EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr C Ehinger	**v**	Black Swan Analysis Ltd

Heard at: Reading **On:** 1 October 2018

Before: Employment Judge Gumbiti-Zimuto (sitting alone)

Appearances
For the Claimant: Miss G Crew of Counsel
For the Respondent: Mr N Shah (Solicitor)

RESERVED JUDGMENT

The Claimant's complaints of unfair dismissal and wrongful dismissal are well founded and succeed.

REASONS

1. In a claim form date stamped 5 January 2018, but in fact presented on 3 January 2018, the Claimant made complaints of unfair dismissal and wrongful dismissal. The Respondent denied the Claimant's complaints.

2. In a supplemental witness statement dated 1 October 2018, the Claimant explains that his claim form was presented to the Employment Tribunal at London Central on 3 January 2018 by his then solicitor, Mr Wood, who delivered it personally. Mr Wood obtained from the London Central Employment Tribunal a receipt timed at 15:27. On the face of the receipt, there is nothing that indicates that it relates to the Claimant's case. However, the Claimant has produced an email he received from Mr Wood, timed at 16:43 dated on 3 January 2018, confirming that the Claimant's complaint had been presented at London Central Employment Tribunal and attaching a copy of the claim form. The copy claim form is an unstamped version of the document presented to the Watford Employment Tribunal on 5 January 2018. In the circumstances, I am satisfied that the Claimant's claim, although bearing the date 5 January 2018, was in fact presented on 3 January 2018 and therefore was presented in time.

3. The Respondent, having been provided with a copy of the receipt from the London Central Employment Tribunal, does not take any issue with this conclusion. A preliminary hearing that had been listed, the purpose of which was to consider whether having regard to the time limit for presentation of complaints the employment tribunal had jurisdiction to consider the complaints of unfair dismissal and wrongful dismissal, was vacated on the respondent's indication that it took no issue on the time point.

Issues

4. The issues that I have had to decide in this case were as follows.

Unfair Dismissal

4.1 Was the Claimant dismissed on 23 July 2017 or did the Claimant's employment with the Respondent come to an end as a result of an agreed termination effective on 31 August 2017?

4.2 If the Claimant was dismissed, did the Respondent dismiss the Claimant for a potentially fair reason pursuant to section 98 of the Employment Rights Act 1996?

4.3 If so, did the Respondent act reasonably or unreasonably in treating it as a sufficient reason for dismissing the Claimant?

4.4 Was the Claimant's dismissal within the range of reasonable responses?

4.5 Did the Respondent follow a fair procedure?

Wrongful Dismissal

4.5 Was the Respondent entitled to dismiss the Claimant without paying notice pay?

5. During the course of this hearing, I am not considering remedy. However, it is in issue between the parties whether the Respondent complied with the ACAS Code of Practice in dismissing the Claimant.

Evidence

6. The Claimant gave evidence in support of his own case. The Respondent relied on the evidence of Mrs Nic Talbot-Watt. Both provided written witness statements as their evidence-in-chief. I was also provided with a trial bundle containing 183 pages of documents. From these sources, I made the findings of fact which are set out below.

7. At the commencement of the proceedings, the Claimant took issue with paragraph 36 of Mrs Talbot-Watt's witness statement which reads: *"There*

was no dismissal and termination was by agreement, the termination date being 31 August 2017." The Claimant's position was that this was a new basis of defence and departs from the response which had been previously entered by the Respondent and thus an amendment was required if it was to be permitted.

8. The Respondent's position was that the amendment was not required because the contents of the particulars of response, "headline defence", contained a denial that the Claimant had been "unfairly dismissed as alleged or at all". The respondent stated that that the denial made it clear that it was not being accepted by the Respondent that the Claimant had been dismissed.

9. I formed the view that the Respondent's position on this was wrong. In section 4.1 of the response form ET3, the Respondent gave the date of the end of the Claimant's employment as 23 July 2017. That is the date that the Claimant says he was dismissed. It is not the date on which the Respondent says the termination of the Claimant's employment by mutual agreement took effect.

