EMPLOYMENT TRIBUNALS

Claimant: Mrs R Hofmanova

Respondent: TSUK Limited

Heard at: Manchester **On:** 16 – 18 March 2020
Deliberations:
19 and 27 March 2020

Before: Employment Judge Hoey
Ms Berkeley-Hill
Mr T King

REPRESENTATION:

Claimant: Representing herself
Respondent: Mr McNerney (counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claim for unfair dismissal is not well founded and is dismissed.

2. The claim for direct sex discrimination is not well founded and is dismissed.

3. The claim for victimisation is not well founded and is dismissed.

4. The claim for a redundancy payment is not well founded and is dismissed.

5. The claims are therefore dismissed.

REASONS

Introduction

1. The claimant lodged a number of claims in a claim form presented on 4 February 2019 with the response form submitted on 8 March 2019. At a case management preliminary hearing on 20 May 2019 the claims the claimant wished to advance were discussed and focussed. A 4 day hearing was fixed.

2. The claimant represented herself. An Interpreter assisted the Tribunal. The interpreter was able to confirm that there were no regional variations and that she was able to fully interpret what was said by and to the claimant. The respondent was represented by counsel.

3. The Hearing began by my explaining the overriding objective and the importance of ensuring the case was dealt with in a just and fair way and that the parties were placed on an equal footing. I also explained that matters needed to progress expeditiously and in a proportionate and fair fashion.

4. I took some time to explain to the claimant the rules as to evidence and how a Tribunal reaches its decision. It was important that all relevant evidence was placed before the Tribunal so a decision could be made on the relevant issues that the Tribunal had to determine. The claimant understood these rules. I also sought to ensure that the parties were on an equal footing during the Hearing and the respondent's counsel assisted the Tribunal in that regard.

5. The parties had agreed a joint bundle comprising 281 pages and the Tribunal heard from three witnesses for the respondent (the HR Manager, the Compliance and HR Manager and the Maintenance Manager), together with the claimant and two witnesses, (her husband and a Production Operative), all of whom had provided a written statement which the Tribunal considered. Each of the witnesses was asked relevant questions by the parties and the panel.

Issues

6. At the case management preliminary hearing the issues to be determined were discussed and agreed. These issues were carefully considered at the commencement of the Hearing and the parties agreed that the issues to be determined by this Tribunal comprised:

<u>Direct sex discrimination – section 13 Equality Act 2020</u>

(I) Are the facts such that the Tribunal could conclude that the claimant was subjected to a detriment by having to use female toilets which were dirty and unhygienic from September 2017 to termination of employment and in that respect the respondent, because of the claimant's sex, treated her less favourably than it treated male employees who had better toilet facilities?

(II) If so, can the respondent show that there was no breach of section 13?

(III) Insofar as any breach of section 13 occurred within 3 months can the claimant show that it formed part of conduct extending over a period ending on or after that date?

Victimisation – section 27 Equality Act 2010

(IV) Can the claimant establish that she did a protected act when she made a complaint about the state of the ladies' toilets on one or more of the following occasions by making an allegation whether express or implied that the respondent contravened the Equality Act 2010:

(a) In a grievance of 29 April 2018;

(b) In a grievance of 3 July 2018;

(c) In an email of 24 September 2018

(V) If so, are the facts such that the Tribunal could conclude that because of any protected act the respondent subjected the claimant to a detriment by dismissing her.

(VI) If so, can the respondent nevertheless show that there was no breach of section 27.

Unfair dismissal

(VII) Can the respondent show that the reason or principal reason for the dismissal was a potentially fair reason relating to the claimant's conduct or, in the alternative, some other substantial reason in the form of loss of trust and confidence of the claimant.

(VIII) If so, was the dismissal fair or unfair under section 98(4) of the Employment Rights Act 1996.

Redundancy payment

(IX) Was the reason or principal reason for dismissal redundancy as defined in section 139 of Employment Rights Act 1996.

7. The parties agreed that remedy would be dealt with at the separate hearing, if required.

8. On day three after the respondent had concluded its case and released its witnesses and at the commencement of the claimant's cross examination, the claimant suggested (in the course of an answer to a question) that her claim for sex discrimination related not just to the quality of the female toilets but also the quantity. This was not a claim that the claimant had indicated she wished to advance either at the preliminary hearing or at the start of the Hearing when the issues were carefully set out.

9. After a discussion and having considered matters the claimant confirmed the only live issue with regard to her claim for unlawful sex discrimination was the condition of the female toilets only, as had been set out in the list of issues.

10. The parties worked together to achieve the overriding objective and the case was concluded within the time fixed.

11. The respondent made an application to postpone proceedings in the course of day two of the Hearing in light of the perceived health issues pertaining to the claimant in relation to the prevailing public health crisis.

12. Following detailed consideration of the submissions and the claimant's position, the application was rejected for reasons provided orally at the time. The claimant was keen to progress with her case and advised the Tribunal that she had no relevant health concerns.

13. Having considered the Government guidance and the position the hearing proceeded. None of the conditions set out in the Guidance had been satisfied from what the claimant had stated. A subsequent application was refused for the same reasons.

14. The respondent sought a reserved judgment and having considered the facts and submissions this is the Tribunal's judgment on the issues to be determined. It is arrived at following detailed deliberations and seeks to set out the facts, issues and reasons in a proportionate way.

Facts

15. The Tribunal is able to make the following findings of fact based on the evidence it heard on the balance of probabilities, namely whether the fact is more likely than not to be true. The vast majority of the material facts were not in dispute.

16. The Tribunal only makes findings in respect of issues it has to be determine and not in respect of every piece of evidence led before the Tribunal.

