EMPLOYMENT TRIBUNALS

Claimant:	**Mr. P Capodici**
Respondent:	**Transformers and Rectifiers Ltd**
Heard at:	**Reading Employment Tribunal**
On:	**8th and 9th December 2021 (and 11th January 2022 in Chambers)**
Before:	**Employment Judge Eeley**

Representation

Claimant:	In person
Respondent:	Mrs. A Penkethman, associate

RESERVED JUDGMENT

1. The claimant's claim of unfair dismissal within the meaning of the Employment Rights Act 1996 fails and is dismissed.

2. The claimant's claim for notice pay arising from breach of contract fails and is dismissed.

REASONS

Background

1. By a claim form presented to the Tribunal on 5th November 2019 the claimant brought claims of unfair dismissal, wrongful dismissal and a failure to make a redundancy payment. He also sought to present his unfair dismissal claim as based both on an express and also a constructive dismissal. Following two preliminary hearings the claims which remained to be determined by this Tribunal were claims for notice

pay (wrongful dismissal) and unfair dismissal (following an express dismissal).

2. In determining this claim I received written witness statements and heard oral evidence from the following witnesses:

    a. The claimant;
    b. Mr. Clive Valler, the respondent's Factory Manager;
    c. Mr. Mark Holtman, the respondent's Operations Director;
    d. Mr. Neil McFadden, the respondent's Managing Director.

    I was referred to the contents of an agreed hearing bundle (which ran to 281 pages) and two further photocopied documents which were handwritten letters: one from the claimant to Mr. Holtman dated 9th September 2019 and the other from the claimant to Mr. McFadden dated 21st August 2019. I read those pages in the bundle to which I was referred by the parties. I also heard oral submissions from both parties and considered the respondent's skeleton argument, which was presented at the outset of the hearing. Unless otherwise indicated, numbers in square brackets below are references to pages in the agreed bundle of documents.

Findings of fact

3. The claimant was employed by the respondent as an Assembler. The claimant commenced employment on 31st October 2013 and was dismissed summarily on 6th August 2019.

4. The cleaning at the respondent's workplace was undertaken by an outsourced cleaning company. For the purposes of this claim the cleaners were two Nepalese employees: a male and a female. On 26th July 2019 the respondent received a complaint from those two cleaners about an incident of inappropriate behaviour and unwanted conduct from the claimant which was said to have occurred whilst he was in the company toilets near the factory workshop. The complaint was reported to Mr. Clive Valler who listened to what they had to say and calmed them down. The cleaners indicated that they wanted to report the incident to the police as harassment, intimidation, bullying and antisocial behaviour. Mr. Valler asked them to wait and speak to his superior, Mark Holtman. Mr. Valler was concerned to ensure that the company did not become the subject of a police investigation. It was his view that the issue should be dealt with internally via the company's own procedures. He therefore commenced an investigation.

Written procedure

5. The respondent company has a written disciplinary procedure [73]. Paragraph 3 of the policy sets out examples of conduct which will be normally regarded as 'misconduct' to be dealt with under the respondent's disciplinary procedure. For the purposes of these proceedings the relevant paragraphs are:

    (g) Refusal to follow instructions; and
    (j) Obscene language or other offensive behaviour.

6. Paragraph 4.1 of the procedure defines the concept of gross misconduct. The introductory paragraph states: *"gross misconduct is a serious breach of contract and includes misconduct which, in our opinion, is likely to prejudice our business or reputation or irreparably damage the working relationship and trust between us. Gross misconduct will be dealt with under our disciplinary procedure and will normally lead to dismissal without notice or pay in lieu of notice (summary dismissal)."* Paragraph 4.2 of the procedure sets out examples of matters which were normally to be regarded as 'gross misconduct.' For the purposes of these proceedings the following subparagraphs were of note:
    (g) Unlawful discrimination or harassment;
    (l) Serious breach of confidence;
    (s) Harassment of, or discrimination against, employees, contractors, clients or members of the public, related to gender, marital or civil partner status, gender reassignment, race, colour, nationality, ethnic or national origin, disability, religion or belief or age.

7. Paragraph 6.1 of the respondent's disciplinary procedure deals with "minor conduct issues". It states: *"Minor conduct issues can often be resolved informally between you and your line manager. These discussions should be held in private and without undue delay whenever there is cause for concern. Where appropriate, a note of any such informal discussions may be placed on your personnel file but will be ignored for the purposes of any future disciplinary hearings. In some cases an informal verbal warning may be given, which will not form part of your disciplinary records. Formal steps will be taken under this procedure if the matter is not resolved, or if informal discussion is not appropriate (for example, because of the seriousness of the allegation.)"*

8. The respondent's disciplinary procedure sets out the process for an investigation. The purpose of an investigation is said to be to establish a fair and balanced view of the facts relating to any disciplinary allegations against the employee before deciding whether to proceed with a disciplinary hearing. It is stated that the amount of investigation required depends on the nature of the allegations and will vary from case to case. It might involve interviewing and taking statements from the employee and any witnesses and/or reviewing relevant documents. It goes on to specify that investigative interviews are solely for the purpose of fact finding and no decision on disciplinary action will be taken until after a disciplinary hearing has been held. The employee is not entitled to have a companion at an investigative interview.