10. In paragraph 2 of the particulars of response, it states that: "The Claimant was employed as a Managing Director from 10th August 2010 until his dismissal on 23rd July 2017." In paragraph 29 it states that: "The Respondent had good reason to dismiss the Claimant on the grounds of misconduct". In paragraph 32 it states that: "The Respondent denies that the Claimant was wrongfully dismissed. The Claimant was dismissed on the grounds of gross misconduct and therefore is not entitled to notice pay."

11. The Claimant is correct in saying that the witness statement of Mrs Talbot-Watt did introduce a position which was different to the one which had been outlined in the response by the Respondent.

12. Mr Shah asked for permission to amend the response to allow it to read that the termination of the Claimant's employment was by mutual agreement. I permitted an amendment to incorporate paragraph 36 of Mrs Talbot-Watts's witness statement. I also allowed the Claimant to file an amended witness statement dealing with that point.

13. At the start of proceedings, the Respondent made an application to include two further pages of documents. The documents were a Vodafone itemised bill for a mobile telephone ending with the numbers '333'. I refused the Respondent's application. My reason for refusing were as follows.

14. In paragraph 15a. of the Claimant's grounds of complaints it reads: *"On 24 July 2017, one hour after the termination email, the Claimant's work mobile phone was disconnected and was never re-enabled."* The Respondent replied to this in the particulars of response at paragraph 12 where the

Respondent says that the Claimant's mobile phone was not disconnected and takes issue with what the Claimant says about that.

15. The case management orders made by the Tribunal included an order that the Claimant and Respondent shall send each other a list of any documents that they wish to refer to at the hearing or which are relevant to the case by 12 March 2018. The Respondent did not send Vodafone documents to the Claimant on 12 March. The Respondent was required to prepare a trial bundle of documents for the hearing. In the trial bundle prepared by the Respondent the Vodafone bill was not included. Rule 31 of the Employment Tribunals Rules of Procedure 2013 provides that:

> "The Tribunal may order any person in Great Britain to disclose documents or information to a party (by providing copies or otherwise) or to allow a party to inspect such material as might be ordered by a County Court or Sheriff Court."

The County Court's procedure to deal with disclosure is contained in the Civil Procedure Rules. The Civil Procedure Rules, Rule 31.21 provides what the consequences of failure to disclose documents or permit inspection are and it says that:

> "A party may not rely on any document which he fails to disclose or in respect of which he fails to permit inspection unless the court gives permission."

16. The issue whether the Claimant's phone was blocked was live between the parties from the outset it was mentioned in the claim form and response form. The Respondent has provided no explanation as to why a document which purports to engage with a live issue between the parties was not disclosed.

17. The document is not referenced in Ms Talbot-Watt's witness statement. Producing the document during the hearing in this way takes the Claimant by surprise. To spring it on the Claimant during the hearing in my view is not an appropriate way to conduct litigation in circumstances where the Respondent has been represented by a professional organisation throughout.

18. In the circumstances, I did not consider it was appropriate for me to give the Respondent permission to rely on documents which they had held back until the last moment, presenting it on the morning of the hearing, when on the face of it, they were documents which had been in their possession since 15 August and 15 September 2017.

19. I made the following findings of fact.

20. The Respondent is a Limited Company with 10 employees. The Respondent's business is to provide consultancy services to firms operating in the pharmaceutical and healthcare industries. The Claimant was employed as managing director from 10 August 2010 until his dismissal on 23 July 2017.

21. The Claimant's employment was governed by a written contract of employment. The agreement setting out the contract of employment was made on 17 December 2010 (p47). The agreement provided that the Claimant's employment "may be terminated by not less than six months' notice in writing given by either party to the other." Written notice was to be given by being sent to the Claimant's address or by fax. Clause 16 of the contract provided that: "The Company's disciplinary rules and procedures that apply to the Director are set out in Appendix 1 to this Service Agreement." These applied to the Claimant.

