5.26.2 He explained that he had written to W after he became ill as he thought that she would be able to get his original job back. Another employee had delivered his note.

5.27 After this appeal meeting, Mr Jones interviewed W on 3 April (89). He found that she seemed to be genuine and upset but composed. He noted that a rash appeared on her neck and upper chest during the meeting. W explained matters as she had seen them including as follows:

5.27.1 She had had a normal friendship with the claimant (including going to gigs) but, at the end of September/beginning of October, he had confessed that he loved her. From then until December he made little comments to her about her losing weight and having missed her over the summer holidays, then one day he said that he could not be around her and had to stay away. He said that he was in love with her and it was like being on a diet craving chocolate as he wanted to be around her all the time.

5.27.2 Things then started to turn sour. The claimant was unhappy if she spoke to other people and started to accuse her of certain things – he was “paranoid and possessive”. He became overpowering and she kept asking him to stay away from her. The Thursday before Christmas the claimant had approached and said that he knew why

she had been a bitch to him over the last few months. It was that she was having an affair with M and he wanted her to admit it. He said that he had watched her going out of the fire exit. The claimant had dragged W around other people and asked if they knew that they were having an affair, including M but he denied it. The claimant said that they were lying and had spies.

5.27.3 W explained that she had not said anything previously because she was just being a friend and thought that the claimant would not return to work after Christmas but when he did she spoke to her manager and HR.

5.27.4 She told Mr Jones that her manager told her that another employee had a letter from the claimant (58) and if she wanted to she could get it, which she did. She found offensive the bit of the letter about her needing to accept what she had done as she had not done anything.

5.27.5 Then the claimant sent a second letter (57) through another employee. She was worried and anxious about that letter. It was untrue: she had not have an affair, had not bullied anyone and did not have lookouts. The letter was intimidating and stalkerish and she found it threatening. It had made her "scared and anxious, petrified". She is worried and looking over her shoulder at work.

5.27.6 W had first telephoned the police in early March for some advice and contacted them again when the claimant started coming more and more onto the line.

5.28 Mr Jones then interviewed four of the claimant's managers who had been involved in these matters and 13 of his colleagues on 3, 4 and 8 April 2019 (93 – 103). The notes of the interviews are a matter of record but key points arising included as follows:

5.28.1 The Team Leader of W and the claimant at the time of the pre-Christmas incident had spoken to each of them then and on their return to work after Christmas. He explained to Mr Jones that the claimant could not get that what he had done wrong and the Team Leader thought it was stalking. It had definitely been right to move the claimant. He had been told not to be on the Motorhome line but he would continue to come up at break times and he had to try to tell him to go back to his area.

5.28.2 The Process Manager confirmed the after the claimant had kept appearing on the Motorhome line and he had asked him to return to his work area. The claimant's Despatch Manager had told him that he had told the claimant not to come to the factory but he did not keep to the reasonable instruction.

5.28.3 The Despatch Manager (who would conducted the initial investigation meeting) considered that the first letter (58) stating "go

and do it now" had been offensive. He felt that the claimant was totally obsessed with W and could not see how and why she was uncomfortable. The claimant told him that he "stood watching her at the door and it was like she strangled him". The Manager genuinely believed that it was harassment. He had told the claimant not to go into the factory but he continued to do so even at break times and then when going for parts. He had spoken to the claimant about this.

5.28.4 The other employees interviewed did not shed a great of light on matters although matters arising included: M did deny having an affair with W or having her mobile number; there had been an argument between the claimant and W before Christmas 2018; W had been upset and had taken the claimant around the caravan line when employees had been asked if they knew she and M were having an affair, which no one confirmed; the so-called "spies" for W denied that they were or that they were concealing information.

5.29 In continuation of the appeal hearing, Mr Jones interviewed the claimant again on 9 April 2019 (104). As a result of his investigations Mr Jones had prepared 36 questions in relation to which he sought clarification from the claimant.

5.29.1 As to the claimant being separated from W, in essence, the claimant maintained his earlier version of events including the following. He had been told that he was being moved to put some distance between them, not that he should not contact W in person, just give her some space. He was told, "Don't approach her, keep away from her, don't go anywhere near her – but I was told to go out of the way from her – I thought it would just be a week." He did not know that he could not text her or ring her. He did not have her phone number, which is why he had to write to her. He was told not to go into the factory and not to use the same smoking shelter.