9. Paragraph 10 of the procedure deals with the issue of suspension. It states that suspension will be for no longer than is necessary to investigate the allegations and will be confirmed in writing. It confirms that suspension is not a disciplinary penalty and does not imply that any decision has already been made about the allegations. Pay and benefits during suspension will be calculated as set out in the employee's contract. In the event that the respondent considers that there are grounds for disciplinary action an employee will be invited to a

disciplinary hearing. The procedure confirms that the employee will be informed in writing of the allegations against him or her, the basis of those allegations, and what the likely range of consequences is if the respondent decides after the hearing that the allegations are true. The procedure also specifies that the respondent will include the following, where appropriate: a summary of relevant information gathered during the investigation; a copy of any relevant documents which will be used at the disciplinary hearing; and a copy of any relevant witness statements, except where a witness's identity is to be kept confidential, in which case the respondent will give the employee as much information as possible whilst maintaining confidentiality. The employee will then be given written notice of the date, time and place of the disciplinary hearing, which is to be held as soon as reasonably practicable but which will give a reasonable amount of time (usually 2 to 7 days) for the employee to prepare his/her case based on the information provided. An employee has the right to be accompanied at any disciplinary hearing.

10. The procedure provides that at any disciplinary hearing the respondent will go through the allegations against the employee and the evidence that has been gathered and the employee is given the opportunity to respond to the allegations and present any evidence of their own. The respondent's procedure confirms that the employee will be informed in writing of the respondent's decision and the reasons for it, usually within one week of the disciplinary hearing. Where possible this will also be explained to the employee in person.

11. Paragraph 14.2 of the procedure confirms that an employee will not normally be dismissed for a first act of misconduct unless the respondent decides that it amounts to gross misconduct or the employee has not yet completed the probationary period. As is often the case with such procedures, the written procedure sets out a series of staged warnings from first written warning through final written warning, culminating in dismissal. It is stated within the document that dismissal may be appropriate for any act of gross misconduct regardless of whether or not the employee has active warnings on their disciplinary record. *"Gross misconduct will usually result in immediate dismissal without notice or payment in lieu of notice (summary dismissal).*" It also sets out some possible alternatives to dismissal such as: demotion; transfer to another department or job; a period of suspension without pay; loss of seniority; reduction in pay; loss of future pay increment or bonus; loss of overtime.

12. Each employee is to be offered the opportunity to appeal against disciplinary action. The appeal should be set out in writing (with grounds) within one week of the date on which the employee was informed of the decision. If the employee appeals an appeal hearing will take place and after the hearing the respondent could decide to confirm the original decision, revoke the original decision, or substitute a different penalty. The outcome of the appeal will be confirmed in writing as soon as possible, usually within one week of the hearing. Where possible this will also be explained to the employee in person.

Investigation

13. Following receipt of the cleaners' complaint, the respondent invited the claimant to attend an investigation hearing by letter [93]. The investigation manager was to be Clive Valler and the meeting would take place on 30th July. The reasons for the investigation meeting were said to be: *"it is alleged that you have been obstructive towards our contract cleaners, in that you have been deliberately using the urinals when they are in the middle of cleaning them, harassing them in their place of work, and have taken no heed of signage used to ensure that health and safety standards are maintained within the toilet area during cleaning time. The latest of such incidents took place on Friday, 26th July 2019 while they were cleaning the toilets."* It was confirmed that the meeting was not a disciplinary hearing but was an opportunity for the respondent to speak to the claimant about the allegation ahead of deciding whether to proceed with a hearing. A copy of the respondent's disciplinary procedure was enclosed with the letter.

14. The investigation meeting took place on 30th July 2019. The claimant attended, together with Clive Valler, Alan Winston (supervisor) and Stephanie Barnett. A note of the meeting was taken [94]. The note was not a verbatim record of what had been said but was intended to be a summary of what was said during the meeting. The claimant received a copy of those notes which had been typed following the meeting. He had the opportunity to correct and annotate the notes where he felt they were incorrect or omitted relevant details. He did so and the copy presented to the Tribunal was the final version which included the respondent's typed notes with the claimant's handwritten annotations. I find that this document is an accurate record of what was said during the meeting, albeit not a verbatim record. The claimant has made his annotations in handwriting. Any amendment that he wishes to make now (during the Tribunal hearing) which was not included in the handwritten annotations is unlikely to be accurate. Memories fade over time and the record which was made closer in time to the meeting itself is more likely to be an accurate reflection of the meeting than any recollections described orally at the Tribunal hearing some 2 ½ years later.

15. At the outset of the meeting Mr. Valler explained that both of the cleaners had complained to the business about the claimant's behaviour. The allegations were that there had been bullying, unreasonable behaviour, not listening to what they requested, knocking barriers out of the way, using the urinals whilst they were being cleaned and using the toilet cubicle with the door open. The claimant denied harassing the cleaners and denied knocking over a barrier. The respondent confirmed that it was alleged that these incidents had been ongoing for a number of months. The claimant denied this and asserted that the only incident was on the previous Friday when, before 7am, he used the toilets. He was asked why he had not used another set of toilets given that the sign was up. His explanation was that he had been told not to use the other toilets. He asserted that he had been told this categorically on several occasions (at least three). He maintained that everyone had been told that. Mr. Valler's response was to confirm that yes, normally that is the case, but when there is a sign up (to not use the facilities) and a mop across the door to stop people entering an employees should not do so.

The claimant denied that there was a sign in place. His amended version of the notes confirmed that there was one mop in the doorway. He confirmed again that he had previously been strenuously told not to use the office toilets. He stated, "*there are lots of normal people all who have to have a dump before they start work, that and blow their nose. Are you now telling me I can't go…?"* Mr. Valler confirmed that he was not saying that and referred to the ethics of the situation. It was about using the facilities whilst someone is cleaning them and using the cubicle with the door open. The claimant confirmed that the cleaners had lied. He denied harassing the cleaners.

