EMPLOYMENT TRIBUNALS

Claimant: Mr S Crabtree

Respondent: E E Limited

Heard at: Newcastle Hearing Centre (in part by CVP)
On: 29, 30 and 31 March and 1 April 2021
With deliberations on: 5 May 2021

Before: Employment Judge Morris
Members: Mrs L Jackson
Mrs P Wright

Representation:
Claimant: Mr P Hargreaves, solicitor
Respondent: Mr M Sellwood of counsel

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is as follows:

1. The claimant's complaint that his dismissal by the respondent was unfair, being contrary to Section 94 of the Employment Rights Act 1996 by reference to section 103A of that Act is not well-founded and is dismissed.

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

3. The claimant's complaint that, contrary to section 47B of the Employment Rights Act 1996, the respondent subjected him to detriment on the ground that he had made a protected disclosure is not well-founded and is dismissed.

4. Neither of the claimant's contract claims in relation to non-payment of bonus and not having been given due notice of the termination of his contract of employment is well-founded and each is dismissed.

5. The claimant's complaint that, contrary to Regulation 14 of the Working Time Regulations 1998, the respondent did not compensate him in respect of his entitlement to paid holiday that had accrued but had not been taken at the termination of his employment was withdrawn by the claimant and is dismissed.

REASONS

Representation and evidence

1. The claimant was represented by Mr P Hargreaves who called the claimant to give evidence. The respondent was represented by Mr M Sellwood of counsel who called the following employees of the respondent to give evidence on its behalf: Mr B Evans, Regional Commercial Manager; Mr J Clark, Store Manager and Operations Lead for the Northern Region; Mr S Potter, Regional Manager for the North East Region; Mr M Patel, Regional Manager for the North West Region (these job titles being in respect of the posts these individuals held at the time relevant to these proceedings). The Tribunal also had before it a witness statement from Ms Mollie Pullen, the content of which Mr Hargreaves did not seek to challenge and, as such, she did not give oral evidence.

2. In the proceedings reference was made to two employees of the respondent both of whom are named Mr Evans. In the reasons below reference to "Mr Evans" shall mean Mr B Evans, Regional Commercial Manager. The store manager at Teesside Park (who agreed to assist with the closure of the Stockton store) will be referred to as, "Mr P Evans".

3. With the agreement of the parties the Hearing was conducted in a hybrid fashion: the claimant, Mr Hargreaves and the three members of the Tribunal attended the hearing in person; Mr Sellwood and the respondent's witnesses attended by way of the Cloud Video Platform.

4. The evidence in chief of or on behalf of the parties was given by way of written statements, which had been exchanged between them. The Tribunal also had before it an agreed bundle of documents comprising in excess of 1,000 pages (which was added to at the commencement of the hearing) that were supposedly relevant to the issues it had to determine although only a much smaller number were actually referred to. The production of such a large and unnecessary bundle of documents is to be deprecated. The numbers shown in parenthesis below refer to page numbers (or the first page number of a large document) in that bundle.

The claimant's complaints

5. As had been identified at a Preliminary Hearing conducted on 6 January 2020, the claimant's complaints were as follows:

    5.1 His dismissal by the respondent was unfair being contrary to Section 94 of the Employment Rights Act 1996 ("the 1996 Act") in that, by reference to section 103A of that Act, the reason for his dismissal (or, if more than one, the principal reason) was that he had made a protected disclosure.

    5.2 His dismissal by the respondent was unfair being contrary to Section 94 of the 1996 Act in that, by reference to section 98 of that Act (at the risk of over-simplification), he had not been guilty of misconduct as alleged and the respondent had not acted

reasonably in relation to his dismissal including as to the investigative and disciplinary processes and the sanction of dismissal.

5.3 Contrary to section 47B of the 1996 Act (with reference to sections 43A to 43C of that Act) he had been subjected to detriment by the respondent on the ground that he made a protected disclosure.

5.4 The respondent had acted in breach of his contract of employment by not paying to him the full amount of the commission/bonus pay to which he was entitled.

5.5 The respondent had acted in breach of his contract of employment by not giving him the notice of the termination of that contract to which he was entitled or paying him in lieu of that notice.

5.6 Contrary to Regulation 14 of the Working Time Regulations 1998 ("the WTR"), the respondent had not compensated him in respect of his entitlement to paid holiday that had accrued but not been taken at the termination of his employment.

The issues

6. The parties had produced a list of 22 principal issues running to 4 pages, which being a matter of record need not be set out fully in this part of these Reasons. Instead, they will be addressed in the Tribunal's consideration below and, where relevant and appropriate, the paragraph numbering in the agreed list of the issues has been used as a side heading in our determination below. Suffice is to say that the issues address the first five of the six complaints of the claimant set out above, the sixth in relation to holiday pay having been withdrawn at the hearing.

Consideration and findings of fact

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

7.1 The respondent is well-known in the telecommunications industry including in respect of being a mobile telephone network operator and Internet service provider. It is a very large organisation with some 4,500 retail employees and other significant resources including a dedicated human resources department within which there is an employee relations department.

7.2 The claimant's employment began on 1 July 2004, as a sales consultant with the brand T-Mobile (82), and ended on 3 August 2019 when he was summarily dismissed for gross misconduct.

During his employment the claimant moved around several of the respondent's stores primarily in the North East of England.

7.3 The claimant became a Store Manager but, in relation to a matter that is not relevant to these proceedings, on 1 May 2016 he was demoted to a post of Assistant Manager. In about September 2017 Mr Potter promoted him to return to a post as Manager of the respondent's store at Wellington Square, Stockton, where he was working at the time relevant to these proceedings. They had a good relationship and the claimant was generally well-regarded and regularly earned good commission on top of his basic salary.

7.4 Within the respondent's organisation, the payment of any commission is governed by the respondent's Retail Rewards Policy (929). Targets (which are are set centrally by the respondent's Insights Team) and therefore commission are to a large extent based on footfall, i.e. the number of customers visiting a store. Individual employees have personal targets and store managers, such as the claimant, earn commission if the store achieves its targets. Other more senior staff (for example area managers and regional managers) also earn commission based on stores in their areas achieving their respective targets. A store manager's commission is based upon three elements: volume scheme, based on sales; store profit; customer experience (936).

7.5 The Tribunal interjects at this stage that the parties used the word "bonus" and the word "commission" synonymously; possibly because the claimant's contract of employment refers to a "Retail bonus scheme" while the scheme itself refers to "Retail Reward (commissions) schemes".

7.6 It was common ground that the retail sector in Stockton had experienced something of a decline at the time with, for example, the closure of the Marks and Spencer store and a number of concessions being lost from the Debenhams store, which was likely to have an impact on the footfall in the respondent's Stockton store.

7.7 The respondent has a contract with IPSOS to count the numbers of customers entering and leaving its stores in relation to which it uses a static electronic beam counter positioned at the entrance door. The footfall figures recorded by IPSOS are important as they affect what the respondent refers to as being "the conversion rate" (being the percentage by which football is converted into sales) and, therefore, targets in respect of the first two of the above elements: volume and store profit.

7.8 Shortly after his arrival at Stockton the claimant realised that there was an issue with the footfall records, which appeared higher than the number of customers visiting the store. He raised this with Mr Potter and Mr Evans and directly with IPSOS. The claimant's concern was that the respondent was not paying the commission due.

7.9 Mr Evans pursued this with Mr N Atkinson (manager of the Insights team) in an email dated 18 January 2018 (148) in which he noted that the counter recorded 6 people visiting the store while Insights recorded 89 people. As mentioned above, Insights is the respondent's internal department responsible for setting targets in light of relevant data. Mr Evans continued to pursue this matter with Mr Atkinson by telephone and email (148, 149, 150, 151, 153-6, 169 and 170).

