EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102506/2020

**Final Hearing held in person in Glasgow on 11, 12, 13 and 15 January 2021;
Further written representations dated 22 January 2021; and
Deliberation in chambers on 25 February 2021 and 27 May 2021**

Employment Judge: Ian McPherson

Mr Kerry Wilson	**Claimant** **Represented by:** **Ms Katherine Irvine** **Solicitor**
William Grant & Sons Distillers Limited	**Respondents** **Represented by:** **Mr David Hay** **Advocate** **Instructed by:** **Pinsent Masons LLP** **Solicitors**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:-

(1) the claimant was fairly dismissed by the respondents, and so his complaint of unfair dismissal is not well-founded, and, accordingly, it is dismissed by the Tribunal ; and

(2) the respondents have not established that the claimant's employment was lawfully terminated by them, by reason of his gross misconduct, and so his complaint of wrongful dismissal, and failure to pay notice pay, is well-founded, and, accordingly, the respondents are ordered to pay to the claimant,

as damages for that breach of contract, the sum of **ELEVEN THOUSAND, TWO HUNDRED AND SIXTY FOUR POUNDS, SEVENTY SIX PENCE** (**£11,264.76),** being his statutory entitlement to minimum notice on termination of his employment by the respondents.

REASONS

Introduction

1. This case called before the Tribunal as an Employment Judge sitting alone, on Monday, 11 January 2021, for a 3-day Final Hearing for full disposal, including remedy if appropriate, as per Notice of Final Hearing in Person issued to both parties' representatives by the Tribunal on 25 September 2020.

2. In the event, evidence and closing submissions could not be concluded within the allocated 3-day sitting but, with co-operation by both parties with the Tribunal administration, a fourth day was added by the Tribunal, and the case continued until Friday, 15 January 2021, when the evidence was concluded, and the Tribunal heard closing submissions from parties' legal representatives.

3. At the Judge's invitation, further written representations were received from both parties on 22 January 2021. While the Tribunal deliberated in private, in chambers, on 25 February 2021, after receipt of those further written representations, and a draft Judgment was dictated, unfortunately, the Judge's sick leave absence from the office, from 18 March to 3 May 2021, meant the Tribunal was unable to finalise its final decision, by revising, and completing, the draft, until recently.

4. The Judge apologises to both parties for this unavoidable delay, which has already been intimated to parties by email from the Tribunal sent on 11 May 2021, explaining the position.

Claim and response

5. On 7 May 2020, following ACAS early conciliation between 18 March and 18 April 2020, the claimant, then acting through his solicitor, Mr Ben Doherty, from Lindsays, Solicitors, Glasgow, presented to the Employment Tribunal an ET1

claim form against the respondents, complaining of unfair dismissal arising from the termination of his employment, on 21 December 2019, as a Spirit Supply Operative with the respondents at their Girvan Distillery, Ayrshire.

6. The claimant complained that he had been unfairly, summarily dismissed by the respondents on the grounds of gross misconduct. He alleged that he was owed notice pay, and he contended that his dismissal was wrongful and unfair, and so he sought compensation for unfair dismissal, and wrongful dismissal, as well as an order for reinstatement to get his old job back.

7. The claimant's claim against the respondents was accepted by the Tribunal administration, on 26 May 2020, and a copy served on the respondents, at their Glenfiddich Distillery address in Dufftown, Keith requiring them to lodge an ET3 response by 23 June 2020 at the latest. A date listing stencil was enclosed, with the Tribunal proposing to list the case for Final Hearing in August or September 2020.

8. Thereafter, on 23 June 2020, an ET3 response was submitted on behalf of the respondents, by their external solicitor, Ms Nicola Welsh, from Pinsent Masons LLP, Solicitors, Glasgow, who stated that the claim was defended, and attached a detailed 5-page, 54 paragraph, grounds of resistance.

9. The respondents denied that the claimant had been unfairly dismissed as alleged or at all, and explained that he had been dismissed due to gross misconduct, that they had a fair reason for dismissing him, and that the sanction of dismissal was both fair and reasonable having regard to all the circumstances.

10. Further, the respondents denied that they had acted in breach of the claimant's employment contract, as alleged or at all, and explained that the claimant had committed a repudiatory breach of contract entitling the respondents to terminate his employment summarily.

11. The respondents' ET3 response was accepted by the Tribunal administration on 25 June 2020, and a copy sent to the claimant's representative and ACAS. Following initial consideration by Employment Judge Shona MacLean, on 30 June 2020, she considered the file, did not dismiss the claim or response on initial

consideration, and ordered that it would proceed to a Final Hearing. Given no Hearings in person were then being listed, she considered that a Hearing was suitable to take place by video link using the Tribunal's Cloud Video Platform (CVP).

Arrangements for Final Hearing

12. On 7 July 2020, Ms Welsh, solicitor for the respondents, wrote to the Employment Tribunal requesting that the Final Hearing be held in person, when it was possible to do so, explaining that the respondents considered that the Hearing was not suitable to take place by video link as they intended to call three witnesses, who would be referring to site maps showing the layout of the distillery, and a number of documents as part of their evidence, which the respondents believed would not be as easy to follow if the Hearing was to be held remotely.

13. Also, on 7 July 2020, the claimant's then solicitor, Mr Ben Doherty, wrote to the Tribunal, stating that the claimant would have no objection to the Hearing taking place by video conference, as it was his understanding of the video conference facilities that witnesses would still be able to cross refer to documents, and that video conferencing would not limit the effectiveness of the evidence given by the respondent's witnesses.

14. Following consideration by Employment Judge Mary Kearns, on 15 July 2020, parties' representatives were issued with date listing stencils for an in person Final Hearing to be held on dates to be fixed in January to March 2021.

15. Thereafter, following receipt of parties' completed date listing stencils, and consideration by Employment Judge Robert Gall, the Final Hearing in person was assigned for 3 days for its full disposal, including remedy if appropriate, and Notice of Final Hearing in person was issued on 25 September 2020.

16. On that same date, following receipt of Notice of Final Hearing, the claimant's solicitors, at Lindsays, advised that handling of the case had been passed from Mr Doherty to Ms Kathleen Irvine, another solicitor in that firm.

17. By Notice of Preliminary Hearing by Telephone Conference Call, issued to parties' representatives on 24 December 2020, the case was listed for a Telephone Conference Call to make arrangements for the forthcoming Final Hearing in person. That Preliminary Hearing took place, conducted by Employment Judge Ian McPherson, by Telephone Conference Call on the morning of 5 January 2021, at 9.30am, when the claimant was represented by his solicitor, Ms Irvine, and the respondents by their solicitor, Ms Welsh.

18. The Telephone Conference Call was used by the Judge to explain how the Employment Tribunal would run, within the Glasgow Tribunal Centre, the social distancing measures in place, and timetabling of witnesses, to ensure that no more than 5 persons were in the Hearing room at any one time.

19. At initial consideration, unusually, no judicial direction was given for the issue of Standard Orders for a Final Hearing. Fortuitously, with both parties being legally represented, arrangements were put in hand, between parties' solicitors, for preparation of a Joint Bundle, and the Tribunal was advised that the respondents would be represented by Counsel, Mr David Hay, Advocate from the Scottish Bar.

20. In addition to documents to be finalised in the Joint Bundle, the respondents' solicitor advised that she intended to use a "***Go Pro***" video footage of the distillery, details of which were to be sent to the Tribunal administration for discussion with the Digital Support Officer, so that the video footage could hopefully be played, without any technical difficulty, at the start of the Final Hearing.

21. It was also agreed, as regards attendance of witnesses, that evidence would be heard, in turn, from Mr Scott Baird (Investigation Manager); Mr Brian Bartlett (Disciplinary Manager); Mr Stuart Watts (Appeal Manager), and finally the claimant himself, Mr Kerry Wilson, on the basis of an agreed timetable of 2 hours per witness-in-chief, one hour cross-examination, up to a quarter of an hour for any questions of clarification from the Judge, and up to quarter of an hour for any necessary re-examination.

22. On that basis, it was agreed that the evidence from the 4 witnesses could be taken over 2.5 days, with closing submissions on the afternoon of the third day,

with a written skeleton argument to be provided by each party's legal representative, no more than 45 minutes per side for oral submissions, and with a hyperlinked joint list of authorities for the Judge.

Final Hearing before this Tribunal

23. When the case called before me, as an Employment Judge sitting alone, shortly after 10.00am, on the morning of Monday 11 January 2021, the claimant was in attendance, represented by his solicitor, Ms Kathleen Irvine, while the respondents were represented by Mr David Hay, Advocate, accompanied by Ms Karen Coyle, the respondent's HR Manager, and it was confirmed that Ms Coyle was not being led as a witness for the respondents at this Final Hearing.

24. There was provided to the Tribunal an agreed Joint Bundle, duly indexed, and containing some 56 separate documents, extending over 228 pages. While the index included a document 57 (to be added, to include the respondent's vacancy search results), Mr Hay advised that it was not envisaged that any further documents would be added by the respondents, as he was awaiting final instructions that they were not minded to pursue any argument that the claimant had failed to mitigate his losses following termination of his employment with the respondents.

25. For the claimant, Ms Irvine confirmed that the claimant no longer sought reinstatement, or re-engagement, by the respondents, and, in the event of success with his claim, he was seeking an award of financial compensation against the respondents, as per the Schedule of Loss included in the Joint Bundle, as document 56, in particular at pages 155 to 157, showing a grand total of **£69,728.49**, for basic and compensatory awards, including a 25% increase for the respondents' alleged unreasonable failure to comply with the ACAS Code.

26. While there was no Counter Schedule for the respondents, Mr Hay indicated that discussions were ongoing, and would be confirmed, as regards figures for pension contributions, and private healthcare cover. I was advised that appropriate figures would be agreed between parties' representatives, and the Tribunal advised accordingly. While the ET1 claim form had indicated the effective

date of termination as 21 December 2019, both Ms Irvine and Mr Hay agreed that the effective date of termination was, in fact, 19 December 2019, and this was thus an agreed fact.

27. Further, there was discussion as regards document 23 in the Joint Bundle, at pages 53 and 54, being a statement of Gordon McNair, with a hand drawn map of the area, accompanying his handwritten witness statement signed on 27 November 2019. The document at page 54 being agreed as not the full extent of Mr McNair's hand drawn map, a substituted page, in agreed terms, was provided, there being no objection by parties to the substitution of that page 54 in the Joint Bundle.

28. Those preliminary matters discussed, and there being no other matters raised by either party's representative, the Tribunal proceeded to hear evidence from the respondents' first witness, Mr Scott Baird, the Investigation Manager. In the course of Mr Baird's evidence, the Tribunal viewed the two videos provided by the respondents, there being no objection by Ms Irvine, solicitor for the claimant, and these comprised an MP4 video file showing walk to D line – actual, and another MP4 video file showing walk to D line – direct. These videos had been intimated by the respondents' solicitor, Nicola Welsh, to the claimant's solicitor, Katherine Irvine, on 6 January 2021, following the Telephone Conference Call Preliminary Hearing held the previous day. Mr Baird's evidence concluded at the end of that first day of the Final Hearing.

29. On the following day, Tuesday 12 January 2021, there was a discussion with both parties' representatives, as regards timetabling, given the fact that Ms Irvine's cross-examination of the respondents' witness, Mr Baird, had taken 2 hours, rather than the one hour previously predicted. I suggested to parties' representatives that they liaise as regards agreeing a timetable to conclude the evidence and, if possible, closing submissions, within the remaining 2 days, and provide that to the Tribunal.

30. At the start of that second day, on Tuesday, 12 January 2012, Mr Hay confirmed that there was no argument by the respondents about the claimant's failure to mitigate his losses, and that the core components of the gross and net pay shown

in the claimant's Schedule of Loss were also accepted, but details about pension loss, from the deferred benefit scheme, were yet to be agreed with parties' solicitors, and the Tribunal would be updated.

31. Arising from Mr Baird's evidence, when reference was made to an article which had appeared in the "***Scottish Sun***" concerning the claimant's suspension, Ms Irvine stated that it was not intended to lodge the actual article itself, and that the investigatory meeting with the claimant had taken place on 5 December 2019, notwithstanding the minutes of that meeting, included in the Joint Bundle, at document 40, pages 85 to 87, being dated 6 December 2019.

32. The Tribunal then proceeded to hear sworn evidence from the respondents' next witness, Mr Brian Bartlett, the Disciplinary Manager. In the course of his cross-examination by Ms Irvine, when reference was being made to the notes of the disciplinary hearing with Mr Bartlett, on 17 December 2019, in particular at pages 106 and 107 of the Joint Bundle, Mr Hay, counsel for the respondents, stated that he was not clear about the line of cross-examination, to which Ms Irvine responded that she was not saying that the respondents were under pressure by the Press directly, but the claimant was saying that he had been made ***"a scapegoat".***

33. In these circumstances, Mr Hay stated that the Tribunal might need to see the Press article agreed as having been reported, as its terms were not articulated in the ET1 claim form, and it had not been lodged as a production, by either party. In the event, at closing submissions, I ordered parties' representatives to submit, as part of further written representations, an agreed joint statement of facts about the Press article referred to, to include a copy of the agreed text of that article to add to the Joint Bundle.

34. As part of the further written representations received on 22 January 2021, and now added to the Joint Bundle, the Tribunal received from Ms Irvine, a copy of the "***Scottish Sun***" article, published on 7 December 2019, entitled:- "***FANCY A WEE DRAM? Scots Distillery Worker suspended amid claims mystery piddler weed next to whisky barrels".*** The text of that article has been reproduced below, as part of the Tribunal's findings of fact.

35. At the close of Mr Bartlett's evidence, on the late afternoon of Tuesday, 12 January 2021, the Tribunal then proceeded to hear evidence from the respondents' final witness, Mr Stuart Watts, the Appeals Manager, whose evidence was continued over to, and concluded, the following day, Wednesday, 13 January 2021.

36. At the conclusion of the respondents' evidence, the Tribunal then heard from the claimant himself on Wednesday, 13 January 2021. In the course of his evidence, I discussed with parties' representatives, and it was mutually agreed, that in light of information given in evidence in chief by the claimant about the circumstances of his family, and in particular one of his grown up children, that a formal Order be made by the Tribunal, in terms of **Rule 50 of the Employment Tribunals Rules of Procedure 2013**, with a view to preventing or restricting the public disclosure of aspects of the evidence given in this case, relating to that person, in order to protect the Convention rights of that person.

Findings of Fact

37. I have not sought to set out every detail of the evidence which I heard nor to resolve every difference between the parties, but only those which appear to me to be material. My material findings, relevant to the issues before me for judicial determination, based on the balance of probability, are as set out below, in a way that is proportionate to the complexity and importance of the relevant issues before the Tribunal.

38. On the basis of the sworn evidence heard from the various witnesses led before me over the course of this Final Hearing, and the various documents and the Joint Bundle of Documents provided to me, so far as spoken to in evidence, the Tribunal has found the following essential facts established:-

    (1) The claimant was formerly employed by the respondents as a Spirit Supply Operative at their Girvan Distillery. He is a married man, with two grown up children, both living at home, one of whom is employed, and the other, the younger son, is not. The family was financially dependent upon his income from employment with the respondents. The claimant was, at the

date of the Final Hearing, in receipt of a carers' allowance for his younger son.

(2) His employment with the respondents started on 23 May 1988, and ended on 19 December 2019, when he was summarily dismissed for an act of gross misconduct. He had had 31 years' service with the respondents, and his disciplinary record was clear of default, prior to his summary dismissal.