16. Mr. Valler asked the claimant whether he thought it was reasonable to use a toilet whilst it was being cleaned. The claimant's response was to comment that lots of cleaners do their work outside of normal working hours. He went on to query why the female cleaner cleaned the toilets and never the male cleaner. He asserted that the male cleaner just changed the toilet rolls. He asserted that lots of companies don't let cleaners in during the working day.

17. The claimant confirmed again that the mop was across the door on the previous Friday. The notes then contain a comment which the claimant denies making. However, I find that this section of the typed notes reflects comments which the claimant did actually make during the meeting. The notes recording the exchange between the claimant and the cleaner make no sense if the disputed comments are deleted. I find that the claimant did say: *"She said, "you can't come in". I said I was. She said you need to talk to the management, and I said no you do. So, I walked away before it turned into an argument. We have had this conversation two or three times in the last year. I have never allowed it to get out of hand. I don't want it to get into an argument."* Mr. Valler commented that to his mind it was clear that the toilet should not be used when it was being cleaned. He commented that if the toilet was broken the claimant wouldn't use it and would use the other one (i.e. the office toilet). At this point Alan Winston is recorded as having said: *"We have always said if you are desperate to use the other toilet."* The claimant repeated that he had been told three times strenuously not to use the other toilets. Clive Valler confirmed that people still use the other toilets. He commented that if other employees had done this then surely the claimant would have done so. He asked the claimant whether he thought it was unreasonable behaviour to use the urinal when someone is cleaning it. The claimant's typed response to this question was "I told you I couldn't use the other ones. What should I do? *I went to use the other toilet but the bloke was using it.*" The accuracy of the italicized portion of this comment is disputed by the claimant in his handwritten annotation on the notes but I find it more likely than not that it is an accurate record of what was said.

18. Mr. Valler then confirmed that there is a unisex toilet and one male and one female toilet. The following exchange was recorded in the notes (and was not amended by the claimant when he reviewed the notes and made annotations and corrections):

    SB-Did you use the toilets on Friday when the cleaners were in them
    PC-Yes

SB-Did you use the urinals and toilets
PC-Yes. They say harassment and I did not do that.
SB-How frequently has this happened?
PC-Over the years, five or six times.
SB- Did the cleaner protest?
PC- No protests…I walked away.
CV-Please don't raise your voice.
PC- I am not raising my voice.
SB-Is there anything else you want to add?
PC- Think you should get the bloke to do some of the cleaning. He just empties the bins and puts the toilet rolls on and get the cleaners to come outside of work time. Don't understand why this is an issue…
CV- We haven't had anyone else complained about.
PC-I have been honest. We have only had words three or four times. I want an explanation about why I have harassed them.
SB-This is for us to review and then decide if there is a need to take disciplinary action in this instance. You will be informed if that is the case."

The claimant's handwritten annotation at the bottom of the notes states: "The notetaker did a decent job it's a "decent effort", with some mistakes, some credit. I want it clearly recognised it is not my syntax. My syntax is not as blunt or abrupt. Example enclosed."

19. On 30th July 2019 the claimant was suspended from work. This was confirmed in writing in the letter of the same date [97]. The letter confirmed that the allegation was: "It is alleged that you have been obstructive towards our contract cleaners, in that you have been deliberately using the urinals when they are in the middle of cleaning them, harassing them in their place of work, and have taken no heed of signage used to ensure that Health and Safety standards are maintained within the toilet area during cleaning time." The suspension was to continue whilst the investigation was ongoing

20. The claimant was invited to a disciplinary hearing which was to take place on 5th August 2019 and which would be conducted by Mr. Holtman. The letter of invitation appears at [99]. The annotations on that letter by the claimant indicate that he received the letter on 1st August 2019 at around midday. The letter stated, amongst other things, that: "You should provide me with any witness statements, documents or other evidence that you wish to me to review to assist in our investigations at the earliest opportunity and no later than 12 midday on Friday, 2nd August 2019." The claimant noted in his evidence to the Tribunal that this meant that he had only a matter of hours to read this and provide his written response to the allegation. The letter confirmed that the claimant was entitled to be accompanied by an appropriate work colleague or trade union representative and that he was permitted to refer to any matters or documents that he felt may be relevant. The letter also warned that if at the disciplinary hearing it was concluded that the behaviour constituted gross misconduct then he was at risk of summary dismissal. The invitation letter indicated that copies of the witness statements, including the claimant's, were enclosed. The claimant's

handwritten annotation indicated that his witness statement had not been enclosed with the letter.

21. The respondent typed a statement said to have been dictated by the two cleaners in question on 31st July [101]. It stated: *"On Friday 26 July Peter was told that the toilets were being cleaned. There was a barrier of two mop stick barring the toilets doors. Kopila was busy cleaning and she asked Peter not to enter as she had not finished. Peter replied that he had to go. Bishnu arrived and asked what was the matter. Peter went to use one of the stalls without closing the door. Peter used a lot of toilet paper and threw it into the toilet bowl and left without flushing. Bishnu asked him why he was making an issue out of this we all have jobs to do and there was pressure to complete in a certain time. Peter then left On previous occasions Peter has used the toilet without closing the door while Kopila has been present. He has also used the urinal when it has been cleaned. He has constantly ignored requests to not use the toilet while it has been cleaned. Peter has stood extremely close without letting her know causing distress to Kopila. This behaviour has been repeated several times"*