17. The respondent is a production company established in 1998 which manufactures plastic goods. It is also a wholesaler of household goods. It has its Head Office in Italy with sites in Luxembourg and France and a factory in Manchester.

18. The claimant joined on 18 August 2014 as a Production Operator. Her employment ended on 9 November 2018 (the date when her dismissal was communicated to her). As Production Operator she sat on the production line dealing with manufacturing tasks.

19. The respondent had around 20 female staff and 60 male staff in Manchester.

20. The claimant's husband was also employed by the respondent. He was engaged as a Production Cleaner. That job involved keeping the factory

clean and tidy, cleaning machines and the site. That included cleaning the filter room and cleaning filters.

21. In or around August 2016 the claimant was asked to change her role from Production Operator to Production Cleaner. She agreed. She carried out the cleaning function and the role of Production Cleaner from September 2016 to her dismissal. She did not carry out any of the Production Operator tasks from that point. The Tribunal was satisfied that this was a permanent change to her contract of employment, although nothing was confirmed in writing (bearing in mind no written agreement is needed in Scots law to change terms and conditions). The claimant had not complained about the change to her role as Production Cleaner and had carried out the role for over 2 years (which she accepted).

22. There was a team of four Production Cleaners which carried out cleaning tasks as required by the respondent.

23. The claimant entered into a contract of employment upon commencement of her employment, which stated her role was Production Operator. The contract also stated that the claimant may be required to undertake such other duties (in addition to those as Production Operator) from time to time as required. That document was not updated following her agreement to undertake the role of Production Cleaner.

Complaints

24. On 8 March 2018 the claimant raised a complaint about the condition of toilet facilities. She believed that the female toilets were of poor quality.

First meeting with claimant

25. On 12 March 2018 the claimant met the HR Manager together with the Compliance and Health and Safety Manager. The claimant believed that she had suffered an infection caused by the state of the toilet facilities in the production area. The other female staff within the factory used the same toilet facilities as the claimant. No other employee had raised any issues or concerns as to the toilet facilities. The claimant was told that there was another toilet available to her (and others) which was a unisex toilet.

26. The respondent's toilets are cleaned twice a day, firstly between 6 and 8 am by an outside cleaning contractor and later in the day by cleaning staff.

Toilet examination

27. Following the meeting on 12 March 2018 the HR Manager and Compliance and Health and Safety Manager examined the toilets – both male and female toilets. They found them to be hygienic, safe and of a satisfactory standard. They concluded that the quality of the male and female toilets was comparable. There was no material difference. They identified a faulty seat in one of the female cubicles which was replaced.

28. The claimant was told that she could use the unisex toilet which was a comparable distance from her work station as the production toilet was, if she did not like the production facilities.

29. She was also allowed to use the staff visitor toilet.

Allegation against Team Leaders

30. The claimant had also complained about mistreatment by colleagues as she felt her Team Leaders were shouting at her because she was not cleaning the filters.

Second meeting with claimant

31. On 19 March 2018 at a second meeting with the claimant with the HR Manager and Compliance and Health and Safety Manager, the claimant repeated the allegation she made before stating she had a recurring health issue which she believed was caused by unhygienic facilities. She alleged that men had better toilets than women. The respondent advised the claimant that the quality of the toilets was the same.

32. At the end of the meeting the claimant was taken to the visitor toilet. Having considered matters the claimant confirmed that the toilets were “ok for her now” and that she found the female toilets acceptable.

33. On 28 March 2018 each of the Team Leaders was interviewed. There was no evidence of unacceptable behaviour.

Third meeting with claimant

34. On 4 April 2018 a third meeting took place with the claimant at which the claimant stated she was satisfied with the condition of the toilet facilities.

Fourth meeting with claimant

35. On 13 April 2018 the claimant attended a fourth meeting, on this occasion with the HR Manager where she said she was “very happy with the toilet facilities” and was feeling better. The claimant was asked to provide her consent for an occupational health report. In relation to her issues with Team Leaders, the claimant was offered another job that would allow her to work with different Team Leaders. She refused that role as it would require her to clean toilets, a task that she did not wish to undertake.

Further issues

36. On 16 April 2018 the respondent wrote to the claimant’s GP to see what steps were needed and whether or not there was any connection between the claimant’s health issues and the respondent’s toilet facilities.

37. On 26 April 2018 the claimant was reminded of the need to wear PPE when working around the machines.

Claimant's grievance and issues

38. On 1 May 2019 the claimant said in an email that her health had been damaged "and it is proven that the toilet facilities in the company were dangerous." She also complained about the Team Leaders. The respondent treated this as a grievance.

39. On 4 May 2018 the claimant was sent a copy of the grievance procedure and asked to give specific details as to her complaints. She did not provide further details.

40. On 4 May 2018 further concerns were raised in relation to the claimant not following instructions as to her cleaning duties.

Occupational health report

41. On 22 May 2018 the occupational health assessment was provided to the respondent. This was unable to attribute the claimant's health issues to any of the respondent's facilities. The report also stated that the claimant was fit to continue with her cleaning roles and work as a cleaner.

Outcome of grievance

42. On 30 May 2018 the claimant was given the outcome of a grievance in connection with "unsanitary working conditions". The grievance was not upheld. The toilets were found to be satisfactory. The document also noted that there was no support for the suggestion the facilities had caused the claimant to suffer any issue. The claimant did not appeal against this decision.

43. On 31 May 2018 the claimant was given the outcome in respect of her grievance about "unfair/abusive treatment and discrimination" (which related to allegations about the team leaders). The outcome noted that an investigation had identified no relevant concerns. The outcome also noted an alternative role had been offered to the claimant to allow her to work with other Team Leaders, an offer that she declined. The claimant did not appeal against this decision.

