EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mr A A Butt	**v**	**National Car Parks (NCP)**

Heard at: London Central

On: 29 June 2017
In chambers: 30 June 2017

Before: Employment Judge Lewis

Representation

For the Claimant: In person

For the Respondents: Mr McGlashan, consultant

RESERVED JUDGMENT

1. The claim for unfair dismissal is not upheld.
2. The claim for wrongful dismissal (notice pay) is not upheld.
3. The claim for unauthorised deduction from wages is not upheld.

REASONS

Claims and issues

1. The claimant brings claims for unfair dismissal, wrongful dismissal and pay arrears. The issues are as follows:

Unfair dismissal

1.1 Have the respondents shown the reason for dismissal?

1.2 Was the reason a substantial reason of a kind which can justify dismissal?

1.3 Was the dismissal fair or unfair applying the band of reasonable responses? As part of that,

1.3.1 following the 3 stage test in *British Home Stores v Burchell* [1978] IRLR 379
- did the respondents genuinely believe the claimant was guilty of misconduct?
- did they hold that belief on reasonable grounds?
- did they carry out a proper and adequate investigation?

1.3.2 was dismissal a fair sanction?

1.4 Was there a breach of the ACAS Code on Disciplinary and Grievance procedures?

1.5 If the dismissal was unfair on procedural grounds, what is the chance that the respondents would have dismissed the claimant even if they had followed fair procedures and on what date would the dismissal have taken place?

1.6 Should there be any deduction from the basic award for conduct prior to dismissal? Regarding the compensatory award, did the claimant cause or contribute to his dismissal and if so, to what extent?

1.7 Should the claimant succeed, remedy.

Wrongful dismissal

1.8 Whether the claimant committed gross misconduct

1.9 If not, the amount of notice to which the claimant was entitled.

1.10 Calculation.

Pay arrears

1.11 Whether the claimant was suspended without pay and for what period.

1.12 Whether the respondents were entitled under the contract to suspend the claimant without pay.

Fact findings

2. The tribunal heard evidence from the claimant, and for the respondents from Carl Peckham, Robert England and Roger Ashley. There was an agreed trial bundle of 239 pages plus a bundle of additional documents from the claimant.

3. The respondents provide off-street parking services. They employ approximately 1200 people. The claimant started his employment with the respondents in July 2011. From about October 2012, he was employed as a Mobile Support Officer.

4. The claimant's duties involved visiting various NCP sites. When at a site, he would carry out a patrol, ensure the car park was clean and functioning properly, and check the payment and ticket machines were working. He would also respond to calls from the customer service centre to deal with particular problems on specific sites, eg an equipment breakdown or antisocial behaviour by customers. The claimant's designated area was West End and City, but for most of 2016 he had been asked to cover the whole of London, ie 20 car parks from Shepherds Bush to Canary Wharf, because of staff shortages.

5. The claimant was entitled to the use of a company car. He would collect a car from the fleet at the start of a shift and return it at the end. He would not necessarily use the same car as on a previous shift. He was required to report any damage to the car at the end of a shift on completing a 'Commercial vehicle inspection and defect log'.

6. The respondents have a Loss Prevention Department which is responsible for operational security, including detection and prevention of theft, fraud, assault etc by employees or by third parties. Sometimes a covert investigation is necessary.

7. The staff handbook states that the company reserves the right to search bags and vehicles, monitor telephone and CCTV in NCP workplaces, monitor email, internet, voicemail and text messages sent to NCP telephones from NCP equipment, and check employees' educational and professional background.

8. The respondents' local managers had suspicions that the claimant was not fully working his night shifts. They often had difficulty contacting him on the company mobile phone. Loss Prevention was therefore asked to investigate.

9. On night shifts, the car parks visited by the claimant would be unstaffed. Only some of the sites had CCTV. There was no mechanised clocking in and out system. Although the claimant had to enter the date and times of his visit in the site log book, this could easily be incorrectly entered. It was therefore difficult to check whether the claimant was performing his duties. The company largely relied on trust in relation to the claimant and other Mobile Support Operatives.

10. As a result of this system, the only way to check objectively whether the claimant was working his full shift was covert surveillance. This required authorisation as director level, which was obtained.