22. The claimant provided a handwritten letter dated 1st August 2019 which included his initial written response to the allegations [102]. The material portions of the letter stated: *"Secondly the statement by the two cleaners is wholly erroneous. There was 1 mop in the doorway. I used a urinal trough. I did not touch any toilet paper."* The claimant alleged that portions of the cleaners' statement were a lie. He denied speaking to the to the cleaners first-they always spoke to him. He commented that when they speak to him they do come very close and maybe subliminally he interpreted this as a potential aggravation and spoke shortly with them and went away so as not to have an argument. He alleged that a conversation took place between the cleaner and himself on 26th July 2019 as follows:
"I enter-use urinal-wash hands
Female -Why don't you use the other toilet?
Peter-We are not allowed to
Female- Why don't you use the other toilet?
Peter-We are not allowed to
Female-Why don't you use the other toilet?
Peter-Talk to the management
Female-You talk to the management
Peter-No you talk to the management
Female-you talk to the management."
At this point the claimant said that the male cleaner arrived and the claimant left.
The claimant confirmed that the exchanges with the cleaners on the 3 or 4 times they have spoken have been about one minute long with the cleaners doing a lot of repetition. The claimant asserted that he walked away not out of rudeness but because it would not be productive to continue.

23. The claimant asserted that the cleaners should not be allowed to get in the way when workers are arriving. He reiterated that the employees had been told several times not to use the administration's toilet. However,

he did indicate that on one occasion when the men's cubicles were full he had used the toilet with the brown door (i.e. a separate set of toilets).

24. Importantly the claimant included the following paragraph in the end of his letter (in relation to the comments made at the earlier meeting): *"Finally I was asked how many times had I used to the urinal with them there. I said 5 or 6 certainly not double figures. It is about six. Three times with the male between 9/4/14-16/12/16. With the female in the area one in the cubicle, I believe I closed the door because she was cleaning the trough and twice in the trough because she was cleaning the cubicles. Very finally-there is not a molecule of misogyny in me toward the female race."*

Disciplinary stage

25. The claimant attended the disciplinary meeting on 6th August 2019. Present at the meeting was Mr. Holtman and also Jake Robbins and Mike Daly. The intention was apparently that Mr. Robbins and Mr. Daly would take notes of the meeting. Typed notes of the meeting were at [105a] and [105b]. The material parts of the notes are as follows:

"MH-Reading through page 4 of your letter, it is clear that you have used the urinal while the cleaner was in there." Mark then reads page 4 of the letter out loud.

MH-"I was asked how many times I had used the urinal with them there. I said 5 or 6 certainly not double figures. It is about 6"

MH-"This is not acceptable behaviour."

PC- "No one is allowed to use the other toilets. I told this to the cleaner. When Michael or Clive say don't use the toilet, I don't do it. I've been in there with the male cleaner and this has never happened before."

MH-"But you must use the other toilets if the cleaners are in there."

PC-"There was no sign. There was a mop in the doorway. Over the last 2 and half years this has never been a problem."

MH-"Peter, do you agree that the events discussed took place?"

PC-"Yes, but the cleaners have different syntax. Everyone has different syntax."

MH-"Please can you come back in 10 minutes so I can think about this?"

PC-"Yes, I'll be back in 15 minutes."

…

When the claimant came back into the meeting he was asked if he had any additional comments to make. The claimant confirmed that he didn't and Mr Holtman went on to state: "Based on your antisocial behaviour towards the cleaners and the statements in your own letter of events, the business is dismissing you from the organisation for gross misconduct. This is effective immediately and all outstanding monies will

be paid to you. You have the right to appeal this decision if you wish to do so."

26. During the course of the Tribunal hearing the claimant asserted that some aspects of the notes of this meeting were inaccurate and that he did not make all the comments attributed to him. On balance, I find that he did make the comments set out in the notes and that the notes are an accurate record of the meeting. The comments attributed to him are credible given the contents of the claimant's own letter to the respondent and given that he did not challenge the accuracy of the notes until he was being cross examined in front of the Tribunal.

27. The dismissal was confirmed by letter dated 6th August 2019 [106]. The material paragraph in the letter states: *"The conclusion reached in terminating your employment was on the grounds of your acknowledgement during the meeting 29th July that you did use the urinals whilst a (female) cleaner was in the process of cleaning the toilets. This was despite signage asking you not to use the toilet at this time and the cleaners request for you to refrain. Regardless of rules on the use of toilets (and you acknowledge you have used other toilets in the building from time to time), we do not believe it is appropriate for you to carry out such acts whilst the cleaner is performing their role. We have taken account of your service with the business but feel this is a highly inappropriate act."* The letter informed the claimant of his right to appeal in writing by 13th August to Neil McFadden setting out grounds of appeal in full. The letter confirmed that it was a summary dismissal and no notice pay would be paid.

28. The claimant duly appealed. Mr McFadden received a letter from the claimant on 13th August 2019 raising a number of issues relating to procedure. He received a further letter from the claimant on 21st August giving details of the appeal.

<u>Appeal</u>

29. The appeal hearing took place on 16th September 2019 and notes of the meeting were taken [109]. During the course of the appeal hearing the claimant commented that it only took six minutes for him to be fired during the disciplinary hearing-one minute for each year he had worked there. The claimant said that his previous foreman would have treated it as a minor issue and it would have been a dressing down that he would have received. He questioned why it was being treated as gross misconduct. He produced copies of the Metro newspaper and quoted stories regarding theft which led to employees being fired at other companies and sought to draw a comparison with his own situation. Mr McFadden dismissed these comparisons and reiterated the scenario from 29th July that a mop/bucket was blocking the entrance to factory staff male toilets while the female cleaner was in attendance. The claimant crossed the barrier and continued to use the facilities whilst the cleaner was still in there.