5.29.2 The claimant explained that he had written the first of the letters referred to above (56a) in October 2018 to say that he apologised and if he could do anything to put it right. In the second letter (the first after his move to Despatch) (58) he had said that she needed to undo what she had done meaning undo him the being in Despatch. Asked about the third letter (57), he said that W was spreading stuff about him and he is not there to defend himself. He has nothing to lose. Asked what he meant by "I will do it my way", he explained that he would try to get back – he had done nothing wrong and had not stalked her. Asked what he meant by having "loads of evidence, emails, people", he answered that the whole bottom bit is a bluff; he was trying to influence her and had 10 minutes before the interview for his job. He did not have loads of evidence.

5.29.3 When Mr Jones told the claimant that he had interviewed 19 people and none had collaborated his story he explained that he had watched W “at break times – every day 3 years she’s go to the caravan line and then she started going for her break and she was doubling back – I only noticed because she was my friend”. He had never said anything for 5 months, “We are best friends and she spends a lot of time with” M.

5.30 Still in continuation of the appeal hearing, Mr Jones met the claimant again on 10 April 2019 (111). They rehearsed many of the matters referred to above. Particular points were that the claimant suggested that although he had been told not to contact W, “The letters were not contact”. The then accepted that sending the letters was not okay but explained that he needed to ask her for help. Towards the end of this meeting the claimant confirmed that he felt that he had had the put his side of the story. The meeting concluded by the claimant saying that W flirts with M, “she is having an affair with him and she meets him every dinner time – she didn’t know I knew – I kept out of the way I kept quiet”.

5.31 After that meeting Mr Jones interviewed two further employees (114) but the information they provided adds nothing to my consideration of the issues before me.

5.32 At this point Mr Jones prepared a six-page “Appeal Summary” (117) setting out his understanding of events and their chronology, the various interviews and meetings that he and others had held, the reasons for the dismissal, the grounds of appeal and his conclusions. Having considered everything Mr Jones believed that the claimant’s conduct was harassing W, that he had developed feelings for her, became obsessed with the affair he believed she was having with another man and that had led him to become paranoid watching her during normal interactions with other employees. The claimant had then written to W twice in breach of what Mr Jones considered to be a reasonable instruction not to contact her causing her further anxiety and stress that he found to be genuine. He considered the claimant’s behaviour to be therefore unacceptable and constituted harassment. The claimant had continued to contact W by letter having clearly been told not to and everything he said and wrote confirmed to Mr Jones that he would not stop if he had been given a lesser sanction. He agreed with Mr Fenton’s reasons for dismissing the claimant summarily albeit he considered that Mr Fenton had not looked into the evidence as fully as he should have done.

5.33 For these reasons, Mr Jones decided to uphold the decision that the claimant should be summarily dismissed. He had a final meeting with the claimant to give him that decision on 12 April, which he confirmed in writing on 15 April 2019 (115).

Submissions

6. After the evidence had been concluded the parties' representatives made submissions both orally and in the very helpful written skeleton arguments that each of them had prepared. It is not necessary to set the submissions out in detail here because they are a matter of record and the salient points will be obvious from my conclusions below. Suffice it to say that I fully considered all the submissions made, together with the statutory and case law referred to, and the parties can be assured that they were all taken into account in coming to my decision. That said, I record the key aspects of the submissions below in which, given that the written submissions exist as a record, I focus principally upon those that were made orally.

7. On behalf of the claimant, Mr Robinson-Young summarised the factual context before making submissions including as follows:

    7.1 The claimant had been given no clear instructions not to contact W only that they needed time and space between them. He was placed in Despatch and although the respondent was contractually entitled to move him, thought should have been given to the type of place. Work outside was unsuitable for him as he suffers from asthma and industrial white finger. The nurse had noted his symptoms and his doctor had placed him on steroids.

