EMPLOYMENT TRIBUNALS

Claimant: Mr William Hardy

Respondent: G R H Food Company Limited

Heard at: Mold **On:** 10 March 2017, 7 July 2017 (in Chambers 12 July 2017)

Before: Employment Judge T Vincent Ryan

Representation:
Claimant: Mr R Bradley (Counsel)
Respondent: Mr P Sangha (Counsel)

RESERVED JUDGMENT

The Judgment of the Tribunal is

(1) The Respondent's application to postpone the hearing on 10 March 2017 refused.

(2) The Respondent's application to convert the hearing on 10 March 2017 to a Preliminary Hearing to deal with the question of admissibility of evidence is refused.

(3) Oral evidence and documentation relating to meetings between the parties on 10 and 13 June 2016 are admissible in evidence as such evidence does not constitute evidence of negotiations before termination of employment as defined in Section 111A Employment Rights Act 1996.

(4) The Claimant was unfairly dismissed by the Respondent on the 19 July 2016. Consideration will be given at the Remedy Hearing to issues relating to the Claimant's conduct (Section 122(2) and Section 123(6) Employment Rights Act 1996).

(5) The Respondent breached the Claimant's Contract of Employment with regard to notice of termination.

REASONS

1. **<u>The Issues</u>**

1.1 The Respondent wished to call as a witness to the hearing the Investigating Officer Mr. Gary Johnson who was not available owing sadly to the ill health of his mother who appeared to be in the terminal stages of illness. The issue for the Tribunal however was whether the overriding objective would be better served by either proceeding in the absence of Mr. Johnson or postponing the hearing to facilitate his attendance on a later occasion by reference to Rule 2 of ETS (Constitutional Rules and Procedures) Regulations 2013, that is whether it would be fair and just to postpone the hearing taking into account all relevant factors.

1.2 Whether once again the overriding objective would be better served by converting today's hearing to a Preliminary hearing to consider the admissibility of what was said to be pre-termination negotiations and the admissibility of documents relating thereto or for the matter to proceed for decision by me as the Judge adjudicating upon the claims on 10 March.

1.3 With regard to unfair dismissal

1.3.1 Whether Andrew Hockridge (the Respondent's Managing Director and the Disciplining Officer) had a reasonable and genuine belief in the Claimant's gross negligence concerning three matters within his area of responsibility and control;

1.3.2 Subject to the above whether at the time that Mr. Hockridge formed that belief there had been, and he did so on the basis of, a reasonable investigation;

1.3.3 Whether in all the circumstances summary dismissal fell within the range of reasonable responses of a reasonable employer in respect of the three allegations for which the Claimant was dismissed;

1.3.4 Whether in all the circumstances of the case and taking into account the Respondent's size and resources it acted fairly

and reasonably up to and including the Appeal Hearing conducted by Mr. Gareth Hockridge (a Director of the Respondent Company and son of the Managing Director Andrew Hockridge).

1.4 In respect of the breach of contract claim the issue is whether the Respondent was entitled to dismiss the Claimant without giving notice of termination in circumstances where the Claimant was in repudiatory breach of contract by virtue of his acts or omissions said to amount to gross negligence. The issue for the Tribunal was whether the Respondent has established to the Tribunal's satisfaction and on the balance of probabilities that the Claimant was in repudiatory breach of his contract by virtue of one or more of the allegations of gross negligence for which ostensibly he was dismissed. He was summarily dismissed.

2. **The Facts**

2.1 The Respondent is a cheese packing company which buys ready made cheese that it then cuts down into small packs. It produces packed, sliced and grated cheese in addition to which it blends a small amount of cheese. Predominantly it deals with hard cheeses. At all material times it was trialing the production of goats' cheese referred to as "goats' cheese perls". The respondent's business expanded over the period of time that the Claimant was employed from approximately 40 - 50 employees to somewhere in the region of 75 employees operating 3 packing lines on one site and with plans for further development. Its Managing Director is Mr. Andrew Hockridge; his sister Wendy Hockridge and father Gareth Hockridge are also Directors of the company. It has a turnover of somewhere in the region of £15 million per year.

2.2 The other employees who feature in the events described below are

Gary Johnson, Former Commercial Director of the Respondent Company who is no longer employed by it
Hannah Johnson, HR Manager. Miss Johnson is an employee of the Company
Josie Campbell, Technical Assistant

2.3 The Respondent issues a handbook to its employees, a copy of which is at pages 42 – 87 of the Trial Bundle (to which all further page references relate unless otherwise stated). The Disciplinary Procedure commences at page 77 and the Appeals Procedure is at page 80. The Respondent issues job descriptions and statements of terms and conditions of employment.