7.10 Other staff at the Stockton store were similarly concerned that their targets were too high, which they attributed to a fault with the footfall counter, with the result that they were not being paid the commission that they had earned. In early 2018 they (not the claimant) raised an informal grievance about this situation and Mr Potter and Mr Evans met them at the store in around June 2018. Following that meeting Mr Potter agreed to adjust the targets of the Stockton store manually until it could be established whether there was an issue with the footfall counter. He reduced the footfall by 27%, which in turn reduced certain of the conversion targets. He did this for the months of August to October 2018. It was not necessary to make manual adjustments after this three-month period because targets are set using a footfall average over a three-month period, which meant that the mean average would automatically include the adjustment. The adjustments Mr Potter made resulted in bringing the conversion rates for the Stockton store in line with the regional average. In fact, the result was that the Stockton store had a lower conversion rate target than the remainder of the region, which was significantly lower than the previous year's actual performance at the store.

7.11 Mr Potter also adjusted the home broadband key performance indicator down by some 25% for the same three-month period on the basis that staff had explained that fibre availability in the area was poor.

7.12 Mr Evans continued to pursue this issue with Mr Atkinson and, in particular, the fact that if IPSOS could not obtain an accurate footfall it would use an average of the respondent's entire retail estate (151), which could produce inaccurate figures: for example, the Stockton store was closed on a Sunday but footfall was recorded as if customers had attended the store, and on the Bank Holiday Monday of 28 May 2018 the store had been open from 11.00 to 16.00 but IPSOS recorded there having been footfall from 09.00 to 17.00.

7.13 The footfall counter was broken in September 2018 and an IPSOS engineer visited on 15 September to repair it and on 15 December to install a new counter.

7.14 The informal grievance that had been raised by the Stockton staff was escalated to become a formal grievance in September 2018. It

was ultimately upheld by one of the respondent's regional managers in April 2019 (217).

7.15 In the above circumstances, there can be little doubt that, as Mr Potter put it, the footfall counter at the Stockton store was "definitely an issue". That said, in the absence of any evidence from the claimant, the Tribunal is not satisfied that his assertion that there was some form of 'deal' or arrangement between IPSOS and the respondent, possibly at Board level, whereby IPSOS, under pressure from the respondent to keep its contract, had agreed to manipulate the footfall figures so as to deny employees of the respondent the commission to which they were rightly due; which Mr Potter described as being "ridiculous".

7.16 Mr Evans and the claimant met monthly to discuss the performance of the Stockton store, which Mr Evans considered was underperforming on both volume and value despite the manual adjustments to the targets referred to above. On 11 January 2019 Mr Evans undertook a routine visit and audit at the Stockton store. Mr Evans sent the claimant his report of the visit in which he noted a number of matters requiring attention (195).

7.17 Mr Evans met the claimant again on 1 April 2019 following which he sent the claimant an informal performance improvement plan ("PIP"), which he had produced in line with the respondent's Managing Performance policy, and had been agreed between them at their meeting (213). The plan included various requirements relating to the claimant's performance as manager, which were fairly evenly split between those relating to his management of his team, which required improvement (for example, reviewing his team's reviews, placing one employee on a PIP and coaching the team) and others relating to the store achieving its volume targets; albeit the Tribunal accepts that there could be some overlap in that the sale of only three tablets, in relation to which the plan requires the claimant to conduct training sessions, could arise from the lack of customers coming into the store.

7.18 The claimant suggests that the PIP was, first, unjustified and, secondly, driven by Mr Potter whose attitude to him (according to the claimant) had changed since he raised the footfall issue. On the evidence before it the Tribunal does not accept those assertions. On the contrary, it is satisfied that the PIP arose out Mr Evans doing his job as Regional Commercial Manager. It was justified and was not instigated by Mr Potter although he was aware of it and agreed it. The claimant suggests that this was Mr Potter's first attempt to get rid of him; again, the Tribunal does not accept that assertion.

7.19 In this regard, as soon as the respondent decided that there were plans to consolidate stores in the north-east region in around April 2019 with the potential for the redundancy of one store manager (see below) Mr Potter brought the PIP to an end in order to ensure

that there was no undue pressure on the claimant at a difficult time. The Tribunal is satisfied that that would not be the approach of someone who wanted to use the PIP to engineer the dismissal of the claimant.

7.20 In April 2019 the respondent proposed a consolidation process to reduce the number of its stores from 20 to 18. The affected stores were the claimant's store at Stockton, and three others known as Hill Street, Teesside Park and Linthorpe Road. The Stockton and Hill Street stores were proposed for closure. The redundancy of only one store manager was envisaged, however, because there was a vacancy at the Redcar store.

7.21 Detailed consultation packs were produced for local employee representatives and employees, which are dated 1 April 2019 (225). In discussion with local trade unions it was agreed that selection of those to be made redundant would be based on 50% interview scores and 50% previous 12-month performance. Four store managers (one of whom was the claimant) were placed in the pool of those 'at risk' of redundancy. On 7 May 2019 Mr Potter conducted interviews by telephone with those employees, all of whom were asked the same three questions, and also to identify their successes and challenges (264). The claimant was accompanied by an employee representative. Ms L Ridley took notes (257), which Mr Potter used to complete Desktop Selection Assessment Forms for each individual. The claimant obtained the lowest score of the four store managers (260). To address the issue that the Stockton store had faced with the footfall counter, Mr Potter discounted the footfall figures by 27%. Even with that adjustment the claimant's scores were the lowest of the pool of four store managers.

7.22 By letter of 17 May 2019 Mr Potter informed the claimant that his position as store manager had provisionally been selected for redundancy (270). He was told that individual consultations would be undertaken during which ways of avoiding redundancy and mitigating the impact would be discussed with him, particularly the possibility of identifying any appropriate alternative positions. In this regard Mr Potter had in mind that there were some likely vacancies in the York area and he was confident that an alternative role could be secured for the claimant.

7.23 One day after Mr Potter informed the claimant that he was at risk of redundancy he was told by the manager of the Darlington store that he would be resigning. This immediately created a vacancy for a store manager and avoided the need for any redundancy. Mr Potter visited the Stockton store to inform the claimant of this development. The claimant's evidence is that Mr Potter was agitated, shouted at him and seemed to be accusing him of causing this situation. The Tribunal does not accept that evidence and prefers the evidence of Mr Potter that he was disappointed that the Darlington manager had not informed him earlier that he would be

resigning and frustrated by the fact that everyone had been put through the consultation process unnecessarily.

7.24 The claimant had some knowledge of the Darlington store (where the vacancy just arisen) as he had worked there as an assistant manager but Mr Potter decided that he should be offered the existing vacancy at the Redcar store. In cross examination he gave several reasons for this decision: one of the other managers had health issues that impacted upon travelling; she also had ranked higher than the claimant on performance; another manager did not drive and the journey to Redcar would have involved 2 or 3 buses or trains; Redcar is a busy store at which the claimant had previously worked and where he had been the top salesman; Darlington is a large store and Mr Potter had some concerns that the claimant was somewhat apathetic such that Darlington was "too much of a stretch" from Stockton. In cross examination he described the claimant as being at times "lazy" in respect of such matters as the state of the Stockton store and its signage; albeit that at other times the store was "absolutely immaculate". The Tribunal considers these reasons to be reasonable and rejects the submission made on his behalf that the claimant was given the Redcar store, which was less convenient, in order to annoy him.

7.25 The respondent categorises its stores as small, medium or large. The salary of a store manager depends upon the size of the store at which he or she works. At the time when the claimant was offered and accepted the post of manager at Redcar he was paid (in respect of his position at the Stockton store, which is a small store) £28,500 which was at the top of the salary scale for a small store. The range of salaries for a manager at a medium store was between £28,000 and £34,000. Thus, the claimant was already within the salary scale payable to managers at a medium store such as Redcar. On appointment to Redcar the claimant discussed with Mr Potter whether he would be entitled to a pay rise but, as he had been rated as "1" at his most recent appraisal, he was not eligible for a pay rise. The claimant then raised with Mr Potter that he would incur additional costs in travelling to Redcar. Mr Potter explained that it was not the respondent's policy to pay an allowance if a store manager changed store location as the contract of employment allowed a change of store within a reasonable distance without further financial entitlement. Despite that policy, Mr Potter agreed to raise with the Head of Stores whether the claimant might be paid a travel allowance. In cross examination his unchallenged evidence was that the claimant had received an additional £1,500 effectively increasing his salary to £30,000. As Mr Potter explained, that therefore took the claimant to the middle of the salary range for the medium band of stores and further, having been appointed to a medium-sized store he would become eligible for future increases to which he would not have been entitled had he remained at the top of the salary band for small stores.