Claimant raises further grievance

44. On 3 July 2018 the claimant raised another grievance. She claimed that she had been mistreated by the Team Leaders which alleged she was being screamed at for breaking machines, unsuitable cleaning products were provided, nonsense orders were issued to her, there was permanent indecent behaviour, health and safety is not protected, her career was limited, she was ethnically discriminated and she was unjustifiably penalised.

Claimant refuses to wear PPE

45. On 4 July 2018 the claimant was asked to wear Personal Protective Equipment ("PPE") in an area of the factory that can get very dusty. She was

asked to wear the equipment for health and safety reasons. All staff were required to wear PPE (including overalls and a mask) in this area of the factory and all staff had done so, which included other cleaners. The claimant refused to comply with that instruction. She said it was too hot to wear the equipment.

46. The HR Manager was discussing matters with the claimant on the factory floor at this time, on or around 4 July 2018. During the discussions the claimant became aggressive. The HR Manager calmed the situation down by stepping back and reminding the claimant that she must wear PPE in that area as it was a health and safety requirement.

Claimant issued with informal warning re PPE

47. On 5 July 2018 an informal verbal warning was issued to the claimant making it clear to the claimant that it was essential that she wore the relevant PPE equipment about which she had been told the previous day. That warning stated that the equipment was mandatory due to the nature of cleaning the filters which is dusty and noisy.

48. The warning advised the claimant that the equipment is provided to protect the claimant's health and safety and a refusal to wear it is a serious breach of the health and safety rules. The claimant was advised that there was a risk of dismissal if there were any further incidences of a similar nature by her.

Grievance meeting

49. On 9 July 2018 the claimant was invited to a meeting to discuss the grievances she raised in her communication of 3 July 2018.

50. On 3 September 2018 a grievance meeting was convened with the claimant, the HR Manager and the Compliance and Health and Safety Manager. The claimant had a union representative present. The claimant was reminded that the medical evidence showed no link between the claimant's health issues and the respondent's facilities. It was also noted that the claimant was not wearing PPE. The claimant stated said equipment "aggravated her medical condition" but she did not provide any further information and no information had been included in the occupational health report. The claimant was reminded of her duty to ensure she wore the correct PPE given the importance of it.

Outcome of grievance

51. On 4 September 2018 the grievance outcome was issued to the claimant. It was noted that no other females had complained about the toilets which were of satisfactory quality and that the medical evidence said there was no link with the facilities and the claimant's condition. PPE required to be worn. The grievances were dismissed. The claimant did not appeal against the outcome of that grievance.

Further issues arising

52. On 24 September 2018 the claimant sent an email to the Compliance and Health and Safety Manager headed "degrading and inhuman working conditions". The claimant referred to the moving of the cleaning station. This had occurred following a technical audit which required the respondent to move the cleaning station and keep equipment safe and together. The cleaning station had been moved to a space under a canopy next to the main building. Other cleaners had carried out their work there without any issue. The respondent had also provided jackets and hats in the event staff needed them. The claimant said she did not wish to work outside and said doing so "increased health threats".

53. On 25 September 2018 the claimant emailed the Compliance and Health and Safety Manager saying "You are the last person I trust. The aggressiveness of my superiors is increasing".

54. On 27 September 2018 the claimant refused to work in the area of the factory which required PPE. She said it was too hot. She also refused to go to the cleaning station outside because she was said it was too cold. No other staff had raised any issues with regard to the temperature in either area and there was no evidence before the respondent which suggested there were any temperature concerns or legitimate reasons not to comply with the instruction. No information had been provided to justify the claimant's refusal.

Fit note

55. The claimant lodged a fit note from 9 October to 16 October 2018 citing "otitis media" as the reason for absence.

Management meeting

56. On 11 October 2018 the claimant was invited to a management meeting, the aim of which was to address the respondent's concerns and raise issues they had about the claimant's refusal to carry out her duties as Production Cleaner. The respondent was concerned that the trust and confidence within the relationship had been eroded and explained that there was a risk that she could be dismissed.

57. The letter set out the issues the claimant had raised during her recent communications, including the working conditions and communications. The letter set the steps that had been taken in relation to those issues and the grievance outcomes sent to the claimant. The letter explained that the company had spoken to its health and safety adviser who was satisfied with the matters arising.

58. The letter explained that there were 6 areas of concern, which included issues in connection with PPE which was provided for suitable working conditions, the claimant's refusal to work outside and in areas within the factory which was impacting upon her ability to do her daily tasks.

59. The claimant was advised that there was a risk of dismissal. She was also advised that she could bring a companion to that meeting.

60. On 16 October 2018 the claimant submitted a fit note certifying her as not fit for work for the period 16 October 2018 to 23 October 2018 by reason of an "ongoing ear infection".

61. On 18 October 2018 the claimant attended the meeting with an Interpreter. It was chaired by the HR Manager. The claimant compared herself to another cleaner and asked why she could not do her role. She was told she had to carry out her own cleaning duties as required by the respondent. The claimant indicated that she did not want to work at heights or in different temperatures because she said it affected her health. She gave no further details. Ms Allen asked that the claimant "try and meet the respondent halfway" and they would see if there were any alternative roles to deal with any concerns the claimant had.