2.4 The Claimant commenced employment with the Respondent on 13 August 2012 as Technical Manager. His job description and main responsibilities are set out in a document at page 91 and his terms and conditions of employment are at pages 92 to 95. His duties included looking after quality systems, customer audits, British retail consortium systems, food labeling and food safety, dealing with Trading Standards and Environmental Health Officers, managing specifications on site together with customer enquiries and complaints. He was responsible for day to day product quality and ensuring that samples were tested appropriately. Whilst he had quality control operatives and there was a Technical Assistant (Josie Campbell) who reported to him, nevertheless the Claimant was ultimately responsible for matters such as labeling of products including ensuring the integrity of the bar code system, hazard analysis and critical control in relation to the production of goods for sale which in turn involved the testing processes and procedures to the satisfaction of the Environmental Health Officer (EHO); and in the latter regard he was responsible for completion (along with other team members) of the Hazard Analysis Critical Control documentation (HACCP). He was also responsible for micro-biological swabbing specifically testing for listeria on products and on the premises. He was not responsible for the “Red Tractor” audit in relation to checking the provenance of products. The Respondent had found it difficult to recruit into the Technical Manager role; it took quite some time to appoint the Claimant. It is thought to be an important role however to date the Respondent has not been able to replace the Claimant since his dismissal in July 2016.

2.5 In about March or April 2016 Andrew Hockridge discovered that the Claimant had made an application for a job relatively locally. Mr. Hockridge was by his own admission shocked. He was generally pleased with the Claimant and considered him to be a good employee although there were some matters that were outstanding and required attention and some important issues that he was dealing with that had suffered delay. Andrew Hockridge knew of a delay in the progression of the goats cheese perl project and was aware that there was some potential difficulties with the presence of listeria in the premises and on products but he did not have specific details about these matters. No matters were raised with the Claimant over his conduct or performance; he received a pay rise at the beginning of 2016 and in May 2016 received a bonus that was paid to all salaried staff who were paid monthly. Andrew Hockridge did not raise with the Claimant in March, April nor May any matters relating to the perception that he was disgruntled or dissatisfied and the knowledge that he had applied for at least one other job.

2.6 On 10 June 2016 the Respondent received a complaint and notification of a problem from a customer who had been supplied with five pallets of packed cheese in respect of which the labeling and specifically the bar codes on very many of the packets could not be read. Bar code design production was within the Claimant's remit. The customer required the Respondent to collect the cheese that had been defectively labeled and to replace it. This had financial implications for the Respondent giving rise to potential loss and reputational damage. Andrew Hockridge was surprised and disappointed. He attributed what he considered to be the Claimant's inefficiency and lack of care to corroboration of his suspicion that the Claimant was unhappy at work and was not fully committed to it. Mr. Andrew Hockridge decided to act upon his disquiet at what he considered to be the evolving situation which now had an apparent impact on the Respondent's business. He called the Claimant into a meeting together with Hannah Johnson (HR Manager) without prior notification on 10 June 2016.

2.7 At the meeting on 10 June Andrew Hockridge took the Claimant by surprise telling him that he was aware of his recent job application, he felt that the claimant had lost interest in, and was not suited to, his job and he raised with him the problem over the bar code production. He presented the Claimant with two options, either the Claimant resigned on agreeable terms supported by a compromise agreement barring any claims against the Respondent company or he would be subjected to investigation with the risk of disciplinary action or performance management. Andrew Hockridge's preferred resolution to what he considered to be a problem was for the Claimant to resign on mutually agreeable terms. He was prepared as an alternative to put the Claimant at jeopardy of losing his job by way of disciplinary investigation which may lead to disciplinary action or performance management, but either way at this stage he had formed the settled view that the Claimant's continued long-term employment was not tenable. Andrew Hockridge was prepared to follow appropriate HR procedures and was not going to dismiss the Claimant precipitously but from 10 June 2016 until the decision to terminate the Claimant's employment Andrew Hockridge was unable to view the Claimant's conduct and performance wholly objectively. I find that Andrew Hockridge had not decided beyond reasonable doubt to dismiss the Claimant but that dismissal was more likely than not if the opportunity arose in the light of investigation. This view was held by Andrew Hockridge who at that time was appraised of the bar code and packaging complaint from the customer complaint made on 10 June and that there were other matters for which the Claimant could be at the very least criticised with regard to slow or poor performance.