7.26 Also in connection with the move to the Redcar store the claimant was paid commission based on a six-month average thus addressing the impact of the consolidation process and his changeover of stores from Stockton to the Redcar on him earning commission. In relation to this matter the Tribunal notes that at the claimant's grievance appeal Mr Byrne upheld the first point of his grievance relating to the commission payment. It notes, however, that he did so only on the basis that there was no evidence of Mr Potter having requested the commission payment whereas there was evidence that the claimant had been in touch with the commissions team regarding the payment. The Tribunal accepts that as evidence of the outcome of the grievance but also accepts the evidence of Mr Potter at the hearing that while he accepted this grievance outcome, he disagreed with it because managers cannot authorise payment of their own commission; the commissions team would send him an email and he would say, "Yes". He accepted that the claimant might have raised the matter initially but either he or the Head of Stores would have to have been involved in approving it. On balance of probability, the Tribunal finds that if the payment of this commission was not arranged by Mr Potter it was at least authorised by him.

7.27 The claimant formally commenced his placement at the Redcar store on 17 June 2019 (582).

7.28 Self-evidently, as the claimant was not ultimately dismissed by reason of redundancy, these proceedings do not include a complaint of unfair dismissal on the basis, for example, of unfair selection, lack of consultation etc. The Tribunal records, however, that it is entirely satisfied that there was nothing untoward in the redundancy process undertaken primarily by Mr Potter on behalf of the respondent. In particular, it does not accept the claimant's contention that this was a further attempt on the part of Mr Potter to get rid of him. To the contrary, the Tribunal is satisfied that the respondent had sound business reasons for undertaking the redundancy process (which was not challenged) and that it was conducted reasonably throughout.

7.29 Store managers are responsible for closing down their stores. The process is led by Mr D Smith (Project Manager, Channel Planning) in accordance with a Consolidation Closure Pack (347). The last day of trading at Stockton was 2 June 2019, which was then followed by the closure process. The claimant was due to be on annual leave for part of that time and the store manager at Teesside Park, Mr P Evans, agreed to assist with the closure.

7.30 On 10 June 2019 Mr Clark became aware of high stock losses at the Stockton store: a device stock loss of £1,146 and an accessory loss of £2,018 (281). Mr Clark contacted the claimant who told him that he had been advised by the Stock Integrity Team to write off the value of any leftover stock on the last day. Mr Clark considered this to be odd as he was not aware of any such advice and, if

properly accounted for, there was no reason to write stock off unless it had gone missing or was damaged, in which case an incident report form would need to be completed, but this had not happened. Mr Clark ran a stock adjustment report (386) that revealed a considerable volume of stock unaccounted for at Stockton, and did not correspond with what the claimant had told him.

7.31 Mr Clark contacted the Stock Integrity Team who confirmed that Stockton stock should be redistributed either to other stores or to the warehouse and, therefore, logged out of the store (283). This did not corroborate the claimant's version of events.

7.32 In these circumstances, on his own initiative, Mr Clark commenced an investigation, which he was entitled to do as Operations Lead for the Northern Region and did not require the authority of Mr Potter or anyone else to do so. He identified that stock accounts at Stockton appeared to show a pattern of stock being written off and then immediately written on again during stock counts. He reported this to Mr Potter on 15 June 2019 (289).

7.33 As Mr P Evans had been present when the Stockton store was closing down Mr Clark spoke to him by telephone on 17 June 2019. He confirmed that all the stock he had transferred to the warehouse had been properly accounted for and that he had complied with the correct processes.

7.34 Mr Clark next spoke to Mr I Howells (297), who had been an adviser at the Stockton store prior to its closure. He informed Mr Clark that the weekly stock counts had to take place on Wednesdays and it was he who conducted them because the claimant was always off. He explained that if he could not find an item of stock he would telephone the claimant and would often be instructed to write the item back onto the system. This was in breach of the Stock Management Policy. Additionally, Mr Howells told Mr Clark that when he carried out a count of the demonstration ("demo") items he would upload the same file onto the system each time without physically checking the items. He did this as it had always been done in that way at Stockton and he had been directed to do so by the claimant. The Tribunal accepts that the claimant had given such instructions to Mr Howells

7.35 Mr Clark was concerned that the above meant that Stockton would have had unreliable stock figures, for which the claimant had ultimate responsibility.

7.36 Mr Clark also became aware that the claimant had sent a sealed tote of demo stock from Stockton to Teesside Park on 25 May 2019. The advisers who opened it discovered that the items it contained had been irreparably damaged and that a Samsung 'phone, which was supposed to be in the tote, was not present.

7.37 On 21 June 2019 Mr Clark met the claimant to discuss the above issues (358). He maintained that all stock had been properly accounted for when Stockton closed and that the approach of him and Mr Howells to the stock count accorded with relevant policies and procedures of the respondent. He did not recall stock ever being written on that could not be found and denied telling Mr Howells to do so. This was inconsistent with Mr Howells' account and the stock movement report that Mr Clark had run off previously (386). Mr Clark also questioned the claimant about a number of different pieces of stock (including some Galaxy earbuds) but was not satisfied with his answers. As to the items in the tote, the claimant informed Mr Clark that he had placed them there in pristine condition. This was inconsistent with photographs that had been provided to Mr Clark (445).

7.38 Given these inconsistencies Mr Clark decided to suspend the claimant on full pay pending further investigation, which he did that day. He confirmed his decision by letter of 24 June 2019 (409).

7.39 On 22 June 2019 Mr Clark pursued his enquiries with the advisers who had opened the tote (311 and 312). They confirmed that it contained smashed iPads and 'phones, which had not been protected in any way during transit (for example by using bubble-wrap), which seemed to Mr Clark to be reckless management. He also spoke again with Mr P Evans who confirmed that the Galaxy earbuds had been left in a cage at Stockton for the claimant to deal with on his return from holiday (313).

7.40 Mr Clark also spoke to Mr Smith, Project Manager, about a watch and some cables which the claimant had said had been left in the store but Mr Smith said that they were not there when his store closure team completed their work (355).

7.41 Mr Clark considered the claimant to have been evasive during their meeting and that his accounts had conflicted with those of witnesses to whom he had spoken as well as the documentary evidence. He was satisfied that he should recommend a disciplinary case against the claimant on the basis that he had breached his position of trust and failed to adhere to the Stock Management Policy, which constituted a case of possible gross misconduct under the respondent's disciplinary procedure.

7.42 On 25 June 2019 Mr Clark received an email from Mr Smith informing him that his team had found a number of valuable items in boxes of rubbish which were to be thrown away (412). This was further evidence that stock counts at Stockton had not been properly conducted resulting in false stock levels at that store. He also sent Mr Clark photographs showing the store to have been left in a messy state and not properly cleared (415).

7.43 The above led Mr Clark to complete a Misconduct Investigation Report (357) in which he recommended that this case be

progressed as gross misconduct under the respondent's disciplinary procedure (367).

7.44 The Tribunal is satisfied that Mr Clark had reasonable grounds upon which to make this recommendation and rejects the claimant's assertion in his witness statement that "this was a stitch up to get me out". In light of Mr Clark's evidence before it, the Tribunal similarly rejects the contention in the claimant's witness statement that the outcome of Mr Clark's investigation had already been determined, that the opportunity had been taken to blacken his name and create an unfair impression of him or that he was just trying to build a case against the claimant, "and was not interested in a fair investigation, he was matching an investigation to his decided outcome".