62. Other staff had been able to wear the relevant protective equipment without any issues being raised. Other staff had also been working in the relevant areas of the factory (inside and outside) with no concerns arising. The other staff were treated in the same way as the claimant. The other cleaners had no issue with the working environment, temperature or PPE and had worked in the same areas as the claimant without any issue. Each of the other cleaners had worn PPE and complied with the same instructions issued to the claimant, and worked in the areas required without difficulty. The claimant herself had done so until around September 2018.

63. On 22 October 2018 the claimant emailed the HR Manager saying she had "limited capabilities" because of ear damage and that the symptoms affected her role as a cleaner.

Offer of alternative role

64. On 22 October 2018, following the discussion in the meeting as to other roles, the HR Manager replied to the claimant's email of 22 October and offered the claimant another role, this time in another area of the business which would not require the claimant to work outside, at heights or to clean machinery. That would ensure any issues as to temperature affecting the claimant would be resolved. The hours were a little different from her then current role. That role would have resolved any issues the claimant had (whether by reason of her health or otherwise).

65. If the claimant did not work in the areas requested (which include the cleaning station and in the filter room) there would be little way of duties left for the claimant to do. The cleaning of the filters was an important role as the machine was expensive and a key part of the manufacturing process. Cleaning it was therefore vital.

66. The respondent also required to ensure that all staff wore PPE without the need to check they were doing so given the nature of the working environment and the importance of health and safety.

67. The claimant considered the offer of an alternative role and asked if the hours could be changed to the same as her husband's. This was not possible. The HR Manager said that if the claimant did not want that role and she was not fit for work she would have to ensure she had a fit note covering her absence. The claimant replied saying "I will remain ill". The HR Manager believed the claimant had declined the offer of the alternative role. The claimant did not pursue the role further.

Further absence

68. On 25 October 2018 the claimant produced a further fit note covering the period 23 October to 1 November 2018 by reason of "ongoing ear issues".

69. Ms Allen emailed the claimant on 31 October 2018 noting that the fit note expired on 1 November 2018 and asked if the claimant was able to resume work.

70. On 2 November 2018 a fit note is produced covering the period 2 November 2018 to 9 November 2018 by reason of "ongoing ear issue".

Outcome of meeting - dismissal

71. On 9 November 2018, by email, the claimant is sent an outcome letter from the management meeting. The respondent set out the concerns they had regarding the claimant's conduct with regard to her failure to carry out instructions. They noted that the claimant had refused to accept an alternative role which would dealt with each of the claimant's concerns and maintained her employment.

72. The respondent believed there was nothing else they could do to assist the claimant who had been unable to carry out the majority of her tasks, had refused an alternative role, had refused to carry out instructions with regard to her cleaning duties and had failed to comply with instructions to wear protective equipment.

73. The claimant was dismissed with immediate effect, being paid in leu of her notice. She was dismissed because of:

    a. her refusal to follow instructions to clean the area of the factory to which she was directed (the filter room) and to clean the filters;
    b. her refusal to follow the instructions to use the cleaning station outside the production building under the canopy, to which she was directed;
    c. her refusal to wear protective equipment, namely a mask and overalls; and
    d. because she had refused an offer of alternative work which would have removed any concern the claimant had with regard to the work/conditions.

Appeal not pursued

74. On 13 November 2018 the claimant appealed and an appeal meeting was fixed. This date was changed as the result of the unavailability of the respondent's officer. The claimant decided not to progress with her appeal as she believed there was no point.

Law

Jurisdiction

75. The complaints of sex discrimination were brought under the Equality Act 2010.

Burden of proof

76. The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material provides as follows:

> **"(2) If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision."**

77. The section goes on to make it clear that a reference to the Court includes an Employment Tribunal.

78. It is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

79. In **Hewage v Grampian Health Board [2012] IRLR 870** the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provision should apply. That guidance appears in **Igen Limited v Wong [2005] ICR 931** and was supplemented in **Madarassy v Nomura International PLC [2007] ICR 867**. Although the concept of the shifting burden of proof involves a two stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question. However, if in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

80. In this case the Tribunal has been able to make positive findings of fact without resort the burden of proof provisions.

Time limits

81. The time limit for Equality Act claims appears in section 123 as follows:

> **"(1) Proceedings on a complaint within section 120 may not be brought after the end of –**
>
> **(a) the period of three months starting with the date of the act to which the complaint relates, or**
>
> **(b) such other period as the Employment Tribunal thinks just and equitable …**
>
> **(2) …**
>
> **(3) For the purposes of this section –**
>
> **(a) conduct extending over a period is to be treated as done at the end of the period;**
>
> **(b) failure to do something is to be treated as occurring when the person in question decided on it".**

82. A continuing course of conduct might amount to an act extending over a period, in which case time runs from the last act in question. The case law on time limits to which we had regard included **Hendricks –v- Commissioner of Police of the Metropolis [2003] IRLR 96** which deals with circumstances in which there will be an act extending over a period. In dealing with a case of alleged race and sex discrimination over a period, Mummery LJ said this at paragraph 52:

> **"The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of "an act extending over a period." I agree with the observation made by Sedley LJ, in his decision on the paper application for permission to appeal, that the Appeal Tribunal allowed itself to be side-tracked by focusing on whether a "policy" could be discerned. Instead, the focus should be on the substance of the complaints that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed."**

Direct sex discrimination

83. Discrimination is defined in section 13(1) as follows:

> **"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."**

84. The concept of treatment being less favourable inherently suggests some form of comparison and in such cases section 23(1) applies:

> **"On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case."**

85. The effect of section 23 as a whole is to ensure that any comparison made must be between situations which are genuinely comparable. The case law, however, makes it clear that it is not necessary for a claimant to have an actual comparator to succeed. The comparison can be with a hypothetical person without a disability.