(3) A copy of the claimant's contract of employment with the respondents was produced to the Tribunal at pages 37A and 37B of the Joint Bundle. It comprised a letter of 22 May 1995 to the claimant, confirming his conditions of employment with effect from 1 June 1995, and his acceptance signed on 29 May 1995. Should the claimant decide to leave, he was required to give 1 months' notice and, where the company gave him notice, it was provided that he would receive a minimum of 1 months' notice.

(4) Despite a change in his contractual hours and working pattern thereafter, the respondents did not issue the claimant with any subsequent written particulars of employment, nor any written statement of changes in his employment particulars, and none were produced to this Tribunal by either party.

(5) The statutory rights of employer and employee to minimum notice, as per **Section 86 of the Employment Rights Act 1996**, were not affected. As such, as at the effective date of termination of employment with the respondents, on 19 December 2019, the claimant had a statutory right to a minimum period of 12 weeks' notice. By being summarily dismissed by the respondents, on grounds of gross misconduct, the claimant received no payment of notice pay from the respondents.

(6) In his evidence to the Tribunal, the claimant stated that, as at the date of his suspension, on 25 November 2019, he was working Mondays to Fridays, on a 2 shift system with the respondents, which had been

introduced around 2012, where his average working hours were between 38 and 48 hours per week, if he was on a nightshift, and up to 60 hours per week, for a day shift. His normal working hours were allocated fortnightly on a "*People Planner*" put on the respondents' noticeboard.

(7) The respondents are a large distiller, and manufacturer of spirits. They have a number of distilleries throughout the United Kingdom, including the Girvan Distillery in Ayrshire.

(8) The claimant worked, at the Girvan Distillery, on the D-line of the distillery, and his role as a Spirit Supply Operative involved him in disgorging casks. There were about 5 operatives on the D-line shift, plus a co-ordinator and team leader.

(9) It came to the respondents' attention that, on or around 20 November 2019, a pool of urine had been discovered on the floor around the area of a stow of empty casks at the C-line area in the respondents' spirit blend and fill area of its Girvan Distillery.

(10) The respondents provided, for use at this Final Hearing, and produced at pages 37C to 37I of the Bundle, photographs of relevant parts of the Girvan Distillery site, including the C line Cask Storage area, and, at page 38, a photograph of a pool of urine at the cask on the day of the incident, taken by Stuart Maxwell, and at page 40 of the Joint Bundle, the investigation manager, Mr Baird's annotated map of the area.

(11) Also, the respondents provided, at page 51 of the Joint Bundle, the disciplinary manager, Mr Bartlett's map of the area showing the routes taken on the day of the incident, 20 November 2019, by the claimant, shown in blue, and the witness, Gordon McNair, shown in green.

(12) A copy of the urine sample test results from the laboratory (Matrix Diagnostics) were produced at page 52 of the Joint Bundle. The sample, collected on 27 November 2019, was determined, after analysis, to be consistent with urine, due to the presence of Creatinine, however the high

pH of 13.2 suggested that the sample had been contaminated in some way, for example, with bleach.

(13) Further, the respondents also produced, at pages 41 to 50 of the Joint Bundle, a photographic image (taken by Stuart Maxwell) of a deodoriser concentrate product Sta Kill, incorporating a urine stain neutraliser; data sheet from Bio Productions for that product; and photographic images of the respondents' floor cleaning solution, Jangro Professional, a heavy duty cleaner with a pH of 13.1.

(14) Finally, the respondents also provided, and the Tribunal viewed at this Final Hearing, video footage of the area concerned showing the route taken by the claimant, and the most direct route to the claimant's work area at the D line.

(15) It was alleged that the claimant had urinated on a spirit storage cask in the spirit blend and fill area, and, as a result of this allegation, and a formal witness statement taken from one of the claimant's colleagues, Gordon McNair, the claimant was suspended with pay with immediate effect on 25 November 2019, by Stuart Maxwell, Blend & Fill Team Leader, when he attended on site for a night shift. His previous shift had finished on the afternoon of 20 November 2019.

(16) A copy of Mr McNair's witness statement, and hand drawn map of the area concerned, was produced to the Tribunal at pages 53 and 54 of the Joint Bundle. The claimant was suspended, on full-pay, by Mr Maxwell, in the presence of Karen Coyle, HR Manager, on 25 November 2019. A copy of the hand-delivered letter of suspension from Mr Maxwell to the claimant was produced to the Tribunal at pages 55 and 56 of the Joint Bundle.

(17) The claimant's suspension did not constitute disciplinary action, and the letter of suspension given to him stated that it did not imply any assumption that he was guilty of any misconduct. It stated that it was a non-disciplinary sanction to facilitate an investigation into the allegation that he had

urinated on a spirit storage cask in the spirit blend and fill area. No date of the alleged urination was provided.

(18) The claimant was also given formal notice that an investigation would be carried out into the allegation, as per the respondents' Disciplinary Policy, a copy of which was enclosed for his use. A copy of the respondents' Disciplinary Policy was produced to the Tribunal at pages 33 to 37 of the Joint Bundle.

(19) In terms of that Disciplinary Policy, "***gross misconduct***" is defined as follows: - "*Gross misconduct is a disciplinary offence of such a serious and fundamental nature that it breaches the contractual relationship between the employee and the Company. In the event that an employee commits an act of gross misconduct, the Company will be entitled to terminate summarily the employee's contract of employment without notice or pay in lieu of notice."*

(20) Further, the Disciplinary Policy further states: - "*Matters that the Company will be entitled to view as amounting to gross misconduct include (but are not limited to):*

- *Stealing from the Company…*
- *Other offences of dishonesty…*
- *Falsification of records…*
- *Fighting with or physical assault on employees or the public*
- *Deliberate or serious damage to or misuse of the Company's property*
- *Being under the influence of alcohol…*
- *Material breach of the Company's rules, including, but not restricted to, health and safety rules ….*
- *Smoking in non-designated areas of the Company's premises*
- *Gross negligence*
- *Conviction of a criminal offence that is relevant to the employee's employment*

- *Conduct that brings the Company's name into disrepute*
- *Discrimination or harassment of a fellow worker…*
- *Other acts of misconduct which may come within the general definition of gross misconduct"*

(21) Subsequently, the respondents carried out an investigation into the matter, and invited the claimant and certain other employees to attend investigation meetings on 3 December 2019, by letters issued by Scott Baird, Shift Operations Leader, dated 25 November 2019.

(22) A copy of the respondents' invite letter to the claimant was produced to the Tribunal at page 60 of the Joint Bundle. The invite letters hand-delivered to the other employees, copies produced to the Tribunal at pages 57 to 59 of the Joint Bundle, simply stated that Mr Baird was conducting an investigation into unspecified conduct by the claimant.

(23) The claimant attended that investigation meeting with Mr Baird on 3 December 2019 accompanied by a companion, Bobby McDowell, who was the GMB trade union site representative, and, at the investigation meeting, where Mr Baird was accompanied by Rebecca Riches, HR Adviser, the claimant was given the opportunity to respond to the allegation that had been made against him. As with the letter of suspension, the allegation was not dated. The claimant denied the allegation against him.

(24) Mr Baird, as the Investigation Manager, asked the claimant why he had been in the C area of the Girvan Distillery, which is not near the area D where the claimant worked. The claimant stated he had been returning from his lunch break and he took a different route back to his line area. He said that he had chosen to turn left towards the annexe rather than turn right to return to his work area as he felt like a change of scenery.

(25) When asked why he had been seen between two pallets, the claimant stated that he had been distracted by a small bird that was between the two pallets and that he went between the pallets to check if there had been

any contamination. The claimant stated that the bird was not there when he went between the pallets.

(26) The claimant acknowledged that he had been seen by a colleague as he was leaving this area to return to his work area. The Investigation Manager informed the claimant that tests on the sample of the liquid found at the area where the incident was alleged to have happened had confirmed that the liquid was urine.

(27) The claimant was advised that further investigation would be carried out, and a number of witnesses would be interviewed. The respondents' notes of that investigation interview with the claimant, on 3 December 2019, as taken by Ms Riches, were produced to the Tribunal at pages 61 to 63 of the Joint Bundle.

(28) Mr Baird also interviewed other employees on that date, in particular Gordon McNair (Spirit Supply team member), Stuart Maxwell (Filling & Blend Team Leader), Fraser Reid (Filling & Blend co-ordinator), Peter McGrouther (Spirit Supply team member), Jordon Robb (Spirit Supply team member), and also a follow up interview with Mr McNair.

(29) The respondents' notes of those investigation interviews with those other employees, on 3 December 2019, as taken by Ms Riches, were produced to the Tribunal at pages 65 to 78 of the Joint Bundle.

(30) The claimant thereafter attended a second investigation meeting, on 6 December 2019, via Skype, accompanied by Mr McDowell as his companion. The respondents' notes of that further investigation interview with the claimant, on 6 December 2019, as taken by Ms Riches, were produced to the Tribunal at pages 85 to 87 of the Joint Bundle.

(31) The claimant was advised that as part of the investigation a urine deodoriser had been found in the tamber unit at the claimant's workstation. When asked if he had been aware of this item, the claimant stated that he thought it was a cleaning spray. Mr Baird, as the Investigation Manager, noted that the container was clearly marked as being urine deodoriser.

(32) The investigation meeting with the claimant was adjourned, and he was advised that the investigation would be concluded as soon as possible. As part of the investigation, the Investigation Manager spoke with seven witnesses, and the Investigation Manager also gathered physical evidence comprising of the urine sample, urine deodoriser, photos of the casks shown the alleged urine contamination, and an independent laboratory analysis of the urine sample.

(33) The Investigation Manager concluded that there was reason to believe that the claimant had urinated in the area as alleged, and the Investigation Manager recommended that disciplinary proceedings be initiated against the claimant.

(34) On 7 December 2019, the "***Scottish Sun***" published an article entitled:- "***FANCY A WEE DRAM? Scots Distillery Worker suspended amid claims mystery piddler weed next to whisky barrels".*** The text of that article was as follows:

"A DISTILLERY worker has been suspended amid claims a mystery piddler urinated next to whisky barrels.

The man, 49 was put on gardening leave as bosses at drinks firm William Grant & Sons probed a puddle spotted in one of their warehouses.

Insiders at the plant in Girvan, Ayrshire, told the Scottish Sun on Sunday that samples of the wee were collected and sent to a laboratory for tests.

And it emerged that a barrel feared to have been splashed with pee had been destroyed.

But senior sources rejected allegations that the revolting practice had been "going on for a while".

They insisted their inquiries found the rogue piddle was a "one-off".

The employee at the centre of the claims, who we have chosen not to name, has worked for the company for 31 years and denies all responsibility for the incident.

But a source said "It's shocking. One of the workers was suspended for allegedly urinating in a storage area for barrels.

"I'm not aware of any police involvement but a major investigation is under way now to find out what's been going on".

It's believed the company's probe found the contaminated barrel was stored far away from any booze.

And the spot where the discovery was made was cleared up immediately.

The company have declined to comment.

But an insider said; "The barrels in that area of the distillery were all empty.

"There may have been a little wee found on one of them but that has since been destroyed."

The suspended worker said he didn't want to talk about the claim when approached at his home.

He is receiving support from distillery staff while investigations continue.

William Grant & Sons bottles its own Grant's whisky plus top brands such as The Balvenie, Tullamore Dew, Glenfiddich and Drambuie.

A spokesman for South Ayrshire Council said: "We are satisfied the company is dealing with the issue."

(35) While the Press article provided potential for reputational damage to the respondents, and their witnesses spoke of the importance of product integrity, and health and safety on site, the site being a facility concerned with the production of drink for human consumption, neither party provided

any evidence to the Tribunal of actual reputational damage to the respondents, occasioned as a result of the incident on 20 November 2019, and / or its reporting in the Press.

(36) On 9 December 2019, Mr Baird had an investigation interview with Ross Hyslop, another Spirit Supply team member. A copy of the respondents' notes of that investigation interview, taken by Ms Riches, was produced to the Tribunal at pages 88 to 90 of the Joint Bundle.

(37) Mr Baird, as the Investigation Manager, complied an investigation report dated 9 December 2019, a copy of which was produced to the Tribunal at pages 91 to 100 of the Joint Bundle. He recommended that formal action be considered against Mr Wilson , the claimant, though the application of the respondents' Disciplinary Policy.

(38) Following the investigation report, the respondents invited the claimant to attend a formal disciplinary hearing on 17 December 2019. A copy of Stuart Maxwell's letter of invite to the claimant, dated 9 December 2019, was produced to the Tribunal at page 101 of the Joint Bundle. The claimant was provided with a copy of Mr Baird's investigation report.

(39) The claimant was informed in writing of the allegation which he would be asked to respond to, namely that he had urinated on a spirit storage cask in the Girvan Distillery blend and fill area on 20 November 2019, and that acts of this nature are classed by the respondents as gross misconduct and, if proven, could lead to his summary dismissal. Further, the respondents advised the claimant that he had a right to be accompanied at this disciplinary hearing.

(40) The claimant's disciplinary hearing took place on 17 December 2019, before Brian Bartlett, the respondents' Liquid Supply Area Leader, when the claimant attended, again accompanied by Mr McDowell as his companion.

(41) A copy of the respondents' minutes of the disciplinary hearing held on 17 December 2019, as taken by Liam MacNamee, HR Business Partner, was produced to the Tribunal at pages 102 to 114 of the Joint Bundle.

(42) The respondent's Disciplinary Manager, Mr Bartlett, put the allegation to the claimant, and the circumstances of the case were discussed at the disciplinary hearing. The claimant was given a full opportunity to put forward his version of events, and he was reminded that no decision would be made until conclusion of the disciplinary hearing. The disciplinary hearing was adjourned to allow Mr Bartlett, as the Disciplinary Manager, to consider the facts and circumstances of the case.

(43) Thereafter, the claimant was invited to attend a disciplinary outcome meeting on 19 December 2019. He attended that meeting, accompanied by Mr McDowell as his companion and, at the outset of this meeting, the claimant raised a further point, in that he felt that the minutes of the disciplinary hearing on 17 December 2019 had not captured all of his comments and that points he had raised had not been taken into consideration. A copy of an email chain between the claimant and Mr MacNamee on 18 and 19 December 2019 was produced to the Tribunal at pages 115 to 117 of the Joint Bundle.

(44) At the disciplinary outcome meeting with Mr Bartlett, on 19 December 2019, the claimant was advised that all of the points he had raised at the disciplinary hearing were accurately captured in the minutes, and that all of those points had been taken into consideration. The claimant asked a question about the presence of bleach and a high "PH" showing in the test results of the urine sample, and he queried why this would be the case if the floor had been previously dry.

(45) Mr Bartlett, as the Disciplinary Manager, explained that it had been established that where a dry floor had previously been washed with cleaning solution, then became wet, the PH in the liquid rises due to the presence of the cleaning solution, and this matched the findings of the independent testing laboratory.

(46) The Disciplinary Manager adjourned the disciplinary outcome meeting to consider the additional points raised by the claimant, and when the meeting was then reconvened, the claimant was informed that, given the respondents believed him to be guilty of gross misconduct, it had been decided to summarily dismiss the claimant from the respondents' employment.

(47) A copy of the respondents' minutes of that disciplinary outcome meeting on 19 December 2019, discussing the minutes from the hearing on 17 December 2019, taken by Mr MacNamee, and signed off by the claimant, Mr McDowell, and Mr Bartlett, was produced to the Tribunal at page 118 of the Joint Bundle.

(48) There was also produced to the Tribunal, at page 119 of the Joint Bundle, a separate minute of the disciplinary outcome meeting of 19 December 2019, taken by the respondents, and recording what Mr Bartlett said to the claimant, and then provided him with his letter of dismissal.