7.45 By letter of 3 July 2019 Mr Potter invited the claimant to attend a disciplinary hearing (438). The allegations against the claimant are clearly set out in that letter (which was drafted by the respondent's Employee Relations team and approved by Mr Potter) and do not need to be repeated in full here. They can be summarised as being as follows:

7.45.1 The claimant had encouraged or instructed a manipulation of store stock counts through writing stock on and off to prevent loss appearing and had encouraged or instructed a staff member to manipulate the demo stock counts by uploading a file as opposed to physically checking each demo item.

7.45.2 The claimant had been negligent and failed to safeguard company stock, including that several items had not been protected and significantly damaged as part of transfer from Stockton while others had been discarded in waste boxes, details of which were provided.

7.45.3 The claimant had failed to control stock, details of which were again provided including regarding a Samsung watch.

7.45.4 The claimant had failed to follow company process and policy by not reporting stock loss and completing incident report forms after the stock loss.

7.45.5 The above actions were in breach of the respondent's Stock Management Policy.

7.45.6 The claimant's actions were also in breach of the respondent's Standards of Behaviour policy and procedure.

7.46 The invitation letter properly informed the claimant of his entitlement to be accompanied, attached relevant documentation, informed him of possible outcomes and gave details of the help that was available to him.

7.47 The disciplinary meeting took place on 11 July 2019 (476). It was conducted by Mr Potter with Ms E White taking notes; the claimant was unaccompanied. It was a long meeting lasting almost 5 hours with only two short breaks totalling less than 1 hour. From its reading of the notes, the Tribunal is satisfied that each of the above allegations was fully explored and that the claimant was given the opportunity to explain things from his perspective. On points of detail:

7.47.1 In connection with the uploading of a pre-populated file in respect of the demo stock counts without physically checking the items, the claimant explained to Mr Potter that his was a more efficient way of doing things; twice saying "it was easier". When Mr Potter asked him whether he appreciated why the business did not want it done that way he answered, "Well yes but I didn't see the problem with it …." (480).

7.47.2 He similarly told Mr Potter that his process with the tamper-proof tote bag by was more efficient.

7.47.3 Mr Potter is recorded as having stated, "I'm not bothered about the stock it about your lack of management and care – No accountability". In cross examination he accepted that he had not used an ideal phrase but explained that he had meant that his main concern was about management and policies and processes, and that the claimant had failed to follow those so as to safeguard the stock. That was his primary concern not where the stock was.

7.47.4 Also in cross examination Mr Potter accepted that the claimant had been on holiday for a time during the store closure but explained that the stock corrections been under his remit over several months, and he had not followed procedure. It was not, he said, a performance issue but was related to conduct as the claimant had knowingly failed to follow procedure.

7.48 In his witness statement the claimant took issue with the accuracy of the notes of the disciplinary hearing and that he had asked for the CCTV footage; which Mr Potter explained had been wiped. The claimant does not, however, take the opportunity in his witness statement to give evidence of why in respect of each of the allegation his explanation should have been accepted and in what way the decision of Mr Potter, and before him Mr Clark, was wrong.

7.49 On 12 July 2019 the claimant was certifying as not being fit to work for three weeks because of work-related stress (508).

7.50 Mr Potter considered the claimant's explanations in respect of each of the above allegations to be unsatisfactory and found them to be well-founded. In summary, his conclusions in respect of each allegation was as follows:

7.50.1 In light of the evidence from Mr Clark and Mr Howell, Mr Potter considered that the claimant had been unable to provide a satisfactory explanation for the stock movement or that he had not instructed Mr Howell to carry out stock counts in contravention of the respondent's Stock Movement policy; neither could he account for many items that appeared to have been written on and off again or provide a reasonable explanation for that pattern.

7.50.2 The claimant's assertion that he had put the items in the tote in a good condition was not corroborated by the photographic evidence, and his general attitude towards stock appeared careless, including items being found in the rubbish at the Stockton store.

7.50.3 The claimant had failed to account for the missing Samsung watch, which was confirmed in Mr Howell's statement.

7.50.4 The claimant had not completed an incident report form, as required, which demonstrated negligence as the manager responsible for the closure of the store.

7.50.5 The claimant's actions demonstrated the failure to comply with the Stock Management Policy and writing stock on and off again repeatedly was a manipulation of stock.

7.50.6 In the circumstances, the claimant's actions and instructions amounted to a breach of the respondent's Standards of Behaviour in that he had failed to work with honesty and integrity, and had not taken responsibility for what had occurred.

7.51 In respect of each of the allegations Mr Potter took into account the claimant's explanations and considered alternatives to dismissal. Ultimately he decided that the claimant should be summarily dismissed for gross misconduct. He advised the claimant of his decision by letter dated 1 August 2019 (517). That letter was again drafted by the respondent's employee relations team and approved by Mr Potter. It is lengthy and detailed and the Tribunal is satisfied that it comprehensively addressed each allegation against the claimant, the points that he had raised in response, why those points were not accepted and why Mr Potter made the decisions he made.

7.52 In his decision letter Mr Potter also advised the claimant of his right to appeal against that decision, which the claimant exercised by letter of 5 August 2019 (544). With that appeal letter the claimant enclosed a further letter setting out a grievance that he wished to raise in relation to the recent treatment to which he had been subject (546).

7.53 In two letters dated 23 August 2019 Mr Patel invited the claimant to attend two meetings with him on 3 September 2019: first, a

grievance meeting that morning (558) and, secondly, a disciplinary appeal meeting that afternoon (560). The claimant was reminded of his entitlement to be accompanied at each meeting. At the meetings Mr Patel was accompanied by Mr C Plank as note taker; the claimant attended unaccompanied.

7.54 The claimant had first mentioned raising a grievance in a telephone conversation with Ms Pullen on 31 July 2019. As she understood the respondent's procedures, however, apart from in exceptional circumstances (such as allegations of discrimination) a grievance should not be used to make a complaint about a particular policy process that has its own appeal process. She therefore advised the claimant that the disciplinary process had not yet been exhausted and if he was dissatisfied with the outcome of that process he could appeal.

7.55 At the grievance meeting (562) Mr Patel worked through the issues that the claimant had raised his grievance letter albeit not addressing points that he considered were more appropriately to be dealt with at the dismissal appeal hearing that afternoon. At the conclusion of the meeting the claimant confirmed that he was comfortable with the approach that had been taken at the meeting and felt that it had been fair (568).

7.56 Following the meeting Mr Patel spoke to Mr Potter on 19 September regarding certain of the matters that the claimant had raised including the issue with the footfall counter and his having arranged for commission to be paid to the claimant for the month of July when no bonus payments would ordinarily have been due (577). After their discussion Mr Potter sent Mr Patel certain documents as evidence of the above.

7.57 Having considered all of the above information Mr Patel reached the following conclusions in relation to the points that the claimant had raised in his grievance:

7.57.1 The issue of the footfall at Stockton had been addressed when it was raised and that store had had its targets manually adjusted to compensate for this.

7.57.2 Having reviewed relevant information in relation to the consolidation exercise he was satisfied that a fair process had been followed.

7.57.3 He was similarly satisfied that Mr Potter had arranged for the claimant to receive a manual commission payment for July, which he had received.

7.57.4 The PIP set up by Mr Evans was only an informal plan and had not been formalised and there was no evidence from the claimant that he had been victimised or treated differently to others.

7.58 For the above reasons Mr Patel did not uphold the claimant's grievance. He informed the claimant of his decision and reasoning in a detailed letter dated 8 October 2019 (588) in which he also advised him of his right to appeal. The claimant responded on 11 October 2019, amongst other things, thanking Mr Patel for holding the meeting and for the work he had put into it and advising that he wished to appeal the outcome (600).

7.59 As mentioned above the disciplinary appeal hearing took place on the afternoon of 3 September 2019. Having reviewed the notes of that appeal hearing (569), the Tribunal is satisfied that Mr Patel fully explored the claimant's grounds of appeal and gave him every opportunity to put forward his explanations and observations. The Tribunal also notes that at the conclusion of the hearing the claimant confirmed that he felt that it had been fair (574).