86. Further, as the Employment Appeal Tribunal and appellate courts have emphasised in a number of cases, including **Amnesty International v Ahmed [2009] IRLR 884**, in most cases where the conduct in question is not overtly related to sex, the real question is the "reason why" the decision maker acted as he or she did. Answering that question involves consideration of the mental processes (whether conscious or subconscious) of the alleged discriminator, and it may be possible for the Tribunal to make a finding as to the reason why a person acted as he or she did without the need to concern itself with constructing a hypothetical comparator.

Victimisation

87. Victimisation has a specific legal meaning defined by section 27:

> **(1) A person (A) victimises another person (B) if A subjects B to a detriment because--**
>
> **(a) B does a protected act, or**
>
> **(b) A believes that B has done, or may do, a protected act.**
>
> **(2) Each of the following is a protected act--**
>
> **(a) bringing proceedings under this Act;**
>
> **(b) giving evidence or information in connection with proceedings under this Act;**
>
> **(c) doing any other thing for the purposes of or in connection with this Act;**
>
> **(d) making an allegation (whether or not express) that A or another person has contravened this Act.**
>
> **(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.**

88. This provision does not require any form of comparison. If it is shown that a protected act has taken place and the claimant has been subjected to a detriment, it is essentially a question of the "reason why".

89. Something amounts to a detriment if the treatment is of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to her detriment – see paragraphs 31-37 of the speech of Lord Hope in **Shamoon v Chief Constable of the RUC [2013] ICR 337 (House of Lords).**

Unfair dismissal

90. The Tribunal has to decide whether the employer had a reason for the dismissal which was one of the potentially fair reasons for dismissal within section 98(1) and (2) of the Employment Rights Act 1996 and whether it had a genuine belief in that reason. One of the potentially fair reasons is for matters relating to "conduct". The burden of proof here rests on the respondent who must persuade the Tribunal that it had a genuine belief that the employee committed the relevant misconduct and that belief was the reason for dismissal.

91. Once an employer has shown a potentially fair reason for dismissal within the meaning of section 98(2), the Tribunal must go on to decide whether the dismissal for that reason was fair or unfair which involves deciding whether the employer acted reasonably or unreasonably dismissing for the reason given in accordance with section 98(4).

92. Section 98(4) provides that the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer);

a) Depends on whether in the circumstances (including the size and administrative rescores of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and

b) Shall be determined in accordance with equity and the substantial merits of the case.

93. What a Tribunal must decide is not what it would have done but whether the employer acted reasonably; **Grundy (Teddington) Ltd v Willis HSBC Bank Plc (formerly Midland Bank plc) v Madden 2000 ICR 1283 CA** .

94. Mr Justice Browne-Wilkinson in his judgement in **Iceland Frozen Foods Ltd v Jones ICR 17 EAT** set out the law in term so the approach Tribunal must adopt as follows;

a. "The starting out should always be the words of section 98 (4) themselves

b. In applying the section, a Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Tribunal) consider the dismissal to be fair

c. In judging the reasonableness of the employers conduct a Tribunal must not substitute its decision as to what was the right course to adopt for that of three employers

d. In many (though not all) cases there is a band of reasonable responses to the employees conduct which in which the employer acting reasonably may take one view, another quite reasonably take another.

e. The function of the Tribunal, as an industrial jury, is to determine whether in the circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which the reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair, it is falls outside the band it is unfair."

95. In terms of procedural fairness, the House of Lords in **Polkey v AE Dayton Services Ltd** 1988 ICR 142 HL firmly establishes that procedural fairness is highly relevant to the reasonableness test under section 98(4). Where an employer fails to take appropriate procedural steps, the Tribunal is not permitted to ask in applying the reasonableness test whether it would have made any difference if the right procedure had been followed.

96. If there is a failure to carry out a fair procedure, the dismissal will not be rendered fair because it did not affect the ultimate outcome; however, any compensation may be reduced. Lord Bridge set out in this case the procedural steps which an employer in the great majority of cases will be necessary for an employer to take to be considered to have acted reasonably in dismissing;

> ”in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation;”

97. Where the employer relies on conduct as the fair reason for dismissal, it is for the employer to show that misconduct was the reason for dismissal. According to the EAT in **British Home Stores v Burchell 1980 ICR 303** the employer must show;

    a) It believed the employee guilty of misconduct

    b) It had in mind reasonable grounds upon which to sustain that belief

    c) At the stage at which that belief was formed on those grounds it had carried out as much investigation into the matter as was reasonable in the circumstances

98. The employer need not have conclusive evidence of misconduct but a genuine and reasonable belief, reasonably tested. The burden of proof is on the employer to show a fair reason but the second stage of reasonableness is a neutral burden. The Tribunal must be satisfied that the employer acted fairly and reasonably in all the circumstances in dismissing for that reason, taking account of the size and resources of the employer, equity and the substantial merits of the case.

99. In considering a claim for unfair dismissal by reason of conduct, the Tribunal is required to consider the terms of the ACAS Code of Practice on Disciplinary and Grievance matters. This sets out what a reasonable employer would normally do when considering dismissal by reason of conduct. This includes conducting a reasonable investigation, inviting the employee to a meeting, conducting a fair meeting, issuing an outcome letter and allowing an appeal. The claimant was directed to consider the Code in advance of the conclusion of the case.

Redundancy

100. An employee is to be taken as dismissed by reason of redundancy as defined in section 139 of the Employment Rights Act 1996 (and thereby entitled to a redundancy payment) when the dismissal is wholly or mainly attributable to (a0 the fact the employer has ceased or intends to cease to carry on the business for the purposes which the employee was employed or to carry on business in the place employed or (b) the requirements of the business for employees to carry out work of a particular kind or to carry out work of a particular kind in the place employed have ceased or diminished.