22. On 23 May 2017, the Claimant attended a meeting together with Mrs Talbot-Watt, another employee of the Respondent, CB, and a work placement student, ED. It is alleged by the Respondent that during the course of this meeting the Claimant acted in an aggressive manner and was verbally abusive towards ED. It is alleged that the Claimant made offensive remarks, calling ED a 'deadweight', other remarks about his weight and referred to him as a drain on the Respondent.

23. While the Claimant does not agree with everything that he is alleged to have said to ED during the meeting, the Claimant accepts that he acted in an unprofessional manner. The Claimant does not accept that he behaved in a bullying manner or that his conduct during the meeting amounted to gross misconduct.

24. I find that on 23 May, the Claimant behaved in an unprofessional manner towards ED and that one of the remarks he made to ED included a reference to him as 'deadweight'. I find that whilst Mrs Talbot-Watt was unhappy with the way that the Claimant behaved on this occasion, at that time, she did not consider that it amounted to gross misconduct.

25. ED raised a grievance concerning the way that the Claimant had behaved on 23 May. The Respondent carried out a grievance investigation which involved the Claimant being interviewed by HRFace2Face. The way that the Respondent resolved the grievance made by ED was by a settlement agreement which resulted in a sum of money being paid to ED who then left the Respondent's employment.

26. In the Respondent's response, there is a reference made to the Claimant's behaviour in the period between 23 May and 23 July. It is said that the Claimant's behaviour in the office continued to deteriorate. While I do not accept Mrs Talbot-Watt's evidence on this, I do accept that in the period up to 23 July 2017 Mrs Talbot-Watt was concerned about the Claimant's behaviour on 23 May towards ED.

27. The Claimant had meetings with Mrs Talbot-Watt on 3 July and on 10 July.

28. On 23 July 2017, a Sunday, Mrs Talbot-Watt sent the Claimant an email at 18:54. Extracts from that email include the following:

"It's been two weeks now since we had our review. I don't think things have moved on really, and over the past two weeks I have come to the realisation that I can not move on from what happened with Ellis on 23 May, to the point that I cannot continue to work with you.
This probably hasn't come as a total shock, but I think we need to consider how this gets resolved.
…

…so I would like you to take the next 3-4 weeks away from the office to consider how you would like to handle this…

I will put a meeting in our diaries for the week of August 14th for a board meeting and discussion to agree next steps."

29. The Claimant replied the same day at 22:33. His response included the following:

"Thank you for your email. I am shocked actually, not by what you said, but by the fact that you afforded me so little courtesy as to send me something like this, rather than speaking to me in person.

I will be in the office tomorrow…

I agree with you that we need to talk, however, I don't believe it is your place to tell me when I can and cannot work and where."

30. At 23:00 hours on the same day, Mrs Talbot-Watt sent an email to the Claimant which read as follows:

"Dear Christopher
I am writing to inform you that this is notification of dismissal from employment due to gross misconduct in accordance with your employment contract as a director of Black Swan Analysis.

You will receive a written notification.

A hearing will be held at the next board meeting on August 15th which will be held at

Moorbridge Court,
29-41 Moorbridge Road,
Maidenhead.

You are entitled to bring representation with you to the meeting.

Due to the nature of the grievance, you are required to be absent from the workplace until the hearing.

Regards

Nic Talbot-Watt"

31. Putting aside the question whether or not this amounted to a dismissal of the Claimant, the parties both agree that Mrs Talbot-Watt had the authority to dismiss the Claimant on behalf of the Respondent.

32. There is a dispute between the Claimant and the Respondent about what occurred next.

33. The Claimant contends that his company mobile phone was disconnected and that he was denied access to the Respondent's email. The respondent says that whilst there was an issue which arose with respect to the emails, the Claimant's mobile phone was not disconnected and in fact the Claimant continued to carry out his work for the Respondent including attending meetings with the Respondent's clients.