30. The claimant referred back to 5 or 6 years ago when Management had told him not to use the "brown door" toilet. The claimant said that he had

needed to use the facility so as not to soil himself as all the three factory toilets were locked. He also confirmed that the incidents in question in the factory toilets were when it was 7am and he needed to be at his place of work and sort out his lunch. He confirmed on five or six occasions he had used the factory toilet whilst the cleaners were in there. The claimant challenged the cleaners' statement and said that other people must have used the toilet whilst the cleaners were in there.

31. Part way through the meeting Mr McFadden asked the claimant to cease being so aggressive. The claimant confirmed that he had used the toilets whilst the cleaners were in there five or six times. Mr McFadden asked the claimant why he would use the urinal when a female cleaner was in attendance and Peter said that a few years ago no mop bucket was put in the doorway. The meeting concluded with Mr McFadden upholding the decision to dismiss and explaining his reasons and stating that everybody should be treated with respect. Mr McFadden also confirmed that the cleaners had initially wanted to take the incident to the police but management had assured them that it would be investigated internally first. The claimant confirmed strenuously that this was the first time he had been made aware of the possibility of the police being involved. He wanted it noted that the cleaners had accused him of harassment but that that had not been addressed meeting. The claimant was told he would receive a copy of the minutes together with a letter confirming the decision to uphold the dismissal. He was escorted from the premises by Mr McFadden.

32. A copy of the appeal hearing notes was sent to the claimant with a covering letter dated 16th September confirming the outcome of the appeal was that the decision to dismiss the claimant was upheld [108].

33. During the Tribunal hearing the claimant made reference to a sketch map of the staff toilets which he had drawn to show the layout of the area [119].

34. The claimant referred to a number of diary entries which he said noted incidents which had occurred with his colleagues such as other disciplinary matters:

    12th February 2015 "Colin Bright, the 50 year old slurping beverage drinker finished today. He was given 2 weeks notice but chose to quit. Apparently his work was not good enough. This was the second time here. He started this time 2nd January last year." [135]

    11th April 2016 "we were compelled to wear black caps from today. (See 27/6/16) all day long." [140]

    26th April 2016 "Ear protectors with air blower idiocy today." [141]

    27th June 2016 "We did not have to wear the black caps all day from today (see 11/4/16). We were given white helmets today." [142]

    31 August 2017 "Robert (from Basingstoke) quit today and Ryan was fired (he was a winder for four weeks about 15 years ago). [144]

21st November 2016 "Mark (Gadget) was suspended on full pay for dropping aluminium very loudly behind Paul Cotton. Wiz asked me to go back to my bench for showing which spanners to buy to Jim." [280]

24th July 2018 "was told Fraser, Jose's store assistant was fired two weeks ago. He had threatened Paul Cotton etc." [281]

The law

Unfair dismissal

34. The relevant part of the Employment Rights Act 1996 is section 98 which states (so far as relevant):

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair it is for the employer to show-
(a) the reason (or if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it-
….
(b) relates to the conduct of the employee,
….

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-
(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

35. In line with the Employment Rights Act it is for the respondent to prove the reason or principal reason for the dismissal. A 'reason for dismissal' has been described as 'a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee' *(Abernethy v Mott, Hay and Anderson 1974 ICR 323)*.Thereafter the burden of proof is neutral as to the fairness of the dismissal (*Boys and Girls Welfare Society v Macdonald 1997 ICR 693, EAT).*

36. In a conduct dismissal case the questions to be addressed by the Tribunal are:

a. Did the respondent have a genuine belief that the claimant was guilty of the alleged conduct?

b. Did the respondent carry out a reasonable investigation into the allegations of misconduct?
c. Following the investigation, did the respondent have reasonable grounds or evidence for concluding that the claimant had committed the alleged misconduct?
d. Did the respondent follow a fair procedure in relation to the disciplinary allegation? If there is a failure to adopt a fair procedure at the time of the dismissal, whether set out in the ACAS Code or otherwise (for example, in the employer's disciplinary rules), the dismissal will not be rendered fair simply because the unfairness did not affect the end result. However, any compensation is likely to be substantially reduced (*Polkey v AE Dayton Services Ltd 1988 ICR 142, HL*)
e. Did the decision to dismiss the claimant fall within the band of reasonable responses which a reasonable employer might have adopted?

(See *British Home Stores Ltd v Burchell 1980 ICR 303, EAT)*

37. In considering the so-called 'band of reasonable responses' the Tribunal must not substitute its own view for that of the reasonable employer (*Iceland Frozen Foods Ltd v Jones 1983 ICR 17, EAT; Foley v Post Office; HSBC Bank plc (formerly Midland Bank plc) v Madden 2000 ICR 1283, CA)*. As stated in the Jones case:

> '*We consider that the authorities establish that in law the correct approach for the… tribunal to adopt in answering the question posed by [S.98(4)] is as follows:*
> *(1)the starting point should always be the words of [S.98(4)] themselves;*
> *(2)in applying the section [a] tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the… tribunal) consider the dismissal to be fair;*
> *(3)in judging the reasonableness of the employer's conduct [a] tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;*
> *(4)in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;*
> *(5)the function of the… tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.'*