    7.2 On any analysis, the first letter the claimant had written on 8 February 2018 (58) was not threatening or harassing. He was a friend asking for help. He had been banned from entering the factory and had had to stay outside, which is why he wrote the note. He wanted a job back in the warm and who can blame him?

    7.3 He had then been told that they were interviewing for his job. Despite having been told his rule was temporary, it would become permanent and the claimant could see his livelihood in what he thought would be a job for life disappear. He did the only thing he could think of and wrote the second letter (57). It may not be written in the best terms but he did not intend to cause offence.

    7.4 The claimant then met Mr Mullen who told him the communication must stop and there has been no further communication from him to W although she had communicated with him by sending a message by a colleague saying that she was gutted as to what was occurring.

    7.5 The claimant never had precisely framed charges against him but only a general charge that did not meet the Strouthos test. The respondent relies upon Retarded Children's Aid Society Ltd v Day [1978] IRLR 128 and British Leyland UK Limited v Swift [1981] IRLR 91 but the claimant did not see what he had done wrong: he had carried out what he had been told. He had been told to put distance between himself and W and he did; she was not told the same which seems bizarre. Natural justice requires that an employee should know the case against him. The requirements in Spink apply even more so in this case.

7.6 The original investigation had been a complete and utter failure: a failure to investigate and interview the complainant. With reference to Taylor v OCS Group Ltd [2006] IRLR 613, it is accepted that an appeal can put things right but Mr Jones' investigation did not go far enough. It did not investigate harassment but centred on the alleged affair. The main allegation was had the claimant caused harassment to such a degree that summary dismissal was the only answer? Mr Jones appeared to look only for evidence to show fault and not for exculpatory evidence: A v B. If that is right the appeal investigation cannot be enough to satisfy Burchell: a genuine belief founded on reasonable investigation.

7.7 The respondent decided that summary dismissal for gross misconduct was the only sanction. By the time of that decision there had been no contact between the claimant and W for a month, no wilful disregard of lawful instruction and no intention to cause mischief. The only contact was when he thought he would be in the job he could not handle and therefore would be out of work, and then only when he was told that the respondent was interviewing his job. There is no evidence of contact thereafter. A reasonable conclusion would have been a warning. The sanction of dismissal for gross misconduct could not be justified and gross misconduct is not made out: Laws.

7.8 This was not a case of harassment under the Equality Act. Nevertheless, Dowson sets out the tests. The primary test involves a course of conduct and there had been no course of conduct here.

8. On behalf of the respondent, Mr Dulovic made submissions including as follows:

8.1 The remarkable thing in this case is that no malice had been shown to the claimant by any of the respondent's witnesses or the employees interviewed including W.

8.2 The claimant's representative submitted that the charges had not been properly framed but the invitation letter stated, "Potential Gross Misconduct – Specifically the harassment of a colleague." How much clearer could that be? Perhaps it could or should be more detailed but the claimant had just been interviewed two days earlier and knew exactly what it was about.

8.3 Similarly, the claimant cannot present that he did not know what he had been dismissed for. That was an issue for the respondent, however, as he showed no understanding and no acceptance that he was in any way in the wrong, and a complete lack of understanding of the position of W. There was no credit to him saying that she had bullied him for five months when he had not done anything. Why would she do so unless she felt uncomfortable with him there – why would she feel that? The answer is that the claimant believed for five months that she was having an affair with another man and he spoke to her about that.

8.4 For the claimant's representative to suggest that this was not harassment and there was no course of conduct is a deliberately naive proposition. The two letters sent in January 2019 were not be taken in a vacuum out of context with what had occurred beforehand. They need to be read in light of the history and complaint of W. The letters dealing to the disciplinary were the last two events and it was clear from the evidence of W and the other employees that there was a course of conduct involving stalking, the claimant speaking to her and other employees and gossiping in the workplace. It beggars belief that he cannot see that this is harmful whether it is true or not. There was clearly an intimidating and hostile environment created by the claimant and, while not an Equality Act claim, the essential ingredient is a course of conduct that causes an intimidating, hostile, degrading, humiliating or offensive environment.

8.5 The reason for the dismissal is the facts known to the employer or the beliefs known to the employer that caused the dismissal. The Tribunal cannot reconstruct the facts because of the claimant's explanation. It is how matters presented on the evidence available to the respondent at the time that determines whether dismissal is justified.