2.8 The Claimant was as I have said taken by surprise and he needed some time to think about matters. He was sent home by Mr. Andrew Hockridge. He was to consider what had been discussed namely that he had two options one of which was relatively easy being a negotiated termination of employment and the other which would be more difficult and less pleasant namely investigation and whatever then ensued. The meeting on 10 June at which these matters were discussed was at the behest and instigation of Andrew Hockridge; he presented only two options and effectively an ultimatum to the Claimant that he must go down one or other path. This was not a meeting by way of a negotiation in which the Claimant entered into it knowingly, freely or with any bargaining power. There was no dialogue or discussion. The Claimant was presented with two options and given an opportunity to go away and consider them and take advice upon them. He had not sought for, or wished for, at this stage any agreement on termination of employment and that was not in his mind subject only of course to him receiving an alternative job offer but that would have been between him and an alternative employer not Andrew Hockridge. He was told to return to work on 13th June 2016 to meet with Mr. Hockridge and Ms Johnson.

2.9 Again on 13th June 2016 the claimant was called into a room with Andrew Hockridge and Ms Johnson and was asked whether he had made a decision on the options that had been presented to him; he had not; he was given a draft compromise agreement dated 13th June 2016 and he was sent home with instructions to see a solicitor about signing it. It was explained to him that he would have to take legal advice upon the document and have it countersigned but that the Respondent would assist in the payment of solicitors' fees. There was now some apparent urgency on the part of the Respondent to bring matters to a head preferably by way of a compromise agreement. There was no negotiation at this meeting; the claimant was presented with a document and sent away.

2.10 The Claimant was unable to arrange an appointment with his solicitor until 15th June 2016 and they both needed to know more details of what it was that Andrew Hockridge had in mind. Andrew Hockridge or Ms Johnson on his behalf then instructed the claimant to return to work on 16th June 2016 and to meet with them.

2.11 The Claimant returned to work on 16 June 2016 having seen his solicitor. He informed Andrew Hockridge that on advice he was not prepared to sign the agreement without receiving written details of what was proposed by the Respondent. At this point the Claimant was prepared to enter into negotiations and discussions but needed more details before doing so; he did not do so. Andrew Hockridge

considered that the Claimant's refusal to sign the draft agreement that week meant that the option of doing so was removed from the table and the Claimant would therefore be subjected to investigation. Andrew Hockridge suspended the Claimant on 16 June 2016. The letter of suspension is dated 16 June 2016 and appears at pages 123 to 124. Allegations were put to the Claimant of a failure to implement QC checks resulting in stock recalls costing the company money and loss of confidence from customers (the bar code issue mentioned above) and a failure to manage new product development in a timely manner missing deadlines on numerous occasions said to have cost the company time and money (the goat cheese perl project). He was suspended in accordance with the company's disciplinary procedure and the matter was to be investigated by Mr. Gary Johnson. The Claimant did not return to work between the date of suspension and the date of termination of employment on 19 July 2016 save to attend two investigatory meetings (23 June 2016, 12 July 2016) and the disciplinary hearing on 19 July 2016.

2.12 There was no pre-termination negotiation during the course of the meetings on 10th, 13th and 16th June 2016. The Claimant was told that the respondent felt he had lost interest in his job, he asked questions and was presented with a draft document and an explanation that he needed to obtain legal advice, an offer was made to pay him a set sum in consideration of his leaving but there was no discussion about that sum or the terms on offer. There was no negotiation or discussion around terms that the Claimant would be prepared to consider. He was effectively to take or leave the respondent's proposal and if he left it then he would be subjected to procedures which would likely lead to his dismissal in due course.

2.13 Mr. Johnson conducted a detailed investigation concerning the Claimant's performance of his duties and came up with four matters within his terms of reference (TORs) as follows:

(1) the bar code issue (TOR 1)
(2) the goats cheese perls issues (TOR 2)
(3) Circumstances surrounding the company's response to a Red Tractor audit which was said not to have been dealt with in a timely manner risking accreditation (TOR 3). Red Tractor accreditation is with regard to promoting food assurance with better labeling confirming the product is sourced reliably.
(4) an alleged failure to meet requirements in respect of micro-biological testing specifically with regard to listeria testing and recording, the listeria issue (TOR 4)

None of these issues had been raised with the Claimant as being disciplinary or performance management issues prior to 10 June 2016. Only TOR 1 was raised on 10 June 2016 specifically although Mr. Hockridge said that there were other issues. Upon suspension only TOR 1 and TOR 2 were raised. It became apparent during the investigation that TOR 3 was not the Claimant's responsibility. Mr. Johnson produced a report that appears at pages 132 to 140. As indicated above the Claimant attended two investigatory interviews namely on 13 June and 17 June 2016 and he attended the first of them without knowing the full extent of the matters under investigation. He was however made aware of the four matters during the course of the investigation and he was given every opportunity to put forward his explanation, defence and mitigation.