Submissions

Respondent’s submissions

101. Counsel for the respondent produced written submissions (which had been given to the claimant who had time to consider them) and he spoke to these.

102. With regard to the claim for unfair dismissal, he argued that the reason why the claimant was dismissed was because she refused to clean the filter room and the filters, she refused to use the cleaning station to which she was directed and she refused to wear PPE. She had then refused an alternative role. These were matters relating to the claimant's conduct and so she was dismissed for a potentially fair reason.

103. As to procedure, counsel for the respondent said that the respondent was not perfect but natural justice had been followed and the key requirements of the ACAS Code of Practice implemented. The claimant had been given notice of a hearing (reminding her of the right to bring a companion). She knew of the allegations she was facing. She was given a hearing, an outcome and the right of appeal.

104. The issues arising were very serious. Failing to wear PPE by itself could give rise to gross misconduct justifying dismissal. The respondent by its nature took health and safety very seriously and it did not have time to check employees were using PPE. They required to have the trust that all staff would do so.

105. The respondent had gone the extra mile and offered the claimant an alternative role which dealt with each of her concerns (albeit there was no good reason why the claimant could not comply with the instructions).

106. Counsel for the respondent noted that the other cleaners had all carried out the duties the claimant had been asked to do without difficulty. There was no issue with regard to the temperature or location. Steps had been taken to protect employees, such if they were cold jackets and hats were provided. The claimant had still refused, insisting that she work in an environment with a constant temperature.

107. Counsel argued that there was no legitimate reason for failing to comply with the instruction to wear PPE nor for failing to agree to the new role.

108. In all the circumstances it was argued that the dismissal was fair.

109. With regard to the sex discrimination claim, it was submitted that there was no evidence whatsoever suggesting a difference in hygiene as between the male and female toilets. In any event, the claimant accepted the position as acceptable from March 2018 and the claim was out of time.

110. With regard to the victimisation claim, the fundamental point was that there was no causation. There was no evidence whatsoever that the dismissal was because the claimant raised her complaint of a difference in hygiene. The respondent's evidence was clear and compelling.

111. Finally, there was no evidence of any redundancy situation.

112. He argued that each of the claims should be dismissed.

Claimant's submissions

113. The claimant argued that her dismissal was unfair. She candidly accepted that she knew the nature of the allegations facing her at the management meeting, namely the failure to wear PPE and carry out the instructions as to cleaning the filter room and filters and use the cleaning station. She argued that this affected her health.

114. She argued that she was absent by reason of illness when she was dismissed and should not have been dismissed. She argued that she had not refused the alternative role as she was ill and decisions could not be taken when an employee was not at work or in a face to face meeting.

115. With regard to the sex discrimination claim, she accepted that she was satisfied with the toilets from March 2018 but prior to that date they were different.

116. She asked the Tribunal to consider the evidence with regard to the other claims.

Discussion and reasons

117. The Tribunal is able unanimously to reach the following conclusions following its deliberations.

Direct sex discrimination

118. The Tribunal is satisfied from the evidence to which it was directed that there was no material difference between the male and female toilets in terms of quality. The Tribunal accepts the respondent's submissions in this regard.

119. The Tribunal considered the evidence carefully. While the claimant argued there was a difference in terms of the condition of the facilities, the Tribunal preferred the evidence of the HR Manager and the Compliance and health and Safety Manager who both examined the condition of both male and female toilets. They were clear in that the quality of both male and female facilities was comparable. The only issue they discovered was a faulty toilet seat in one of the female cubicles which was replaced upon it being brought to their attention. That was a minor issue.

120. The condition of the male and female toilets was not materially different and men and women were therefore not treated differently. There was no less favourable treatment.

121. As the male and female toilets were of a comparable standard and there was no less favourable treatment, the claim for sex discrimination is not well founded.

122. In any event, the claimant candidly accepted that from 18 March 2018 she was satisfied with the condition of the toilets.

123. Given the claim form was presented on 4 February 2019 with the ACAS early conciliation period between 1 and 4 February 2019, the claim for sex discrimination in this regard was out of time. The claim required to have been lodged within 3 months of the relevant date, the date of discrimination or the last date if there was an act extending over a period of time. The 3 month time limit therefore ran from 18 March 2018. The claim ought to have been lodged by 17 June 2018 (subject to any adjustment for ACAS early conciliation). It was lodged in February 2019. The claim was raised around 8 months late.

124. There was no reason to suggest why the time limit should be extended nor evidence in support of any suggestion it was just and equitable to extend the time limit.

125. The Tribunal did not therefore have jurisdiction to consider the claim, it having been brought out of time. It was not just and equitable to extend the time limit.

126. The claim for sex discrimination therefore fails.

Victimisation

127. The respondent conceded that the claimant had raised a grievance on 29 April 2018 and 3 July 2018, on both occasions the claimant having done a protected act, namely complained about the state of the ladies' toilets.

128. The respondent did not concede that the email dated 24 September 2018 amounted to a protected act. That email referred only to the temperatures and made no reference, express or implied, to any unlawful discrimination in terms of the Equality Act. No mention is made of a difference in terms of the toilet facilities.

129. The Tribunal was not satisfied the email of 24 September 2018 amounted to a protected act. In order to qualify there required to be some allegation that the Equality Act 2010 was breached. This was not in existence from a fair reading of the email, which focused only on temperatures. There was no mention at all as to toilets or any sex discrimination.

130. The Tribunal then proceeded to consider whether or not the respondent dismissed the claimant because of any of the protected acts.