7.60 Following the appeal hearing Mr Patel reviewed the evidence that had been provided to him and ultimately decided that the appeal had been unsuccessful. He advised the claimant of his decision by letter of 11 October 2019 (608). In that letter he set out in some detail his findings in relation to what he had identified as the three principal grounds of the claimant's appeal as follows:

7.60.1 The claimant had not raised any new evidence to challenge the findings at the disciplinary hearing regarding stock. In particular that he had instructed or coached Mr Howells to falsify stock counts without verifying that the stock was actually in the store, first, by confirming that stock was physically present in the store and, secondly, in respect of demo stock, by uploading a pre-populated file. The claimant having previously admitted copying and pasting demo logs, which would amount to falsifying records, led Mr Patel to conclude that he was not checking stock and he preferred Mr Howells' account. Further, he had no reason to disbelieve the account of Mr P Evans who had helped support the store during its closure.

7.60.2 Mr Patel was satisfied as to the consideration that had been given during the investigation meeting and the disciplinary hearing to the issue of the damage to stock and did not find satisfactory the claimant's explanation of why he had not packed the stock appropriately: i.e. that he did not have bubble-wrap to size.

7.60.3 Mr Patel was similarly satisfied as to the conduct of the disciplinary process and, on a point of detail, that the claimant did not have the right to see Mr Howells' statement.

7.61 The claimant's grievance appeal hearing was heard by Mr D Byrne, Regional Manager East Scotland, on 25 November 2019. His decision was communicated to the claimant by letter of 27 February 2020 (655). As set out below, Mr Byrne decided to uphold partly the

claimant's appeal in respect of the three points that the claimant had raised:

7.61.1 He upheld the first point of the claimant's grievance as there was no evidence of Mr Potter having requested that the commission payment should be made to him whereas there was evidence that the claimant had been in touch with the commissions team regarding the payment.

7.61.2 He did not uphold the grievance relating to the reduction of targets by 27% during the consolidation process. Mr Byrne had worked from the raw data and applied that reduction to the overall scores with the result that the claimant came at the top of the four store managers in the redundancy pool. Having obtained Mr Potter's explanation in this respect, however, he was satisfied that the adjustment of 27% had been made, the overall approach had been fair and the claimant had been the candidate with the lowest score.

7.61.3 Mr Byrne did not uphold the grievance relating to the PIP, which he noted was an informal PIP that had been issued by Mr Evans as the claimant was underperforming. There were 10 items on the plan five regarding management matters and five that were KPI related. He considered it reasonable to support a store manager with a structured informal action plan in such situations. In particular, he found that the store was not over-targeted during the relevant period used by the PIP and that such had no impact on whether or not the claimant received a pay rise.

Submissions

8. After the evidence had been concluded the parties representatives made submissions, which addressed the matters that had been identified as the issues in this case in the context of relevant statutory and case law some of which was cited. It is not necessary for the Tribunal to set out those submissions in detail here because they are a matter of record and the salient points will be obvious from its findings and conclusions below. Suffice it to say that it fully considered all the submissions made and the parties can be assured that they were all taken into account into coming to the Tribunal's decision.

9. That said, the key points made by Mr Sellwood on behalf of the respondent, included as follows:

Section 47B detriment

9.1 The respondent accepts that the claimant communicated that the footfall scanner in the Stockton store had been left in a non-functional state for three months. That apart the other acts relied upon contained inaccurate dates and were hopelessly unparticularised.

9.2 The claimant relied upon a breach of legal obligation but that could not apply to the commission payments, which were discretionary.

9.3 As to whether the claimant reasonably believed that it was in the public interest to make the disclosures, reliance is placed upon the decision in Chestertons v Nurmohamed:

9.3.1 The numbers in the group.
Any breach applied only to the claimant and a few colleagues, and the claimant said in cross-examination that when he made the disclosure (which is the time to be considered) he did not have any other stores in mind.

9.3.2 The nature of the interests affected.
The interest was money only.

9.3.3 The nature of the wrongdoing disclosed.
The group is 7 maximum and 3 for some of the period.

9.3.4 The identity of the alleged wrongdoer.
The respondent is not in the public sector, which has some bearing on public interest.

9.4 The detriments relied upon by the claimant must be a material factor in the complaint of detriment or the sole or principal reason for his dismissal. As to the detriment relied upon, amongst other things, there was no contemporaneous complaint and no evidence from others, and the claimant's assertions were disputed by evidence from the respondent's witnesses and were not supported by the evidence in the bundle.

Unfair dismissal

9.5 Even if the disclosures were made there is not a shred of evidence that they were the sole or principal reason for the claimant's dismissal.

9.6 The reason for the claimant's dismissal was poor stock management, which is a matter of choice and plainly conduct rather than capability.

9.7 By reference to the considerations in BHS v Burchell, it was difficult to see no genuine belief in the misconduct given that stock had been written off and Mr Howells said he had followed instructions; the claimant suggested he had been singled out but Stockton was one of only two stores in the North-East to have device loss variance over £1,000 and the only store in the UK to have accessory loss variance over £500; the items in the tote had been plainly damaged. The range of reasonable responses applies to the investigation and that of the respondent cannot possibly be beyond that range. There had been a five-hour long disciplinary meeting in which the claimant had explained his situation, which came down to

him knowing better and Mr P Evans and Mr Clark were either lying or mistaken. The decision to dismiss was clearly within the range of reasonable responses. The claimant had responsibility to manage the store and his colleagues, to keep stock safe and comply with policy but he did not do so. Indeed he instructed his colleague to act contrary to policies and did not recognise that he had done anything wrong.

9.8 Referring to Polkey, there should be a reduction of 100% to 80% as it was almost certain that the claimant would have been dismissed, and a reduction of 60% to reflect contributory fault because the claimant's conduct was significantly below what was expected of him in his role.

Commission

9.9 The respondent's commission scheme is "non-contractual and discretionary". It is accepted that discretion has to be exercised in good faith and rationally (Braganza v BP), which the respondent had done, including the setting of the targets, reducing the targets manually and fixing the footfall counter in December 2018 (and there had been no complaints about the counter in 2019) yet, despite that, the performance at the Stockton store continued to flatline.

Wrongful dismissal

9.10 A different test applies being whether there was actually a breach of contract justifying summary dismissal. The evidence is clear: the claimant broke policy and failed to safeguard stock, which amounts to a repudiatory breach of his contract of employment.

10. The key points made by Mr Hargreaves on behalf of the claimant, included as follows:

Unfair dismissal

10.1 The claimant had referred to incidents marking the deterioration in his relationship with Mr Potter between the end of 2018 and the start of 2019. In isolation that may feel trivial but the claimant had been managing the store in respect of which issues had arisen and he raised them with regard to targets. The claimant's account about the PIP again might not seem so significant. As to his account of redundancy, his evidence was clear regarding what should have happened in respect of the targets. It was clear from discussions with the workers' representative the way in which the reduction should have been applied. If that had been done the claimant would have been top but instead Mr Potter did it differently. Mr Potter's attitude was corroborated by his reaction when the Darlington manager resigned. The claimant was given the Redcar store, which was less convenient, to annoy him.

10.2 The claimant's credibility is clear from what he said at the investigatory, disciplinary and appeal meetings in which he was consistent. He had lost his job having seen a pattern of events culminating in his dismissal.

10.3 The claimant was on holiday during the last week of operation of the Stockton store. He received calls from colleagues of unusual behaviour. When he returned he found the store a bombsite and spoke to the Project Manager who told him that his team would clear it up.

10.4 The claimant had done a stock count and became aware that items were missing. He had not done an incident report in a timely manner. He had told Mr Clark that everything was accounted for but that was a misunderstanding. The claimant did not try to hide matters by lodging a report - he knew items would be identified - and then he did the incident report. The claimant focused on stock and where it could be; the respondent focused on breach of procedure.

10.5 One can have a detailed investigation but this was designed to find the claimant culpable. Best practice is for the employee to be warned in advance of any investigatory meeting but at the time of the investigation meetings with Mr Clark neither he nor Mr Howells were forewarned, which was heavy-handed. The claimant was taken by surprise. This was not dishonesty but mismanagement. Mr Clark took another manager with him to look after the store indicating a clear intention to suspend the claimant.