11. Two Loss Prevention managers, Carl Peckham and Jonathan Eddery, therefore covertly monitored the claimant on his night shift, which was scheduled for 7 pm on 4 August 2016 to 7 am on 5 August 2016. They followed him by car when he left his first site and took photographs. Over that period, they observed that the claimant was away from his car and not carrying out duties for over 5 hours. He had repeatedly parked in places some distance from any NCP site.

12. In addition, they noticed and took photographs of damage to the rear of the claimant's car which was present while parked at 2.05 am, but had not been present at the start of his journeys.

13. The claimant did not complete a log recording the damage to the car until 6 August 2016.

14. On 6 September 2016, Mr Peckham and Mr Eddery went to interview the claimant while he was on duty at NCP's Farringdon carpark. The reason for delay in interviewing the claimant was because of other more pressing matters, including a large-scale theft and some serious staff assaults, which took priority.

15. The claimant was not forewarned of the visit or invited to an interview in advance. Loss Prevention prefer to give no forewarning because in their experience, staff frequently go off sick to avoid being interviewed or are given an opportunity to hide evidence.

16. There is a dispute over exactly what happened at this interview. In the tribunal, I heard accounts from the claimant and Mr Peckham, set out also in their witness statements. I was also shown the claimant's grievance written at the time (see below) and statements taken from Mr Peckham and Mr Eddery during investigation of the grievance.

17. Mr Eddery opened the interview by specifying the allegations and stating that he and Mr Peckham wanted to interview the claimant. He said the information would then be passed on to HR.

18. Mr Eddery pointed out that some of the allegations amounted to a criminal offence, ie using the vehicle without the owner's consent and without insurance, and theft of fuel because the car use was not on company business. This could lead to a criminal record, problems with references, and problems with SIA and CRB clearance. He could also get points on his licence.

19. The claimant says that from the outset he was told that he must resign or that he would be reported to the police. Mr Peckham and Mr Eddery deny this. They say that the claimant was uncooperative from the beginning and refused to answer questions. They say his first reaction was to ask about the likely consequences and his options. They say they only mentioned the possibility of resigning and the risk of police action because he asked about the options. They admit they told the claimant that if he did not want to answer the questions, he could resign with immediate effect.

20. I find that Mr Eddery did mention the possibility of police action very early in the interview, when trying to impress upon the claimant the seriousness of the allegations. I also find that the option of resigning was given at an early stage, although only after the claimant had asked what would happen. I think it unlikely that Mr Eddery would have suggested the claimant resign without any prompting; he had come to conduct an

interview. However, I also find that as time went on, the discussion became increasingly focused on the risk of police action and on resignation as a real option. I believe this was a consequence of the claimant's patent reluctance to answer questions and increasing frustration and impatience by Mr Peckham and Mr Eddery. I do not believe they ever said in terms that the claimant must resign or he would be reported to the police. However, the possibility that he could end up being reported if he did not resign would have been the message received between the lines by the claimant.

21. The claimant asked for some time to consider his options. He says he was given two minutes. Mr Peckham says he was given at least 20 minutes and that during this period, the claimant was sitting in the office with either Mr Peckham or Mr Eddery, each of whom had to periodically pop out to deal with other matters. I think it possible the claimant was told he could 'take two minutes' but I believe he was given a little longer in practice while Mr Peckham and Mr Eddery turned their attention to the customer issues at the site.

22. I was played a recording of the last few minutes of the meeting which the parties agree lasted at least an hour. The claimant said he was not going to resign. Mr Eddery then insisted that the interview took place. The claimant said he was not feeling well and was not going to attend any meeting. He said that if a meeting was booked in advance, he would attend. Mr Eddery said then he would be suspended with immediate effect for not attending the interview.

23. The meeting concluded with Mr Eddery accusing the claimant of having the keys. The claimant said he never took any keys. Mr Eddery responded, 'Well expect a phone call from the police'. The claimant then left.

24. The respondents have an HR policy regarding the investigation process. It states that investigations must be carried out in a fair and objective manner. Investigations may be conducted either by Business Unit managers or by Loss Prevention. The detailed guidance in the policy relates only to instances where Business Unit managers have decided to carry out their own investigations. It advises managers never to engage in discussion on potential action during investigation. It states that if employees refuse to answer a question, they should be asked again; if they still refuse, the interviewer should simply state that it will be recorded in the notes that they refuse to answer a question. The policy also warns that an employee might raise the subject of resignation instead of answering questions; this is often an emotional reaction and can just as quickly change later on. Interviews should not be stopped to discuss offers of resignation. Employees should be told any decision to resign would have to be made after the interview process.