131. The Tribunal was satisfied from the facts that the decision to dismiss the claimant was not in any way, including in any minor or trivial way, connected with any of the protected acts (nor connected to the claimant's email of 24 September 2018). The claimant's raising of the complaints was not in any way part of the reason why she was dismissed. The dismissing officer's

evidence was cogent and compelling. The Tribunal accepted that evidence in its entirety.

132. The claimant was dismissed because she refused to wear protective equipment, refused to clean areas to which she was directed and had refused an alternative role. There was no connection at all to the grievances or issues the claimant had raised.

133. The claim for victimisation is therefore ill founded and is dismissed.

Unfair Dismissal

Reason for dismissal

134. The first issue for the Tribunal was to determine what the reason for the dismissal was. A reason for dismissal is set out in facts or beliefs held by the employer which causes the employer to dismiss the claimant. The Tribunal considered the submissions of both parties together with the facts and with the evidence presented.

135. The Tribunal concluded that the principal reason for the claimant's dismissal was for matters relating to her conduct. The Tribunal was satisfied that the reason for the claimant's dismissal was because of the following:

a. her failure to follow instructions to clean the area of the factory to which she was directed (the filter room) and to clean the filters;
b. her refusal to follow the instructions to use the cleaning station outside the production building under the canopy, to which she was directed;
c. her refusal to wear protective equipment, namely a mask and overalls; and
d. because she had refused an offer of alternative work which would have removed any concern the claimant had with regard to the work/conditions.

136. These were matters relating to the claimant's conduct. She had refused to comply with the instructions given to her. The respondent has therefore satisfied the Tribunal that the claimant was dismissed for a potentially fair reason.

Genuine belief in guilt

137. The next issue was whether nor not the respondent genuinely believed in the guilt of the claimant. The Tribunal was satisfied, having considered the evidence of the dismissing officer, that she genuinely believed the claimant was guilty of the matters relied upon. The Tribunal accepted the evidence of the dismissing officer which was cogent and compelling.

Honest belief in guilt

138. The Tribunal was also satisfied that the belief was honestly held. The dismissing officer genuinely and honestly believed in the claimant's guilt.

Reasonable investigation and reasonable procedure?

139. The next issue was whether or not the respondent had carried out as much investigation as was reasonable in the circumstances. The respondent must also carry out a fair procedure.

140. The Tribunal must not to substitute its view for that of the employer. It must decide whether or not the approach taken by the respondent was one which a reasonable employer could do in all the circumstances.

141. The Tribunal considered that the respondent's approach was not perfect but the test is not one of perfection. The question was whether the approach adopted fell within the range of options open to a reasonable employer in the specific circumstances taking account of size, resources, equity and the merits.

142. On 5 July 2018 the claimant had been issued with a warning in connection with the wearing of equipment. She had been told that she required to wear the equipment which failing dismissal could ensue.

143. On a number of occasions the claimant had been specifically told that the use of such equipment was an essential requirement. She required to wear the equipment to protect her health and safety. The respondent required to be sure all staff wore such equipment. Other staff had no issue and the claimant had previously followed the instruction. The claimant understood that wearing PPE was an essential requirement and that failure to comply could result in her dismissal.

144. The claimant had also been instructed on a number of occasions to carry out the full extent of her cleaning duties. That included cleaning filters and the filter room. This was an important duty as the filter was a key part of the machinery upon which the respondent depended. It was an expensive piece of machinery which required to be kept clean. The respondent required to have the trust that its cleaners would carry out their duties and keep the filter room and filters clean.

145. The Tribunal was satisfied that it was reasonable for the respondent to conclude that there was no legitimate reason for the claimant's refusal to wear the equipment asked of her (which others wore without difficulty). No evidence was provided by the claimant to the respondent as to why she was unable to comply with the instruction.

146. The other staff had no issue with these instructions. The claimant had stated that it "aggravated her condition" but provided no evidence to the respondent in support of that assertion. The respondent gave the claimant the opportunity to explain why she was unable to comply with the instructions but no detail was provided.

147. In cross-examination the claimant accepted that her principal concern was being asked to work in areas where the temperature varied. She believed that

she had the right to work in an environment with a constant temperature. In the course of cross-examination she stated: "I believed I was entitled to decide whether I would go or not go outside". It was clear to the Tribunal that the claimant was not prepared to work in the areas directed as she did not wish to do so and accordingly she refused to comply with the instruction. There was no medical or health and safety reason as such but rather the claimant believed that she was entitled to refuse to comply as she wished to work in an environment that had a constant temperature.

148. In her evidence before the Tribunal she said that she believed she had the right to choose where to work in the factory (and ignore instructions), as she believed that her contract could only be changed in writing. She believed that she was still a Production Operator and not a cleaner (even although she had carried out cleaning duties for a lengthy period of time). She had not appreciated that her contract could be changed orally or by the actions of the parties. She had also not appreciated that her contract allowed the respondent to require her to carry out additional duties not connected with Production Operative. The claimant had not provided the respondent with any legitimate reason for her refusal to comply with the lawful and reasonable instructions that were issued to her.

149. The respondent had provided appropriate clothing if a worker needed to work outside. There was no evidence before the respondent that suggested the temperatures within the relevant area of the factory were unreasonable or excessive or that there were legitimate reasons for the claimant to refuse to comply with the instructions, instructions with which the claimant had complied previously.

150. The instructions given to the claimant were reasonable and lawful. Other staff had no difficulty carrying them out and the claimant provided no evidence to support her refusal to comply.