8.6 The circumstances are close to a breakdown of a relationship with no fault on either side but are not that. Having investigated, the respondent was satisfied that the claimant was at fault. It is noteworthy that all the managers appear to reach their own independent conclusions on the facts that W's complaint and reaction to the harassment were genuine, the claimant had become obsessed with the idea that she was having an illicit affair, the claimant had no insight or grasp of the effect of his behaviour on W and both Messrs Fenton and Jones clearly formed the view that they could have no faith or trust that, if they exercised leniency, C would heed a lesser sanction and modify his behaviour.

8.7 It is conceded that the disciplinary process was flawed at the disciplinary hearing. To his credit, Mr Jones took note of that voluntarily without being prompted by his legal advisers and took the view that he needed to start again.

8.8 It is all very well to be critical now about the extent of the appeal investigation but there is nothing overtly or subconsciously unfair. The claimant was asked who he wanted to be interviewed and he reviewed all the notes of the investigation interviews and the disciplinary. Anything that the claimant wanted investigated was investigated. This is not a case of not seeking exculpatory evidence. All the people who the claimant suggested should be interviewed and would support him did not.

8.9 With reference to Taylor, the appeal was a full rehearing and reinvestigation. The label is neither here nor there. It was a fair procedure which gave the claimant the opportunity to set out his case and have a say. Referring to Burchell there was a genuine belief, a reasonable belief and an investigation. Given that there was no malice it is remarkable that everybody material formed the same view of the claimant's mental state and

his behaviour to W; and the same view that W's distress was perfectly genuine and not manufactured, and not her simply venting at him for no reason.

8.10 Referring to Ladbroke v Arnott, is it necessary to dismiss? The answer to which is that there was no realistic alternative option because the claimant did not understand or accept that his behaviour was completely unacceptable. Not to dismiss would leave the innocent party (W) to the mercy of the claimant when it was known that there would be a further incident: Retarded Children Society. Dismissal was the most appropriate sanction as the claimant was determined to go his own way. The respondent was satisfied that if he was given another chance to change his ways he would not. So there was no other sanction possible and therefore the dismissal was within the range of reasonable responses.

The Law

Unfair dismissal

9. The principal statutory provisions that are relevant to the issues in relation to the claim of unfair dismissal are to be found in the 1996 Act and are as follows:

"94 The right.

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

"98 General.

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

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

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

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

……

(b) relates to the conduct of the employee,

……

(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."

Contract claim

10. Article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, with reference to section 3(2) of the Employment Tribunals Act 1996, provides (at risk of oversimplification) that proceedings can be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages for the breach of a contract of employment.

Consideration: application of the facts and the law to determine the issues

11. The above are the salient facts and submissions relevant to and upon which I based my judgment. I considered those facts and the submissions made in the light of the relevant law and the case precedents in this area of law. I address first, the claimant's complaint of unfair dismissal and then his contract claim.

Unfair dismissal

12. In this 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 acted, then the employer's decision to dismiss will be reasonable. However, this is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse. The ET must not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The ET must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which "a reasonable employer might have adopted". An ET must focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any internal appeal process) and not on whether in fact the employee has suffered an injustice. An appeal from the ET to the EAT lies only in respect of a question of law arising from the ET's decision: see section 21(1) of the Employment Tribunals Act 1996."

13. Unfair dismissal as a concept was first introduced into the UK legislation in 1972. Some might have expected a tribunal to focus on whether it was fair that the employee had been dismissed. The higher courts have consistently said, however, that that is not the correct approach; rather a tribunal should focus its attention on the conduct of the employer: W Devis & Sons Ltd v Atkins [1977] IRLR 314. That being so, 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 4 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?

14. The first questions for me to consider are what was the reason for the dismissal of the claimant and was that a potentially fair reason within section 98(1) 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.

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 ….*

16. During my hearing of this complaint, the claimant has not questioned that it was his conduct that was relied upon by the respondent as the real reason for his dismissal.