25. As I have already stated, this part of the policy does not explicitly apply to Loss Prevention investigations. I do not know why not. I mention the guidance here because it would have been useful for the Loss Prevention

interviewers to have followed this advice in relation to the claimant. I shall discuss this further in my conclusions.

26. The claimant was sent a letter dated 7 September 2016 by Mr Webster, the Cluster Manager, confirming his suspension. Mr Webster stated the claimant would be placed on unpaid suspension due to his unwillingness to cooperate with the Loss Prevention investigation. The disciplinary and grievance procedure states that an employee may be suspended from work on full pay in order for a full investigation to be carried out.

27. Mr Webster's letter stated that if the claimant subsequently became unfit for work due to illness, he would be taken off suspension and recorded as sick. Any entitlement to company sick pay would then be suspended until the matter had been satisfactorily concluded.

28. The claimant was signed off sick by his GP on 8 September 2016. The fit note, initially until 22 September 2016, stated 'stress at work' and added the comment 'Blackmailed at work'.

29. The claimant remained off sick until his dismissal. He was unpaid for the first three days of his sickness. After that, he was paid only statutory sick pay. The claimant's 'Colleague handbook' states, 'If you have been with us for more than six months, then you may be entitled to NCP Company Sick Pay. This is normally payable after the first three days of any absence, unless detailed otherwise in your offer of employment.' For employees between 2 and 5 years' service, the entitlement is then set out as up to 30 working days per year, full pay.

30. The claimant sent an email to HR on 7 September 2016 headed 'Getting blackmailed for resignation'. This was treated as a grievance. The claimant stated that the two men had accused him of not working, stated they had been following him for a couple of weeks, and had shown him photographs. He said they had threatened to call the police and that he would get 6 points on his license for driving without insurance, and he could be prosecuted for fraud, which would prevent him getting a job anywhere. He said they were pressurising him to resign and told him he could have two minutes to think about it.

31. The claimant added that he had similar issues when he was accused of the same thing the previous year and he had caught management falsifying records. He said he had made written complaints which were rejected, and no one had replied to his appeal.

32. The claimant told me that none of the people involved in the incident the previous year had been involved in the incident leading to his dismissal.

33. On 19 September 2016, the claimant was invited to a grievance meeting on 28 September 2016. The claimant replied on 24 September 2016 that he did not feel well enough to attend and he would inform the company when he did feel able to. He submitted a further fit note stating he was

unable to attend work from 23 September to 7 October 2016 due to stress at work.

34. On 5 October 2016, the respondents informed the claimant that the grievance meeting was rescheduled for 13 October 2016. On that day, the claimant sent in an email stating he was feeling unwell and unable to attend.

35. The grievance hearing finally took place on 22 November 2016 in front of Scott Morgan, a Business Manager, and accompanied by Lucy Egerton from HR. The claimant had been offered the opportunity to be accompanied, but did not bring someone. Mr Morgan had also interviewed Mr Peckham and Mr Eddery.

36. The claimant said he had been given the opportunity of resigning or being reported to the police, and that he had been given two minutes to decide. Mr Peckham and Mr Eddery said the claimant had asked what his options were after being told of the allegations. They had said he could either resign with immediate effect or go through the interview and investigation process, which could then result in disciplinary action. They agreed they mentioned their belief he had committed criminal offences and he had asked for clarification. They said they gave the claimant 20 minutes to think through the options.

37. By letter dated 22 November 2016, Mr Morgan rejected the claimant's grievance. He did not accept the claimant had been blackmailed to resign. He accepted that the Loss Prevention officers had simply been outlining the claimant's options. He also accepted they had given the claimant 20 minutes' thinking time. The CCTV showed Mr Peckham and Mr Eddery had been on site about 1 hour, which would be long enough to incorporate that 20 minutes. The claimant was told of his right of appeal.