34. The Respondent's position here is not set out in the witness statement of Mrs Talbot-Watt. The only evidence is the extemporary evidence given by Mrs Talbot-Watt during cross-examination. It was not a matter that was put to the Claimant during his cross-examination by the Respondent. I am unable to accept the evidence which was given by Mrs Talbot-Watt about the Claimant continuing to work after 23 July.

35. On 25 July 2017, Mrs Talbot-Watt wrote to the Claimant in an email sent at 14:08. In her extemporary evidence, Mrs Talbot-Watt explained that she had taken advice from Peninsula and had decided to send this email which was drafted by Peninsula in order to "undo what she had done" on 23 July. The email reads as follows:

> *"Dear Chris*
>
> *I have reflected on my previous email and I think it is fair to say I acted in complete haste. I want to move past this to continue with a positive working environment and believing that time is an ultimate healer, I am willing to offer you three weeks of authorised paid leave from the business. I hope that after this we can have a discussion on how we are to move forward with this as it is clear to me from your original email that you are unhappy with our current working relationship, and that this time away will give you adequate time to reflect and prepare for this conversation.*
>
> *Obviously this means that our employment is not terminated. This was completely in the heat of the moment and I wish to apologise for this. Please could you confirm your acceptance of this.*
>
> *Best regards*
> *Nic Talbot-Watt"*

36. The Claimant replied to the email on 28 July at 19:45. Parts of his email read as follows:

> *"Unfortunately, your email of 23 July perpetuates your recent conduct towards me.*
>
> *Your treatment of me has put an enormous amount of mental stress and burden on me and my family…*
>
> *I am left questioning whether I can possibly continue to work with someone who is prepared to treat anyone in this way, and in an environment which is so toxic and can convey such a lack of respect for me as a director and a shareholder in the business.*
>
> *I don't agree that spending three weeks away from the business on paid leave is going to help in any way to resolve this. I would like to discuss your treatment of me and decide if there is a way we can move forward as soon as possible.*
> *…*
> *In the meantime, I continue to reserve all of my rights."*

37. The effect of that email response was to reject the invitation to accept that his termination of employment had been rescinded. There was no reply to that email from the Claimant from Mrs Talbot-Watt. The Claimant sent a further email on 8 August which in part read as follows:

> *"I would like to meet to discuss whether there is a way forward. For the purposes of this discussion, I will put aside what has happened to explore whether there is a mutually acceptable resolution."*

38. No meeting took place. The Claimant did not attend the directors meeting which had been indicated in the email of 23 July as occurring on 15 August. I am satisfied from the fact that there is no reference to this meeting ever having taken place that there was no meeting of the board on 15 August.

39. On 17 August 2017, the Claimant sent a sick note accompanied by a letter. He sent this to Ann Jenkins, the company secretary. The letter accompanying this sick note read as follows:

> *"As company secretary for Black Swan Analysis, I am sending you a statement of fitness for work from my GP that I have received this week. This requirement for reporting my sickness absence is highlighted in section 10.2 of my Director Service Agreement. I believe this note from my local GP who is providing my treatment at the moment for anxiety and depression is acceptable."*

40. Towards the end of August, on about 25 August, there were discussions that took place between the Claimant and the Respondent which were facilitated by Peninsula. During the course of those discussions, Mrs Talbot-Watt says that the Claimant agreed to a termination of his employment to end by 31 August. However, she produced no evidence of

such an agreement having been recorded in any document. The Claimant denies any such agreement was reached.

41. During Mrs Talbot-Watt answering questions it became clear that what had happened was that the the basis for an agreement was arrived at between the Claimant and the Respondent. The agreement was to be completed on finalising terms which included agreement about monies owed to the Claimant. The agreement was never finalised, and the Respondent never made the anticipated payment to the Claimant. Mrs Talbott-Watt's evidence made clear that there were discussions but there was no agreement to terminate the Claimant's employment on 31 August 2017.