10.6 The claimant was well-regarded and experienced yet his account was less favoured than that of Mr Howells

10.7 The claimant was not at the store when it was closed or when the stock was sent back but the entire focus of the investigation was on him. At the point of store closure there is a higher risk given the large movement of stock and other people being involved. The claimant admitted what he had done but that was not a breach of policy. Items are logged on and off again and he explained why.

10.8 The claimant had given his explanations regarding the non-tamper bag, which were sensible, but the respondent had jumped on him for having broken procedures.

Section 47B detriment

10.9 A number of disclosures are relied on, which relate to a breach of legal obligation. If not it could still provide an ulterior motive (the claimant made a noise and raised issues) as to why the relationship with Mr Potter changed. That change in attitude gave rise to the informal PIP, the claimant's redundancy and the way his dismissal was carried through.

Breach of contract

10.10 The contract the claimant had says that the payment of bonuses is discretionary but as long as he hit the targets the bonus would be paid. This amounts to an obligation on the company to make the payment. It was based on footfall, which had to be accurate. The commission that should have been paid ought to have been. The respondent should have addressed that by paying the claimant back pay. It did not do that, which amounts to a breach of contract.

The law

11. The principal statutory provisions that are relevant to the issues in this case are as follows:

The 1996 Act

"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 —

.....

(c) 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."

"103A Protected disclosure

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."

Breach of Contract

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 the risk of over-simplification) 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 if the claim arises or is outstanding on the termination of the employee's employment.

Application of the facts and the law to determine the issues

12. The above are the salient facts relevant to and upon which the Tribunal based its judgment having considered those facts and submissions in the light of the relevant law and the case precedents in this area of law some of which are referred to elsewhere in these Reasons.

13. As mentioned above, the parties had helpfully compiled an agreed list of issues, which the Tribunal will address below; and where relevant and appropriate, the paragraph numbering in the agreed list of the issues has been used as a side heading in our determination below.

14. In the parties' list the complaint of unfair dismissal is dealt with first but as the claim of 'automatic' unfair dismissal is predicated upon the claimant having made a protected disclosure it is that issue that the Tribunal addresses first.

Protected disclosure

Issue 8(i)

15. In relation to this act of the claimant reporting his concerns in relation to the footfall inaccuracy to Mr Evans in the Summer of 2019 it was submitted on behalf of the respondent that the date of 2019 was wrong and should be 2018 but, in any event, there was no detail of what was communicated: it cannot be a communication of information under the statute without stating what was said and how it was communicated by the claimant. Although noting those submissions, the Tribunal gives the benefit of the doubt to the claimant as to the error in the date and is satisfied on the evidence before it that the claimant did report such concerns to Mr Evans, albeit in 2018.

Issue 8(ii)

16. The Tribunal is not satisfied that the claimant reported to Mr Atkinson by email that the footfall figures for his store relating to the August Bank Holiday weekend 2017 were incorrect. As to detail, the claimant himself accepted that the reference to the August Bank Holiday weekend 2017 was inaccurate. Even allowing the amendment of this act to refer to, first, the May Bank Holiday weekend and, secondly, 2018, and acknowledging that the claimant in his witness statement stated that he "sent an email reporting this issue to" Mr Atkinson to which he had received "a terse reply", there is no evidence of that email exchange before the Tribunal. As found above, the evidence before the Tribunal is that it was Mr Evans and not claimant who engaged with Mr Atkinson, and others, by telephone and email, albeit that on occasion, Mr Evans did send a copy of his email to the claimant. Further, the Tribunal does not consider the reply relied upon by the claimant to be terse but, in any event, it was neither sent to nor copied to the claimant.

17. Thus, the Tribunal is not satisfied that this act occurred.

Issue 8(iii)

18. As the respondent conceded the claimant did report to Mr Evans and Mr Potter that the footfall scanner in his store had been left in a non-functional state for three months.

Issue 8(iv)

19. On behalf of the respondent it was submitted that this complaint of making repeated disclosures over the period about the inaccuracy of footfall figures for the store to Mr Evans and Mr Potter could not be a qualifying disclosure without further information regarding such matters as when, which disclosure and what medium was used; it was hopelessly unparticularised. The Tribunal does not accept that submission. To the contrary it is satisfied on the evidence before it (including the documents, the evidence of Mr Potter and the evidence of Mr Evans in relation to the PIP) that the claimant did make such disclosures.

Issue 10

20. On behalf of the respondent it was submitted that there cannot be a breach of a legal obligation if the payment of commission to the claimant was discretionary. That is not the question, however; rather, in accordance with section 43B of the 1996 Act, it is whether the claimant had "a reasonable belief" that the disclosure tended to show, for example, that the respondent had failed to comply with a legal obligation to which it was subject.

21. Even applying that 'test', clause 4 of the contract of employment between the claimant and the respondent is clear that the retail bonus scheme "is non-contractual and discretionary". Given that clear wording, the Tribunal is not satisfied that the claimant can maintain that he had a reasonable

belief of a breach of a legal obligation; for example, on the basis of custom and practice. Instead, it is satisfied that on the basis of that contract of employment it was not reasonable for the claimant to believe that the non-payment of commission to him constituted a breach of a legal obligation.

22. On the above basis, therefore, the Tribunal is not satisfied that the claimant made a qualifying disclosure under section 43B of the 1996 Act and, therefore, he cannot have made a protected disclosure under section 43A of the 1996 Act. Nevertheless, lest our decision in that respect had been to the contrary we consider it appropriate to address the remaining issues with regard to the claimant's protected disclosure claim.

Issue 11

23. As relied upon by the respondent, in the decision in Chesterton Global Ltd (t/a Chestertons) v Nurmohamed [2017] EWCA Civ 979 it was stated that while a tribunal in deciding whether a disclosure was in the public interest would have to consider all the circumstances, the following factors would normally be relevant:

> "*(a) the numbers in the group whose interests the disclosure served …..;*
> *(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed—a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;*
> *(c) the nature of the wrongdoing disclosed—disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;*
> *(d) the identity of the alleged wrongdoer—as Mr Laddie put it in his skeleton argument, "the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i e staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest"—though he goes on to say that this should not be taken too far.*"

24. Addressing the points in the above guidance in turn:

24.1 On the claimant's own evidence, when he raised the issue of the footfall counter and the impact upon commission payments he was not raising a company-wide issue; rather the focus was principally on him and the paucity of the commission payments that he considered he was receiving; albeit that there could be a consequential benefit for colleagues working at the Stockton store. On the basis of the claimant's witness statement it appears that at the relevant time there were only two such colleagues (his Senior Sales assistant and a part-time sales assistant) although he had originally had six colleagues working at that store.

24.2 The nature of the interests affected was income. That is certainly not "trivial" but neither does the Tribunal considers that it amounts to "a disclosure of wrongdoing directly affecting a very important interest".

24.3 The Tribunal is satisfied that the nature of any wrongdoing disclosed related to "inadvertent wrongdoing". There is no evidence whatsoever before the Tribunal to support the claimant's assertions that the respondent, including at Board level, had a secret contractual arrangement with IPSOS to reduce the footfall account at its stores across the Country so as to deny employees the commission that would otherwise have been due to them.

24.4 The respondent is clearly a large and prominent business; even more so if considered as part of the BT Group. That is clearly relevant but the Tribunal considers that that would have been more so if the other three matters set out above had been found to be in favour of the claimant. They have not been and, therefore, given the numbers affected, the nature of the interests and the nature of the wrongdoing, the Tribunal is not satisfied that this fourth factor should outweigh those others.

25. In summary of this first issue, therefore, and considering each of the above four matters in the round, the Tribunal is not satisfied that the claimant made a protected disclosure under section 43A of the 1996 Act.

Unfair dismissal

26. The Tribunal now turns to consider the first complaints referred to in the agreed list of issues: namely "Unfair Dismissal/Automatically Unfair Dismissal".