38. By another letter dated 22 November 2016, Malcolm Bird, Cluster Manager, wrote to the claimant requiring him to attend a disciplinary hearing for gross misconduct on 24 November 2016. He was informed of his right to be accompanied. The allegations were failing to protect company property; failing to report damage of a company vehicle; unauthorised absence from workplace; failing to follow company policies and procedures; failing to comply with contractual working hours; and failing to comply with a reasonable request from Loss Prevention. The letter said that these actions constituted misconduct under the disciplinary procedure and could result in a formal warning.

39. The letter attached the respondents' disciplinary and grievance policy; various photographs; witness statements from Mr Eddery and Mr Peckham regarding their surveillance; an email from Chris Kent-Webster, a Cluster Manager, about signing the log sheet and saying the claimant initially denied the damage; commercial vehicle inspection and defect logs; and a statement from Tony Antobre, a Customer Service Advisor, regarding the log.

40. The witness statements from Mr Peckham and Mr Eddery said that local managers had raised concerns that the claimant was doing a second job during his working hours. The Loss Prevention officers had followed the claimant from the moment he left his first site, Finsbury Park. At 9.21 pm, the claimant had parked outside a residential building at the end of Bingham Place, a no through road, with no NCP site in adjacent streets. The claimant did not return for approximately 1 hour 45 minutes. He then drove to Walm Lane, where he parked his car opposite some fast food restaurants. Again there was no NCP site nearby. At 2.31 am, the claimant parked again in the same location in Bingham Place. The car remained there at least till 3.30 am when Mr Peckham and Mr Eddery ended their shifts.

41. The disciplinary procedure gives various examples of gross misconduct which are stated not to be exhaustive. The examples include 'theft, fraud, deliberate falsification of records' but do not explicitly state 'unauthorised absence'.

42. The claimant did not receive the grievance outcome letter or the invitation to the disciplinary. These had been undelivered by Royal Mail because no one was in and were sitting in the delivery office. When HR sent the claimant an email on 23 November 2016 regarding the disciplinary the next day, this was the first he had heard about it. He said he was too unwell to attend and he was also awaiting the grievance outcome.

43. By email dated 25 November 2016, the claimant was invited to a rearranged disciplinary meeting on 29 November 2016. The claimant said he had not been given enough notice to attend. He was happy to attend a meeting provided he was given enough notice.

44. On 29 November 2016, the claimant was invited to attend a grievance appeal meeting on 2 December 2016. The claimant said he was unable to come but asked for it to be rescheduled any day the following week. It was fixed for 5 December 2016.

45. At some point, the disciplinary hearing was fixed for 7 December 2016. On 6 December 2016, HR emailed the claimant to say that they needed to postpone the hearing.

46. On 12 December 2016, Tristan Arnold, Head of Operations, wrote to the claimant rejecting his grievance appeal. He had listened to the 5 minute recording of the end of the discussion with the Loss Prevention officers on 6 September 2016. He did not hear anything which sounded threatening. They appeared calm throughout, whereas the claimant was agitated. Moreover, the claimant's estimate of the length of the meeting was 1 hour 45, whereas CCTV showed they had only been present for 1 hour. The claimant was therefore likely to be inaccurate with his time frames on the subject of whether he was given 2 or 20 minutes to think.

47. On 12 December 2016, Anne-Marie Gough, HR Manager (South) wrote to the claimant to inform him the disciplinary hearing was now refixed for 16

December 2016. The claimant emailed on 15 December 2016 to state that his union representative was going on holiday the next day but would be back from 9 January 2017. He could be available 9, 10 or 12 January 2017. He said the union representative had been ready to attend on the cancelled meeting of 7 December 2016.

48. Ms Gough responded to state that 3 weeks was too long a delay. The options were for the claimant to attend as invited or to refix for the following week. Otherwise the hearing would be held in his absence. The claimant could provide a written statement.

49. The claimant did not attend the hearing and did not provide a statement. Roger Ashley, Head of Operations (Anglia) decided to go ahead in his absence. He felt there had already been long enough delay from the originally scheduled date on 24 November. Although the claimant was off sick with stress, that appeared to be related to the disciplinary incident and the claimant had been well enough to attend the grievance meetings and had been happy to attend a disciplinary on 7 December 2016.