38. The band of reasonable responses applies to the question of the procedural fairness of the dismissal as well as the substantive fairness of the dismissal. (*J Sainsbury plc v Hitt 2003 ICR 111, CA; Whitbread plc (t/a Whitbread Medway Inns) v Hall 2001 ICR 699, CA.*)

39. The reasonableness test is based on the facts or beliefs known to the employer *at the time of the dismissal*. A dismissal will not be made

reasonable by events which occur after the dismissal has taken place *(W Devis and Sons Ltd v Atkins 1977 ICR 662, HL.)*

40. The claim of unfair dismissal is a statutory claim and statutory principles and associated case law guidance apply. It is not the same as the common law concept of wrongful dismissal and the same case facts may result in different outcomes under the statutory test as compared to the common law test. The question to be addressed is that posed by section 98(4) Employment Rights Act 1996. This requires the Tribunal to look at the fairness of the dismissal. It does not require the employer to specifically categorise the conduct as gross misconduct entitling the employer to dismiss summarily before it can decide that the dismissal was fair within section 98(4), although the two concepts may well coincide in many cases. Dismissal for a first offence properly categorised as gross misconduct may often be assessed as a fair dismissal within section 98(4). The question for section 98 is whether the decision to dismiss falls within the range of reasonable responses in all the circumstances. Was the conduct itself serious enough? What other relevant factors are there? Generally speaking, dismissal for a first offence will be reserved for acts of gross misconduct but there is no statutory rule to that effect.

41. If an employer categorises the actions of its employee as gross misconduct this is not the end of the matter. They still need to consider whether dismissal is the fair and appropriate sanction. Are there mitigating factors indicating that there should be a lesser sanction. (Indeed, aggravating factors may also be considered and taken into account). What is the attitude of the employee to their own conduct? Is there remorse? Will the conduct be repeated in future? There *may* be factors in any given case which take the decision to dismiss outside the range of reasonable responses even where there is said to be gross misconduct.

42. An employee may argue that he has been unfairly dismissed on the basis that the employer has treated him inconsistently as compared to other employees. Dismissal might be considered an unfair sanction because the employer has in the past treated other employees guilty of similar misconduct more leniently. Such a dismissal may then be unfair because it is not in accordance with equity within the meaning of section 98(4) (see Post Office v Fennell [1981] IRLR 221). However, provided the employer has considered previous situations and distinguished them on rational grounds, it will not be possible to say that the sanction of dismissal is inappropriate. In general terms, inconsistent behaviour can arise in one of two ways. First, the employer may treat employees in a similar position differently. Second, he may, in relation to a particular employee, have treated certain conduct leniently in the past and then suddenly treated it as a dismissible offence without any warning of this change in attitude. Both forms of inconsistency may render a dismissal unfair.

43. Although the employer should consider how previous similar situations have been dealt with, the allegedly similar situations must truly be similar (Hadjioannou v Coral Casinos Ltd [1981] 352*).*This is likely to set significant limitations on the circumstances in which alleged inequitable or disparate treatment can render an otherwise fair dismissal unfair. Second, an employer cannot be considered to have treated other employees differently if he was unaware of their conduct. Third, if an employer consciously distinguishes

between two cases, the dismissal can be successfully challenged only if there is no rational basis for the distinction made (Securicor Ltd v Smith [1989] IRLR 356.)

44. In the event that a claimant establishes that he or she has been unfairly dismissed the question of remedy will arise. In most cases the issue is one of compensation rather than reinstatement or re-engagement. The Tribunal will then consider what loss the claimant had sustained in consequence of the alleged dismissal. The Tribunal will then consider making a basic and/or a compensatory award (s118 ERA 1996). The Tribunal will consider whether the claimant has taken reasonable steps to mitigate his loss in determining the period/amount of loss to be compensated. The Tribunal may also consider whether the basic or compensatory award should be reduced pursuant to section 122(2) and/or section 123(6) of the Employment Rights Act 1996. A reduction in the basic award may be made where and to the extent that it is just and equitable to do so based on the claimant's conduct prior to the dismissal. A reduction may be made to the compensatory award where it is found that the claimant's blameworthy or culpable conduct contributed to the dismissal.

Notice pay

45. Wrongful dismissal is a common law contractual claim. The issue is the employee's conduct and whether the employee was in fundamental breach of contract. The reasonableness of the employer's belief as to the employee's guilt is immaterial. The question is whether the employer was entitled to dismiss the employee without notice. The claim may be defended upon the basis that the employee was in repudiatory breach of the contract entitling the employer to dismiss without giving notice. The damages for a successful claim are generally limited to the benefits that would have accrued to the employee during the notice period. The aim of damages is to place the employee in the position they would have been in had the contract been performed by the employer giving the correct notice of termination to the employee.

46. A repudiatory breach of contract is one which goes to the root of the contract. It is a very serious breach of contract. In most cases the question will be framed in terms of gross misconduct. Gross misconduct is so serious that it is repudiatory and entitles the employer to dismiss summarily. Cases involving repudiatory breaches by employees often rely on serious misconduct by the employee, such as dishonesty, intentional disobedience or negligence. They often refer to 'gross misconduct' and 'gross negligence', but the legal test to be applied by courts and tribunals is not whether the employee's negligence or misconduct should be called 'gross', but whether it amounts to repudiation of the whole contract. This is a question of fact.