(49) Specifically, Mr Bartlett stated : " ***I can see no reason to disagree with the investigation finding that you urinated on a spirit storage cask in the Girvan Distillery spirit blend and fill are on 20th November 2019. The full detail in relation to the decision is set out in this letter…. The Company finds your conduct to be entirely unacceptable and cannot be tolerated under any circumstances. It is the decision of the Company that your conduct amounts to gross misconduct and, as such, I have been left with no option but to dismiss you from your employment with the Company with immediate effect. Your final pay and any outstanding monies due to you will be paid in line with normal payroll procedures. Your P45 will be forwarded to you once final payroll has been completed."***

(50) Mr Bartlett's decision to summarily dismiss the claimant for gross misconduct, and the claimant's right of appeal against that decision, were confirmed to the claimant in writing by letter dated 19 December 2019,

which set out detailed reasoning for the Disciplinary Manager's decision to summarily dismiss the claimant.

(51) A copy of Mr Bartlett's disciplinary outcome letter to the claimant, dated 19 December 2019, was produced to the Tribunal at pages 120 to 124 of the Joint Bundle.

(52) The claimant was informed that the Disciplinary Manager had given careful consideration to all of the points raised by the claimant, but he had found that the explanation provided by the claimant as to his movements around the time of the incident was evasive and inconsistent. The claimant had initially given a very brief account of his movements and, when he became aware that a witness had seen him coming out from between the two pallets, he then gave a detailed account of his movements.

(53) The Disciplinary Manager found the claimant's explanation of having been checking on a distressed bird between the pallets to not be credible, and he had not raised any concern around health and safety as a result of a bird having been near the casks.

(54) Further, the Disciplinary Manager was satisfied that the analysis of the urine showed that it was human urine, and the witness evidence placed the claimant at the area where the urine was found. The casks in that area are rotated on average four times a day, and team members would have been in the area twice before on that day and that no urine was reported until after the claimant was seen leaving the area.

(55) On the basis of the evidence available, the Disciplinary Manager found that the claimant had urinated in the cask area as alleged, and that this amounted to gross misconduct which warranted his summary dismissal from the respondents' employment.

(56) Having received the respondents' disciplinary outcome meeting letter of confirmation, by letter dated 19 December 2019, received on 21 December 2019, the claimant appealed, by his letter to the respondents' Stuart Watts, Site Leader, Girvan Distillery, dated 23 December 2019, wishing to appeal

"***the act of misconduct in question and against the level of disciplinary sanction imposed".***

(57) The claimant stated that he was appealing on the grounds that he felt there was "***insufficient evidence to sustain a belief, and that the decision to dismiss is too harsh given my length of service to the company".*** A copy of his letter of appeal was produced to the Tribunal at page 125 of the Joint Bundle.

(58) Having received the claimant's appeal against dismissal, the respondents contacted him by email, on 24 December 2019, from Karen Coyle, HR Manager, to acknowledge his appeal, and advised him that, due to the Christmas and New Year holidays, the appeal would be held week commencing 6 January 2020. A copy of Ms Coyle's email to the claimant was produced to the Tribunal at page 126 of the Joint Bundle.

(59) Thereafter, the respondents' Stuart Watts, Girvan Distillery Site Leader, wrote to the claimant, by letter dated 6 January 2020, inviting him to attend an appeal hearing on 8 January 2020. A copy of that letter of invitation was produced to the Tribunal at page 127 of the Joint Bundle.

(60) The letter of invitation, which stated that the appeal hearing would be held by Mr Watts, with Judith Sommerville, HR Director in attendance, in accordance with the company's Disciplinary Policy (a copy of which was enclosed) confirmed that the claimant had the right to be accompanied at the appeal hearing, where the appeal hearing was being convened to hear and consider whatever points the claimant wished to put forward with respect to his appeal.

(61) The appeal hearing invite letter specifically informed the claimant that, if there were any reasons for his appeal, other than those he had already provided in his letter of 23 December 2019, which he wished to make, then he should provide written representations prior to the appeal hearing, and he was informed that the appeal hearing had the power to overturn the

decisions made, impose different disciplinary sanctions, or uphold the original decisions, and that Mr Watts' decision would be final.

(62) The claimant did not submit any written representations, and he duly attended, on 8 January 2020, accompanied by Billy McDowell as his companion, for the appeal hearing with Mr Watts. There was no complaint by the claimant, or on his behalf, that he had been provided with insufficient time to prepare for his appeal hearing, and no request was made for a postponement to a later date.

(63) The claimant's grounds for appeal, and the circumstances of the case were discussed with Mr Watts, as the respondents' Appeals Manager, and the claimant was given an opportunity to put forward each of his grounds of appeal. Thereafter, Mr Watts adjourned the appeal hearing in order to consider his outcome and decision.

(64) The Tribunal was provided with a copy of the respondents' minutes of the appeal hearing held on 8 January 2020, produced at pages 129 to 135 of the Joint Bundle, as taken by Ms Sommerville, the HR Director.

(65) The appeal outcome was confirmed to the claimant in writing by letter from Mr Watts, dated 14 January 2020, where the respondents provided detailed responses to each of the claimant's points of appeal. A copy of Mr Watts' appeal outcome letter to the claimant was produced to the Tribunal at pages 136 to 138 of the Joint Bundle.

(66) Mr Watts, as the Appeals Manager, advised that, having carefully considered the claimant's versions of events, he did not find the claimant's explanation for having been between the stow of casks on 20 November 2019 to be credible. The stow area in question regularly changes as pallets are moved and as a result the space between the stows changes and can be impassable.

(67) Mr Watts did not accept that individuals would walk between the stows as opposed to the passageway at the side, and he noted that, from a health

and safety perspective, individuals should not be walking between the stows unless they were working in that area, which the claimant was not.

(68) At the appeal hearing, the claimant had stated that he had a keen interest in ornithology and that this justified him having been between the two casks as he claimed to have seen a robin in the area. Mr Watts found that the claimant had not made reference to his interest in ornithology at any point during the investigation or disciplinary process. Had the claimant felt strongly about his interest in ornithology, then Mr Watts believed he would have raised this previously, and he found that the claimant's attempt to do so at the appeal hearing severely undermined the claimant's credibility.

(69) The claimant had alleged that he had been found guilty of the allegation as a result of people's perception of the incident and due to colleagues within the Girvan Distillery discussing the incident. Mr Watts acknowledged that it was unfortunate that there had been speculation from others on the incident, however he was satisfied that the investigation and disciplinary process had been thorough, objective, and impartial.

(70) Mr Watts, as the Appeals Manager, who had personal knowledge of the claimant as a long-standing employee of the company, took into consideration the claimant's length of service with the respondents but he found that, given the serious nature of the misconduct, the claimant's length of service did not mitigate the misconduct so far as to warrant action short of dismissal.

(71) Further, Mr Watts confirmed that the sanction of dismissal was appropriate in the circumstances, and that the claimant's dismissal would be upheld, and the claimant was informed that he had no further right of internal appeal, and that he had exhausted the respondents' internal process.

(72) The claimant notified ACAS of his claim against the respondents on 18 March 2020, and they issued the early conciliation certificate to the claimant on 18 April 2020, following which the claimant presented his ET1 claim form to the Tribunal on 7 May 2020.

(73) A copy of the claimant's Schedule of Loss, seeking a grand total of **£69,728.49** was produced to the Tribunal as part of the Joint Bundle, at pages 155 to 157.

(74) In his ET1 claim form, the claimant had stated that he was paid £2,466 per month, gross pay before tax, £2,662 per month, normal net take home pay. The respondent's ET3 response, defending the claim, and setting forth detailed grounds of resistance, neither confirmed, nor denied, the claimant's stated earnings from employment with the respondents.

(75) However, at this Final Hearing, the respondents Counsel indicated that the claimant's gross weekly pay of **£938.73**, as stated in the claimant's Schedule of Loss, was agreed.

(76) The Schedule of Loss, however, stated no figure for the claimant's net weekly pay with the respondents, and the Schedule of Loss wrongly assessed the claimant's compensatory award losses on the basis of his gross, rather than, net earnings with the respondents.

(77) In these circumstances, the Tribunal is unable to make a finding in fact on the matter of the claimant's net weekly pay when employed by the respondents.

(78) A copy of the claimant's payslips from the respondents, between September 2019 and February 2020, were produced to the Tribunal at pages 139 to 144 of the Joint Bundle. The latter payslips, post December 2019, were in respect of payment of holiday pay accrued, but untaken, at the effective date of dismissal.

(79) The claimant's Schedule of Loss, as amended at 21 January 2021, was intimated to the Tribunal after the close of the Final Hearing, as part of the further written representations from the claimant's solicitor. It sought a grand total of **£68,091.49**, on the following basis:-

Claimant's Schedule of Loss as amended at 21 January 2021

1. Details

Gross weekly basic pay	£938.73
Average taken from Sept to November 2019 pay slips):	= (12,203.48/3 =(4067.83 x12) / 52
Contractual notice period:	12 weeks (statutory minimum required)
Date of birth of claimant:	16/09/1970
Period of service:	23/05/1988 to 21/12/2019
Complete continuous service:	31 years 7 months
Age at effective date of termination (EDT):	49 years 3 months

2. Basic award (*max 20 yrs)

1.5 x 9yrs x £525 (statutory cap on weeks' pay)

= £7087.50

1.0 x *11yrs x £525

= £5,775 **Total basic award = £12,862.50**

3. Compensatory award
Loss to Tribunal

3.1. Loss of basic salary to date of tribunal (52 weeks x £938.73):	£48,813.96
3.2. Loss of statutory rights:	£500
3.3. Loss of pension contributions by Respondent	£6,962
January to December 2020	£716.49
3.4. Loss of Private Healthcare Package – equivalent cost to Claimant to obtain same/similar policy (cost	

to Respondent for 2020 £338)

3.4. Expenses incurred to date of tribunal: £ none claimed

Past losses £56,992.45

Less

Gross Income received to date of tribunal (ASDA WAGE) IN PERIOD March 2020 to December 2020

= £12,173.80

And

Pension Contributions from new employer in same period = £635.46

Total £12,809.26

(NB previously missing Oct (£1723.98) and December (£1037.92) wages and pensions contributions (£97.06 and £156.90) now added to this sum compared to previous SofL)

Total past loss £44,183.19

Total loss and adjustments

3.5. Increase in compensatory award due to Respondent's unreasonable failure to comply with the Acas Code [25% added to Compensatory award £44,183.19]:

Total adjustment for any uplift

+ £11,045.80

GRAND TOTAL OF COMPENSATORY AWARDS
£ 68,091.49

State Benefits – subject to recoupment from Respondent per

Employment Protection (Recoupment of [Benefits]) Regulations 1996 > Part III Recoupment of Benefit

The Claimant has received **£ 3,206** by way of Universal Credit Payments between January and December 2020 – see Universal Credit print outs

It is submitted the Carers Allowance to which the Claimant continues to receive (and has received since EDT) does not fall to be relevant for recoupment purposes in terms of the legislation and is a benefit to which he was entitled irrespective of loss of employment from the Respondent's employment.

(80) As part of the Joint Bundle**,** copy documents produced to the Tribunal at pages 145 to 228, the claimant submitted evidence of his attempts to mitigate his losses post termination of employment with the respondents on 19 December 2019.

(81) The respondents did not dispute, and the Tribunal finds, that the claimant made reasonable attempts to mitigate his losses, following termination of his employment with the respondents. In particular, he obtained alternative employment with Asda in the period 28 March to 16 December 2020.

(82) As per his evidence to the Tribunal, the claimant advised further that, as of 6 January 2021, he had started in new , full-time employment with a new employer, Solway Precast Concrete, working 47.5 hours per week, @ £8.82 per hour, but, as yet, he had no supporting documentation to produce and add to the Joint Bundle.

Tribunal's assessment of the evidence heard at the Final Hearing

25. In considering the evidence led before the Tribunal, I have had to carefully assess the whole evidence heard from the various witnesses led before me, and to consider the many documents produced to the Tribunal in the Joint Bundle lodged and used at this Final Hearing, so far as spoken to in evidence, which evidence and my assessment I now set out in the following:-

(1) Mr Scott Baird : Respondents' Investigation Manager.

(a) Mr Baird was the first witness for the respondents to be heard by the Tribunal on the morning of Monday, 11 January 2021. Aged 28, and a graduate, chemical engineer, Mr Baird is the respondents' Shift Operations Leader, with 5 years' service with the respondents.

(b) In giving his evidence to the Tribunal, Mr Baird did so under reference to various documents lodged with the Tribunal, and in the Joint Bundle used at the Final Hearing, identifying those which he had access at the time of his involvement in the claimant's case.

(c) He explained the layout of the Girvan Distillery site, and the various processes undertaken there, including casking and gorging, and the C and D line operations. Further, he explained his role, as Investigation Manager, and his knowledge of the circumstances leading to the claimant's summary dismissal from employment with the respondents.

(d) He did so clearly and confidently, under reference to the relevant productions contained with the Joint Bundle used at the Final Hearing, and he was fairly clear and articulate in answering questions put to him in examination-in-chief by Mr Hay, counsel for the respondents.

(e) Further, Mr Baird was subject to cross-examination by Ms Irvine, solicitor for the claimant, but his evidence in chief was not greatly undermined, as it was generally in accord with the contemporary records taken at the time. Mr Baird was prepared to make appropriate concessions to her when links in the chain of evidence were not documented, and it became clear that, if he could have done things again, then he might have done some things differently, given this case was his first involvement in a disciplinary process as investigator.

(f) Overall, Mr Baird's evidence relating to his role as Investigation Manager, into the circumstances arising from the allegation against the claimant, and events leading to his summary dismissal by the respondents, satisfied me that Mr Baird was giving the Tribunal a full recollection of events, as best as he could remember them.

(g) He came across to the Tribunal as a credible and reliable witness. While, in his investigation report, he wrote of an "***investigation panel***", where he was described as "***lead investigator",*** and Rebecca Riches from HR was described as "***supporting investigation / scribe",*** I was satisfied from the evidence heard from Mr Bair, as also the other 2 witnesses for the respondents, that Mr Baird was the sole investigator, and Ms Riches was his note-taker.

(h) Likewise, the fact that, in his investigation report, Mr Baird spoke of the allegation against the claimant being "***upheld***", and he stated that he did not believe Mr Wilson's version of events to be credible, is his opinion, at that stage, based on his investigation, and not evidence that he had pre-judged matters.

(i) Mr Baird recommended formal action be considered through the application of the Disciplinary Policy. As per his role, he investigated and reported, and he did not make any recommendation, or decision, as to the type or severity of any disciplinary action that should be taken against the claimant. That role fell to Mr Bartlett as the Disciplinary Manager, and there was a clear distinction in their respective roles and responsibilities.

(2) <u>Mr Brian Bartlett: -Respondents' Disciplinary Manager</u>

(a) On the afternoon of Monday, 11 January 2021, and continued over to the next day, the Tribunal then heard evidence from Mr Bartlett, the Disciplinary Manager, in the claimant's case. Aged

34, and employed 11 years with the respondents, he is the Liquid Supply Area Leader. He spoke to his involvement in the claimant's case, as Disciplinary Manager, including the fact that he had chaired the disciplinary hearing held with the claimant, which had led to the claimant's summary dismissal from the respondents' employment.

(b) In giving his evidence to the Tribunal, Mr Bartlett did so under reference to the various documents lodged with the Tribunal, and the Joint Bundle used at the Final Hearing, identifying those which related to his involvement in the claimant's case, and in particular, his involvement in making the decision to summarily dismiss the claimant from the respondent's employment. Further, Mr Bartlett explained his reasons for summarily dismissing the claimant from the respondents' employment.