50. Ms Gough attended the disciplinary hearing with Mr Ashley. On 20 December 2016, Mr Ashley wrote to the claimant dismissing him for gross misconduct and without notice. This was based on three findings: (1) failure to protect the company car by leaving it unattended in a location unconnected with NCP and not reporting the damage until 6 August 2016; (2) unauthorised absence from the workplace – the evidence showed 5.5 hours when the claimant was not on site at an NCP car park or anywhere close to an NCP site; his break was only 1 hour 30; the vehicle had been parked at Bingham Place from 9.21 pm – 23.05 pm and 2.31 – 3.30 am at least; it had been parked at Walm Lane between 11.35 pm and 1.59 am. The claimant had provided no rebuttal or explanation when invited to an investigation meeting by the Loss Prevention officers or subsequently; (3) On 6 September 2016, the claimant had refused to be interviewed by the Loss Prevention officers and then had left the site.

51. The letter said the claimant had the right of appeal.

52. On 24 December 2016, the claimant sent in a written appeal. His grounds were (1) the allegations were baseless and fabricated; (2) people in management do not know what they are doing; (3) a year ago management had fabricated documents to put him in trouble. He said he had never had any warnings in the past. He asked why he had not been told that he was under surveillance. He referred to being threatened and blackmailed for resignation for over an hour by the Loss Prevention officers.

53. The appeal was heard on 5 January 2017 by Rob England, Senior Head of Operations, South. He was accompanied by a Business Manager, Carly Edwards. Mr England asked the claimant if he wanted to carry on as he did not have anyone with him. The claimant confirmed that he did.

54. Mr England went through each line of the claimant's appeal email and discussed it with him. The minutes of the appeal show there was a careful and systematic discussion. The meeting lasted 2 hours 15 minutes.

55. Mr England asked about the incident the previous year. In essence, this involved the claimant apparently catching his manager and the Night Controller typing out a complaint letter against him as if from a colleague ('Tom') who was not present.

56. Regarding what happened on 4 August 2016, the claimant said he could not remember. Mr England asked if he was visiting someone in Bingham Place. The claimant said: 'I have no idea. We pick up the van, visit the sites, go to a restaurant or something to eat, something like that.'

57. Following the meeting, Mr England investigated further. He went back to Mr Eddery and Mr Peckham to ask why they had delayed trying to interview the claimant. He obtained a transcription of the recording of the meeting of 6 September 2016, most of which was inaudible. He asked the two night shift team leaders about their concerns which had triggered the investigation. Both found it difficult to keep in contact with the claimant through his shift and to track where he was.

58. Mr England wrote to the claimant on 16 January 2017 rejecting the appeal. He answered each of the claimant's main points of appeal. He did not accept the allegations were baseless and fabricated, having looked at the evidence provided by the Loss Prevention team. He felt the surveillance was a proportionate step to take given the seriousness of the concern that the claimant was regularly absent from work. The photographs were taken during working hours in a public space and were disclosed to the claimant afterwards. Moreover the handbook notifies employees that workplace surveillance might take place.

59. The issue of the handling of the investigation meeting had already been dealt with by the grievance and grievance appeal and Mr England did not want to go over the same ground. However, he did listen to the claimant's description of the incident and he did get a transcript of the recording. He did not feel there was any evidence to suggest blackmail.

60. Regarding the disciplinary hearing, Mr England pointed out that the disciplinary procedure said, if a representative cannot attend, a further date must be suggested by the claimant within 5 days of the original date proposed. This had not happened, nor had the claimant submitted a written statement.

61. Mr England told the tribunal and I accept, that he did not give much weight to the fact that the claimant had not initially recorded the vehicle damage in the log, since he had belatedly done so. The reason he upheld the dismissal was because of his absence from work for over five hours and taking one of the company's vehicles to do that. If the claimant had told him what he was doing, potentially he might have accepted the explanation. But the claimant had not given any explanation. Mr England

had asked himself whether it was ordinary misconduct or gross misconduct and he had decided it was the latter.

62. Mr England had considered whether it mattered that there was a four week delay before the allegations were put to the claimant. However, he felt that the claimant would have been able to remember something as striking as parking his car in those locations for many hours.