2.14 Mr. Johnson concluded his report by stating his opinion that there was a case of serious misconduct for the Claimant to answer. Thereupon, on 13 July 2016, Andrew Hockridge wrote to the Claimant a letter that appears at pages 173 to 174 inviting him to a disciplinary hearing on 19 July 2016. TOR 1 - TOR 4 were put to him and Mr. Hockridge stated at page 173 that the company would consider these allegations to amount to gross negligence (if proven) and serious violations of the company's rules and standards of conduct so that once again he stated that if found to be proven then the Claimant would be summarily dismissed. His statutory rights were explained to him and he was sent a considerable amount of documentation to assist him in preparation of the disciplinary hearing which was to be held on 19 July 2016. The documentation included all relevant documents and the investigation report.

2.15 The Claimant prepared a detailed response to the investigation report and his response is at pages 175 to 180.

2.16 The hearing took place on the 19 July 2016 over the course of some 3 hours between 10.30am and 1.30pm. The Claimant appeared without a representative and Hannah Johnson took notes while Andrew Hockridge was the Disciplining Officer. The minutes of that hearing are at pages 181 to 195. The Claimant was given every opportunity to defend himself against the allegations and to provide mitigating circumstances. Andrew Hockridge considered the Claimant's written and oral responses but was not convinced by them; he did not change his view which was formed as early as 10th June 2016 that the claimant ought to consider his position and leave his employment, preferably by agreement but failing that through management action.

2.17 I make the following findings in respect of the four allegations as follows:-

2.17.1 TOR 1 Quality control failure – bar code issue. The Claimant was responsible for bar coding and the standard of packaging in that regard. The bar codes on the relevant order of five pallets of cheese that was the subject of complaint on the 10 June 2016 had not been checked; the Claimant did not communicate satisfactorily with his staff about the inadequacies of the scanner that they used to test the codes. The Claimant knew that one of the scanners was broken and he did nothing about expediting its repair or replacement or about using a substitute scanner which was available for use but rather was prepared for the chance to be taken that products would leave the Respondent's premises with deficient or defective bar codes. The Claimant showed little serious concern to Andrew Hockridge regarding the potential financial loss to the company or the damage to the company's reputation. The products were not saleable by the customer without re-packaging or re-labelling. The Claimant did not give an explanation that was reasonably satisfactory to Andrew Hockridge as to why he did not use a secondary scanner. Approximately 15,000 packs of cheese were unchecked. Quality control staff, and specifically Josie Campbell at pages 129 to 130, had raised concerns about the scanner and the Claimant had clearly either not read or heeded what was being signaled to him on the appropriate forms regarding the efficacy of the scanner. The Claimant had failed to implement procedures that would have avoided or mitigated against incidents such as gave rise to the complaint of 10 June 2016. The Claimant did not consider this to be a major issue. Mr. Johnson's investigatory findings were borne out as shown in respect of TOR 1 at page 134.

2.17.2 TOR 2 Goats cheese perl project: The goats' cheese project involved soft cheese as opposed to the hard cheeses that the Respondent usually produced. A licence was required for its production and before a full licence could be granted a temporary licence was obtained from the Environmental Health Department. The temporary licence was subject to conditions. The Environmental Health Officer (EHO) made it clear in email correspondence that further information was required and that the matter would have to be kept under review subject to the provision of information and testing. The EHO was to be satisfied as to how the Claimant would

verify the specification of the cheese entering the premises was within prescribed chemical limits and he wanted details of the checks. He required up to date certificates and details of an amended procedure for checking final products because the procedures had to be amended to accommodate this new product. There was correspondence between the Claimant and EHO in August and September 2015 following which the Claimant submitted further details in December 2015. The EHO reminded the Claimant that information was outstanding and on 8 January 2016 confirmed that his recommendations would have to be implemented before the final approval; in writing he asked for details of the measures the Respondent was going to take. On 12 January 2016 the Claimant confirmed that amongst other things that there would be sampling over a 3 month period but he did not carry out that sampling. The email correspondence between the Claimant and EHO is at pages 97 to 104. Matters were left hanging; the time limit on the temporary licence was in place up to and beyond the disciplinary suspension on 16 June. The Claimant did not carry out the sampling in the 3 month period that he had indicated to the EHO he would do so and when he wrote in January 2016; his excuse was that the production team did not tell him when they were running the product on the line and so he did not have an opportunity to test. There is no evidence or suggestion that he ever instructed the production operators to run the product so that he could test it or that he gave clear instructions as to when and how he ought to be notified so that he could conduct the tests. It appears that the matter was just left unattended to by the Claimant. He did not think it was a significant failure.