(c) Overall, Mr Bartlett gave his evidence clearly and confidently, under reference to the relevant productions contained within the Joint Bundle used at the Final Hearing, and he was fairly clear and articulate in answering questions put to him in examination-in-chief by Mr Hay, counsel for the respondents.

(d) He was cross-examined by the claimant's solicitor, Ms Irvine, but that did nothing to undermine this witness's evidence-in-chief. He was thoughtful in his answers, and he made concessions where appropriate. I found him to be a credible and reliable witness. His evidence was generally in accord with the contemporary records taken at the time.

(e) I was satisfied that he came to his own, personal decision to summarily dismiss the claimant, because he considered that the appropriate disciplinary sanction for what he regarded as gross misconduct by the claimant.

(3) <u>Mr Stuart Watts:- Respondents' Appeals Manager</u>

(a) The third, and final witness, led on behalf of the respondents was Mr Watts, whose evidence was heard on Tuesday, 12 January 2021. Aged 43, with over 17 years' service with the respondents, and now the respondents' Distillery Development Director, Mr Watts spoke to his involvement in the claimant's case, when as the Girvan Site Leader, he was the Appeals Manager.

(b) He spoke in evidence to the key fact that he had upheld Mr Bartlett's decision to summarily dismiss the claimant from the respondents' employment. Although never the claimant's direct line manager, he stated that he knew the claimant as a team member, and he had a general awareness of the claimant's contribution to the respondents, and that he was a long-standing employee of the respondents.

(c) In giving his evidence to the Tribunal, Mr Watts did so under reference to various documents contained within the Joint Bundle used at the Final Hearing, identifying those which he had access at the time of making his decision to reject the claimant's internal appeal against dismissal.

(d) Mr Watts generally explained his role, as Appeals Manager, and his reasons for upholding Mr Bartlett's decision to summarily dismiss the claimant from the respondents' employment. His evidence was generally in accord with the contemporary records taken at the time.

(e) In giving his evidence, Mr Watts was clear that he knew the appeal was a serious matter, and that he was inclined to give the claimant as much leeway as possible, and latitude to put his appeal in his own words, and that he gave the claimant the floor to raise whatever concerns he had to flesh out his appeal. He described his approach as a review, and not re-running the disciplinary hearing, but giving the claimant the opportunity to

say things from his perspective, as he accepted there was ***"no smoking gun"*** pointing at the claimant.

(f) While aware of the Press article, Mr Watts stated that it was not part of his thinking at the appeal, and he deemed it "***unfortunate noise around the periphery***", with potential reputational risk to the respondents' business.

(g) Overall, Mr Watts was a witness who satisfied me that he was recounting events as best he could recall, and he too came across the Tribunal as a credible and reliable witness speaking clearly, and confidently, to his role as the Appeals Manager. I was satisfied that he approached his role fairly and impartially, and as such, I reject the suggestion that he was merely a "***rubber-stamp***" for Mr Bartlett's decision.

(4) <u>Mr Kerry Wilson: Claimant</u>

(a) The final witness heard by the Tribunal was the claimant himself, aged 50, and with 31 years' previous service with the respondents, and his evidence was taken on Wednesday, 13 January 2021. He was examined-in-chief by his solicitor, Ms Irvine, and thereafter cross-examined by Mr Hay, counsel for the respondents.

(b) In giving his evidence to the Tribunal, the claimant did so under reference to various documents contained within the Joint Bundle used at the Final Hearing, identifying those to which he had access at the time, and in particular the statements that he had made at the time, of the investigatory interviews, the disciplinary hearing, and the appeal hearing, and his evidence in that regard was generally in accord with the contemporary records taken at the time.

(c) Overall, the claimant was a witness who satisfied me that he was recounting events as best he could recall, and he too

came across to the Tribunal as a credible witness, who was still clearly aggrieved that he had been summarily dismissed from the respondents' employment, in circumstances that he clearly still regards as being unfair. His evidence was however, at points, unreliable, as the claimant accepted that, at times, he could not recall what he had seen, and when, from the respondents.

(d) He spoke of having been made a "***scapegoat"***, and being made "***the culprit"***, and of the respondents' "***going through the tick box of Grants' law, and get it done as quick as they can."*** While that was the claimant's evidence, the chronology of events speaks for itself, and there were intervals between each of the investigatory, disciplinary and appeal stages. There was, in my view, no substance to his allegation that Mr Watts had, in effect, "***rubber-stamped***" Mr Bartlett's dismissal. I am satisfied that Mr Watts considered the appeal carefully, on its own merits.

(e) While the claimant spoke of his appeal letter having been written, not in his own wording, but after legal advice from a lawyer, but not his current solicitors, the claimant was not legally represented before the respondents' internal processes, but he was accompanied by Mr McDowall from the GMB trade union.

(f) While he described Mr McDowall, as "***just a guide"***, the claimant's evidence before the Tribunal, in evidence in chief, was that he probably went into the appeal meeting "***unprepared"***, as he had been dismissed and he was "***running out of ways of answering better than I gave at the previous meeting with Mr Bartlett***."

(g) As he explained it to the Tribunal, in his evidence in chief, the claimant stated that, at his appeal before Mr Watts, "***I was***

looking for some leeway, and recognition that they'd been too harsh." In cross-examination, the claimant stated that he was "***unprepared, no notes, and just hoping to get my job back*****."** Further, he added later, while he understood the appeal was his opportunity to raise things, he stated that he just couldn't get out what he wanted, even after an adjournment of the appeal meeting at his request.

(h) Further, the claimant spoke with obvious pride of his long service with the respondent company, and his evidence to this Tribunal did not appear to be motivated in any way by any malice, or ill-will towards the respondents, or indeed the managers who were giving evidence on its behalf at this Final Hearing.

(i) He spoke, in his evidence in chief, of having no grudge against the company, or anybody in it, albeit he had described Mr Bartlett, the Dismissing Manager, as "***judge, jury and executioner",*** and the claimant also stated how he had often done a volunteering, ambassadorial role for the company, from whom he had received 20- and 30-years' long service awards.

(j) It was of note that, in answer to Mr Hay, counsel for the respondents, in cross-examination, the claimant, while denying that he had urinated as alleged, and accepting that there were toilets in the building that an employee could use, accepted that it was "***entirely unacceptable for employees to urinate on casks".***

(k) The one area of the claimant's evidence that I did not accept was his insistence, in cross-examination, that there was regular winged and legged animal ingress into the respondents' site at Girvan Distillery, by a variety of species, as that was at odds with the evidence from the respondents'

witnesses, which I accepted as being a more accurate description of matters. Otherwise the claimant's other evidence was fairly straightforward, and matter of fact, whereas this part of his testimony to the Tribunal simply did not have the ring of truth to it, and so I rejected it for that reason.

Parties' closing submissions

26. I received written skeleton arguments from both parties' representatives on the final day of the Final Hearing, on Friday, 15 January 2021. Parties' representatives also addressed me orally, on their written skeletons, on that date, when I thanked both Mr Hay, counsel for the respondents, and Ms Irvine, solicitor for the claimant, for their respective written skeleton arguments, which I found most helpful, as also , as I record here, I thank them too for their further written representations intimated on 22 January 2021.

27. As they are all held on the Tribunal's casefile, it is not necessary to repeat their full terms *verbatim* here, but, in these Reasons, I do, however, as and when required, detail from their skeleton arguments, and further written representations, the main points which each party's representative made to the Tribunal.

28. Mr Hay's nine-page, typewritten skeleton argument for the respondents, ran to 17 paragraphs, and a list of authorities, reading as follows:-

Fairness:-

(1) Burchell v BHS Limited [1980] ICR 303

(2) Hussain v Elonex Plc [1999] IRLR 420

(3) Sainsbury v Hitt [2003] ICR 111

(4) Shrestha v Genesis Housing Association Ltd [2015] IRLR 399

Appeal/Procedure:-

(1) Post Office v Marney [1990] IRLR 170

(2) Taylor v OCS Group [2006] ICR 1602

(3) Asda Stores Ltd v Raymond [2017] UKEAT 0268/17

29. For the claimant, Ms Irvine's written skeleton argument ran to nine typewritten pages also, with 21 numbered paragraphs, and her list of authorities was follows:-

Unfair Dismissal:

(1) Sneddon v Carr – Gomm Scotland Ltd [2012] IRLR 820

(2) W. Davis & Sons Ltd v Atkins [1977] IRLR 314 HL

(3) Trusthouse Forte Ltd v Adonis [1984] IRLR 382

(4) Strouthos v London Underground [2004] EWCA Civ 402

(5) London Ambulance v Small [2009] EWCA Civ 220

Wrongful Dismissal:

British Heart Foundation v Roy [2015] UKEAT/0049/15

30. Having heard oral submissions from the respondents' counsel, Mr Hay, and the claimant's solicitor, Ms Irvine, where they each spoke to their own written skeletons, and also commented upon the other's skeleton, I made an order for Ms Irvine to provide an amended, updated Schedule of Loss for the claimant, to take account of my observations on the document intimated by her on 15 January 2021. She did do, on 21 January 2021, and its terms are incorporated into the Tribunal's findings in fact earlier in these Reasons.

31. I also invited them both to make any further written representations they might wish to make, addressing the matters raised in clarification by me, at the Hearing on submissions on Friday afternoon, 15 January 2012, to supplement those intimated in their written skeletons, received on 14 January 2021, to address the cases cited by me in discussion with them, being:-

(1) Allma Construction Ltd v Laing [2012] UKEAT 0041/11

(2) Strathclyde Joint Police Board v Cusick [2011] UKEAT/0060/10

(3) Wincanton Plc v Atkinson & Another [2011] UKEAT/0040/11

Reserved Judgment

32. When proceedings concluded, on the afternoon of Friday, 15 January 2021, I advised both parties' representatives that Judgment was being reserved, and it would be issued in writing, with Reasons, in due course, after private deliberation by the Tribunal, following receipt of parties' further written representations. Those representations were received by the Tribunal, on 22 January 2021, and referred to the Judge on 28 January 2021.

33. For the reasons already given at paragraphs 3 and 4 of these Reasons, I apologise to both parties for the delay in producing this Judgment and Reasons. This written Judgment, with Reasons, represents the final product from my private deliberations, and reflects my final decision on the case brought before the Tribunal by the claimant, as defended by the respondents.

Issues for the Tribunal

34. This case called before the Tribunal for full disposal, including remedy, if appropriate. The principal issues before the Tribunal were to consider the respondents' liability, if any, for the claimant's complaints of unfair dismissal and wrongful dismissal, and, if the Tribunal found the claimant to have been unfairly and / or wrongfully dismissed by the respondents, then to consider the further issue arising of determining the appropriate remedy.

Relevant Law: Unfair Dismissal

35. The law relating to unfair dismissal is contained in **Section 98 of the Employment Rights Act 1996** ("***ERA***"). It is for the respondents to establish the reason for dismissal as being one which is potentially fair in terms of **Section 98 (1) and (2) of ERA.** A reason for dismissal is a set of facts known to the employer, or it may be of beliefs held by the employer, which causes the employer

to dismiss the employee: **Abernethy v Mott, Hay & Anderson [1974] ICR 323 (CA).** A reason for dismissal is potentially fair if it relates to the conduct of the employee.

36. The leading case law authority relating to conduct as a reason for dismissal is the Employment Appeal Tribunal's judgment in **British Homes Stores v Burchell** [**1978] IRLR 379 / [1980] ICR 303 (EAT)** which states that in order for an employer to rely on misconduct as the reason for dismissal there are three questions that the Tribunal must answer in the affirmative, namely, as at the time of the claimant's dismissal: -

- Did the respondents genuinely believe that the claimant was guilty of the misconduct alleged?
- If so, was that belief based on reasonable grounds?
- At the time it formed that belief, had the respondents carried out as much investigation into the matter as was reasonable in the circumstances?

37. The respondent employer's investigation does not require to be to the standard of an investigation which might be involved if a crime is thought to have been committed. The investigation must be within the band of investigations which would be carried out by a reasonable employer. It must therefore be a reasonable investigation. This approach was confirmed by the Court of Appeal in the well-known case law authority of **Sainsbury Supermarkets Ltd v Hitt [2003] IRLR 23 / [2003] ICR 111 (CA).** The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed.

38. Further, in considering the disciplinary sanction imposed by the respondents, the Tribunal must take care not to substitute its own view of what it would have done if in the shoes of the employer. If dismissal lies within the band of reasonable responses of a reasonable employer, it matters not that the

Tribunal would have taken a different view as to the sanction which would appropriately be imposed in the circumstances of the case.

39. This band of reasonable responses approach, confirmed by the Employment Appeal Tribunal in the well-known case law authority of **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439/[1983] ICR 17 (EAT),** was also confirmed in further case law authority from the Court of Appeal in **Post Office v Foley; HSBC Bank plc (formerly Midland Bank plc) v Madden [2000] IRLR 827/[2000] ICR 1283 (CA).**

40. Guidance as to the interpretation of the relevant statutory provisions on misconduct dismissals has been given to ETs by the EAT, and higher Courts, over many, many decades now, so much so that, as Lord Justice Aikens stated, in **Orr v Milton Keynes Council [2011] EWCA Civ 62 / [2011] ICR 704 / [2011] IRLR 37(CA)**, that the case law on the interpretation and application of **Section 98 of ERA** is "***vast; indeed, it could be said that the section has become encrusted with case law."***

41. Fortuitously, Lord Justice Aikens then helpfully summarised, in 9 points, at **paragraph 78** of the Court of Appeal's Judgment, the relevant principles established by the case law, as follows:-

> ***" For the purposes of the present appeal, I think that the relevant principles established by the cases are as follows: (1) the reason for the dismissal of an employee is a set of facts known to an employer, or it may be a set of beliefs held by him, which causes him to dismiss an employee.(2) An employer cannot rely on facts of which he did not know at the time of the dismissal of an employee to establish that the "real reason" for dismissing the employee was one of those set out in the statute or was of a kind that justified the dismissal of the employee holding the position he did. (3) Once the employer has established before an ET that the "real reason" for dismissing the employee is one within what is now section 98(1)(b), i.e.. that it was a "valid reason", the ET has to decide whether the dismissal was fair or unfair. That requires, first and foremost, the application of the***

statutory test set out in section 98(4)(a). (5) In applying that sub-section, the ET must decide on the reasonableness of the employer's decision to dismiss for the "real reason". That involves a consideration, at least in misconduct cases, of three aspects of the employer's conduct. First, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; secondly, did the employer believe that the employee was guilty of the misconduct complained of and, thirdly, did the employer have reasonable grounds for that belief. If the answer to each of those questions is "yes", the ET must then decide on the reasonableness of the response of the employer. (6) In doing the exercise set out at (5), the ET must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to its own subjective views, whether the employer has acted within a "band or range of reasonable responses" to the particular misconduct found of the particular employee. If it has, then the employer's decision to dismiss will be reasonable. But that is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse. (7) The ET must not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The ET must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which "a reasonable employer might have adopted". (8) A particular application of (6) and (7) is that an ET may not substitute its own evaluation of a witness for that of the employer at the time of its investigation and dismissal, save in exceptional circumstances. (9) An ET must focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any appeal process) and not on whether in fact the employee has suffered an injustice.