63. Since there is a notice pay claim as well as an unfair dismissal claim, I will add a word about the claimant's evidence in the employment tribunal regarding where he was on 4 August 2016. I am afraid I found his evidence evasive and inconsistent. He repeatedly referred to his right to a one and a half hour break, but could not explain the fact that he had been observed away from any site for five and a half hours. He referred to the time taken travelling to 20 sites all over London, but again, that did not explain the car being parked in two places for hours on end. Then he said that he would do his patrols and then 'stay in his area' to see whether he was called out to any sites. His evidence eventually boiled down to this – he would patrol his sites, do a check, then hang about in the locality to see if he was specifically called out to any site. In other words, he did not spend his full shift (apart from his break) patrolling sites as he was supposed to do.

Law

64. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2), eg conduct, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

65. Under s98(4) '… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) 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 shall be determined in accordance with equity and the substantial merits of the case.'

66. Tribunals must consider the reasonableness of the dismissal in accordance with s98(4). However, tribunals have been given guidance by the EAT in British Home Stores v Burchell [1978] IRLR 379; [1980] ICR 303, EAT. There are three stages:
(1) did the respondents genuinely believe the claimant was guilty of the alleged misconduct?
(2) did they hold that belief on reasonable grounds?
(3) did they carry out a proper and adequate investigation?

67. Tribunals must bear in mind that whereas the burden of proving the reason for dismissal lies on the respondents, the second and third stages of Burchell are neutral as to burden of proof and the onus is not on the respondents (Boys and Girls Welfare Society v McDonald [1996] IRLR 129, [1997] ICR 693).

68. Finally, tribunals must decide whether it was reasonable for the respondents to dismiss the claimant for that reason.

69. I have reminded myself that the question is whether dismissal was within the band of reasonable responses open to a reasonable employer. It is not for me to substitute my own decision.

70. The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason. The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed. (Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, CA)

71. In relation to dismissal for gross misconduct, ultimately the question is whether the employer had a reasonable belief that the employee committed that level of misconduct and deserved instant dismissal. Just because the claimant has committed gross misconduct, does not mean the dismissal was fair. The usual approach under s98(4) must be followed. The fact of summary dismissal is a factor to be considered along with all the other circumstances

72. In reaching their decision, tribunals must also take into account the ACAS Code on Disciplinary and Grievance Procedures. By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question. A failure by any person to follow a provision of the Code does not however in itself render him liable to any proceedings.

73. The respondents drew to my attention McGowan v Scottish Water [2005] IRLR 167, (S)EAT for the proposition that covert surveillance can be a fair and proportionate measure and is not necessarily a breach of human rights. In that case, the employer arranged for covert surveillance of the front door of the claimant's house and filmed his comings and goings for over a week.

Conclusions

74. I now apply the law to the facts to determine the issues. If I do not repeat every single fact, it is in the interests of keeping these reasons to a manageable length.

Unfair dismissal

75. The first issue is whether the respondents have shown the reason why the claimant was dismissed. I find that they have. The claimant was dismissed for gross misconduct, ie for unauthorised absence from work on the night shift starting 4 August 2016. The ancillary matters of not immediately reporting the damage to the car and refusing to be interviewed by the Loss Prevention officers were not major factors in Mr England's mind when he completed the dismissal and appeal process.

76. This reason was a substantial reason of a kind which can justify dismissal.

77. I now have to decide whether it was fair for the respondents to dismiss the claimant for that reason and whether they followed a fair procedure. As I explained at the start of the hearing, I must apply the band of reasonable responses.

78. First I will go through the three stages in the case of BHS v Burchell.

79. Stage 1: did the respondents genuinely believe the claimant was guilty of this misconduct? I find that they did.

80. Stage 2: did the respondents hold that belief on reasonable grounds? I find that they did. The claimant's two night shift team leaders already had concerns that the claimant was not working a full shift. They found him difficult to track and get hold of. Covert surveillance was carried out by the Loss Prevention team. There were witness statements from the two members of the team and supporting photographs showing that the claimant was parked some way from any NCP site for at least five and a half hours during a 12 hour shift. The claimant was only entitled to take breaks of one and a half hours. The claimant never gave any explanation of what he was doing at that time or why his car was parked at Bingham Place and Walm Lane apart from a vague statement about entitlement to breaks.

81. The claimant suggested that the evidence against him was fabricated, but there was no reason for Mr Ashley or Mr England to believe that. The fact that there may have been an attempt to fabricate a complaint against the claimant in the previous year by entirely different people was not a reason to think that the Loss Prevention team would fabricate entirely different evidence. Moreover, there were photographs.