42. On 19 October 2017, the Claimant approached ACAS and began early conciliation process. The Respondent became aware of the Claimant's approach to ACAS in October 2017. During her evidence, Mrs Talbot-Watt initially volunteered that the Respondent became aware of the early conciliation process in October.

43. In October, the Respondent commenced investigation into a number of allegations against the Claimant. These were described as financial irregularities. To quote Mrs Talbot-Watt: *"They were financial fraud issues"*. When questioned about these financial fraud issues, Mrs Talbot-Watt explained that since these events occurred, the Respondent in fact has taken no action against the Claimant. She described a number of internal administrative steps which had been taken but has indicated that there was no action taken against the Claimant arising from these matters which she had described as financial fraud issues.

44. Mrs Talbot-Watt denied that the reason for instigating investigations into financial fraud issues was because the Claimant had approached ACAS. Mrs Talbot-Watt then went on to change her evidence and say that the Respondent had not heard from ACAS until November 2017. I found her evidence on this unsatisfactory and I am satisfied that her initial evidence that the Respondent became aware of the Claimant's approach to ACAS in October 2017 to be accurate. I am also satisfied that the investigations which were carried out into financial fraud issues revealed no wrongdoing on the part of the Claimant and the timing of these actions on the part of the Respondent was directly related to the Claimant's approach to ACAS.

45. In arriving at my conclusions in this case I have remined myself that where the words used are unambiguous words of dismissal it is the words alone which are decisive of the issue and actions taken by the parties afterwards, short of waiver of some kind, are irrelevant. Where the words are ambiguous all the relevant surrounding circumstances, both preceding and succeeding the uttering of the words are relevant to their meaning. Was the decision to dismiss conscious and rational?

46. Section 98 of the Employment Rights Act 1996 ("ERA") provides that in determining whether the dismissal of an employee was fair or unfair, it shall be for the employer to show the reason (or, if there was more than

one, the principal reason) for the dismissal, and that it is a reason falling within subsection (2). The conduct of an employee is a reason falling within the subsection.

47. Where an employer has shown a potentially fair reason 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.

48. The Respondent must show that: it believed the claimant was guilty of misconduct; it had reasonable grounds upon which to sustain the belief; at the stage which it formed that belief on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances of the case. It is not necessary that the tribunal itself would have shared the same view of those circumstances.[1]

49. After considering the investigatory and disciplinary process, the tribunal has to consider the reasonableness of the employer's decision to dismiss and (not substituting our own decision as to what was the right course to adopt for that of the employer) must decide whether the Claimant's dismissal "fell within a band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair"[2]. The burden is neutral at this stage: the Tribunal has to make its decision based upon the evidence of the claimant and respondent with neither having the burden of proving reasonableness.

50. The ACAS Code of Practice includes the following provisions:

> 9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.
> 10. The notification should also give details of the time and venue for the disciplinary meeting and advise the employee of their right to be accompanied at the meeting.
> 11. The meeting should be held without unreasonable delay whilst allowing the employee reasonable time to prepare their case.
> …
> 26. Where an employee feels that disciplinary action taken against them is wrong or unjust the should appeal against the decision. Appeals should be

[1] British Home Stores Limited v Burchell [1978] IRLR 379
[2] Iceland Frozen Foods v Jones [1982] IRLR 439

> heard without unreasonable delay and ideally at an agreed time and place. Employees should let the employers know of the ground for their appeal in writing.
> 27. The appeal should be dealt with impartially and wherever possible, by a manager who has not previously been involved in the case.

51. The respondent did not follow this guidance or attempt to do so. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that in case of unfair dismissal, if it appears to the employment tribunal that the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies, the employer has failed to comply with that Code in relation to that matter, and that failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

Conclusions

> Was the Claimant dismissed or did the Claimant's employment come to an end as a result of an agreed termination effective on 31 August 2017?