151. The respondent had given the claimant the opportunity to present her defence at the management meeting. She had been told what the concerns were and that there was a risk she could be dismissed. She had been told she could bring a companion to the meeting. The respondent did consider the response provided by the claimant. She provided no evidence in support of her refusal to comply with the instructions, despite her previous warnings.

152. The Tribunal accepted the respondent's submission that natural justice had been followed. In other words the requirements of the ACAS Code of Practice in relation to disciplinary matters had been followed.

153. The claimant candidly accepted during her submissions that she knew what the respondent's concerns were with regard to the instructions she had been given with which she had refused to comply. The letter sent to the claimant set out the position. While this letter was not perfect and could have been better drafted, the claimant accepted that she understood the allegations she faced and that dismissal was a potential outcome.

154. The respondent had offered the claimant a solution to avoid any issues she had. The respondent reasonably believed from the information before them that the claimant did not wish to undertake the alternative role. They had in fact offered 2 alternative positions to the claimant, both of which she had declined. This was an important point since the respondent had considered the issues raised by the claimant and that even although there was no evidence to support the claimant's assertions as to any impact on her health, the respondent looked for an alternative role.

155. The respondent offered the claimant an alternative role which would have fully resolved the issues the claimant had raised.

156. The respondent did not act unreasonably in concluding that the claimant had refused that alternative role. The claimant wanted to work the same hours as her husband. It was not possible to alter the hours in the new role. The claimant chose to remain in her original cleaning role.

157. The difficulty for the respondent was that the claimant was refusing to carry out a large part of her role. This left the claimant with little by way of tasks left.

158. In all the circumstances the respondent carried out as much investigation as was reasonable.

159. While the claimant may have believed she was entitled to refuse to carry out the instructions, the respondent did not act unreasonably and a reasonable investigation had been carried out.

Did the decision to dismiss fall within the range of responses open to a reasonable employer?

160. The final consideration was whether the decision to dismiss fell within the range of responses open to a reasonable employer. The law recognises that reasonable employers can act in different ways when faced with the same situation. There is a range of responses open to reasonable employers. The question is whether the decision to dismiss in all the circumstances of this case fell within the range of responses open to a reasonable employer.

161. The Tribunal considered all the facts and submissions raised by the parties. Whilst some employers might well have issued a final written warning the Tribunal was satisfied that the decision to dismiss was an option open to a reasonable employer in light of the facts of the respondent.

162. The Tribunal must avoid substituting its view as to what it would have done and instead consider whether a reasonable employer facing the circumstances of this case, could have dismissed taking account of size, resources, equity and the merits of the case. We were satisfied that a reasonable employer could have dismissed the claimant in the circumstances of this case.

163. The claimant had refused to work in the areas directed and refused to wear the relevant equipment. These were lawful and reasonable instructions, which

other staff had no difficulty following. The claimant herself had previously complied without difficulty.

164. The claimant had refused to comply with these instructions. Even if the claimant thought she was entitled to refuse to comply (because she thought she was employed as a Production Operator), the respondent acted reasonably given the circumstances it faced. Other reasonable employers may well have reacted differently and not dismissed but we are satisfied a reasonable employer could have dismissed in the circumstances of this case.

165. The respondent offered the claimant a solution that would have resolved each of the concerns she had raised. The respondent, reasonably, from the information before them, concluded that the claimant rejected that role (as she had rejected the other role that had been offered to her, to avoid her working with team leaders about whom she had complained). Given her refusal to accept that role, the respondent reasonably chose to dismiss the claimant.

166. The respondent sought to accommodate the claimant's concerns by offering her an alternative role which dealt with each of her concerns. That role would have avoided her working in the areas with which she claimed to have difficulty. It was not unreasonable for the respondent to believe that she had declined that role. The respondent sought to work with the claimant to identify alternatives but the claimant was not prepared to alter her position. She had previously been offered another role but did not want to accept that role. The claimant was given the right to appeal (at which hearing she could have set out her position) but she did not proceed with her appeal. The respondent was reasonably entitled to conclude that the claimant had refused to comply with a lawful and reasonable instruction (without any legitimate basis) and that the claimant had refused an alternative role which would have resolved any concerns the claimant believed she had.

167. We note that the claimant believed that no changes could be made to her contract without a face to face meeting. She believed that she could not be dismissed unless she was at work (and could not be dismissed when certified as unfit to work). The claimant was mistaken in these beliefs. An employer, when considering dismissal, is under an obligation to act reasonably. That does not prohibit the progressing of matters by agreement or during absence where it was reasonable to do so. It is possible to change a contract by agreement, even where such an agreement is not committed to writing.

168. The Tribunal considered all of the evidence it heard and to which its attention was directed. The Tribunal took care to consider the claimant's position and reviewed her position in detail. The decision as to whether or not the dismissal is fair is determined by applying the statutory wording in this area, and not by deciding what the Tribunal itself would have done. The touchstone is what a reasonable employer would do, both in terms of procedure and in terms of the outcome itself.

169. The Tribunal is satisfied that the respondent acted reasonably in all the circumstances taking account of size, resources, equity and the merits of the case.

170. In all the circumstances the claim of unfair dismissal is not well founded and is dismissed.

Redundancy

171. The final claim was that the claimant believed she had been dismissed by reason of redundancy and therefore entitled to a redundancy payment. The work required of the claimant was still in existence and there was no evidence of any diminution or reduction in the respondent's requirements of the relevant work. There was no redundancy situation and this claim is not well founded.

Claims dismissed

172. In all the circumstances the claims are dismissed.

Employment Judge Hoey

Date: 1 April 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON
3 April 2020

FOR THE TRIBUNAL OFFICE