82. On the less important matters there was also evidence, ie the log showed that damage to the car was not recorded until 6 August 2016. The photographs showed the claimant inspecting damage on the car on his 4/5 August 2016 shift, so he was aware of it at that time. There were also statements from colleagues that the claimant was aware of the damage.

As for the interview on 6 September 2016, there was no dispute that the claimant had refused to be interviewed and had left the site.

83. Stage 3: did the respondents carry out a reasonable investigation? I find that they did. They established by surveillance that the claimant was not at work. Although covert surveillance is normally an extreme measure, it was the only way the respondents could check up on the claimant's whereabouts given the lack of a clocking in system at the sites and lack of CCTV at many of the sites which were unstaffed. Staff had been warned of general monitoring at work, albeit not specifically that they might be followed off the premises. In the circumstances, however, that was the only practical way of establishing the facts. Moreover, the surveillance was not of the claimant's private home or in his private time. Nor was he filmed. He was followed on work hours, while he was purporting to be at work, and a few photographs were taken. He was followed in his car, but he was not followed once he left the car.

84. The claimant was given the chance of answering the allegations when Mr Peckham and Mr Eddery visited the site. He refused to do so. Nor did he ever try to provide a written answer. He was asked again at the appeal hearing.

85. I do not think the delay of four weeks in bringing the allegations to the claimant's attention was unreasonable. A reasonable employer could take the view, as Mr England did, that the nature of the allegations was such that the claimant would still be able to remember one month later where he had been. The number of hours involved and the precise addresses given would have been sufficiently memorable in a context that the claimant should not have been away from sites at all unless travelling between sites or on his breaks.

86. I have concerns about the conduct of the investigatory and disciplinary meetings, which I will refer to below, but overall I consider there was a reasonable investigation.

87. The next question is whether dismissal was a fair sanction, ie was it fair to dismiss the claimant for this reason. I find that it was. Unauthorised absence or failure to attend work and carry out duties, while pretending that you are at work and getting paid for such work, can clearly be viewed as gross misconduct. It does not need to be listed as such in the company's disciplinary procedure, which simply gave examples.

88. The respondents need to be able to trust their Mobile Support Officers on night shift to work a full shift as monitoring their presence is difficult. One and a half hour breaks are permitted. They can be taken when the claimant wants. The claimant did not put forward any mitigating factors and was evasive when asked for an explanation. In these circumstances, a reasonable employer could clearly make the decision to dismiss.

89. I do not believe a reasonable employer could dismiss the claimant purely because he delayed in noting the car damage on the log, because he did

do so belatedly. Nor do I think a reasonable employer could dismiss because the claimant refused to answer the investigatory questions on the spot and insisted on arranging the meeting ahead. However, Mr England considered the unauthorised absence sufficient on its own to warrant dismissal and refuse the appeal.

Fair procedure and the ACAS Code

90. I have some serious concerns about the procedure followed in this case.

91. I consider the meeting with the claimant on 6 September 2016 was poorly handled by Mr Peckham and Mr Eddery. I accept that a reasonable employer might have legitimate reasons for not forewarning an employee of an investigative interview, but if the employee refuses to answer questions on the spot, it is not appropriate to keep pressurising them and to tell them their alternative is to resign. A proper response is set out in the HR policy for Business Managers conducting investigation interviews, and it should have been adhered to in this case.

92. Indeed, no employee should be allowed – let alone encouraged – to rush into a decision to resign when first confronted by serious allegations. It does not matter whether they are given two minutes or twenty minutes to think about it. Nor do I find even twenty minutes very satisfactory when the claimant is in the same room as those wanting to question him for that period.

93. I also consider the mention of the police and criminal proceedings to have been highly inappropriate. This was not a matter of theft or assault. The description of what the claimant did as a criminal offence may have been technically correct, but it did not have that flavour. It was a serious disciplinary offence, not a criminal matter. The police were highly unlikely to see it as such. The only reason the Loss Prevention officers were suitable at all for this type of offence was because of the difficulty in the ordinary way of establishing where the claimant was, given the nature of his job. I do not know what the Loss Prevention officers were trying to achieve by this emphasis on the police.

94. Finally on this I would point out that the claimant does not speak English as a first language. This adds a further layer of possibility for misunderstanding over what was being said to him, and another reason why great care and calmness was required.