47. The implied term of mutual trust and confidence applies to both parties to the contract and the employee is also bound by the term that the employee is to provide loyal service to the employer. In determining whether an employee has repudiated the contract of employment, factors such the nature of the employment and the employee's past conduct will be relevant. A court or tribunal must be satisfied, on the balance of probabilities, that there was an *actual* repudiation of the contract by the employee. It is not enough for an employer to prove that it had a reasonable belief that the employee was guilty

of gross misconduct. This is a material difference from the proof needed in an unfair dismissal claim where the issue is of reasonable belief.

37. If an employer dismisses an employee for repudiatory conduct the employer is accepting the employee's breach as terminating the need for the employer, to continue to perform its side of the employment contract bargain.

38. A tribunal deciding a claim for notice pay has to decide whether the claimant actually committed the repudiatory breach of contract. They must make their own findings of fact in relation to this issue. By contrast, in the statutory claim of unfair dismissal the question is not whether the claimant in fact committed a repudiatory breach of contract but rather whether the employer had a genuine belief in the employee's guilt, based on reasonable evidence following a reasonable investigation. The Tribunal does not decide whether it thinks the repudiatory breach in fact occurred for the purposes of the unfair dismissal claim. It must decide the statutory questions posed by section 98 of the Employment Rights Act 1996.

Conclusions

Unfair dismissal

39. I conclude that the respondent has established that the reason for dismissal in this case was the claimant's conduct. The dismissal was for a potentially fair reason. I can discern no evidence to suggest that the dismissal was for some other, impermissible reason. The claimant sought to suggest that the reason for his dismissal was his refusal to relinquish the job title of Assembler to become a Mobile Operator and/or an element of tension between the claimant and Alan Wisden. There was no real evidence that either of these issues was material to the decision to dismiss. There was no indication that either issue played on the mind of the respondent's decision makers or that it would be a motive for them to dismiss a competent and longstanding employee. Even if it was a factor (which I do not think it was) it certainly was not the 'principal' reason for the dismissal.

40. I further conclude that the respondent had a genuine belief in the claimant's guilt which was based on reasonable grounds. In the first instance there was clear and credible evidence from the two cleaners in question. They clearly indicated that the claimant had used the toilets despite being asked not to do so whilst the cleaners were present. He had used the cubicle with the door open whilst the female cleaner was in the vicinity. He had also used the urinals when the cleaners have still been in the vicinity cleaning. They confirmed that he had ignored requests not to use the toilet whilst it was being cleaned.

41. The claimant's initial response at the investigation stage was to confirm that he had, on 5 or 6 occasions, used the toilets and urinals when the cleaners were cleaning in the vicinity. He also accepted that on the most recent occasion there was a mop across the doorway which he stepped over in order to gain access. The claimant's letter of 1st August 2019 also conceded that he had used the urinal when the cleaner was in the vicinity on the last alleged occasion on 26th July 2019. It is also clear from his account of the conversation that the female cleaner asked him to use the other toilet and the

claimant repeatedly refused to do so. In his letter he confirms that he has used the urinal with the cleaners present 5 or 6 times over the years. On 3 occasions it was the male cleaner present. With the female cleaner present he confirmed he had used the cubicle once (door closed) and urinal twice. The respondent was entitled to rely on the claimant's own evidence of the events particularly where he had made admissions. He had drafted this letter in his own words and did not have to make any admissions if he did not feel they were justified. He chose to concede that he had acted in this way. Whilst he only had a limited period of time to prepare this letter it was not a lengthy document and the time limit did not dictate the *contents* of the letter. He could have drafted a letter denying all the allegations within the same time frame if he genuinely felt that this was the accurate and truthful response to the allegations. He did not do so.

42. When the claimant got to the disciplinary hearing his previous admissions from the letter were read out to him. He did not challenge the accuracy of the letter at the disciplinary hearing. He did not assert that his admissions were wrong or otherwise should not be relied upon by the respondent in making the disciplinary decision. His assertion in the Tribunal hearing that he *did* challenge the accuracy of his own letter at the hearing is not credible and is not found to be factually accurate. At the appeal hearing, the claimant still accepted that he had used the urinal whilst the female cleaner was present although he may have quibbled about the precise circumstances of this and the number of times that it had happened.

43. The upshot of the above is that the claimant's own evidence confirmed that he had done what was alleged on at least one occasion and probably between 5 and 6 occasions. At the very least one of those occasions involved using a urinal whilst a female was present. The claimant had clearly refused the cleaner's request to use another toilet whilst these toilets were being cleaned.

44. Based on the above evidence the respondent clearly had reasonable grounds to conclude that the claimant was guilty of the alleged misconduct.

45. I find that the respondent carried out as much investigation as was reasonable in the circumstances. The respondent's disciplinary procedure was also fair and reasonable. The respondent gave the claimant fair notice of the allegations and gave him every opportunity to respond to the allegations and present his case. He was allowed to respond to the allegations in writing and orally at three meetings: investigation, disciplinary and appeal. He was offered the right of appeal and told of his right to be accompanied to the formal disciplinary meetings. He was forewarned that he was at risk of dismissal if the respondent found the allegations proven.

46. Finally, I have concluded that the decision to dismiss the claimant fell squarely within the range of reasonable responses open to a reasonable employer in these circumstances. The claimant unnecessarily used the toilets, including the urinal, whilst the female cleaner was present doing her job. That female cleaner had every right to expect that men would not use the urinals whilst she was present given the difference in gender and the fact that the claimant would have to expose himself, at least to some extent, in order to use the facilities. The experience would have been unnecessarily intimate and embarrassing for the cleaner. The cleaner was clearly distressed and

upset by the incidents and had asked the claimant not to use the facilities whilst she was there. He knew or ought to have known that she did not want him to act as he did, either as a result of their conversations on this and previous occasions, or because there was a mop barring the doorway indicating that the facilities should not be used whilst they were being cleaned. The claimant was also well aware from past experience that the female cleaner often cleaned the male toilets. Any reasonable employee would have realised that the mop signified that employees should not enter whilst cleaning was in progress. It is a relatively commonplace method used by cleaners in both public and workplace toilets. It should have been obvious to the claimant that this was what was requested.