42. I have reminded myself also of the judgment of the Court of Appeal, in **Graham v Secretary of State for Work and Pensions [2012] EWCA Civ 903,** again per Lord Justice Aikens, at paragraphs 35 and 36, reading as follows:-

> ***35. In Orr v Milton Keynes Council [2011] ICR 704, all three members of this court concluded that, on the construction given to section 98(4) and its statutory predecessors in many cases in the Court of Appeal, section 98(4)(b) did not permit any second consideration by an ET in addition to the exercise that it had to perform under section 98(4)(a). In that case I attempted to summarise the present state of the law applicable in a case where an employer alleges that an employee had engaged in misconduct and has dismissed the employee as a result. I said that once it is established that employer's reason for dismissing the employee was a "valid" reason within the statute, the ET has to consider three aspects of the employer's conduct. First, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; secondly, did the employer believe that the employee was guilty of the misconduct complained of and, thirdly, did the employer have reasonable grounds for that belief.***
>
> ***36 If the answer to each of those questions is "yes", the ET must then decide on the reasonableness of the response by the employer. In performing the latter exercise, the ET must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to the ET's own subjective views, whether the employer has acted within a "band or range of reasonable responses" to the particular misconduct found of the particular employee. If the employer has so acted, then the employer's decision to dismiss will be reasonable. However, this is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse. The ET must not***

> ***simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The ET must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which "a reasonable employer might have adopted". An ET must focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any internal appeal process and not on whether in fact the employee has suffered an injustice. An appeal from the ET to the EAT lies only in respect of a question of law arising from the ET's decision: see section 21(1) of the Employment Tribunals Act 1996.***

43. When considering whether or not dismissal is within the range of reasonable responses, the test is always the objective one of the reasonable employer ; it is not a matter of the Tribunal's own subjective views. In this regard, I have also reminded myself of the judgment of Lord Justice Mummery, in the Court of Appeal, in **London Ambulance Service NHS Trust –v- Small [2009] IRLR 563,** and the learned Judge's reminder to Employment Tribunals to guard against being drawn to re-trying a disciplinary case against the dismissed employee because of a consideration of what, in fact happened, ignores the issue with which the Tribunal ought truly to be concerned.

44. In ***Small,*** Lord Justice Mummery stated, at paragraph 43 of the Court of Appeal's judgment, as follows:-

> ***"It is all too easy, even for an experienced ET, to slip into the substitution mindset. In conduct cases the claimant often comes to the ET with more evidence and with an understandable determination to clear his name and to prove to the ET that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the ET so that it is carried along the acquittal route and away from the real question – whether the***

employer acted fairly and reasonably in all the circumstances at the time of the dismissal."

45. Nor is it a matter of the employer's own views as to the reasonableness of its disciplinary decisions. As was observed by Lord Justice Longmore, at paragraph 18, in the Court of Appeal's judgment in **Bowater v Northwest London Hospitals NHS Trust [2011] IRLR 331**:

> "...***the employer cannot be the final arbiter of its own conduct in dismissing an employee. It is for the Employment Tribunal to make its judgment always bearing in mind that the test is whether dismissal is within the range of reasonable options open to a reasonable employer."***

46. Further, following the well-known House of Lords' case law authority of **West Midlands Co-operative Society v Tipton [1986] IRLR 112 / [1996] ICR 192 (HL)**, the respondent employer's actions during the appeal stage of any dismissal procedure fall to be considered in assessing the reasonableness of the dismissal process. It is plain from the House of Lords' Judgment in **Tipton,** applied by the Court of Appeal in **Taylor v OCS Group Ltd [2006] IRLR 613 / [2006] ICR 1602 (CA),** that in determining the reasonableness of an employer's decision to dismiss for a potentially fair reason, the Employment Tribunal must look at the whole of the disciplinary process, including any post-dismissal internal appeal.

47. If the employer succeeds in proving there was a potentially fair reason for the dismissal, then whether the dismissal is to be considered fair or unfair depends upon whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the employee. This question has to be determined, under **Section 98(4) of ERA,** in accordance with equity and the substantial merits of the case.

48. What has to be assessed is not whether the dismissal is fair to the employee in the way that is usually understood, but whether, with the knowledge that the employer had at the time (**Devis v Atkins [1977] ICR 662, HL**), the employer acted reasonably in treating the misconduct that they believed had taken place

as reason for dismissal. It is not relevant whether in fact the misconduct took place. The question is whether, in terms of **Burchell,** the employer believed it had taken place (with reasonable grounds and having carried out a reasonable investigation) and whether in those circumstances it was reasonable to dismiss.

49. The Tribunal must be careful not to assume that merely because it would have acted in a different way to the employer that the employer has therefore acted unreasonably. There may be a band of reasonable responses to a given situation. One reasonable employer may react in one way whilst another reasonable employer may have a different response. The Tribunal's task is to determine whether the respondent employer's decision to dismiss, including any procedure adopted leading up to dismissal, falls within that band of reasonable responses. If so the dismissal is fair. If not the dismissal is unfair.

50. If the Tribunal finds that a claimant has been unfairly dismissed by the respondents, then it can, subject to the claimant's wishes, order re-instatement to the old job, or re-engagement to another job with the same employer, or alternatively award compensation.

51. While the claimant had previously indicated in this case (in his E1 claim form) that he sought to be reinstated to his old job with the respondents, in the event of his success before the Tribunal, and that was opposed by the respondents, at the start of the Final Hearing before this Tribunal, Ms Irvine confirmed that the claimant no longer sought reinstatement, or re-engagement, by the respondents.

52. As regards compensation for any unfair dismissal, compensation is made up of a basic award and a compensatory award. A basic award, based on age, length of service and gross weekly wage, can be reduced in certain circumstances.

53. **Section 122(2) of ERA** states that where the Tribunal considers that any conduct of the claimant before the dismissal (or where the dismissal was with notice before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly.

54. **Section 123 (1) of ERA** provides that the compensatory award is such amount as the Tribunal considers just and equitable having regard to the loss sustained by the claimant in consequence of dismissal in so far as that loss is attributable to action taken by the employer.

55. Subject to a claimant's duty to mitigate their losses, in terms of **Section 123(4),** this generally includes loss of earnings up to the date of the Final Hearing (after deducting any earnings from alternative employment), an assessment of future loss of earnings, if appropriate, a figure representing loss of statutory rights, and consideration of any other heads of loss claimed by the claimant from the respondents.

56. Where, in terms of **Section 123(6) of ERA**, the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, then the Tribunal shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

57. An employer may be found to have acted unreasonably under **Section 98(4) of ERA** on account of an unfair procedure alone. If the dismissal is found to be unfair on procedural grounds, any award of compensation may be reduced by an appropriate percentage if the Tribunal considers there was a chance that had a fair procedure been followed that a fair dismissal would still have occurred.

58. This approach (known as a **Polkey** reduction) derives from the well-known case law authority from the House of Lords' judgment in **Polkey v AE Dayton Services Ltd [1987] IRLR 503/ 1988] ICR 142 (HL),** and further principles have since been set out in by the Employment Appeal Tribunal in the case of **Software 2000 Ltd v Andrews [2007] IRLR 568 / [2007 ICR 825 (EAT).** In this event, the Tribunal requires to assess the percentage chance or risk of the claimant being dismissed in any event, and this approach can involve the Tribunal in a degree of speculation.

59. **Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992** ("TULRCA") provides that if, in the case of proceedings to which the section applies, it appears to the Tribunal that the claim concerns a matter to which a relevant Code of Practice applies, and the employer has unreasonably failed to

comply with the Code in relation to that matter, then the Tribunal may, if it considers it just and equitable in all the circumstances, increase the compensatory award it makes to the employee by no more than a 25% uplift. The ACAS Code of Practice on Disciplinary & Grievance Procedures is a relevant Code of Practice. Similarly, if it appears to the Tribunal that the employee has unreasonably failed to comply with the Code, then the Tribunal may, if it considers it just and equitable in all the circumstances, decrease the compensatory award it makes to the employee by no more than a 25% downlift.

Relevant Law : Wrongful Dismissal

60. As regards wrongful dismissal, that is an entirely separate head of complaint to the statutory complaint of unfair dismissal. One of the most commonly experienced type of wrongful dismissal is where there is a dismissal with no, or inadequate, notice, where summary dismissal is not justifiable.

61. **Section 86 of the Employment Rights Act 1996** makes statutory provision for minimum periods of notice – the claimant's statutory minimum of 12 weeks' notice applies by reason of his length of service with the respondents, and there being no greater period of notice provided for by his contract of employment with the respondents.

62. The **Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994** [**SI 1994 No. 1624**] provides that proceedings for breach of contract may be brought before a Tribunal in respect of a claim for damages or any other sum (other than a claim for personal injuries and other excluded claims) where the claim arises or is outstanding on the termination of the employee's employment. A claim for notice pay is a claim for breach of contract; **Delaney v Staples 1992 ICR 483 HL.**

63. In **Briscoe v Lubrizol Ltd [2002] IRLR 607 (CA),** the Court of Appeal approved the test set out in **Neary v Dean of Westminster [1999] IRLR 288**, where it was held that conduct amounting to gross misconduct justifying summary dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in his employment.

64. In a claim for wrongful dismissal the legal question is whether the employer summarily dismissed the claimant and that by doing so the employer was in breach of contract. Dismissal without notice will be such a breach unless the employer is entitled to dismiss summarily. An employer will only be in that position if the employee is in breach of contract and the employee's breach is repudiatory.

65. A repudiatory breach is one where the employee by conduct abandons and altogether refuses to perform the contract. If the employer, knowing of the repudiatory conduct, dismisses the employee for it then the employer is by so doing accepting the employee's breach and is entitled to dismiss the employee without notice.

66. On the issue of wrongful dismissal, it is necessary for the Tribunal to make its own findings of fact. The question for the Tribunal is objectively whether the employee has committed a breach of contract and whether it was sufficiently serious and injurious to the relationship (which has at its heart mutual trust and confidence) to justify a dismissal.

67. As such, in cases of wrongful dismissal, it is necessary for the respondents to prove that the claimant had actually committed a repudiatory breach of contract : **Shaw v B & W Group Ltd [2012] UKEAT/0583/11**.

68. In **British Heart Foundation v Roy [2015] UKEAT/49/15,** the Employment Appeal Tribunal set out the difference between the test in an unfair dismissal claim and the test for wrongful dismissal. That Judgment helpfully summarises what the Tribunal needs to decide when considering the wrongful dismissal claim and identifies why the questions to be asked are so different in respect of the two claims. It says:

> ***"The law as to wrongful dismissal (in respect of which the appeal arises) needs to be set out. A member of the public might express some surprise if the law were to the effect that an employee whom the employer, on reasonable grounds, suspected of having been guilty of theft and in respect of whom a Judge concluded that indeed she probably was, had to be kept on at work until the expiry of her full notice period and could not be dismissed immediately. Whereas***

the focus in unfair dismissal is on the employer's reasons for that dismissal and it does not matter what the Employment Tribunal thinks objectively probably occurred, or whether, in fact, the misconduct actually happened, it is different when one turns to the question either of contributory fault for the purposes of compensation for unfair dismissal or for wrongful dismissal. There the question is, indeed, whether the misconduct actually occurred. In a claim for wrongful dismissal the legal question is whether the employer dismissed the Claimant in breach of contract. Dismissal without notice will be such a breach unless the employer is entitled to dismiss summarily. An employer will only be in that position if the employee is herself in breach of contract and that breach is repudiatory."

Discussion and Deliberation : Unfair Dismissal

69. Arising from parties` closing submissions to me, on 15 January 2021, it was not really in dispute that the respondents` reason for dismissing the claimant related to his conduct, and that that reason was a potentially fair reason for dismissal, in terms of **Sections 98(1) and 98(2) (b) of the Employment Rights Act 1996.**

70. The real issue for the Tribunal to determine in this case was the fairness or unfairness of the claimant`s dismissal, having regard to the statutory test set forth at **Section 98(4) of the Employment Rights Act 1996**. It is useful, at this point, to remember the role of the Employment Tribunal in an unfair dismissal complaint. As stated by His Honour Judge David Richardson, in the unreported Employment Appeal Tribunal judgment in **MBNA Ltd v Jones [2015] UKEAT/0120/15**, at paragraph 20, the role of the Employment Tribunal in an unfair dismissal complaint is as follows:-

"Where there is an appeal against a finding of unfair dismissal, the respective roles of the ET and EAT are well-known, but it remains important in a case of this kind to restate them briefly. It is the task of the ET to apply section 98(4) to all aspects of the employer's decision to dismiss: the investigation, the process, the conclusions

and the sanction imposed. The ET must apply section 98(4), recognising that there may be a range of reasonable ways in which an employer may react to the circumstances which give rise to the dismissal. The question for the ET will be whether the employer's treatment of the case fell within the band of reasonable responses. It is an error of law for the ET to substitute its own view for that of the employer."

71. The claimant's submissions to the Tribunal, as set forth in Ms Irvine's detailed written submissions, included the following points :-

<u>Submission - The Claim and Defence</u>

12 In summary, the Claimant alleges:

a. *The Respondent did not carry out a reasonable investigation into the alleged act of misconduct and took no steps to find evidence what would exculpate, rather than only implicate the Claimant;*

b. *A conclusion was reached at Investigatory stage that the Claimant had committed the alleged misconduct and recommended the allegation by upheld;*

c. *The Disciplinary manager did not give proper consideration to the issue, and simply considered whether there were grounds to change the investigation decision;*

d. *The decision to dismiss fell outside the band of reasonable responses and no consideration was given to the Claimant's exceptionally long service and clean disciplinary record;*

e. *Investigating and Dismissing officers relied on perceived inconsistencies in the Claimant's responses to questions, where there were none, and erroneously relied on those to find the alleged misconduct proven;*

f. The decision to dismiss was predetermined prior to the re-convened disciplinary meeting of 19 December 2019 and no consideration was given to what was discussed at it;

g. The Respondent failed to comply with its own disciplinary policy or the ACAS Code on Conducting Disciplinaries;

h. The Respondent's decision to dismiss was not fair and reasonable in all the circumstances.