Issue 1

27. Given the Tribunal's finding immediately above that it is not satisfied that the claimant made a protected disclosure, it follows that, with reference to section 103A of the 1996 Act, it cannot be the case that any such disclosure "was the reason (or, if more than one, the principal reason) for the dismissal".

Issue 2

28. This issue reflects the first of the questions for a tribunal to consider in a complaint of unfair dismissal. Namely, 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.

29. During cross examination of both Mr Potter and Mr Patel Mr Hargreaves sought to introduce the issue of capability (although that had not been previously referred to in these proceedings), which he suggested could have been dealt with through performance processes. The Tribunal accepts the answers given by Mr Potter and Mr Patel, however, that the issues related to the claimant's conduct. Mr Potter referred to the claimant having suggested that his approach to counting stock was more efficient than that required in the respondent's policies. The Tribunal accepts Mr Potter's point that the fact that the claimant considered that to be so indicated that he knew what those policies required and yet had failed to accord with them, which amounted to conduct rather than capability. Indeed, as recorded above the claimant twice said "it was easier" to do it his way and when Mr Potter asked him whether he appreciated why the business did not want it done that way he answered, "Well yes but I didn't see the problem with it ….". As Mr Potter said, the claimant "admitted doing things differently to how the policy laid out". Similarly, Mr Patel said that the claimant had chosen not to follow the respondent's policies and guidelines, which, therefore, was not capability but was a matter of choice; and the claimant had not protected the respondent's stock, which was also a choice and therefore conduct. On a point of detail, Mr Patel pointed to the claimant not having taken adequate care to protect high-value devices. As he explained, the respondent takes stock loss very seriously because it does not have high turnover; loss for the respondent is very rare and is taken seriously if procedures have not been followed. The Tribunal accepts those answers of the respondent's witnesses and that the reason for dismissal was conduct.

30. Thus, on the evidence before it the Tribunal is satisfied that the respondent has discharged the burden of proof upon it to show that the reason for the claimant's dismissal was conduct, that being a potentially fair reason.

Issues 3 - 5

31. Having thus been satisfied as to the reason for the dismissal, the Tribunal moves on to consider whether the respondent acted reasonably in dismissing the claimant for the reason of conduct with reference to section 98(4) of the 1996 Act. That section requires consideration of three overlapping elements, each of which the Tribunal must bring into account:

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

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

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

32. In this regard the Tribunal reminds itself of the following important considerations:

32.1 Neither party now has a burden of proof in this respect.

32.2 The focus of the Tribunal is to assess the reasonableness of the respondent and not the unfairness or injustice to the claimant, although not completely ignoring the latter.

32.3 The Tribunal must not substitute its own view for that of the respondent. This principle has been maintained over the years in decisions including Iceland Frozen Foods Limited -v- Jones [1982] IRLR 439 (re-confirmed in Midland Bank v Madden [2000] IRLR 288) and J Sainsbury plc v Hitt [2003] ICR 111. 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*."

32.4 The decision in Polkey v AE Dayton Services Ltd [1988] ICR 142 firmly establishes procedural fairness as an integral part of the issue of reasonableness.

32.5 The Tribunal's consideration of whether the claimant's dismissal was fair or unfair is a single issue involving the substantive and procedural elements of the dismissal decision.

32.6 The 'range of reasonable responses test' (referred to in the guidance in Iceland Frozen Foods Limited and Post Office v Foley [2000] IRLR 827), which will apply to the decision as to whether the decision of the respondent to dismiss the claimant fell within the band of reasonable responses of a reasonable employer acting reasonably, applies equally to the procedure that was followed in reaching that decision.

33. Issues 3 to 5 reflect the well-established principles in British Home Stores Limited -v- Burchell [1978] IRLR 379 (as qualified in Boys and Girls Welfare Society v McDonald [1996] IRLR129) that were more recently indorsed in the decision of the Court of Appeal in Graham v The Secretary of State for Work and Pensions (Job Centre Plus) [2012] EWCA Civ 903. In this respect, the Tribunal reminds itself that in that last decision Aikens L.J. stated at paragraph 35 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 the 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.

34. As set out below, the Tribunal has brought each of the above principles into account in making its decision in relation to which it is satisfied on the basis of the evidence before it as follows:

Genuine belief

34.1 Considering first agreed Issue 3, the information available to Mr Potter at the time he decided to terminate the contract of employment of the claimant is detailed above. In summary, it included the following:

34.1.1 The claimant had failed to comply with the respondent's Stock Management policy and had given instructions to Mr Howells contrary to that policy.

34.1.2 The evidence contradicted the claimant's assertion that he had put the items in the tote in a good condition.

34.1.3 The claimant had failed to account for the missing stock including that he had not completed an incident report form, as he should have done.

34.1.4 The claimant's actions and instructions amounted to a breach of the respondent's Standards of Behaviour.

34.2 In conducting the appeal, Mr Patel found that the claimant had admitted that he had not followed due process and that not enough care had been taken to protect stock and, looking at that, he was satisfied that nothing had changed those key facts.

34.3 In the above circumstances, the Tribunal is satisfied that at the time the respondent (in the shape of Mr Potter) took the decision to dismiss the claimant and (in the shape of Mr Patel) upheld that decision on appeal it was genuinely believed that the claimant had been guilty of misconduct.

Reasonable grounds

34.4 Following the order of the considerations in Burchell, the Tribunal next addresses agreed Issue 4, being the question of whether there were reasonable grounds upon which to sustain the above belief.

34.5 All of the above matters are also applicable to that question and, on that basis, the Tribunal is further satisfied that in the above circumstances and for the above reasons the above managers of the respondent had in their respective minds reasonable grounds upon which to sustain their respective beliefs that the claimant had been guilty of misconduct.

Reasonable investigation

34.6 With regard to Issue 5, Mr Clark's investigation into the circumstances of the claimant's conduct is addressed in some detail above. The Tribunal is satisfied that the investigation was thorough and comprehensive, and more than satisfies the third consideration in Burchell that at the stage at which the belief on those grounds was formed, the respondent had carried out as much investigation into the matter as was reasonable in all the circumstances of the case; not least given that, as mentioned above, the range of reasonable responses test is equally applicable to the conduct of any investigation.

34.7 On a point of detail, the Tribunal does not accept the submission of Mr Hargreaves that best practice is for the employee to be warned in advance of any investigatory meeting. That is not provided for in the ACAS Code of Practice: Disciplinary and Grievance Procedures (2015) (in which other matters relating to investigatory meetings are addressed) and does not accord with the experience of this Tribunal.

34.8 Thus, the Tribunal is also satisfied as to this third question that at the stage at which the respective managers of the respondent formed the above beliefs on the above grounds, the respondent had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

Issue 6

35. This issue 6 relates to the reasonableness or otherwise of the decision that the claimant should be dismissed. Referring to established case law such as Iceland Frozen Foods there is, in many cases, a range or band of reasonable responses to the situation of the employee within which one employer might reasonably take one view and another quite reasonably take another view. The function of this Tribunal 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. This principle was also considered in Graham in which Aikens L.J., at paragraph 35, continued the consideration set out in the quotation above as follows:

> "*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 1996 Act 1996."

36. In the circumstances and given the findings of the Tribunal relating to the considerations in Burchell, which are addressed above, it is satisfied that the dismissal of the claimant was a decision that fell within the band of reasonable responses of a reasonable employer in these circumstances.

37. Generally, with regard to the claimant's complaint of unfair dismissal it seems to the Tribunal that, perhaps understandably, the claimant has linked a number of events that have become, in his mind, parts of a series. These include the issue with the footfall counter and its impact upon his commission (including his assertion of a secret arrangement between the respondent and IPSOS), the PIP, the consolidation process involving the closure of the Stockton store and his selection for redundancy. As Mr Hargreaves put it in submissions, he had lost his job having seen a pattern of events culminating in his dismissal. In cross examination the claimant accepted that to establish such a series would involve a conspiracy involving Mr Potter, Mr Clark, Mr Evans, Ms Ridley and Mr Patel, which he maintained had existed; and if he is correct about the secret arrangement with IPSOS it would also have needed to involve senior managers within both IPSOS and the respondent, he suggested at Board level. The Tribunal has considered these possibilities but on the evidence before it is satisfied that such events were quite separate and distinct. It is not satisfied that these events constituted a course of conduct on behalf of Mr Potter or the respondent to remove the claimant from his employment.