17. In that respect, 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 Fenton and Mr Jones respectively) are clearly set out in their respective contemporaneous decision letters referred to above. Quite simply, applying Abernethy, they had assembled evidence providing facts on the basis of which

they formed beliefs, which were then obviously known to and held by them at the time of the dismissal of the claimant. On the evidence presented to me at this hearing I have no hesitation in finding, and the claimant did not dispute, 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 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?

18. I now turn to consider the question of whether (there being no burden of proof on either party) the respondent 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 (albeit of a single question), each of which the Tribunal must take into account:

    18.1 first, whether, in the circumstances, the respondent acted reasonably or unreasonably;

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

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

19. 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.

20. 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.

21. 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. I do so following the order of the issues as set out in Graham (which reflects the chronological order of such

matters) of considering the investigation, the managers' beliefs and the grounds for those beliefs.

22. The first element in Graham (the third element in Burchell) is that at the stage that Mr Fenton formed his belief on the grounds he had found and Mr Jones maintained that belief, the respondent must have carried out "an investigation into the matter that was reasonable in the circumstances of the case".

23. When Mr Jones was appointed to conduct the claimant's appeal, he considered that the notes of the disciplinary hearing were not good and the hearing itself was quite short. He identified, nevertheless, that Mr Fenton did go on to interview the one witness whom the claimant had asked him to speak to and also re-interviewed W. He noted, however, that Mr Fenton had not interviewed any other witnesses or delved into the points the claimant had raised. Mr Jones therefore felt that Mr Fenton had not investigated as fully as he should have done. In these circumstances Mr Jones commenced the process afresh.

24. In this regard, I have reminded myself of the words of Wood J in Whitbread and Co Plc v Mills [1988] ICR 766:

> "It seems to us that in the context of industrial relations those appeal procedures form an important part of the process of ensuring that a dismissal is fair. Secondly as Lord Bridge said …. in Tipton "both the original and the appellant decision of the employer are necessary elements in the overall process of terminating the contract of employment."

25. There is also the decision in Taylor, from which I have particularly noted the words of Smith LJ at paragraph 47 in which she expresses the opinion that the use of the words 'rehearing' and 'review' in relation to an appeal hearing can lead an employment tribunal into error. She continues:

> "This error is avoided if ETs realise that their task is to apply the statutory test. In doing that they should consider the fairness of the whole of the disciplinary process. If they find that an early stage of the process was defective and unfair in some way, they will want to examine any subsequent proceeding with particular care. But their purpose in so doing will not be to determine whether it amounted to a rehearing or a review but to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at the early stage."

26. In this respect, I note that although Mr Jones considered the disciplinary part of the process to be somewhat deficient he was not similarly critical of the investigation that had been conducted by Mr Mullen. The investigation meeting took place on 26 February 2019. The notes of that meeting run to in excess of six pages and it can be seen that all relevant issues were explored with the claimant who was given every opportunity to explain things from his perspective. The following day, Mr Mullen then interviewed the two employees who had been mentioned by the

claimant. The claimant's representative submitted that Mr Mullen had failed to interview the complainant but I am satisfied that he was sufficiently aware of W's complaint (at least for the purposes of his investigation) and it was not unreasonable that he should focus on understanding the claimant's response and interviewing those to whom the claimant had referred in that connection. Reminding myself that in the decision in Hitt the Court of Appeal made it plain that the range of reasonable responses 'test' applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to any other procedural and substantive aspects of the decision to dismiss a person from his employment for misconduct, I am satisfied that that investigation by Mr Mullen was reasonable in all the circumstances of this case.

27. There was then the disciplinary interview. In this regard I do not find it credible (given the recency of the investigation meeting only two days before at which, as found above, matters relating to W had been thoroughly ventilated) that the claimant did not understand that the letter inviting him to the disciplinary interview, dated 1 March 2019, which refers to the question of disciplinary action with regard to "Potential Gross Misconduct – Specifically the harassment of a colleague", could have related to anything other than the same matters as had been discussed with him at the investigation meeting and, therefore, to his alleged harassment of W.

28. The disciplinary interview on 6 March was certainly fairly brief. Nevertheless, Mr Fenton explored with the claimant the key issue that ultimately gave rise to his dismissal that he had been asked not to contact W but had continued going to the Motorhome line and had written letters to her in respect of which he obtained the claimant's response that he had not contacted W and that he had not been told not to write a letter, which had been delivered by one of the respondent's drivers.