13 The Defendant (sic) *contends that:*

a. The Claimant was fairly dismissed on the grounds of gross misconduct;

b. The Respondent carried out a reasonable investigation in the circumstances, followed a reasonable procedure and formed a genuine and sustainable belief on reasonable grounds that the Claimant was guilty of the alleged misconduct;

c. The sanction of dismissal was both fair and reasonable in all the circumstances;

d. The Respondent followed a fair procedure in dismissing and acted reasonably and as such the dismissal was fair in all the circumstances, including its size and administrative resources;

e. In the event of Unfair Dismissal being found (to have been procedurally unfair?), the Claimant would still have been dismissed and as such no loss has been suffered as a result of the unfairness so compensation should not be awarded;

f. Any failures to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures were not unreasonable and/or it would not be just and equitable to increase compensation as a result;

g. *The Claimant's conduct has caused or contributed significantly to the dismissal and any compensation should be reduced accordingly;*

h. *Wrongful Dismissal is denied - There has been no breach in the Claimant's employment contract by the Respondent, and as a result of the Claimant's repudiatory breach it was entitled to dismiss summarily.*

Submissions –

14 The Claimant says that his dismissal by the Respondent was Unfair (failing which Wrongful) on the grounds that:

a. *the amount of inquiry and investigation should increase where establishing the misconduct depends upon inference rather than the Claimant having been witnessed carrying out the alleged conduct – here there was a substantial level of investigation required, not just to identify evidence pointing to the Claimants guilt, but also to identify and uncover exculpatory evidence to discuss with the employee. The Respondent here failed to carry out such open minded search for exculpatory evidence and closed its mind to the possibility of innocence of the employee form the outset.*

b. *The importance of a proper investigation - it enables the employer to discover the relevant facts and, if properly conducted, it secures fairness to the employee by providing him with an opportunity to respond to the allegations made and, where relevant, raise any substantive defence – a decision had been made at the investigatory stage by Mr Baird, and this was simply followed through absent proper consideration for the evidence itself, rather than the investigatory conclusions and recommendations by Mr Bartlett.*

c. *The Respondent formed their belief hastily and acted hastily upon it, without making the appropriate inquiries or giving the employee a fair*

opportunity to explain himself, and as such their belief is not based on reasonable grounds and they were not as a result acting reasonably.

d. *Undue reliance was placed on the Claimant's perceived "inconsistencies" during the entire process – when in fact his narration of events remained consistent and plausible throughout all disciplinary stages. This led to flawed decision making at each stage by those involved (Baird, Bartlett and Watts).*

e. *As part of a fair process the employee requires to be properly informed of the basis of the problem and giving them an opportunity to put their case in response is one of the basic elements of fairness within the ACAS Code (at para 4, see S [3]). The Code (at S [5]) further provides that:*
'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.'

f. *The Claimant was not provided with such clarity on the allegation he was facing, nor the evidence the Respondent already had in its possession and was making its decisions upon at Investigation stage. Nor has it provided all of the evidence upon which it has relied upon in reaching it's decisions (Mr Bartlett's failure to produce Sta Kill documents, Floor cleaner documents, Lab evidence discussions, Mr Watt's failure to provide details of the additional information and evidence obtained from other in the process before issuing a decision to dismiss)*

g. *It is an elementary principle of justice that the employee should know the case he or she has to meet. It is equally obvious that it is the*

employer's obligation to put that case so that on a fair and common sense reading of the relevant documentation, the employee could be expected to know what charges he or she has to address. That duty is not met if the employee has to speculate what may be in issue and what may not. The Respondent failed to set out to the Claimant is was taking into account many other aspects of its disciplinary policy and potential offences (e.g. damage to company property, Health and Safety Failures, the importance of the business reputation – all of which were clearly in the mind of the employer in dismissing and at Appeal)

h. *The employer should only take into account matters of which it was aware at the time of dismissal. An inquiry which is conducted after the decision to dismiss has been taken (such as Mr Bartlett's alleged enquiries into the Floor Cleaner and issue of whether the urine was human, and the Sta Kill spray), in reality make the dismissal hearing into something of a charade.*

i. *If there was an expectation that employees must report any sighting of birds or animals within the premises and this is to be the rule, it should be very clearly spelt out to the employee. As the Respondent was relying upon that as part of the basis upon which to find the Claimant to not be credible about his reason for having been between the stows in dismissing him, then they should have been able to direct him during the disciplinary process, and the Tribunal at Hearing, to such requirements (policies/procedures) such to justify the decision not to accept his version of events.*

j. *The **ACAS Code** provides the bare bones of a sensible procedure, which in themselves have not been followed by the Respondent, but beyond that, where an employee has not been "caught in the act", the amount of inquiry and investigation, including questioning of the employee, which may be required, will likely to increase. Such was not carried out of the Claimant to a reasonable extent.*

k. *The Respondent failed to take account of whether any motive (or indeed lack thereof) existed which may give credence to the allegation the Claimant had urinated on the cask. It is submitted that it is highly unlikely that the Claimant, given his length of service, his positive attitude toward informal PR for the Respondent business in his own time (non-working) and his family situation and financial dependence of his two grown sons on himself and his wife's income to sustain the family, would open himself up to the risk of dismissal by conducting himself in this manner.*

l. *The Respondent also failed to take account of or at least give sufficient weight to the Claimant's good performance in the workplace in his role (as spoken to by Witness Watts), and his lack of disciplinary record, all of which tend to point away from rather than towards such conduct as was alleged as being likely to have taken place, given there was no first hand evidence of the Claimant having been the person who urinated, and the margin for error in relation to the time period within which the conduct could have been performed. Benefit of the doubt ought to have been afforded to the Claimant in all of the Circumstances.*

m. *As regards the 'thoroughness and the open-mindedness of the decision-maker' it shall be submitted that from the point of investigation all the way through the process, the Respondent's mind was closed off to the possibility of the Claimant's innocence, it failed to adequately consider other potential explanations for or culprit of the conduct.*

n. *The Appeal failed to conduct a thorough review of all of the evidence, as should have taken place given the Appeal letter made clear that the Claimant was questioning in totality the "sufficiency of the evidence" against him. Furthermore, no proper consideration has been given to applying a lesser sanction when taking account of factors such as length of service and disciplinary record.*

o. *Whilst it is possible and reasonable that those involved in the original dismissal must be in daily contact with their superiors who will be responsible for deciding the appeal and therefore the appearance of total disconnection between the two cannot be achieved, there has been no attempt to keep the Appeal and Dismissal (and investigation) separate in that the Appeals officer has clearly discussed evidence and reasoning of those involved earlier in the process, absent giving the Claimant to opportunity to respond.*

p. *Dismissal was not a reasonable sanction – whilst it is not for the tribunal to ask whether a lesser sanction would have been reasonable, but whether or not dismissal was reasonable it shall be submitted that given the margin of doubt as to whether the Claimant had been responsible for the conduct whilst taken with his length of service and clean disciplinary record, all should have led to the Respondent applying the benefit of doubt in not finding his conduct sufficient to amount to dismissal in all the circumstances. The importance of length of service and past conduct are proper factors for a tribunal to take into account when considering whether the sanction imposed falls within the band of reasonable sanctions.*

15 ***Wrongful dismissal*** *–the common law test is to be applied, of whether the misconduct had been proved as a fact. Dismissal without notice will be a breach unless the employer is entitled to dismiss summarily. An employer will only be in that position if the employee is himself in breach of contract and that breach is repudiatory.*

16 It is submitted that in the event the Tribunal accepts there was a fair dismissal, that there has not been sufficient evidence in the hands of the employer at the point of dismissal to evidence the Claimant had in fact been in breach of his contract, by having carried out the conduct. As such compensation for Wrongful Dismissal is sought by way of the notice period (12 weeks) and fringe benefits for that period also.

17 It is accepted that the Respondent's disciplinary procedure was not contractual (page 33 of Joint bundle). As such the prima facie measure of damages will be a sum equivalent to the wages which would have been earned, between the time of actual termination and the time which the contract might lawfully have been terminated (by due notice), together with the value of any fringe benefits which the employee would have received during the same period (pension contributions and healthcare cover in the Claimant's case) - upon the basis of contractual entitlement as opposed to what the employee may have earned but to which he had no contractual entitlement (unlike unfair dismissal where the tribunal will assess what the employee may have received had the employment continued even where they had no contractual entitlement).

Submissions - Remedy

18 Compensation for Unfair Dismissal – as per Schedule of Loss to be provided at Hearing on Submissions;

19 Compensation for Wrongful Dismissal as above;

20 Uplift of Compensation due to the Respondent's failure to comply with the ACAS Code of Practice – 25%.

Conclusion

21 For all these reasons, Judgment of Unfair Dismissal should be made in favour of the Claimant in the Claim, failing which Wrongful dismissal, and such compensation and the Tribunal rules as just and equitable in all of the circumstances.

72. In her further written representations, provided on 22 January 2021, Ms Irvine made further legal submissions in relation to the following:

It is accepted that in terms of Polkey, if the Tribunal believes the Claimant would have been dismissed, even if procedural failings had not taken place, that there can be a percentage reduction to his compensation representing the chance that he would still have lost his employment anyway. Also, that in deciding what (if any) reduction is to be made, the Tribunal should have regard to all of the material and reliable evidence which might assist it in fixing just and equitable compensation – whether that be from the Respondent or the Claimant.

There has been no evidence led by the Respondent that the Claimant's employment would not have continued indefinitely in this matter – in fact there was evidence given by the Respondent witnesses (or from the Claimant) as to the general good performance of the Claimant, and him being awarded in respect of long service, having been in employment for in excess of 31 years.

As such it is respectfully submitted that the only way in which the Tribunal in this matter should consider reducing any compensation to the Claimant, is if it believes that by the nature of the conduct for which the Claimant was being disciplined for was such that dismissal was inevitable, and that the procedural failings were of such a nature as not to detract from the overall likelihood of dismissal resulting from these allegations themselves, and the Claimant would have been dismissed when he was (19/12/2019).

It is accepted that some degree of speculation will be involved in such an assessment by the Tribunal, but that all of the evidence must be considered when making such an assessment (be that from the Respondent or the Claimant).

This is not a claim in which the Claimant claims the unfairness was only procedurally unfair. As has been made clear from the claim form and the evidence led at Hearing, the Claimant criticises the disciplinary process and decision to dismiss as being substantively unfair, in that the reason

for dismissal was not sufficient as was not based upon reasonable grounds after as much investigation as was reasonable in all of the circumstances (Burchell v British Home Stores plc [1980] ICR 303) and that the reasonableness of the investigation and the decision to dismiss itself fell out with the band of reasonable responses (Sainsbury Supermarkets Ltd v Hitt).

In the event the Tribunal is not with the Claimant in finding that there has been substantive unfairness, and makes a finding of only procedural unfairness, then the particular procedures the Respondent failed within must be brought sharply into focus.

It is an essential element of disciplinary proceedings that the employee ought to know the allegation against him, have the chance to see the evidence being relied upon to support that and be offered an opportunity to consider it, object to it, or make submissions on it.

The procedural failings upon which the Claimant relies in this claim are:

(a) That at the point a decision was being made by Mr Baird as to his guilt of the allegations, he had not been afforded with adequate information as to the allegation, nor the evidence upon which Mr Baird was reliant including pages 38 (photo of cask/floor/wet area), 39 (photo of alleged urine sample), page 40 (SB's annotations on floor plan), page 41 (photo of Sta Kill), 52 (Lab Analysis certificate),page 53 to 54 (witness statement of Mr McNair) - had this failure not arisen ter Claimant would have been better able to set out his response to the evidence the Respondent was already basing findings of guilt upon, and the chances of dismissal but for this failure would have been low (no more than say 10 %)

(b) That Mr Bartlett failed to provide the Claimant with the documentation at pages 42 to 48 (Sta Kill technical data including pH level), 49 to 50 (Jangro floor cleaner including pH level of same), 51 (BB's annotated

floor plan) and /or any information about having had nor the content of his alleged phone call with the lab (which provided the initial report at page 52) which from his own evidence took place sometime between the disciplinary meeting on 17/12/2019 and the outcome meeting of 19/12/2019 – had the Claimant been privy to this information, he would have been in a position to query it's legitimacy and if necessary obtain his own evidence to rebut this is he disputed it. He would also have been able to place some reliance on these issues to undermine other aspects of evidence the Respondent relied upon in dismissing (i.e. the "significance" of the presence of the Sta Kill in the D line tambour unit). The chances of a dismissal in any event but for this failure would stand at around 10% maximum.

(c) *That the investigatory meeting itself did result in disciplinary action (a finding of guilt of the Claimant) – submissions as at (a) above*

(d) *That the full allegation that was being considered during the disciplinary process was not put to him, to allow him the opportunity to properly respond and defend himself – I would refer to the previous submissions made for the Claimant on 15/1/2021 (paragraph 14 (g) which outlined the various other matters that the Respondent's witnesses clearly had in their minds at the point of making decisions at each stage (investigatory, disciplinary and Appeal) of the disciplinary process.*

This was such a fundamental failing in procedures that no amount of speculation could reasonably conclude that dismissal would have taken place even absent this failing. The Claimant was at no stage during the disciplinary process, nor at Hearing, questioned as to what his responses were to such matters as the media attention in the matter, or the "high profile nature" of the allegation, the company's reputation, the risk to business and product integrity, reputation, brands and products, damage to property, material breach of contract, bringing the Company into disrepute. As such the Tribunal has no evidence before it as to what the Claimant would have said, how he

may have defended himself against such charges/allegations had they been properly put to him, and so to weigh what effect this failing may have had in relation to whether or not there was likely to have been a dismissal of the Claimant is entirely speculative, and it is submitted that no evidence can be drawn upon to enable the Tribunal to assess likelihood or otherwise of dismissal in all of the circumstances.

(e) Mr Bartlett did not (Contrary to ACAS Code paragraph 12) explain the complaint to the Claimant and go through the evidence, nor did he adjourn the disciplinary proceedings to allow the Claimant and his TU rep to consider the new information he had considered (Sta Kill data, jangro data, alleged lab report call content) – submissions as at (b) above.

(f) Mr Watt's did not deal with the Appeal impartially nor give the Claimant opportunity to make representations upon the additional discussions he had in deciding the Appeal, having consulted with Mr Baird, Mr Bartlet and Ms Coyle prior to meeting the Claimant, but failing to set out the terms of those discussions or representations to the Claimant to allow him the opportunity to comment thereon) - with respect, no evidence can be drawn upon to ascertain the likelihood of dismissal but for this omission, as it simply cannot be known what the Claimant's position in response would or could have been. As such I would suggest that zero percent likelihood of dismissal but for this failing should be found.

(g) The Claimant was not afforded a minimum of 2 days to prepare for and attend his Appeal – criticism has been made of his lack of detail given at the Appeal hearing. Had he been afforded adequate time to consult with his TU member and prepare himself, he may have been better able to expand upon his Appeal letter, but in any event he had made it clear he disputed the evidence was sufficient in all respects. As such it is submitted that absent this failure, there is a strong possibility Mr Watts could have been better directed in what steps to take in

considering the evidence form start to finish, and the reasoning relied upon (in the outcome letters) of the investigation stage and disciplinary stage, before upholding the dismissal, and as such the likelihood of dismissal is low (no more than say 10%)

*On the issue of contributory conduct – this case can be distinguished from that of **Allma Construction**, in that the Claimant here did not and does not admit the allegation he was faced with. That aside, in the event the Tribunal finds there was procedural unfairness only, and is considering whether the Claimant's conduct contributed to his dismissal, then the Tribunal is asked to have in mind the fact that the Respondent's witnesses themselves confirmed thousands of casks/barrels are kept outside in the open air. Those are not protected from any animals or general wildlife, and so to consider urination upon the barrel in the interior of the distillery, as opposed to whatever the casks are subjected to outdoors, before being brought in and taken to the C line for filling (directly from outdoors, on pallets of multiple casks) then any suggestion of risk to health and safety being a primary concern of the Respondents could, it is submitted, only be at a low level, and as such any element of contribution should be considered low (10% at best).*

No evidence has been produced as to what the Respondent's say the risks to breaches of any health and safety (or other) obligations are, so that the importance of the alleged conduct can be weighed.

If the consideration of contributory conduct relates to the Claimant's limited submissions made at Appeal, I would simply re-iterate, his Appeal letter made it clear he clearly denied the conduct, and disputed the sufficiency of evidence in it's entirety. It is not for the Claimant to be expected to particularise every and any criticism of the process and evidence the Respondent has relied upon – it is for Mr Watts to examine the evidence as a whole and ascertain for himself (given the allegation of lack of sufficiency of evidence) whether in his mind the

findings made by the investigator and the dismissing officers was based on reasonable investigation, and were reasonable conclusions to reach in light of all of the evidence. Had he done so there would not have remained the gaps in evidence there were, and he would have drawn different conclusions to his earlier colleagues in our submission.

As such a low contributory element, if any at all, should be applied – similar to that in ***Allma Construction's*** *original Tribunal findings of 5%.*

Strathclyde Joint Police Board v Cusick *[2011] UKEAT 0060_10_1506*

We would distinguish this case from the present one of Mr Wilson – the issue of his prior service was well within the Respondent's knowledge and ought therefore to have been taken into account in the decision upon whether there was reasonable evidence as to his guilt, and also whether dismissal was reasonable in all of the circumstances.