38. In summary of the Tribunal's consideration of the complaint of unfair dismissal on the basis of its findings of fact and for the reasons set out above it is satisfied that, first, the reason for the dismissal of the claimant was conduct and, secondly, the respondent acted reasonably in treating that reason of conduct as a sufficient reason for dismissal with reference to section 98(4) of the 1996 Act.

Section 47B detriment

39. Issues 8 to 11 inclusive in this section of the agreed list of issues have been addressed above. Given the Tribunal's finding that the claimant did not make a protected disclosure it is unnecessary to address the remaining agreed issues but the Tribunal does so, once more lest its decision in that important regard had been to the contrary.

Issue 12

40. The Tribunal utilises below the numbering of the subparagraphs within this Issue 12 in the agreed list.

    (i) There was a clear conflict of evidence as to whether Mr Potter had demonstrated a negative attitude towards the claimant. In this regard the evidence of Mr Potter that there had been no change in his attitude towards the claimant and, particularly, that he had not demonstrated a negative attitude, which was supported by Mr Evans, and the Tribunal found each of them to be credible witnesses. In this respect the Tribunal also brings the following contextual points into account:

        a. the claimant having been demoted to a post of Assistant Manager on 1 May 2016 it was Mr Potter who promoted him back to a post as Manager in about September 2017;

        b. Mr Potter brought the claimant's PIP to an end as soon as he became aware that the respondent had plans to consolidate stores in the North-East region so as to ensure that there was no undue pressure on him at a difficult time;

        c. although contrary to the respondent's policy, when the claimant was allocated the role of manager at the Redcar store (which would increase the distance the claimant needed to travel to work) Mr Potter agreed to raise with the Head of Stores whether he might be paid a travel allowance;

        d. the claimant then received an additional £1,500 effectively increasing his salary to £30,000 notwithstanding that given his recent appraisal he was not entitled to a pay rise;

        e. also in connection with the move to the Redcar store the claimant was paid commission based on a six-month average thus addressing the impact of the consolidation process and his changeover of stores from Stockton to the Redcar on him earning commission, which was at least authorised by Mr Potter.

    (ii) For the same reasons as are set out above, the Tribunal is not satisfied that negative comments were made towards the claimant by Mr Potter. Mr Byrne

    (iii) The above finding applies equally.

(iv) The above finding applies equally.

(v) The above finding applies equally. Additionally, the Tribunal accepts the evidence of Mr Potter that he visited the Stockton store as much as any other store and the evidence is clear that he communicated with the claimant directly rather than through third parties. If in this respect the claimant is alluding to any communications from Mr Evans, the Tribunal is satisfied that such communications were appropriate to his role of Regional Commercial Manager and the functions that had been delegated to him by Mr Potter in that regard.

(vi) The Tribunal has found above that Mr Potter did not request that the claimant be put on a PIP or directly subject him to that plan; rather that was the decision made by Mr Evans albeit it was sanctioned by Mr Potter.

(vii) For the reasons set out above, the Tribunal is satisfied that Mr Potter conducted the redundancy process reasonably and that the selection of the claimant for redundancy was also reasonable.

(viii) The Tribunal has set out above its reasoning as to why Mr Potter's decision to offer the claimant the role of manager at the Redcar store rather than that nearest to his home was reasonable in the circumstances.

(ix) For the reasons set out above, the Tribunal is satisfied that the claimant was afforded a pay rise when he moved to the Redcar store and it is entirely a matter for the respondent's discretion as to whether that was "an adequate pay rise".

(x) As explained above, the claimant was not singled out for investigation in relation to stock levels. It is clear from the report of 10 June 2019 referred to above that Stockton was one of only a few stores in the UK to have device loss variance of over £1,000 and was the only store in the UK to have accessory loss variance over £500. In those circumstances, the Tribunal considers that the circumstances at that store were rightly investigated.

(xi) While it is right that the respondent did instigate and conduct a disciplinary process against the claimant, given the findings of the investigation, the Tribunal considers that to have been a reasonable decision.

Issue 13

41. For the reasons explained above, the Tribunal is not satisfied that by the above acts, the claimant was subjected to detriments not amounting to dismissal.

Issue 14

42. It follows from the above findings that the Tribunal is not satisfied that any of the alleged detriments were done on the ground that the claimant had made protected disclosures.

Breach of Contract

Issue 15

43. As set out above, the relevant clause of the claimant's contract of employment provides that what is referred to as the retail bonus scheme "is non-contractual and discretionary". As the Tribunal has found above, given that clear wording, it is satisfied that the scheme was indeed non-contractual. That being the case, it is satisfied that in not paying to the claimant the amount of commission that he considered he was due in accordance with that scheme, the respondent was not in breach of a clause in that contract.

Issue 16

44. As to whether the respondent exercised its discretion rationally and in good faith, the Tribunal reminds itself that, in accordance with the decision in Braganza v BP Shipping Ltd [2015] UKSC 17, discretionary power should be exercised not only in good faith but also without being arbitrary, capricious or irrational; see also Clark v Nomura International plc [2000] IRLR 766

45. The Tribunal has had regard to the clear guidance that is given by the Supreme Court in Braganza, and brings into account that Court's consideration of previously decided cases as to the meaning of terms such as rationality (and conversely irrationality), the common law principles applicable to the exercise of a contractual discretion including fairness, reasonableness and bona fides, and the references to arbitrarily or capriciously. Having done so, the Tribunal is satisfied that, in this case, given the facts known to the respondent and the adjustments made by Mr Potter to the relevant targets, it did exercise its discretion in relation to paying the claimant commission rationally and in good faith.

Wrongful Dismissal

46. As submitted by Mr Sellwood, the essential question for the Tribunal in respect of this complaint is whether the claimant was guilty of gross misconduct: i.e. did the claimant do something so serious that the respondent was entitled to dismiss him without notice?

47. Thus, unlike a complaint of unfair dismissal, the question is not whether the respondent acted reasonably but whether the Tribunal is satisfied that the claimant's conduct was such that he was guilty of a fundamental, repudiatory breach of his contract of employment thus removing his entitlement under that contract to receive notice due of termination.

Issue 18

48. On the basis of essentially the same factual findings as the Tribunal has made above (and by reference to which it has found that the dismissal of the claimant was fair) it is similarly satisfied that the claimant did act in repudiatory breach of his contract of employment in relation to the following: failing to comply with the respondent's Stock Management policy; giving instructions to Mr Howells contrary to that policy; not ensuring that the respondent's stock was safeguarded, including safely packing items in the tote; failing to account for missing stock; breaching the respondent's Standards of Behaviour. Thus, it is satisfied that he was not entitled to any notice pay.

Issue 19

49. As such, it follows that the respondent did not breach the claimant's contract of employment by not paying him any notice pay.

Conclusion

50. The unanimous judgment of the Employment Tribunal is as follows:

    50.1 The claimant's complaint that his dismissal by the respondent was unfair, being contrary to Section 94 of the 1996 Act by reference to section 103A of that Act is not well-founded and is dismissed.

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

    50.3 The claimant's complaint that, contrary to section 47B of the 1996 Act, the respondent subjected him to detriment on the ground that he had made a protected disclosure is not well-founded and is dismissed.

    50.4 Neither of the claimant's contract claims in relation to non-payment of bonus and not having been given due notice of the termination of his contract of employment is well-founded and each is dismissed.

    50.5 The claimant's complaint that, contrary to Regulation 14 of the WTR, the respondent did not compensate him in respect of his entitlement to paid holiday that had accrued but had not been taken at the termination of his employment was withdrawn by the claimant and is dismissed.

EMPLOYMENT JUDGE MORRIS

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 14 May 2021

Public access to employment Tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-Tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.