29. As part of this process, Mr Fenton interviewed, as the claimant had asked him to, the female employee who had passed on the message from W and although she confirmed that she had done that she also provided additional information to Mr Fenton including that the claimant suggesting that W had spies about her was over the top and that he was obsessed with this. She also informed Mr Fenton that W had been saying that she locked the door if she was in on her own now as she was scared, and that the claimant was obsessed with W and was not going to let this go.

30. Mr Fenton also interviewed W. She told him that she felt anxious and nervous as the claimant was always coming into the Motorhome line and it scared her, and that he seemed to have an obsession with her. She advised Mr Fenton that she had contacted the police about this.

31. On the above bases, Mr Fenton formed the view that the level of detail that the appellant had given, as recorded in the notes of the investigatory meeting (as supported by the interviews with the other three employees) was of great concern yet it appeared that the claimant considered that he had done nothing wrong. Mr Fenton believed that the claimant had shown no remorse or empathy and that it was extremely unlikely that he could ever let go of the personal issues he had had

with W and return to a normal working life in the factory but would continue in a similar manner as he could not seem to understand the effect his actions had had on his colleagues. These were the bases upon which Mr Fenton decided that the claimant should be dismissed on grounds of gross misconduct.

32. I do not seek to go behind the concession made on behalf of the respondent that the disciplinary process was flawed at this stage of the disciplinary hearing but (again reminding myself that the range of reasonable responses 'test' applies to all procedural and substantive aspects of the decision to dismiss a person from his employment for misconduct) I do not find that the disciplinary process at this stage was unreasonable.

33. Be that as it may, I repeat that Mr Jones decided that he should begin afresh in the course of which he met with the claimant on five occasions, three of which I am satisfied amounted to thorough interviews, at which the claimant was represented by an experienced trade union representative and was given every opportunity to explain his position. Indeed at the end of the final substantive interview, Mr Jones asked the claimant, "Do you feel that you have had the opportunity to put your side of the story over", to which he replied, "Yes I do today …." (113). Even then, however, he appears not to have been able to resist going on to reopen matters by stating that W flirts with M, "she is having an affair with him and she meets him every dinner time – she didn't know I knew – I kept out of the way I kept quiet". Mr Jones also interviewed 18 other employees including W, the investigating manager (Mr Mullen) and the dismissing manager (Mr Fenton). The upshot of these interviews is detailed above.

34. On a point of detail relating to Mr Jones reinvestigation, I note that he interviewed all the managers who had been involved in these matters and 13 of the claimant's colleagues, including those to whom he was directed by the claimant (as had Mr Mullen). I am satisfied that Mr Jones conducted those interviews with an open mind to gather such information as he could whether that supported the allegations against the claimant or supported his explanations. As such, I do not accept the submission that his investigation was flawed by a failure to look for and consider any exculpatory evidence. Indeed, as Mr Jones informed the claimant at their meeting on 9 April, none of the 19 people whom he had interviewed had corroborated his account. Furthermore, at the end of that Mr Jones at the claimant, "If there anything else you would like me to investigate? Or anyone else you would like to talk to?", and the claimant simply replied, "No" (110).

35. In summary of my consideration of this first element in Graham, in accordance with the guidance in Taylor I have considered "the fairness of the whole of the disciplinary process" put in place by the respondent. This includes the initial investigation meeting, the disciplinary hearing and the appeal hearings all of which comprise the investigation into these matters. I accept that the disciplinary stage was somewhat deficient but I have not found it to be unreasonable and, having examined the appeal stage with particular care, I am satisfied that the overall investigatory process was fair and "reasonable in the circumstances of the case".

36. The second element in Graham, is whether the respondent (or strictly its managers acting on its behalf) believed that the claimant "was guilty of the conduct complained of".

37. In that regard it is important to note that in Burchell 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". Thus, as submitted on behalf of the respondent, it is not for this Tribunal now to reconstruct matters relating to that guilt of misconduct in light of the evidence provided to me and the submissions made on behalf of the claimant at the hearing.