As regards taking matters into account of which they had no knowledge, it cannot be said the Appeal's officer (Mr Watts) had no knowledge of the various criticisms of the evidence Mr Wilson was making – these were set out throughout the various meeting Minutes, even if not teased out and particularised in his Appeal letter or at Appal – he made it clear he denied the allegation, and called into question the entire sufficiency of evidence.

Submissions on contributory conduct in light of this case remain as above stated.

Wincanton Plc v Atkinson & Anor *[2011] UKEAT 0040_11_1907*

Paragraphs 27 to 29 of above are noted for their content. On the issue of whether actual or potential adverse impact on the employer's reputation is required it is accepted that potential impact would be relevant in whether dismissal was reasonable.

However, the Respondents here (William Grant and Sons Ltd) have not led evidence as to the potential impact on their reputation of business. Vague reference has been made by some of their witnesses to Health and

Safety requirements, or food standards and so on, but no evidence has been put before the Tribunal as to what actual potential risk they faced (in the event the allegation against the Claimant was true and their finding of his guilt reasonable).

It is accepted there has been one newspaper article in relation to the matter, naming the business of the Respondent, however, there has been no suggestion as to what extent this was or even could cause damage to reputation, brand, or any of the other matters the Respondent's mentioned having in their minds when deciding upon the guilt of the Claimant.

There has also been no suggestion there was indeed any follow up press attention, nor customer enquiry, nor any regulatory investigation or involvement. One would have thought that had there been a risk of such, that following the article on 7/12/2019 in "The Sun" that would have come to fruition, or t the very least the Respondent would have put forward evidence in the Bundle as to the various regulatory and other requirements it was under, and which were at risk in light of the Claimant's alleged conduct.

As such, in this particular matter (Mr Wilson's claim) we would submit that the issue of potential impact is not relevant, and if considered so, not to the same extent as would have been relevant in the case of Wincanton, in which the employee had general duties to the public and/via the police force of which he would have been aware. There has been no evidence adduced as to the duties the Claimant was subject to and/or aware of in terms of regulatory or other, and nothing was put to him during the disciplinary process about such either."

73. For the respondents, Mr Hay's written skeleton argument submitted as follows:-

The Relevant Law – Respondent's argument

1. *The law in respect of conduct related dismissals will be well known to the Tribunal. Conduct is a potentially fair reason in terms of section 98 ERA. Where a conduct reason has been established by the employer, it is for the Tribunal to determine, applying a neutral onus, whether the Respondent acted reasonably or unreasonably in treating that reason as sufficient to dismiss (section 98(4) ERA).*

2. *As is known, the question of sufficiency has two broad aspects. The first is that for such a reason to be sufficient is must be based upon reasonable grounds after as much investigation as is reasonable. (See **Burchell v British Home Stores plc** [1980] ICR 303) It is settled law that the appropriate yardstick by which to measure the reasonableness of an investigation is against the band of reasonable responses (See **Sainsbury Supermarkets Ltd v Hitt** [2003] ICR 111 per Mummery LJ at paragraph [30]) This test recognises that different employers may, when presented with the same facts and circumstances, reach different conclusions and affords a margin of appreciation within reasonable bounds. It does not however go so far as to reduce the Tribunal's role to one of mere procedural box-ticking. It does not however set up a requirement that an employer is under an obligation to explore and investigate each and any line of defence unless it is manifestly false or unarguable. It will depend on the facts and circumstances of each particular case, looking at the overall investigation as a whole. (See **Shrestha v Genesis Housing Association** [2015] IRLR 399 at paragraphs [22]-[23] per Richards LJ) The second broad aspect is the sufficiency of the reason for dismissal, as judged by reference to the well-known standard of the band of reasonable responses.*

3. *A fair procedure is also an important aspect of a fair dismissal under the Employment Rights Act 1996. Minimum standards of process in fact finding and disciplinary hearing are contained in the ACAS Code (No 1). In respect of adequate notice of the allegations of misconduct of which an employee is suspected, issues of natural justice can also arise. These are inherently case-specific, although the guidance from the Court of Appeal*

*that remains good law is that what is required is that the employee is informed of the nature of the case, or the essence of the case, against him (See **Hussain v Elonex plc** [1999] IRLR 420). Further guidance from the Court of Appeal in respect of procedural fairness is that it is to be determined by reference to the employer's procedure as a whole, considering both the stage as at the decision to dismiss, and as at the point of appeal (see **Taylor v OCS Group Ltd** [2006] ICR 1602 at paragraphs [43] & [48] per Smith LJ)*

The Respondent's Reason for Dismissal

4. *The Respondent's case on reason for dismissal is, it is submitted, clear. The Claimant was believed to have urinated on a cask contained within the Cask Storage Area of the C-Line within the Respondent's Spirit Supply area on 20/11/19. This was accordingly conduct, a potentially fair reason. As it was put by Mr Watt, the nature of the case against the Claimant was circumstantial, but circumstantial cases can be compelling. Whilst Mr Watt did not consider there to be a 'smoking gun', that was clarified to mean there was no direct eyewitness that the Claimant urinated on the cask. Mr Bartlett also accepted that fact without hesitation. There was, however, a smoking gun present in that Mr McNair observed the Claimant emerging from between the stows at around 12.20 to 12.25 on 20/11/19. He considered this so unusual it prompted him he investigated what was between the stows and discovered liquid which appeared to be (and was confirmed later to be) human urine. Mr McNair was working on the casks that day. He could confirm that at an earlier point that morning that same area of the casks were dry. Those few sentences summarise a substantial and, it is submitted, thorough investigation of matters that all started with the circumstances explained in the handwritten statement of Mr McNair at [pp53-4], led to laboratory examination of a sample of the liquid taken by Mr Maxwell, and the interviewing of a number of other staff in the area. Mr McNair's account is credible. He raised the alarm with Mr Reid (see Mr Reid interview*

statement [pp71-2]). Mr McNair was concerned about the ramifications of his bringing the matter to his seniors' attention (see his interview with Mr Blair on 3/12/19 [p66]). There has been no suggestion that Mr McNair had any axe to grind against the Claimant. In addition to that there is added the vague and unconvincing explanations that were tendered by the Claimant during investigation and disciplinary hearings. All of that material is, it is submitted, ample evidence to prove that the Respondent had as its reason for dismissing the Claimant a genuine belief that he had urinated on the cask in question, that such belief was based upon reasonable grounds and after as much investigation as was reasonable in the circumstances.

5. *With regard to the sufficiency of the reason for dismissal, judged by the classic **Iceland Frozen Food v Jones** test of the band of reasonable responses. Whilst something was sought to be made of the absence of any clear reference to a specific health and safety standard going to the potential unreasonableness of regarding urinating on a cask due to be filled with substance intended for human consumption, it is submitted that the egregious nature such conduct is obvious. Human waste does not belong in the workplace in general, never mind part of an employer's workplace involving the production of drink for human consumption. This is not a case where an employee has accepted that they were caught short and simply had to go to the toilet without appropriate facilities being available. No such case was advanced by the Claimant, whose position was a stark denial. Even if it had been, it would have been met with three important considerations: (i) the nature of the facility being concerned in the production of drink for human consumption; (ii) the confined nature of the locus (as distinct from answering a call of nature outdoors in a place where others might not be expected to congregate; and (iii) the presence of toilets within 1-2 minutes' walk away within the facilities. This case is accordingly nothing like the case of **Asda Stores Ltd v Raymond** on those facts. It is further capable of distinction given that whole case centred around the reasonableness of dismissing an employee who*

offered a substantive defence that his sudden urge to urinate was influenced by a medical condition.

Investigatory steps not taken after the Investigatory Report

6. *The investigation bore to include further material that had originally been prepared by Mr Baird in that Mr Bartlett himself was privy to information in respect of the conclusion of human urine. This position was intimated to the Claimant at the disciplinary hearing of 17 December 2019 (see the agreed minute at [p109]) and in his outcome letter [page ref]. The Lab Report at [p52] provided a quantification of the amount of creatinine present in the sample – a document that had also been provided to the Claimant in advance of the disciplinary hearing of 17 December 2019. Whilst the Respondent accepts it was a shortcoming in its process not to have provided the Claimant with the information as to the conclusion of the lab on the point of human vs animal urine in written form, that shortcoming is not such as to amount to a procedural unfairness. That is submitted for the following reasons:*

   - *the Claimant and his trade union representative were aware of the raw data from the lab report at [p52] in advance of the hearing of 17/12/19;*

   - *they were aware at that meeting that Mr Bartlett had been advised by the lab that the quantity of creatinine in the sample indicated human as opposed to animal urine in response to a direct point in that regard;*

   - *the description of what appeared to be splashed of urine on the cask at around 1 metre up the cask/central hip height were contained in the statements of Mr McNair (see [p66]) and Mr Reid (see [p71]) both taken on 3/12/19 by Mr Baird;*

- *the Chinese whispers/grapevine of which the Claimant was aware prior to the hearing of 17/12/19 spoke of 'somebody' (not 'something') having urinated on the cask;*

- *in a hearing of 19/12/19 prior to the Disciplinary Outcome meeting of the same date the Claimant raised certain concerns, ostensibly to do with the content of the minutes of the 17/12/19 meeting no concern as to the issue of the urine being human urine was raised;*

- *the Claimant similarly made no reference to the question of whether the urine was human urine either in his cursory grounds of appeal, or during the appeal hearing of 8/1/20, where the only reference to urine in Mr Watt's minute is in a reference to previous suggestions that urine was present within the C-line area (see [p132]); the Claimant has adduced no expert or scientific evidence in these proceedings to challenge the contention that the creatinine level of the sample demonstrated human urine.*

7. *In respect of Mr Bartlett's investigations into the pH level of the Sta-Kill spray, and also of the habitually used floor cleaner for the site, it is again accepted that it is a shortcoming in the Respondent's process that the fruits of those investigations, in particular the documents at [pp42-48], [p49] and [p50], were not provided to the Claimant. It is however submitted that shortcoming does not amount to procedural unfairness for the following reasons:*

- *The Claimant had been shown the bottle of Sta-Kill during the second investigatory interview with Mr Baird that took place on 5/12/19 minuted at [pp85-87];*

- *The issue of the pH of the Sta-kill spray (or rather the presence of bleach in the urine sample) had been specifically raised by the Claimant at the hearing of 17/12/19 (see [p109]);*

- *The findings of Mr Bartlett were exculpatory in that they eliminated the possibility of the deodoriser having been used in an attempt to conceal the urine.*

8. *Mr Bartlett also performed a walk of the site for himself (together with his own knowledge of the site). It is submitted that this does not truly amount to further investigation as opposed to an aide in visualisation of the contents of Mr McNair's accounts of seeing the Claimant on 20 November 2019. In any event at no stage did the Claimant request a site walk for his own benefit and was well familiar with the site, having worked in it for many years.*

9. *Two lines of substantive 'defence' were raised by the Claimant at his disciplinary on 17/12/19, described in these submissions as:*

   (i) The shortcut theory; and
   (ii) The bird theory.

(i) the short cut theory

10. *The shortcut theory raised by the Claimant to explain his presence in the Cask Storage Area misses the point. Whilst there may be concerns in employees simply roaming wherever they choose within a site that involves the manipulation of extremely heavy items by heavy machinery, the real issue of suspicion over the Claimant was not simply his mere presence within the cask storage area for the C Line, but that he was observed between the pallets of the cask storage area in the very place urine was discovered. It is not difficult to conceive of the dangers of clambering between pallets of stowed casks in an area where they were anticipated to be manipulated at some point during the day by a forklift*

truck. It is not difficult to conceive of why it would be suspicious to see someone emerge from between two stows of pallets stacked in the manner described by Mr McNair. Those stacked palettes would provide an individual with an opportunity to do something unobserved within the confines of the stow. The Claimant's presence there cannot reasonably be explained by taking a 'shortcut' to a red door and it must hang on the credibility of the bird theory. That route was a shortcut to nowhere and this appeared to be accepted by the Claimant by the conclusion of his oral evidence.

(ii) the bird theory

11. The bird theory was adequately investigated. Virtually all employees spoken to were asked about it. The issue of bird ingress generally was explored. No-one else is noted as having seen a bird that day, and no other witness spoke to any issue with bird ingress recently. Mr Baird did not observe any birds present within that area during his floor walk on 3 December 2019. It would appear to be accepted on the Claimant's own account that his health and safety concern about the presence of the bird was not mentioned in the immediate aftermath of him apparently seeing the bird when he walked past Gordon McNair. But in any event there are difficulties with the theory on its own terms. The Claimant apparently observed a small bird the size of a robin on the floor close to the pallets. In his evidence to the Tribunal he took 2 to 3 steps between the stows at which point he could no longer see the bird. This differs from the account that he gave at the time to his employer, which was that he saw the bird fly away (see for example the minutes of his interview with Mr Baird on 3 December 2019 at [p63]). Leaving to one side the inconsistency of account now provided by the Claimant to the Tribunal, the flying away of the bird is itself not without difficulty – where he said to have observed was a fully enclosed part of the building and not on the outskirts of the building by loading doors. It is perhaps an experience of life that once a bird finds its way into the interior proper of a building, it can be no easy

task to get it out again. Two points arise from that – why did no one else observe the bird? And if the bird was well within the interior of the building surely it still remained a potential hazard that should have been reported either by the Claimant or anyone else. The Claimant's answer to this rather obvious point was first that he had not had an opportunity to see his Team Leader, Mr Maxwell, between the time he observed the bird and finishing his shift (despite the presence of hazard observation cards to record such matters, or the fact he had seen Mr McNair immediately after having noticed the bird on 20 November 2019 and not raising the matter with him); and to state that bird ingress (and ingress by other wild animals) was frequent and ignored by the Respondent. This latter assertion was not only extravagant in its own terms, it was a matter that had not been put squarely to Mr Bartlett (which whose evidence it flatly contradicted) during cross-examination by Ms Irvine. Mr Bartlett's evidence to the tribunal, consistent with his reference to whether the Claimant's explanations amounted to "credible explanations" in his outcome letter of 19/12/19 (at [pp122 & 123]), was that the Claimant was not believed. In light of the considerations outlined above, it was plainly within the band of reasonable responses for an employer not to believe the Claimant's purported explanations for his presence between the stows of the Cask Storage Area. It was accordingly open to the Respondent to reject the Claimant's account, accept Mr McNair's account, and hold that a circumstantial case had been made out.

The Appeal

12. *This is not altered by consideration of the appeal. The Claimant appealed against the decision. His grounds were entirely cursory (see the appeal letter at [p125]) and were not amplified by written representations when invited to do so by Mr Watt in his invite letter of 6/1/19 (see [p127]). Those grounds were not given any further focus at the appeal hearing of 8/1/19 where the Claimant was against assisted by his trade union representative. Indeed the Claimant sought to question Mr McNair's*

account by selective reference to him describing the Claimant being seen by 'the edge' of the stows (per [p65]) apparently ignoring that a little later in that interview Mr McNair later sated "he came out from behind the casks" (see [p66]) and not apparently consistent with the Claimant's own acceptance that he had entered between the stows having taken 2 to 3 steps inside. It is not unfair to categorise the appeal as having little focus, a fact which the Claimant appeared to acknowledge in his cross-examination when he admitted to being underprepared. Mr Watt appears to have done his best to marshal the various points made by the Claimant and to consider them in his outcome letter of 14/1/20 (see [pp136-138]).

Conclusion

13. The Tribunal is accordingly invited to dismiss the claim of unfair dismissal

Remedy

14. In the event the Tribunal considers the dismissal to have been unfair, the Respondent would make the following short points on remedy.

15. Depending on the basis of unfairness, the question of whether or not dismissal would have occurred in any event (Polkey v A E Dayton) should be considered.