2.17.3 TOR 3 Red tractor audit: There was concern on the part of Mr. Johnson that the audit had not been dealt with in a timely manner and that this could jeopardise accreditation. It became apparent however that this was not the Claimant's responsibility. Andrew Hockridge decided to take no further action in respect of TOR 3 at the disciplinary hearing and it did not form the basis of the decision to dismiss. Andrew Hockridge accepted the Claimant's exculpatory explanation.

2.17.4 TOR 4 Micro-biological swabbing – listeria issue: The Claimant was responsible for micro-biological swabbing, devising procedures, seeing to their implementation and testing, with specific reference to listeria. The company's specification for products was that if the level of listeria

registered 10 or more on the relevant scale the product would have to be rejected. Listeria was to be found in the building and whilst there was a low risk of finding listeria with regard to hard cheese the risk was greater with soft cheese and in any event the 10 level was a strict requirement and obviously a much higher level could have very serious if not lethal effects. On 30 June 2016 a Listeria Environmental Swabbing Report was prepared which is at pages 155 to 159. The report author highlighted the risk of increased sickness complaints and enforcement visits, that the situation then pertaining with regard to temporary licence for goats cheese perls could result in a loss of licensed sales and that legal due diligence was very weak. The report also concluded that the Respondent would not have enough data to adequately defend itself against enforcement order proceedings. The Respondent's processes as devised, implemented, and monitored by the Claimant did not meet the legal requirements and the documentation was insufficient. The Claimant was aware of a crack in the ceiling allowing for water leakage above the production line and had not taken adequate measures to ensure that the situation was remedied. He did not make the Respondent aware of the hazards and the action that was required to remedy them. The HACCP documentation for 2013, 2014, and 2015 reported on matters and issues such as this and were both known to management and under review but senior management was not aware of the potential scale of the problem. A major revision of the established HACCP was required and was to have been done by the Claimant by April 2016 but it was not done. A complaint was received from a customer named Noordhoek. The Claimant did not check on this or raise the risk with the Respondent. The Claimant did not recall what action he took in response to the Noordhoek complaint. Andrew Hockridge was genuinely surprised at the lack of control and monitoring carried out by the Claimant in respect of listeria and micro-biological swabbing.

2.18 Andrew Hockridge considered that the Claimant's attitude in response to the matters raised with him was somewhat dismissive of the potential seriousness of the matter. He made some admissions of some failings but he did not appreciate that any of them was potentially serious or major. Andrew Hockridge concluded as he had anticipated since 10 June that there were too many incidents to ignore and he felt justified in taking the stance in view of the Claimant's admissions of failings. Prior to the investigation report being prepared

Andrew Hockridge had more than an inkling but did not have all the details in respect of TORs 2 and 4. Seeing it in black and white and hearing the Claimant's attempt to mitigate his failings confirmed in Andrew Hockridge's mind that the Claimant's attitude and inactivity was unacceptable. He was not prepared to ignore the matter any further.

2.19 Andrew Hockridge was content to put up with the Claimant and, insofar as he was aware of them, the Claimant's shortcomings until he received the complaint about the matters contained in TOR 1. This coupled with his prior knowledge of the job application gave cause for suspicion and following that he received in the investigation report full details of TORs 2 and 4. The investigatory report and the Claimant's responses at the disciplinary hearing confirmed in Andrew Hockridge's mind his prior suspicions that the Claimant was not committed to the Respondent's business, that there were genuine problems over the Claimant's commitment to his work and the manner in which it was being conducted which could lead to problems for the Respondent both as regards financial loss and reputational damage. This served only to confirm Andrew Hockridge's pre-judgment that the Claimant's days were numbered with the Respondent and that that was why he offered the compromise agreement to the Claimant on 10 and 13 June 2016. Andrew Hockridge was not in a position to objectively analyse the investigation report or the Claimant's exculpatory and mitigating comments and responses.

2.20 In consequence Andrew Hockridge dismissed the Claimant and confirmed this in a letter dated 19 July 2016 which is at pages 196 to 198. Andrew Hockridge's conclusion at page 198 puts responsibility on the shoulders of the Technical Manager and what he considered to be the Claimant's lack of control over basic requirements was genuinely held. He also genuinely believed that the Claimant did not appreciate the potential danger that he was putting the Respondent into. The Claimant was given the right to appeal against this summary dismissal. The effective date of dismissal was 19 July 2016.