95. I also consider it poor practice to have gone ahead with the disciplinary hearing in the claimant's absence. The claimant had been ready to go ahead on 7 December 2016. It was the respondents who had cancelled that date. They had changed the date from one where the claimant's trade union representative could attend to one where the representative could not. The claimant offered three alternative dates. These were more than five days later, but they were only three weeks away with Christmas and New Year in between. It would not have been asking too much in all those circumstances to have waited. I add that the matter had not been so

urgent that Loss Prevention could not initially wait four weeks before trying to interview the claimant.

96. This was compounded by the letter inviting the claimant to the disciplinary, although headed 'gross misconduct', stating in its body that the charge was misconduct and the risk was of a warning. The claimant had therefore not been properly notified of the risk of dismissal.

97. Had matters rested here, I would have found the dismissal unfair on procedural grounds. However, Mr England conducted a very thorough and fair appeal. He looked at all the documents. He spoke to the claimant. The claimant was offered the opportunity to be accompanied. Mr England went through each of the allegations and each of the claimant's points. Mr England gathered new evidence from the night shift team leaders. He tried to get a transcript of the recording and looked at what was available.

98. Mr England struck me as his own man. He had not previously been involved in the case. There was no evidence that he was influenced by the views of Mr Ashley. He gave full reasons for his decision.

99. Mr England did not uphold the dismissal because the claimant had walked out of the investigation meeting. The issue was the unauthorised absence which he gave the claimant every opportunity to explain.

100. Looking at the disciplinary process in its entirety, I therefore do not find the dismissal unfair. Overall, the spirit of the ACAS Code was complied with. The claimant knew the allegations against him. By the time of the appeal, he knew dismissal was at stake. The claimant was given copies of the Loss Prevention investigation. He had an opportunity to answer the allegations. He provided no answer except alleging fabrication.

101. For these reasons, I find the dismissal was not unfair.

Wrongful dismissal (notice)

102. For this claim, unlike the unfair dismissal claim, I need to consider the evidence for myself and decide whether the claimant was guilty of gross misconduct. On the balance of probabilities, I find that he was, in relation to unauthorised absence on the shift starting 4 August 2016.

103. The statements and photographs of the Loss Prevention officers detail times when the claimant was parked away from any neighbouring NCP site for a total of five and a half hours. This was probably longer, as they then went off shift. His break was only one and a half hours. I have no reason at all to believe that the surveillance reports were a fabrication. The fact that in a previous year a completely different manager may have attempted to fabricate a false complaint is an unrelated matter. There was also a degree of corroboration by photographs on this occasion.

104. The claimant has never given a coherent explanation for why he was parked where he was. In his evidence to the tribunal, he was unconvincing

and contradictory. When pressed, he eventually said that he visited his sites and then 'stayed in the locality' waiting to be called. This gave me the impression that what he did was rush in and out of a few sites, and then spent the rest of the time on his own activities.

105. I did ask myself whether the claimant may have had difficulty remembering because of the four week gap before the allegations were put to him. I might have found that more convincing if he had simply said 'I can't remember', rather than the sequence of contradictory explanations culminating in a description of 'staying in the locality' (but not on site) unless called.

106. In any event, it seems to me that someone would not forget parking away from any site at a specific location for many hours, interrupted by a visit to a restaurant and then a return, if it was an unusual activity. If the claimant could not remember because he parked away from NCP sites on most shifts, that would indicate an even higher level of unauthorised absence.

107. I therefore find the claimant was dismissed for gross misconduct and he is not entitled to notice pay.

Deduction from wages

108. The claim was originally for unpaid suspension. Had the claim been for unpaid suspension, I would have upheld this, as it is not permitted by the contract. However, the claimant immediately went off sick, supported by fit notes. The claim therefore became one for the difference between SSP and full company sick pay from 8 September 2016 until termination.

109. Although company sick pay is usually paid under the contract, it is still discretionary. The handbook says 'you *may* be entitled to NCP Company Sick Pay' (my italics). The respondents decided not to give Company sick pay because the claimant had gone off sick following a disciplinary suspension. That decision was within their discretion.

110. The claim for unauthorised deduction from wages is therefore not upheld.

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Employment Judge Lewis
4 July 2017