16. Separately, having regard to the circumstances of the case, and in particular the unsatisfactory nature of the purported explanations to the allegations, and the failure to meaningfully challenge several aspects of his claim before this Tribunal on appeal to Mr Watt, the Claimant should be considered to have contributed to his own dismissal to a substantial extent, with an appropriate level of reduction being at least 50%.

17. Separately, whether success on any ground that was not foreshadowed in the Claimant's appeal to Mr Watt was an unreasonable failure to

comply with the ACAS Code which should be reflected in a reduction in compensation, all in terms of section 207A(3) TULR(C)A 1992.

74. In the respondents' further written representations, provided on 22 January 2021, by Ms Welsh, it was stated that:

" In respect of Polkey deduction, the Respondent would emphasis that the assessment of gravity of conduct is apt to include the reasonably foreseeable hypothetical consequences of that conduct and is not limited only to the actual consequences. In this case there was however reputational damage in as afar as the terms of the one Sun article agreed between the parties. As such, a Polkey reduction is at large and the chances of dismissal in any event are submitted to amount to be between 50% to 100% even in the event of a finding of unfairness.

In respect of the considerations of ACAS uplift, the Respondent submits the relevant considerations for the ET to consider are those exemplified by Lady Smith in the EAT decision of Allma Construction Ltd v Laing as discussed at the conclusion of the Final Hearing. In respect of the Respondent's process, the Respondent would submit that the evidence has demonstrated a careful investigative process with a number of steps of investigation, with the Claimant having been permitted trade union representation at every stage from (but not including) the initial meeting confirming suspension through to his appeal. There has been no breach of the requirements of the Code. Esto there is a shortcoming with the Respondent' compliance with the Code, such would not amount to an unreasonable breach of the Code. Esto there is an unreasonable breach , the circumstances of the case would mandate either no uplift, or an uplift at the lower end of the scale of 0% to 25%.

By contrast, the (Claimant) *provided no explanation for his failure to raise points of criticism now advanced at the ET (in particular the human vs animal urine theory) in his appeal to Mr Watts. This placed the Respondent in the difficult position of not being able to address these matters as fully as those which had expressly been raised in the context of the evidence it*

had available to it at the time. This amounts to a serious failure to adhere to the Code, in particular at paragraph 26 thereof, in particular "employees should let employers know the grounds for their appeal in writing". Reduction should be considered at 25% to any compensatory award made by the Tribunal in the Claimant's favour."

75. Having carefully considered the whole evidence led before the Tribunal, the Tribunal is satisfied that all three legs of the **Burchell** test have been satisfied, and that the respondents had a reasonable belief that the claimant was guilty of misconduct, that reasonable belief was formed on reasonable grounds, and that they had carried out as much investigation into the matter as was reasonable in the circumstances.

76. Further, the Tribunal is satisfied that a fair procedure had been carried out by the respondents, and that it was fair to investigate matters before proceeding to a disciplinary hearing, and that the claimant had had an opportunity to know the allegation against him, to be accompanied or represented, and to put his case at both the initial disciplinary hearing, and at the later appeal hearing.

77. While it was suggested that there were some procedural irregularities here, and an unreasonable failure by the respondents to comply with the ACAS Code, the Tribunal does not accept those arguments, as overall the Tribunal is satisfied that the procedures adopted by the respondents were fair and reasonable. In particular, the Tribunal agrees with Mr Hay's submission that procedural fairness is to be determined by reference to the employer's procedure as a whole, considering both the stage as at the decision to dismiss, and as at the point of appeal, and on that basis the Tribunal is satisfied that any procedural shortcomings in the earlier stages were cured by the appeal hearing stage.

78. Accepting that there was fair procedure, the Tribunal turned then to the alternative argument on which it was asserted that the claimant's dismissal was unfair, and that is the submission made on the claimant's behalf that even if there was no procedural unfairness, the claimant nonetheless insisted that his dismissal was unfair, because he felt that the respondents had other options other than summary dismissal open to them, and he regarded

summary dismissal as being excessive when, in his view, another sanction should have been imposed.

79. In essence, one of the main points of the claimant`s representative's closing submissions to the Tribunal, as Ms Irvine put it to the Tribunal, was that she did not believe it was within the band of reasonable responses for the respondents to take disciplinary action against the claimant, which resulted in his summary dismissal, without notice, for gross misconduct, and that it was outwith the band for the respondents to have dismissed him for gross misconduct.

80. On this particular point, the Tribunal recognised that this is primarily a matter for the employer, and the question is whether a decision to so label the conduct in question fell within the band of reasonable responses open to the employer in the circumstances. So too the Tribunal recognised that it must not substitute its view of the situation for that of the employer.

81. Having considered the matter carefully, the Tribunal has decided that the claimant`s conduct was indeed gross misconduct. In coming to that view, the Tribunal took into consideration the judgment of the Employment Appeal Tribunal, in **Sandwell & West Birmingham Hospitals NHS Trust v Westwood [2009] UKEAT/0032/09,** where the EAT under His Honour Judge Hand QC, unreported, held that the question of what amounts to gross misconduct is a mixed question of law and fact, and that Tribunals should direct themselves that gross misconduct involves either deliberate wrongdoing or gross negligence and then consider both the character of the conduct and whether it was reasonable for the employer to regard that conduct as gross misconduct on the facts of the case.

82. The character of the misconduct should not be determined solely by, or confined to, the employer's own analysis, subject only to reasonableness. In that particular case, the employer's disciplinary code stated that failure to adhere to a particular policy would amount to gross misconduct. This did not mean that, once the employer concluded the policy had been broken, the breach necessarily amounted to gross misconduct. The Tribunal in that case was

entitled to consider the conduct that breached the policy and find that it could not reasonably be characterised as deliberate wrongdoing or gross negligence.

83. Further, in another unreported judgment from the Employment Appeal Tribunal, again by His Honour Judge Hand QC, sitting alone, in **Eastland Homes Partnership Ltd v Cunningham [2014] UKEAT/027/13**, the Employment Appeal Tribunal, suggested that where an employer characterises particular conduct as gross misconduct, Tribunals must analyse whether that was a reasonable position to adopt in the circumstances. The Tribunal's failure to do so in that particular case led to its finding of unfair dismissal being overturned.

84. The learned EAT Judge, His Honour Judge Hand QC, held that although the well-known authorities on unfair dismissal do not suggest that any finding as to the reasonableness of the characterisation of conduct as gross misconduct is called for, **Section 98(4) of the Employment Rights Act 1996** requires consideration of "***all the circumstances***". In his view, therefore, if the employer's view that the misconduct is serious enough to be characterised as gross misconduct is objectively (as opposed to subjectively) justifiable, then that should be considered as one of the circumstances against which to judge the reasonableness or unreasonableness of treating the conduct as a sufficient reason for dismissal.

85. Although a dismissal for gross misconduct will often fall within the range of reasonable responses, this is not invariably so, as was made clear by the Employment Appeal Tribunal in **Brito-Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854,** upheld by the Court of Appeal at **[2014] EWCA Civ 1626**. The test for unfair dismissal requires consideration of whether the employer acted reasonably in the circumstances, under **Section 98(4) of ERA**, so a Tribunal should give consideration to whether any mitigating factors render the dismissal unfair, notwithstanding the gross misconduct, and such factors might include, amongst others, an employee's long service, general work record, work experience, position, and any previous unblemished disciplinary record.

86. As such, having carefully considered the evidence heard at the Final Hearing, the Tribunal has decided that the disciplinary officer in coming to the view that it was

gross misconduct, and then the appeals officer upholding that decision, acted fairly and reasonably in treating the claimant`s conduct to be gross misconduct. In the Tribunal's view, it is clear that both Mr Bartlett and Mr Watts were correct in their opinion that there was reasonable belief that there had been misconduct by the claimant, and equally we are satisfied that they were likewise correct to label the claimant's conduct as gross misconduct, and their decisions to do so accordingly fell within the band of reasonable responses.

87. Although urination on company property is not a specific listed example, the Tribunal agrees with the respondents' witnesses that such conduct falls within certain of the other listed examples in the company's Disciplinary Policy, for example, deliberate or serious damage to or misuse of Company property ; and material breach of the Company's rules e.g. health & safety rules.

88. It must be borne in mind that the respondents' Girvan Distillery was a facility for the production of drink for human consumption. This was not a case where an employee has accepted that they were caught short and simply had to urinate there and then without appropriate toilet facilities being available. No such case was ever advanced by the claimant, who consistently denied the allegation made against him and, anyway, there were toilet facilities present within a few minutes' walk away.

89. Further, while the claimant's representative argued that the employer had other options open to them, to address the claimant's case, and in particular Ms Irvine relied upon the respondents not having taken account of the claimant's length of service and good conduct during his employment with the respondents, the Tribunal finds, as a fact, that these factors were taken into account by the employer, and it has also had regard to the fact that, as made clear in the Court of Appeal's judgment, in **Strouthos v London Underground Ltd [2004] IRLR 636**, length of service is a factor to be taken into account, but it is not determinative of the issue whether or not there has been a fair dismissal.

90. As Lord Justice Pill made clear, at paragraphs 29 to 31 of the Court of Appeal's judgment in **Strouthos**, in cases of serious misconduct length of service will not save the employee from dismissal. That is trite law, but it all

depends on the circumstances. Certainly, there will be conduct so serious that, however long an employee has served, dismissal is an appropriate response. However, considering whether, upon a certain course of conduct, dismissal is an appropriate response is a matter of judgment and, in that judgment, length of service is a factor which can properly be taken into account.

91. On the evidence heard at the Final Hearing, the Tribunal is satisfied that the respondents did take into account the claimant's length of service with them but, at the end of the day, that was not a factor which the employer felt merited a response to the claimant's gross misconduct, other than what the respondents' Disciplinary Policy had clearly forewarned employees that, if the company was satisfied that gross misconduct had occurred, summary dismissal may result from a one-off incident which is so serious that it fundamentally breaches the contract of employment.

92. While, the Tribunal recognises, another employer, in similar circumstances, may well have decided to dismiss for misconduct, and pay notice to an employee being dismissed, to reflect previous good service, the Tribunal cannot sustain an argument that it was outwith the range of reasonable responses for the respondents here to have summarily dismissed, and accordingly given no payment in lieu of notice to the claimant, given the nature of their particular line of business.

93. In coming to judgment, on this particular aspect of the case ,the Tribunal was mindful of paragraph 16 of the unreported EAT judgment from Lady Smith, on 15 June 2011, in **Strathclyde Joint Police Board v Cusick [2011] UKEATS 0060/10**, particularly her reference to the Lord Justice Clerk in **Arnott,** where the learned EAT Judge stated as follows:

> "16. If the "***Burchell test***" is passed and the dismissal is, accordingly, potentially fair, when it comes to considering, under **Section 98(4) of the 1996 Act,** whether it was fair, a tribunal requires to be careful to make an objective assessment. It must avoid falling into what is often referred to as the "*substitution mindset*": see, for instance, **London Ambulance Service NHS Trust v Small [2009] IRLR 563 CA.** It is not a matter of the tribunal

> asking itself whether or not they would have dismissed the claimant. Further, the tribunal ought to consider the question of what a reasonable employer would have done in context; that is, by asking themselves not just what any employer, acting reasonably, would have decided but what a reasonable employer whose business / activities were the same as or similar to those of the respondent, would have done in the circumstances: see **Ladbrokes Racing Ltd v Arnott [1981] SC159**, where the Lord Justice Clerk referred to considering what "*would have been considered by a reasonable employer in this line of business in the circumstances which prevailed".*

94. The Tribunal is satisfied that Mr Watts dealt with the claimant's appeal fairly and impartially, and the appeal hearing cured any procedural shortcomings or defects in the earlier investigation and / or disciplinary hearing stages of the respondent's internal procedures. Ms Irvine was, in my view, over egging the pudding to describe the disciplinary hearing as a "***charade*",** as she did at paragraph 14(i) of her written closing submission for the claimant.

95. The respondents were entitled to reject the claimant's account, accept Mr McNair's account, and hold that a circumstantial case had been made out against the claimant – that was plainly within the band of reasonable responses for the respondents as employer.

96. They followed a fair procedure, when the internal stages are viewed as a whole, and while, in evidence, and in Mr Hay's closing submissions, they accepted some shortcomings in their internal process, they did not amount to procedural unfairness to the claimant. On the evidence available, the Tribunal is satisfied that the respondents complied with the ACAS Code of Practice, and that there were no unreasonable failures to do so.

97. For the foregoing reasons, the Tribunal have decided that the claimant having been fairly dismissed by the respondents, his claim of unfair dismissal by the respondents is not well founded, and accordingly, having failed, his claim is dismissed by the Tribunal.

98. The claimant not having succeeded on the merits of his case to establish the respondents` liability for an unfair dismissal, it is not appropriate that the Tribunal proceed to address the competing submissions from both parties on the matter of remedy, contributory conduct, and any ACAS uplift / downlift, and appropriate compensation for the claimant.

Discussion and Deliberation : Wrongful Dismissal

99. Having dismissed the unfair dismissal head of complaint, the Tribunal has turned its attention to the wrongful dismissal claim against the respondents.

100. In this regard, the Tribunal bears in mind that throughout the respondents' internal process, and in his own evidence at this Tribunal, the claimant has consistently denied the allegation that he urinated on a spirit storage cask in the Girvan Distillery spirit blend and fill area on 20 November 2019.

101. For their part, the respondents say that he did do so, and that as that act is gross misconduct, they were entitled to dismiss him summarily, and thus without payment of notice. It is agreed between the parties that no notice was paid, so the onus falls upon the respondents to convince this Tribunal, on the balance of probabilities, that the claimant did, in fact, urinate as alleged.

102. There is no direct evidence before the Tribunal on this point. The respondents have led as witnesses the investigation, disciplinary and appeals managers, but no other witnesses. In particular, while Mr Gordon McNair's witness statement to the respondents was included in the papers before the Tribunal, and it was spoken to in evidence as having been part of the evidence against the claimant ingathered by the respondents internal investigation, Mr McNair was not led as a witness for the respondents.

103. The Tribunal's approach is not the same as in a complaint of unfair dismissal. It is not sufficient for the employer to demonstrate a reasonable belief that the employee was guilty of gross misconduct. They must establish that the claimant did the act of misconduct alleged. By failing to lead evidence from Mr McNair, and indeed Stuart Maxwell, who inspected the locus of the incident, and took the

photographs produced in the Bundle before the Tribunal, the only direct evidence is what the claimant has said, and he has denied that he urinated, as alleged.

104. As such, the respondents have failed to prove to the Tribunal's satisfaction that the claimant did, in fact, urinate, as alleged. Reasonable belief in his guilt, which is relevant for the unfair dismissal complaint, does not suffice for them to prove that they had grounds for his summary dismissal for gross misconduct.

105. In these circumstances, the respondents' argument that the wrongful dismissal claim fails has not been established, as they have not led sufficient evidence before this Tribunal to show that the claimant acted in breach of his contract of employment, and, in particular, that he committed a repudiatory breach of contract entitling them, as his then employer, to summarily dismiss him from their employment.

106. As regards the remedy for that wrongful dismissal, the Tribunal finds that as the claimant had a statutory minimum period of 12 weeks' notice from the respondents, then they should have paid him notice of **£11,264.76**, being **12** times his gross weekly wage of **£938.73**. Accordingly, the Tribunal has ordered the respondents to pay that amount to the claimant as damages for that breach of contract.

Employment Judge: Ian McPherson
Date of Judgment: 02 June 2021
Entered in register: 14 June 2021
and copied to parties