38. For the reasons set out more fully above, I am satisfied that Mr Fenton and Mr Jones both believed that the claimant was guilty of misconduct. That (particularly in relation to the belief of Mr Jones) is clear from the evidence recorded above and was clear from Mr Jones' oral evidence before me. As such, this second element in Graham, the fact of belief of misconduct, is satisfied.

39. The third element in Graham is that the respondent must have in mind reasonable grounds upon which to sustain that belief.

40. The grounds upon which Mr Fenton and Mr Jones based their respective decisions are sufficiently set out above and need not be restated here. There is, however, one aspect of the above matters that has given me particular cause for thought. That is whether the claimant was actually instructed not to contact W and, therefore, if he did contact her whether he breached "a reasonable instruction" not to do so.

41. In this regard, even the claimant accepts that he had been told "Don't approach her, keep away from her, don't go anywhere near her – but I was told to go out of the way from her" and "not to go into the factory" (105) and "give her space" (85). Further, the claimant did not seek to deny that he had written the letters in question to W but suggested that, "The letters were not contact" (112). Similarly, he seeks to suggest that passing the letters to W via colleagues meant that he had not been near her, "I haven't, I haven't been near her!" (62), although he did confirm that he "was trying to communicate with her" (72).

42. Notwithstanding these fine points taken by the claimant to explain that his writing letters to W did not breach the instruction that he does accept he was given not to contact her, I am satisfied that it was reasonable for Mr Fenton and Mr Jones to decide that the claimant had, in writing the two letters breached a clear and reasonable instruction not to contact W.

43. In light of the above, I do not accept the submissions on behalf of the claimant that he had been given no clear instructions not to contact W but had only been told that they needed time and space between them.

44. Amongst the grounds relied upon by the two managers of the respondent who decided that the claimant should be dismissed, Mr Jones in particular brought into account the opinions of the managers whom he interviewed and the evidence of

W. The information Mr Jones gathered from the Team Leader, the Process Manager and the Despatch Manager was clear that the claimant had been told to keep away from the Motorhome line and keep out of the factory; and despite having been told that he had disregarded that instruction, which had had to be repeated. Indeed the claimant does not dispute that he was told that. Mr Jones also gathered information from the managers as to the behaviour of the claimant and its effect: for example, the Team Leader thought that way in which the claimant had acted amounted to "stalking" and the Despatch Manager genuinely believed that it was "harassment".

45. The information Mr Jones gathered from W included that the claimant was "paranoid and possessive", he became overpowering and she kept asking him to stay away from her, he told her that he watched her going out of the fire exit, she found offensive the part of the first letter about her needing to accept what she had done while, as to the second letter, it was intimidating and stalkerish, she found it threatening, it made her "scared and anxious, petrified", and she was worried and looking over her shoulder at work.

46. In light of such evidence from the managers and W, I do not accept the submission on behalf of the claimant that the first of the letters was not threatening or harassing and do not consider relevant to the issues that the claimant did not intend to cause offence. Even the claimant said that the top of one of the letters could cause more harm than good (60). The point is that the respondent's managers were satisfied that the effect of the claimant's letters was to harass W: indeed it would appear from the claimant's evidence that the bottom bit of the second letter is a bluff and he was trying to influence her that harassment was also the purpose of at least the latter part of that the second letter.

47. More particularly, on completion of his reinvestigation of matters and meetings with the claimant as described above, Mr Jones compiled the "Appeal Summary" referred to above. That is a comprehensive document that demonstrates to my satisfaction that Mr Jones thoroughly considered all matters that had been put before him by the claimant and the employees whom he had interviewed. On that basis he decided as I have detailed above: particularly that the claimant had become obsessed with the affair he believed W and M were having and, importantly, that in breach of a clear and reasonable instruction not to, the claimant had contacted W causing her further anxiety and distress that he found genuine. Mr Jones was therefore satisfied that the claimant's behaviour was thus unacceptable and constituted harassment.

48. For all the above reasons, therefore, addressing the third element in Graham, I consider that the respondent did have reasonable grounds upon which to sustain the belief in the claimant's misconduct.

49. 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.