2.21 The Claimant wrote to the Respondent on 22 July 2016 (pages 199 and page 203) in which he indicated that he wanted to appeal against the decision and he asked the Appeals Officer Gareth Hockridge to review the decision that had been made in reliance on the information previously provided. He wished to be reinstated. The appeals procedure is at page 80. At paragraph 15.5 the procedure specifies that the appeal hearing is to review a penalty imposed and says that ideally the appeal should not only be in writing but should include the reasons why the employee feels the decision to be unfair providing any new information or evidence that might support the appeal. It is

not an essential element of the appeals procedure that a dismissed employee provides reasons or new evidence.

2.22 The Appeal Hearing took place on 28 July 2016 and took some 10 minutes. Prior to it Gareth Hockridge read the investigation report and Andrew Hockridge's decision; he also spoke to Andrew Hockridge. At the Appeal Hearing however (minuted at pages 205 to 206) and in his evidence it is clear that Gareth Hockridge expected to receive new evidence for consideration failing which he was not prepared to conduct a thorough review of the existing information and the decision itself. Gareth Hockridge gave the Claimant an opportunity to say what had procedurally been done incorrectly or what evidence had been missed but in the absence of any evidence to support either such contention he did not review the matter. The Claimant had asked for a review because he felt the decision was harsh. Mr. Hockridge was not prepared to review the decision on that basis and did not do so. He confirmed his outcome that the decision to dismiss should be upheld and he did so in a letter dated 28 July at page 207.

3. The Law

3.1 The overriding objective of the rules contained in ETS (Constitution and Rules of Procedure) Regulations 2013 ("the rules") is to enable an Employment Tribunal to deal with cases fairly and justly. Rule 2 sets out some considerations to be taken into account in dealing fairly and justly with matters. A Tribunal shall seek to give effect to the overriding objective throughout its proceedings. Ultimately a Tribunal ought to ensure a fair hearing and a just result. These are the considerations to be taken into account in respect of applications be they for postponement or the conversion of a hearing from a Final Hearing to a Preliminary Hearing.

3.2 Section 111A Employment Rights Act 1996 (ERA) provides that evidence of pre-termination negotiations is inadmissible in any proceedings on a complaint to an Employment Tribunal under section 111 ERA (which includes unfair dismissal). In this context "pre-termination negotiations" means any offer made or discussions held before the termination of the employment in question with a view to it being terminated on terms agreed between the employer and the employee. In relation to anything said or done which in the Tribunal's opinion was improper or was connected with improper behaviour then the rule rendering evidence of pre-termination negotiations inadmissible applies only to the extent that the Tribunal considers to be just.

3.3 Section 94 ERA provides an employee with a right not to be unfairly dismissed by his employer and section 95 ERA defines the circumstances in which an employee is dismissed as including where the contract under which the employee is employed is terminated by the employer whether with or without notice.

3.4 Section 98 ERA deals with the fairness of a dismissal providing a number of potential fair reasons including reasons related to the capability or qualifications of an employee to perform work of a kind which he is employed by the employer to do, and reasons related to the employee's conduct.

3.5 Once a Respondent has proved to the satisfaction of the Tribunal that the reason for dismissal was a potentially fair reason it is for the Tribunal to determine whether the dismissal was fair or unfair having regard to the reasons shown by the employer. Such determination depends on whether in the circumstances (including the size and administrative resources of the employers undertaking) the employer acted reasonably or unreasonably in treating it as sufficient reason for dismissing the employee. The determination shall also be in accordance with equity and substantial merits of the case (section 98(4) ERA).

3.6 Wrongful dismissal: An employee is protected in contract over and above under the general laws as explained above in relation to section 98 ERA. Upon termination of employment an employee is contractually obliged to give the appropriate notice or is contractually entitled to receive the appropriate notice of termination from his employer. An employer is not however obliged to give notice of termination in circumstances where the employee has committed a repudiatory breach of contract. A repudiatory breach of contract is one that seriously damages or destroys the relationship rendering notice irrelevant. It is for the Respondent to a claim of wrongful dismissal to show entitlement to dismiss without notice and therefore to prove on the balance of probabilities that a Claimant has committed a repudiatory breach absolving it of any obligation to give notice.

4. Application of Law to Facts – The Judgment

4.1 The Dismissing Officer's belief: Andrew Hockridge was the Disciplining Officer. He was aware for some time prior to the events described above that the Claimant could be fairly criticised about some aspects of his work and performance but he generally believed that the Claimant was a good employee. He was not concerned about the Claimant's performance or conduct prior to April 2016.