52. I am satisfied that the evidence given by Mrs Talbot-Watt makes clear that the Respondent's case that the Claimant's employment ended as a result of an agreed termination is not made out. There is no evidence of an agreement to terminate the Claimant's employment at all. Paragraph 36 of Mrs Talbot-Watt's witness statement is clearly wrong even on her own version of events.

53. I have also gone on to consider whether the email sent by Mrs Talbot-Watt on 25 July at 14:08 had the effect of neutralising her email sent on 23 July at 23:00 hours. Was the dismissal of the Claimant effectively withdrawn as a result of that email?

54. I remined myself that as a general rule, an employer who uses unambiguous words of dismissal so understood by the employee will thereby dismiss the employee and terminate the contract of employment. Having considered the email of 23 July, I am satisfied that it contained unambiguous words of dismissal. The Respondent argued that the reference to a hearing being held on 15 August and the Claimant being entitled to representation should have led the Claimant to conclude that he had in fact been suspended as opposed to being dismissed. I reject that contention, not least because it is not one which is supported by the actions of Mrs Talbot-Watt on 25 July. There is no indication in this email sent at 14:08 that what she intended to do was suspend the Claimant. The email makes clear that she intended to dismiss him. However, by 25 July, she had taken advice from Peninsula who drafted an email for her in which she claimed to have "reflected on her previous email" in which she "acted in haste". Mrs Talbot-Watt said she sent the email on the 25 July to undo what she had done.

55. I am satisfied that there was a use of unambiguous words of dismissal which could be understood by the Claimant as terminating his contract of employment.

56. I note that there are limited exceptions to this general rule and that the fundamental question for me to consider is whether, in the special circumstances of this case, the person to whom the words were addressed is entitled to assume that the decision that they expressed was a conscious, rational decision or whether there were special circumstances which ought to indicate to the Claimant that the words were not meant or should not be taken at face value.

57. I am not satisfied that there is anything in this case which allows me to form that conclusion. The reference to a board meeting on 15 August and representation and the hearing of a grievance do not in my view take away from the unambiguous words of dismissal. I note that where words are expressed in the heat of the moment, that can afford a special circumstance which may be an exception I do not consider that applies in this case.

58. Was the decision a conscious, rational decision? I am satisfied that it was. In her evidence Mrs Talbot-Watt said that having sent her first email on 23 July, she was annoyed by the way the Claimant had responded in his email sent at 22:33: *"I had not been drinking when I sent the email at 18:54 on 23 July. The atmosphere had deteriorated. I did not want to be working in the same room as the Claimant."* She then talks about the email that was sent by the Claimant and says that the tone and nature of the email sent at 22:33 by the Claimant genuinely expressed what he thought. She stated her intention was that he would be absent from the office. She then goes on to talk about the email sent at 23:00 hours and says: *"It was sent in the heat of the moment. It was Sunday night in the summer. I had had a couple of glasses of wine. In context, it is notification of suspension. There was an intention that he attend meeting on 15 August, a meeting he never attended. It's a heat of the moment email."* She then went on to say: *"I wanted to get advice from Peninsula. I decided to think about it and take advice. I spoke to Peninsula. Peninsula took 24 hours to prepare an email. I wanted my email vetted. I sent this email, that is the email sent on 25 July, as soon as I got it from Peninsula."*

59. In all the circumstances and having regard to the evidence given by Mrs Talbot-Watt not only was this an unambiguous dismissal but it was a conscious, rational decision that she made. She even took the time to take advice from Peninsula about the action that she had taken. It was only after she had received advice from Peninsula that she sent an email in the terms which have been described above and asked the Claimant to accept that his employment had not been terminated. I am satisfied in all the circumstances of this case that the Claimant's employment was terminated by the email of 23 July sent at 23:00.

Was the Claimant dismissed for a potentially fair reason pursuant to section 98 of the Employment Rights Act 1996?