50. In summary, by reference to the three elements in Burchell, on the evidence available to me and on the basis of the findings of fact set out above (and

reminding myself that in relation to this claim of unfair dismissal, it is not for me to believe or otherwise that the claimant actually breached an instruction not to contact W), I accept that:

50.1 Mr Fenton and Mr Jones "did believe" that the claimant was guilty of misconduct;

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

50.3 at the stage at which Mr Jones 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.

51. The final issue is, given the above, the reasonableness or otherwise of the sanction of dismissal: i.e. the question of whether dismissal was within the range of reasonable responses of a reasonable employer. 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. In this regard, I can do no better than quote Lord Denning MR sitting in the Court of Appeal in the case of British Leyland UK Limited v Swift [1981] IRLR 91. There he said as follows:

> "The correct test is: was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view".

52. It is quite possible therefore that another employer in these circumstances might have taken a different view and shown a willingness to accept its employee's explanation. My function, however, 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. In this case, I consider that it is not possible for me to say, given the weight of evidence that I have summarised above that no reasonable employer would have dismissed the claimant. Indeed I am quite satisfied that in the circumstances known to Mr Jones as a result of the respondent's investigation (especially at the appeal stage), the dismissal of the claimant was a decision that fell within the band of reasonable responses of a reasonable employer in these circumstances. I am satisfied that it was within the range of reasonable responses for the respondent to dismiss the claimant.

53. In summary, therefore, I am satisfied that, as is required of me by section 98(4) of the 1996 Act, the respondent acted reasonably in treating the reason for the dismissal of the claimant as a sufficient reason for dismissing him.

Contract claim

54. There remains the claimant's alternative claim that the respondent breached his contract of employment by terminating that contract without giving him the notice of that termination to which he was entitled. The emphasis in this claim is quite different. Although I still need satisfied as to the reason for the claimant's dismissal, it is not a question of whether I am satisfied that the respondent acted reasonably or unreasonably and whether the decision to dismiss fell within the band of reasonable responses (which has no application to this claim), and the restriction on a tribunal substituting its own view does not apply.

55. In a contract claim it is for the tribunal to determine whether the respondent has proved on the balance of probabilities on the evidence before it that the claimant was guilty of conduct so serious as to amount to a repudiatory breach of his contract of employment entitling the respondent to terminate that contract summarily. It is for the tribunal to make its own decision on that and not to evaluate the reasonableness of the respondent's decision.

56. In this case, I find that there is abundant evidence that the claimant knew that he was not to have any contact with W. Such evidence is found in what the respondent's managers (i.e. the Team Leader, the Process Manager and the Despatch Manager) said to Mr Jones as detailed above about the claimant having been repeatedly told to put some space between him and W and not go to the Motorhome line or into the factory at all. In the circumstances, I am satisfied that those directions to the claimant can be categorised as being a reasonable management instruction. Significantly, such evidence is also the found in the claimant's statements at the time and in his evidence before this Tribunal. As set out above he accepts that he had been told "Don't approach her, keep away from her, don't go anywhere near her – but I was told to go out of the way from her" and "not to go into the factory" (105) and "give her space" (85) yet despite that he also confirmed that in the letters he "was trying to communicate with her" (72), and when it was put to him in cross examination that the managers had told him that he could not contact W, his reply was "I shouldn't have …."

57. Despite that, however, he did contact W by writing to her twice and, as mentioned above, I consider it irrelevant that he passed those letters to her via fellow employees rather than handing them directly to her himself.

58. In summary, therefore, having considered all the evidence before me, both oral and documentary, and the submissions made on behalf of the parties I am satisfied that the conduct of the claimant was, indeed, so serious as to amount to a repudiatory breach of his contract of employment and, therefore, the respondent was entitled to terminate that contract summarily. As such, the claimant was not entitled to notice of termination.

Conclusion

59. 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 of the respondent, on the evidence available to them, to form a decision which fell within the range of reasonable responses. I am so satisfied.

60. 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.

61. Additionally, my judgement is that the conduct of the claimant amounted to a repudiatory breach of his contract of employment entitling the respondent to terminate that contract summarily.

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

EMPLOYMENT JUDGE MORRIS

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 2 February 2020