This situation changed to one of concern when Andrew Hockridge heard that the Claimant had been looking for work elsewhere. This concern became an actual issue for Mr. Hockridge when the Respondent received a customer complaint being the matter forming the basis of TOR 1. At that point Andrew Hockridge genuinely believed that the Claimant lacked commitment to the Respondent and was unhappy to the extent that it was affecting his performance. Andrew Hockridge gave the Claimant an opportunity to leave his employment by an easy route or alternatively to face investigation which Andrew Hockridge anticipated, certainly by 10 June 2016, would result in the Claimant's departure either through disciplinary sanction, management out of the business via performance management, or that he would resign. Andrew Hockridge did not anticipate that the Claimant would have a career with the Respondent beyond at latest completion of a capability or performance management procedure. Andrew Hockridge's belief was based on his knowledge and experience of the Claimant, information received regarding his job searches and the customer complaint concerning TOR 1 which he felt was within the Claimant's responsibility and for which he was ultimately responsible. Andrew Hockridge's belief did not change from 10 June 2016 until the effective date of termination of employment on 19 July 2016 but his belief was confirmed to his satisfaction by the investigation report that he received (prepared by Gary Johnson) and the Claimant's responses to questions and matters raised with him during the course of the investigation. The Claimant played down the significance of all the issues and matters of concern to the Respondent that were put to him. He displayed what Andrew Hockridge believed was a lack of conscientious application and a detachment from the Respondent's best interests. Andrew Hockridge felt as he did on the basis of the Claimant's apparent interest in leaving his employment, the perception of his detachment together with his lack of acceptance of the potential seriousness of TORs 1, 2 and 4. His genuine belief was reasonable albeit it was formed as early as 10 June 2016 prior to the disciplinary investigation and the claimant having any opportunity to explain, excuse himself or to provide mitigating circumstances. Events served to confirm in Andrew Hockridge's mind his clearly formed bias against the claimant at least in respect of his continued employment.

4.2 The Investigation: Gary Johnson conducted a thorough investigation save in respect of TOR 3 which was ultimately dismissed. His investigation revealed the extent of the Claimant's responsibility for, and extent of potentially damaging issues in respect of, TORs 1, 2 and 4. The investigation involved appropriate enquiry of essential

witnesses and documentation. Gary Johnson prepared a detailed report. The matters raised were mostly already known about at a superficial level before the investigation commenced but the investigation reinforced Andrew Hockridge's increasingly negative view of the Claimant. It bore out that the Claimant was under-performing and that his apparent lack of application to his duties exposed the Respondent to commercial (including reputational) risks. Had Andrew Hockridge received such a report out of the blue and viewed it objectively without preconceived ideas it is more likely than not that he would have concluded that capability and or disciplinary procedures should be invoked. As it was he had known something of the matters involving TORs 2 and 4 for some time and turned a blind eye to them accepting the situation. The investigation report proved to be convenient corroboration of Andrew Hockridge's concerns that came to the fore with the 10 June complaint (TOR 1) against the background of knowledge of the Claimant's job searches. It provided a means to an end that was predictable since 10 June 2016. Andrew Hockridge's decision to dismiss the Claimant was not based on the investigation report but that report gave him justification for the ending of employment in circumstances where the writing was on the wall for the Claimant since 10 June 2016.

4.3 Range of reasonable responses: From 10 June 2016 onwards the Claimant's dismissal was assured, subject only to his earlier resignation. From that date it was clear that he had no medium to long term future with the Respondent. Dismissal was not within the range of reasonable responses of a reasonable employer for an employee who was unhappy and looking elsewhere for alternative employment in the circumstances that pertained at the time and where there was no threat to the Respondent's confidential and commercial information or contacts (and this was never argued or established by the Respondent). Neither was it within the range of reasonable sanctions in respect of what was known to Andrew Hockridge in respect of TOR 1 as of 10 June 2016 and yet that was when the provisional decision was made to terminate the Claimant's employment. Andrew Hockridge did not distance himself from the process subsequently; his bias and preference for termination of employment was always likely to be and actually proved to be effective. As the Respondent was aware of and tolerated TORs 2 and 4, and TOR 1 amounted to a further example of lack of conscientious application it is more likely than not that if Andrew Hockridge had been well disposed to the Claimant or at worst been indifferent to him the Claimant would have received a genuine performance management and disciplinary sanction short of dismissal from a reasonable employer. Andrew Hockridge was not well disposed to the Claimant because he felt that he could no

longer rely on his commitment and loyalty. That said, a reasonable employer could have concluded that TORs 1, 2 and 4 illustrated a negligent approach and a failure to perform contractual and professional roles that exposed the Respondent's customers to risks. A reasonable employer could have concluded that the Claimant was experienced and capable of fulfilling his role and that any such failures were matters related to conduct rather than capability. If Andrew Hockridge had not prejudged the outcome of the investigation and predetermined the dismissal he could have reasonably concluded, as could any reasonable employer, that dismissal was appropriate. Dismissal fell in the range of reasonable responses to TORs 1, 2 and 4 and in the light of the Claimant's admissions and lack of apparent appreciation of the seriousness of the situation.