47. The claimant's lack of insight as to why his actions were problematic, both at the time and subsequently, was quite remarkable. He seems not to realise that the respondent had a duty of care to the cleaners whilst they were doing their jobs in the respondent's workplace, as well as to its own employees. He seems not to realise the potential impact upon a female cleaner of having to clean the male toilets in these circumstances. This is not a claim of section 26 harassment under the Equality Act 2010 brought to the Tribunal by the cleaner. However, it is instructive to consider the wording of that section in assessing the seriousness of the claimant's conduct in its proper context. The respondent needed to ensure that it did not facilitate inappropriate behaviour towards the cleaner which could leave it open to justifiable allegations that it had breached its duty of care and exposed her to harassment. Section 26 of the Equality Act indicates that harassment in this context is 'unwanted conduct' related to sex which has the purpose or effect of violating the complainant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the complainant. It does not necessarily have to be something in the nature of sexual assault or overtly sexualised behaviour to come within the purview of the section. The allegations made by the cleaner could realistically be thought to come within the scope of the section. (Indeed it is notable that for the first time, during cross examination in the Tribunal, the claimant accepted that a man using the urinal when the female cleaner is present is humiliating and degrading for the cleaner. He said, "of course, I would not do it." He went on to accept that if he used the urinal whilst the female cleaner was there it could be seen as gross misconduct but maintained his position that he never actually did that.

48. The respondent was faced with a complaint from the cleaners which they proposed to take to the police. They clearly felt strongly about this and the respondent clearly recognised the seriousness of the conduct.

49. In light of the above I conclude that the respondent acted reasonably in characterising this as gross misconduct by the claimant. I have considered whether there were any mitigating circumstances which would take the decision to dismiss outside the range of reasonable responses. I have concluded that there are not. The claimant did not demonstrate any remorse. The respondent could have no confidence that the claimant understood that what had done was wrong or that he would not act in exactly the same way in the future. The claimant clung to the instructions he says he was given that he should not use the other toilets but only those on the factory floor. The application of some common sense would have shown the claimant that there was no absolute bar on shop floor workers using the other toilets. They were strongly encouraged to use the factory toilets, at least partially so the others

could be kept clean for those who did not have to work in the grubbier conditions of the workshop. However, the claimant must reasonably have realised that this was not an absolute rule and would give way to common sense when circumstances dictated it. So, if a staff member was desperate to use the facilities because they were unwell or otherwise at risk of soiling themselves no reasonable employee would have thought they were banned from using the other toilets rather than risk an unfortunate 'accident'. Indeed, the claimant himself confirmed that he had used the other toilets on at least one other occasion because circumstances dictated that he needed to go urgently. The claimant's justification or mitigation for his actions therefore does not stand up to scrutiny. Furthermore, the length of the claimant's service and his undisputed competence in his substantive job role do not mean that the decision to dismiss fell outside the range of reasonable responses.

50. It flows from what I have said above that any suggestion by the claimant that the respondent should have dealt with this incident with an informal approach rather than using the formal disciplinary procedure must fail. The respondent was not required to resort to the process set out at paragraph 6.1 of its disciplinary procedure.

51. The claimant referred me to various diary entries as set out above. To the extent that he suggested that these showed inconsistency of treatment rendering the dismissal unfair, the suggestion is rejected. There is no evidence of any comparable cases of misconduct involving his colleagues. The employer and the Tribunal must only consider other cases which are truly comparable to the claimant's. These are not. Furthermore, in none of the examples the claimant gives is there any suggestion that he (the claimant) was given an indication by his employer that conduct of the sort referred to here was <u>not</u> a dismissible offence. There is no suggestion that the respondent misled the claimant as to the gravity of the allegation or its general disciplinary approach to such matters.

52. In light of the foregoing the claimant's claim of unfair dismissal fails and is dismissed. Consequently, I do not strictly have to address the issue of reductions for contributory fault. However, for completeness, it flows from the above that I conclude that there was culpable and blameworthy conduct on the part of the claimant in this case and I would have been minded to have made a substantial reduction in compensation to reflect that.

<u>Breach of contract</u>

53. Furthermore, I find as a fact based on the available evidence, that the claimant did enter the toilets and use the urinal when the female cleaner was present and had indicated that he should wait until she had finished the cleaning. He stepped over the mop which was used as a sign to indicate that the claimant and his colleagues should not enter. This had happened on at least one occasion and, on balance of probabilities, probably 2 or 3 previous occasions. The claimant knew or ought to have known that the cleaner did not want him there and that it would be an unpleasant, embarrassing, degrading, humiliating experience for her. He ought to have realised that he was violating her dignity in her own workplace. I find that the claimant gave no indication that he would act differently in the future. He expressed no remorse. I find that he did not have a good reason for not waiting until she

had finished or using alternative toilets if he genuinely could not wait. On that basis he committed gross misconduct and a repudiatory breach of contract. The respondent was entitled to dismiss him summarily. The claimant's claim for notice pay therefore fails and is dismissed.

Employment Judge Eeley

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Date signed: 14th January 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON:

20 January 2022

FOR EMPLOYMENT TRIBUNALS