60. The reason that the Claimant was dismissed by Mrs Talbot-Watt was because he sent his email at 22:33. It was not because of the way that he had behaved towards ED on 23 May. Following the incident on 23 May the Respondent did nothing about the incident involving ED. Mrs Talbot-Watt had been present. It was only when ED raised a grievance that the Respondent took any action. The action that the Respondent took was to investigate the grievance and then resolve the grievance by entering into a settlement agreement with ED which involved the ending of his employment with the Respondent.

61. Mrs Talbot-Watt's evidence was that the Claimant's behaviour in the period after 23 May was a problem for her and she eventually reached the point where she felt that she could not work with the Claimant anymore.

62. There is no evidence of the Claimant's conduct in the period between 23 May and 23 July which would allow me to conclude that his behaviour amounted to gross misconduct.

63. In relation to the incident on 23 May, whilst the Claimant's behaviour towards ED by his own admission was unprofessional, it does not appear to have been considered to have been gross misconduct by Mrs Talbot-Watt in the period between from 23 May up to 23 July.

64. The Claimant's employment contract contained a procedure for dealing with situations of gross misconduct. Gross misconduct is described non-exhaustively as including wilfully causing harm or injury to another director, physical violence, bullying or grossly offensive behaviour. I read that provision as applying to employees other than directors also. However, no action under the Respondent's disciplinary procedures was ever taken.

65. On 23 July, the date of dismissal, Mrs Talbott-Watt had come to the view that she could not work with the Claimant. She asked that he take time to consider his own position and it was only after he sent what she considered to be an impertinent email at 22:33 on 23 July that she sent her email at 23:00 hours dismissing him. It was not the conduct towards ED that provoked the dismissal – it was the way that the Claimant responded to her in the email of 22:33 on 23 July that caused her to send him the dismissing email. The conduct of the Claimant was therefore sending that email.

66. I am satisfied that it was that conduct that caused the Claimant to be dismissed. I am not satisfied that it was conduct which in all the circumstances justifies the Claimant's dismissal.

67. I am satisfied that a reasonable employer in those circumstances would not have dismissed the Claimant for sending the email on 23 July.

68. In any event the Claimant's behaviour towards ED on 23 May was not conduct that a reasonable employer would have dismissed for on the 23 July. Further in dismissing the Claimant the Respondent failed to follow a fair procedure. The Respondent did not comply with the ACAS Code of Practice

69. I am satisfied that the Claimant was unfairly dismissed.

Wrongful Dismissal

70. I am of the view that the reason for the Claimant's dismissal was not because of gross misconduct in relation to the events relating to ED on 23 May. The reason for the dismissal was because the Claimant sent to Mrs Talbot-Watt what she considered to be an impertinent email. That in my view does not give rise to an entitlement to dismiss the Claimant without paying notice.

71. In the circumstances, the Claimant's complaint of wrongful dismissal also succeeds.

Remedy Hearing

72. During the course of the hearing, I agreed with the parties that the case would be given a provisional listing with a time allocation of half a day on **4 July 2019**. That provisional listing is now made firm and a Remedy Hearing to determine what remedy the Claimant is entitled to receive shall take place at **10.00 am on 4 July 2019 at Reading Employment Tribunals, 30-31 Friar Street (entrance in Merchants Place), Reading, Berkshire RG1 1DX.**

73. The parties are required to comply with the following directions in preparation for the Remedy Hearing:-

55.1 The Claimant is to provide to the Respondent within **28 days of the date on which this judgment is sent to the parties** a witness statement on remedy.

55.2 The Respondent is to provide to the Claimant within **56 days of the date on which this judgment is sent to the parties** any evidence that it seeks to rely on in relation to remedy at the Remedy Hearing

_____
Employment Judge Gumbiti-Zimuto
Date: 3 December 2018
Judgment and Reasons

Sent to the parties on: .....11.12.18.....

.....
For the Tribunal Office

Public access to employment tribunal decisions
All 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.