4.4 Reason for dismissal: The reason that Andrew Hockridge dismissed the Claimant was that he knew that the Claimant was unhappy at work, was looking elsewhere and this caused him serious concern about the Claimant's conscientious commitment to the Respondent and to his professional duties as evidenced by his perceived failings that gave rise to TOR 1.

4.5 Did the Respondent act reasonably or unreasonably in treating that reason as sufficient reason: It was unreasonable of Andrew Hockridge to jump to that conclusion (para 4, 4 above) as early as 10 June 2016 and to close his mind to any exculpatory matters or mitigating circumstances. It was unfair on the Claimant to have to go through a procedure where the decision makers mind was already made up. Regardless of the investigation and anything said or submitted in writing by the Claimant, Andrew Hockridge had decided on 10 June 2016 that the Claimant's employment would end in the near future. As the Claimant did not agree to a mutual parting of ways and contested the allegations against him, the Respondent's actions were unfair and he was not treated with justice and equity in respect of the substantial merits of his case. It was unreasonable for Andrew Hockridge to continue in the role of Disciplining Officer. It was then unreasonable for Gareth Hockridge as the Appeals Officer to fail to conduct a proper, reasonable, just and equitable review as required by the Respondent's own procedures. Gareth Hockridge became fixated on his belief that the Claimant needed to produce new evidence and as he did not do so then the Appeal could not be effective; that was unreasonable and unfair.

4.6 The Claimant's dismissal was unfair for the reasons found above but at the same time the Claimant was at risk of his being fairly dismissed. That risk may be reflected in the calculation of the

Claimant's compensatory award. Neither party made any submission in respect of remedy issues such as any "Polkey" deduction and so I make no formal findings at this stage as to whether, and if so by how much, any compensatory award ought to be reduced to reflect the risk faced by the Claimant of his being fairly dismissed and as to when that could have occurred.

4.7 I have made findings of fact regarding the Claimant's conduct. There was an element of dereliction of duty on the Claimant's part as evidenced by the Investigating Officer's report. The Claimant did not then show genuine contrition or apparent understanding of the potential seriousness of his shortcomings to the Respondent, or appreciation of the Respondent's reasonable concerns. He appeared blasé when the Respondent could reasonably have expected conscientious diligence. Neither party addressed me on the effect, if any, of the Claimant's conduct on any basic or compensatory award. Such matters must therefore await a remedy hearing.

4.8 Breach of contract with regard notice of termination

4.8.1 At the material time the Claimant was dissatisfied at work; he was looking elsewhere for employment. Such conduct did not amount to a repudiatory breach of contract. He was disgruntled and was entitled to look elsewhere.

4.8.2 At the material time the Claimant was underperforming. He was ultimately responsible for, but not solely responsible for, failings in respect of TOR 1. He ought to have managed matters better so as to prevent the problem from giving rise to a customer complaint, potential loss, and reputational damage to the Respondent. His conduct was not such as to destroy or seriously damage the relationship between the Respondent and him alone although it could damage the relationship and require remedial action including performance management with or without a disciplinary warning. TOR 1 alone did not lead to Andrew Hockridge's decision to see an end to the Claimant's employment but it was coupled with his innocuous job search.

4.8.3 TORs 2 and 4 elaborated on circumstances long known to the Respondent and accepted until it was used conveniently to justify the decision to terminate the Claimant's employment. The Claimant had underperformed in respect of the matters covered by TORs 2 and 4 but the Respondent had not thought that such underperformance seriously damaged or destroyed the

relationship until it felt it opportune to rely on that underperformance.

4.8.4 The Claimant's job searches and underperformance did not constitute repudiatory breaches of his contract. The Respondent has not proved that the Claimant breached his contract in a fundamental particular such as to repudiate the contract. On termination of his employment the Claimant was entitled to notice. Clause 10 of his statement of terms and conditions of employment (page 94 and 95) mirror the statutory notice provisions. The Clamant was dismissed during the fourth year of his employment. He was entitled to one weeks notice for each completed year of continuous employment. The Claimant was entitled to but did not receive 3 weeks notice of termination of employment. The Respondent breached the Claimant's contract with regard to notice provisions. The Claimant was wrongfully dismissed.

Employment Judge T Vincent Ryan
Dated: 25th July 2017

JUDGMENT SENT TO THE PARTIES ON

25 July 2017

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS