

**RESERVED JUDGMENT**



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr J Flood  
**Respondent:** Chemfix Products Ltd

**Heard at:** Leeds Employment Tribunal (by CVP)  
**Before:** Employment Judge Deeley

**On:** 7 and 8 March 2024

**Representation**  
**Claimant:** In person  
**Respondent:** Mr D Campion (Counsel)

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1. The claimant's complaint of ordinary unfair dismissal under s98 of the Employment Rights Act 1996 fails and is dismissed.
2. The claimant's complaint of wrongful dismissal succeeds and is upheld. The claimant is awarded 12 weeks' notice pay (payable on a net basis).

## REASONS

### Tribunal proceedings

3. The claimant was represented by solicitors from the presentation of his claim to the Tribunal until the start of the week in which this hearing took place. The respondent has been represented by their current solicitors throughout these proceedings and by Counsel at the final hearing of this claim.

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### Claims and issues

4. The Tribunal provided a draft list of issues (or questions for the Tribunal to decide) to the parties at the start of this hearing, which was discussed and agreed before the Tribunal heard evidence. The agreed list of issues is set out below.

#### 1. *Unfair dismissal*

1.1 *What was the reason or principal reason for dismissal? The respondent says the reason was conduct or some other substantial reason. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.*

1.2 *If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:*

1.2.1 *there were reasonable grounds for that belief;*

1.2.2 *at the time the belief was formed the respondent had carried out a reasonable investigation;*

1.2.3 *the respondent otherwise acted in a procedurally fair manner;*

1.2.4 *dismissal was within the range of reasonable responses.*

1.3 *If the reason was ‘some other substantial reason’, namely an irretrievable breakdown in relationships, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?*

#### 2. *Wrongful dismissal (Notice pay)*

2.1 *The Tribunal must decide:*

2.1.1 *was the claimant guilty of gross misconduct; or*

2.1.2 *did the claimant do something so serious that the respondent was entitled to dismiss him without notice?*

*If not, the claimant would be entitled to 12 weeks’ notice pay.*

#### 3. *Remedy for unfair dismissal (if the claimant succeeds in his unfair dismissal claim)*

##### *Basic award*

3.1 *What basic award is payable to the claimant, if any?*

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- 3.2 *Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?*

*Compensatory award*

- 3.3 *If there is a compensatory award, how much should it be? The Tribunal will decide:*

3.3.1 *What financial losses has the dismissal caused the claimant?*

3.3.2 *Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?*

3.3.3 *If not, for what period of loss should the claimant be compensated?*

3.3.4 *Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?*

3.3.5 *If so, should the claimant's compensation be reduced? By how much?*

*ACAS Code*

3.3.6 *Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?*

3.3.7 *Did the respondent or the claimant unreasonably fail to comply with it by: [claimant and respondent to specify any alleged breaches]*

3.3.8 *If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?*

3.3.9 *If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?*

3.3.10 *If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?*

3.3.11 *Does the statutory cap on the compensatory award apply?*

**FINDINGS OF FACT**

*Context*

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5. Much of the evidence relating to this claim is based on people’s recollection of events that happened some time ago. In assessing the evidence relating to this claim, I have borne in mind the guidance given in the case of *Gestmin SGPS -v- Credit Suisse (UK) Ltd* [2013] EWHC 3560. In that case, the court noted that a century of psychological research has demonstrated that human memories are fallible. If the Tribunal does not accept one or other witness’ version of events in relation to a particular issue, this does not mean that the Tribunal has found that the witness is dishonest.
6. The Tribunal made the findings of fact set out below on the balance of probabilities, having considered:
  - 6.1 the documents which the parties asked the Tribunal to read in the joint hearing file;
  - 6.2 the disciplinary and grievance policies and the equal opportunities policies in the Staff Handbook, copies of which were included in the hearing file at the Tribunal’s request on the second day of the hearing; and
  - 6.3 witness evidence from the **claimant**; and
  - 6.4 witness evidence from the **respondent’s witnesses** set out in the table below.

Respondent’s witnesses	
Ms Alison Greenwood	HR and investigation manager
Mr Robert Murray	Operations Director and disciplinary manager
Mr Carles Paloma	Managing Director and appeal manager

**Background**

7. The respondent operates a manufacturing business producing chemical anchoring, building adhesives and wood repair products from a single site in Dewsbury. The respondent employed around 96 employees at the time of the claimant’s dismissal including:
  - 7.1 around 80 employees who worked as factory operatives (including the engineering and manufacturing teams), alongside the Engineering Manager and the Plastics Engineer;
  - 7.2 six employees who worked in sales and financial accounts;
  - 7.3 a small number of laboratory staff; and
  - 7.4 four directors and their assistants, including Mr Murray and Mr Paloma; and
  - 7.5 one HR/administrative member of staff (Ms Alison Greenwood).

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8. The claimant started working for the respondent as a factory operative on 1 April 2010 and was summarily dismissed on 22 June 2023. The claimant had worked in the respondent's Mixing Shed area throughout the last few years of his employment.
9. The respondent's staff at the times relevant to this claim included:

Name(s)	Role(s)
a) Mr Jack Townend b) Ms Courtney Edwards c) Mr Omar Iqbal d) Mr Rana Afzal	Factory operatives working in the Mixing Shed
a) Mr James Marsden b) Mr Pawel Cwiakala c) Mr Michael Szymanski d) Mr John Gledhill ( <i>previously worked in the Mixing Shed</i> ) e) Mr Laurentiu Misu f) Mr Bradley Astin g) Mr Ryan Mitchel h) Mr L Zawadka ( <i>the claimant's former Team Leader</i> ) i) Euan (surname not provided by the parties)	Factory operatives
Mr Tom Hilton	Team Leader
Ms Dorota Lis and Ms Kristine Tommis	Shift managers
Mr Geoff Daley	H&S and Operations Process Manager
Ms Alison Greenwood	HR and investigation officer
Mr Robert Murray	Operations Director and disciplinary manager
Mr Carles Paloma	Managing Director and appeal manager

**Respondent's Mixing Shed**

10. The respondent's factory had a separate 'Mixing Shed' where limited numbers of staff worked, mixing the chemicals required for the factory's products. The Mixing Shed involved heavier, dirtier and more uncomfortable work than the rest of the factory. For example, staff in the Mixing Shed had to lift 25kg loads. Mixing Shed staff had to wear personal protective equipment ("**PPE**") because they were exposed to various chemicals used in the factory's products, which meant that they could become very hot whilst working.

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11. The claimant developed allergies to some of the chemicals during his work with the respondent, which limited the duties in the Mixing Shed that he could perform. Staff working in the Mixing Shed (including the claimant) were paid at a premium rate compared to other staff due to the demanding nature of their work.
12. The claimant described the layout of the Mixing Shed during his evidence as follows:
  - 12.1 a large area, over 25 metres in length, containing seven large machines and one smaller (lab testing) machine;
  - 12.2 a small area near the entrance to the rest of the factory which was known as the Mixing Shed office. However, the claimant stated that this was more of a shed than an office in the normal sense of the word, containing:
    - 12.2.1 tool lockers for staff's working tools (e.g. scrapers);
    - 12.2.2 a small sink (approximately 1-1.5 metres square); and
    - 12.2.3 coat hooks.
13. The claimant also stated that the Mixing Shed staff used either the male or the female changing rooms situated in the main factory area. These contained lockers for each member of staff to use when changing their clothes for work.
14. The Mixing Shed was physically separated from the rest of the factory by walls and a roller shutter door. The shed also had a rear entrance which opened into the factory's yard, where chemicals were stored.
15. The Mixing Shed staff worked in two teams across an alternating shift pattern consisting of:
  - 15.1 Week 1 - 6am to 2pm; and
  - 15.2 Week 2 – 2pm to 10pm.
16. The claimant normally worked on shift with Mr Jack Townend (following the recent departure of another team member) at the time of these events. Prior to Mr Townend joining the team, Mr Ryan Mitchel had worked with the claimant in the Mixing Shed. The other Mixing Shed shift included Mr Omar Iqbal, Mr Afzal and one other member of staff.
17. The claimant normally worked on the batch master machine, close to the Mixing Shed office because his allergies prevented him handling all chemicals in the Mixing Shed. Mr Townend normally worked on the 1000 machine near the outside door to the shed. The claimant said that the Mixing Shed was very noisy and that he and Mr Townend would not normally be able to speak to each other whilst running the machines.
18. The Mixing Shed staff reported into a Team Leader for manufacturing (Mr Tom Hilton), who was also responsible for around a further twelve factory operatives who worked elsewhere in the factory. Mr Hilton was not based in the Mixing Shed himself.

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The respondent employed two Shift Managers, each of whom would be in overall charge of a shift, namely Ms Dorota Lis and Ms Kristine Tommis.

### **New Mixing Shed team member**

19. Ms Courtney Edwards had worked for the respondent for several years as a factory operative before applying to work in the Mixing Shed. The factory operative's role involved duties such as producing and labelling containers and organising duties on an automatic factory line. The claimant and Ms Edwards had had a few brief conversations before Ms Edwards started training in the Mixing Shed.
20. In Spring 2023, the respondent decided to recruit a new Mixing Shed member of staff to replace a member of staff who had recently left the Mixing Shed. Ms Edwards applied for the role successfully. At least two other factory operatives, including Euan (whose surname was not provided to the Tribunal), had also applied for the role but were unsuccessful. Ms Edwards was the only woman who had ever applied for a role in the Mixing Shed and was the first woman to work there for the respondent. She started her training with Mr Iqbal on the opposite shift to the claimant in early May 2023.

### **Ms Edwards' complaints regarding the claimant**

21. Ms Edwards told Ms Tommis on 24 May 2023 that she no longer wanted to continue with her training to work in the Mixing Shed. At that point in time, Ms Edwards had been training in the Mixing Shed with Mr Iqbal for around three weeks. Ms Tommis recorded that Ms Edwards told her on 24 May 2023 that there were a 'number of reasons' for her decision, the:

*"...main one being that I do not want to work on the other shift, this shift is ok, I do not want to go onto the other shift [Ms Edwards' original shift, which was the shift that the claimant worked].*

*Mainly because of Jonny Flood. Because of him things are not fair on the other shift. His allergies and operators not swapping round. It is not fair.*

*Also some other things like, sometimes I feel I am too short for some jobs. It is also very hot in there. For £1.50 more an hour it is not worth it.*

*Mainly I don't want to go to my shift and work with Jonny Flood."*

22. Ms Tommis spoke to Ms Lis, Ms Greenwood and Mr Murray about her conversation with Ms Edwards. Ms Tommis, Ms Greenwood and Mr Murray then had a further conversation with Ms Edwards on 25 May 2023. The notes of that discussion record the conversation set out below:

*"CE [Ms Edwards] - Yes, Johnny and Jack are two little pricks, Johnny talks about Pawel Cwiakala all the time and slags him off about his work and I think if you have something to say to him say it to his face don't call him behind his back all the time. I know as soon as I go in there, he is going to make my life hell.*

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*He says sarkie comments to me when I am putting my overhauls on, "Oh she's turned up again, she is here again".*

*I hear him saying sarkie comments all the time.*

*When Jack was on holiday, he didn't say a word and Omar said it is because he likes an audience.*

*He says stuff like "Oh don't tell her". He makes me feel intimidated and I have been dreading going onto his shift.*

*He is always slagging people off and Pawel off behind their backs and it's not nice.*

*Omar, Rana, and James are lovely, and they are all great to me.*

*I know if I went on his shift, he would carry on saying things to me and I would end up losing my patience and snapping at him which would get me in trouble.*

*He says, "We have all had money on you to see if you stick at it, I know all the people who have".*

*Jack used to be lovely and now he is attached to Johnny's hip, Jack has changed so much, and I know Johnny will put me down on everything I do, and I don't want to be miserable coming to work.*

*AG [Ms Greenwood] - You said to Kristine that you had said you were too short for one of the machines and a couple of other things regarding the job, but are you saying the reason why you don't want to complete your training and work in the Mixing Shed is because of Johnny?*

*CE - Yeah, he is a bully. I can do the job with no problem, and I have enjoyed it but I can't work with him."*

23. Ms Edwards also signed a statement on 31 May 2023, during which she stated:

*"All the problems with Mr. Flood started when I applied for the job in the Mixing Shed. He had made a few comments before saying Euan was his favourite to win but that didn't bother me.*

*Once I got the job and started my training that's when he made me feel like I shouldn't be there. Johnny and Jack were both saying they had money on me and that I wouldn't last longer than a month.*

*I used to walk into the Mixing Shed to start my shift and as I walked in, he used to say, "Stop talking about her now!". He used to put me in a position where I felt awkward and embarrassed.*

*How he speaks about people to others wouldn't surprise me if he was talking about me like that too as he does not have a nice word to say about anyone.*

*When I joined the Mixing Shed, I got hold of a box to put all my tools and gloves in, because when I used to leave my gloves on my workstation where all the men left*



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*there's it would seem to be my gloves that would always go missing. So, I decided to put my gloves in the box with all my other stuff.*

*Then when I came in on one of my shifts my box had been moved and left under the sink by someone on the opposite shift. The sink must have been leaking because all my stuff in the box was wet.*

*He was always commenting on the amount of training I was getting and that I better be brilliant when I come back on that shift. He made me feel like I would not fit in the Mixing Shed because I was a woman.*

*I felt like I would not fit on his shift, and I would not be able to ask for any help or advice from him because I should be brilliant with the amount of training I have had.*

*Mr. Flood is a sexist and a racist man and I have not heard one nice word said about him. I feel like I would have left Chemfix in a short time after going into the Mixing Shed if I would have not been able to go back on the shop floor as he would have made my life hell.*

*I would have been extremely unhappy having to work in the same department as him as I wouldn't have taken the job knowing how bad he is, and I am glad I stepped down. The only way I would step a foot back in there is if I could change shifts or Mr. Flood leave as he is just a horrible bully."*

24. Mr Murray and Ms Greenwood held a further interview with Ms Edwards on 1 June 2023 during which Ms Edwards stated:

*"Johnny Flood has said "There's no polish on my shift" he used to say that when Ryan Mitchel was on the shift with him and then he would say about Pawel Cwiakala's "I can't understand a fucking word he says" he does not give him the time of day. I believe it must have an effect on Pawel. He is a racist.*

*He is a sexist it's like I have pissed on his chips as Euan was his favourite to get the job and it has always been men in there, so I think he was shocked when I got the job.*

*My gloves were not allowed on the worktable, all the men's were still there each day but when I came in for my shift mine had been removed. Johnny would do his best to make me feel uncomfortable.*

*When he found out that I had stepped down Johnny and Jack made a point of coming into the canteen where I was sitting, I saw them looking in the window and when they saw that I was there they both came in and up to me. Johnny said "So have you left then" I knew he had come in to gloat 100%. John Gledhill was also in there at the time so he might have heard some of what was said. Jack didn't say anything he just stood with Johnny.*

*It was like when I was getting my overalls and PPE on Johnny would shout "Oh she is eager isn't she" but it used to take me forever to get ready for the start of the shift, so I used to go a bit earlier. It's how he says things.*

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*Omar and Rana were there when I said, "Oh my stuff is all wet" and Omar said to me be careful when Johnny is around as he will go upstairs and tell on you, as I had to stand on the step to put the bolts on. Then when Jack was on holiday, he was completely different.*

*Since I stepped down, I have found myself hiding in the toilets to avoid him while the shift changes.*

*This is ridiculous and I am cross with myself but that's to save him walking past me and belittling me."*

25. Ms Edwards signed the notes of the discussion, her interview and her statement.

### **Claimant's suspension**

26. Ms Edwards confirmed that she wished to raise a formal complaint regarding Mr Flood's behaviour. The respondent decided that Ms Greenwood would investigate the complaint.

27. The claimant was suspended on full pay by Ms Lis on 1 June 2023, pending an investigation into Ms Edwards complaint against him.

### **Respondent's investigations**

28. Ms Greenwood met with around thirteen employees from 5 June 2023 onwards to discuss Ms Edwards' complaint against the claimant. Those interviewed included:

28.1 Mr Townend (who worked with the claimant on his shift in the Mixing Shed) on two occasions;

28.2 Mr Marsden (who later accompanied the claimant to his disciplinary and appeal hearings);

28.3 Mr Iqbal and Mr Afzal (who worked on the same shift in the Mixing Shed as Ms Edwards whilst she was being trained by Mr Iqbal);

28.4 three Team Leaders or Managers: Ms Lis, Mr Daley and Mr Hilton.

29. Mr Townend stated during his interview:

29.1 it was Mr Townend (not the claimant) who instigated a bet with Euan on how long Ms Edwards would last in the Mixing Shed. Mr Townend also said that he did not discuss the bet with Mr Flood; and

29.2 it was Mr Townend's idea (not the claimant's) to approach Ms Edwards in the canteen after she decided not to work in the Mixing Shed to ask her why she had reached that decision. Mr Townend stated that he spoke to Ms Edwards and that the claimant did not say anything to Ms Edwards whilst Mr Townend was present.

30. Ms Greenwood also interviewed Ms Edwards again on 7 June 2023. During that interview, Ms Greenwood asked Ms Edwards for further information about the allegations that:

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30.1 the claimant and Mr Townend placed bets on how long Ms Edwards would work in the Mixing Shed for; and

30.2 the conversation in the canteen after she had decided not to continue working in the Mixing Shed.

31. Ms Edwards stated in relation to the bets:

*"Johnny told me about the betting he said, "We all have money on whether you stick at it, I have got £20 on you going within a month" and I replied, "Oh right". This was when we were alone during a conversation where Johnny was asking me if I wanted any children and he said, "Because if you stay in here, you will get messed up". With Johnny mentioning the word "We" I assumed there were other people betting on me too, so I mentioned all this to [Mr] Misu."*

32. Mr Townend stated in his interview with Ms Greenwood that it was he (and not the claimant) who instigated the betting. Mr Townend denied discussing the betting with the claimant and stated:

*"I mainly instigated the joke or betting a couple of days after Courtney had said "If you can do this job, then anybody can do it" – she said this to me before she started her training. So, I was speaking to Euan and telling him what Courtney had said so I said to him "I bet £10 she won't last two months."*

33. Mr Townend also stated in his second statement that only he and Euan had discussed betting.

34. Mr Misu stated during his interview with Ms Greenwood that:

34.1 he had not heard the claimant making sexist or racist comments or bullying employees, including Ms Edwards. However, Ms Edwards had told him that the claimant had bullied her and that:

*"...she was so close to tears when she was telling me. And I believe her because she has no reason to lie. CE also told me that Johnny and Jack were betting on her staying in the job."*

34.2 he and the claimant had an incident during the Covid pandemic in which the claimant swore at him for touching the claimant's papers, but the claimant apologised afterwards.

35. Ms Edwards stated in relation to the canteen incident :

*"It was the day after I had stepped down from the job and I was sitting near the window in the canteen. I could see Johnny and Jack approaching the canteen from the Mixing Shed, they don't normally come in the canteen when I am there before my shift. So, I knew they would both be coming into the canteen to gloat. They walked into the canteen together and they both went and got a drink and then Johnny said, "Was it too hard for you then?" in a sarcastic voice. I said" Yeah, I don't want to be picking up all your work to be honest with all the scrapes and cleans because you are allergic to everything". I know I should not have said that, but I have had enough*

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*of all his comments, and I couldn't really turn round and say to him "It's because you are picking on me". Johnny did not respond but Jack said, "Well he does scrapes as well" and I said "No he doesn't he just sits on batch master" and Johnny turned and said, "Who has told you that Omar?" and I said, "No it wasn't Omar" and Johnny responded by saying "I will be having words with him". I felt that Omar was lucky not to be in that day. They both then just left the canteen together."*

36. Mr Townend stated in his second statement that it was 'my idea' to go to the canteen during their shift. Mr Townend stated that:

*"I wanted to go and find out why she had given up the job and Johnny said "Ok, I want to find out as well.*

...

*We walked in and I said "3 weeks what's happened there?" as a joke. Courtney smiled at first and then got defensive, she said she is not doing it for the money all the scraping and cleaning, so I said fair enough and then I left and went back to the Mixing Shed."*

37. Ms Edwards stated that Mr Gledhill was in the canteen that day. Mr Gledhill stated in his interview with Ms Greenwood that:

37.1 he had not heard the claimant making sexist or racist comments or bullying employees, including Ms Edwards. However, Mr Gledhill also said that when he stopped working in the Mixing Shed:

*"I was asked if I was bullied and I replied 'Nobody bullies me';*

37.2 he was not aware that any bets had been placed on whether Ms Edwards would 'last' in the Mixing Shed;

37.3 he arrived in the canteen when Ms Edwards, the claimant and Mr Townend were talking. Mr Gledhill stated:

*"I didn't really pay attention to what they were saying. JF was doing the talking and CE was replying, and it sounded like she was sticking up for herself as she said something like "I will tell you to your face" but I can imagine what he had been saying to her we all know what he is like. I do not recall Jack Townend saying anything at all."*

38. Ms Edwards also stated that the claimant had made a further comment which she felt 'belittled' her:

*"...we were queuing to clock out and having some banter with each other and he was joining in and giving it back, we were both laughing, Jack said "It's heaving lifting you know" and I said to him "You are making it sound like it's as if I am joining the marines". Omar explained to me that I must learn how the machines work and the products. I explained to Omar that I would be unable to ask Johnny as I would never feel confident enough to ask him as he would make me feel uncomfortable and mock me. This conversation with Omar was after Johnny had been mocking me for having*

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*3 months probationary training for the Mixing Shed, Johnny said he didn't get all that training when he started and he said, "I hope you are going to be brilliant after all that training". Omar kindly said that I could ask him at the changeover if there was anything I was unsure of, and he would do his best to help me. I explained to Omar that Johnny makes me feel that he is not approachable and wouldn't want to ask him things as I know he would belittle me."*

39. Mr Iqbal stated during his interview:

39.1 he had not heard the claimant making sexist or racist comments or bullying employees, including Ms Edwards. He said:

*"It depends how you perceive it yourself – I have never had a problem with him. I would not take anything from anybody so I would not be bullied."*

39.2 Ms Edwards had told him about:

39.2.1 a 'couple of comments' that the claimant made to her, but that he could not remember what they were;

39.2.2 CE's gloves were moved from the workstation because the claimant had tied them up. He could not remember Ms Edwards showing him her box of gloves that she said were wet, after she said that the claimant placed them under the sink;

39.3 Mr Iqbal was aware that 'the other shift' (i.e. the claimant and Mr Townend) were placing a bet as to whether Ms Edwards 'lasts' in the Mixing Shed.

40. Mr Afzal stated during his interview:

40.1 he had not heard the claimant making sexist or racist comments or bullying employees, including Ms Edwards;

40.2 Ms Edwards: *"had shared with him that she did not want to work in mixing because JF works on the easier jobs like the batchmaster"*;

40.3 Ms Edwards also told him that her gloves had been moved 'numerous times', but he did not recall the incident where her gloves were left under the sink. Mr Afzal stated:

*"CE would always leave her box on the floor in random places as she could not reach the top of the lockers where the rest of us keep ours"*;

40.4 Mr Afzal also stated: *"JF likes to get the message across to people by presenting it as a joke, but really, it's not a joke if you understand what I mean."*

41. Other operatives interviewed by Ms Greenwood made statements including:

41.1 Mr Marsden who stated that he was: *"...not aware of anything being said to CE in JF in changeover that would embarrass or intimidate her...I have heard that there was a bet on CE lasting in the Mixing Shed, and I believe it was Johnny and Jack."*

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41.2 Mr Cwiakala who stated that he had heard from other people that the claimant was “a racist”. He stated:

*“JF and I do not like each other – if he had the opportunity to blame me for anything he would, he is a false guy and I do not trust him.*

...

*I have not heard him say anything about Courtney. I am not aware of any betting, and I have not heard him saying anything to her in the changeover, but I am not there all of the time I only cover when I have to.*

*Some people thought she would not last in the job because it’s a dirty job, not because she is a woman.”*

### **Disciplinary hearing – invitation letter**

42. Ms Greenwood decided that there was sufficient evidence to refer the matter to a disciplinary hearing. Mr Murray was appointed as the disciplinary manager and he wrote to the claimant on 8 June 2023 stating:

*“You were suspended on Thursday 1<sup>st</sup> June 2023 after we received an official complaint from Courtney Edwards about your conduct at Chemfix. She accused you of being a sexist, a racist and a bully. We have a conducted a thorough investigation of the matter and now need to meet with you. Please be available to attend a disciplinary hearing at 10am on Wednesday 14<sup>th</sup> June 2023...*

*The purpose of this hearing is to consider whether disciplinary action should be taken against you in respect of the above accusations.*

43. The letter did not set out any detail the factual allegations against the claimant. However, eighteen sets of the interview notes/statements were attached to the letter (including four interviews/statements with Ms Edwards).

### **Disciplinary hearing**

44. Mr Murray chaired the disciplinary hearing on 14 June 2023. The claimant attended, accompanied by his colleague Mr James Marsden, because his union representative was unable to attend the meeting at the time arranged. Ms Greenwood took notes of the meeting, which lasted around one hour and forty minutes. The typed notes were later signed by Ms Greenwood and Mr Murray, however they were not provided to the claimant until he received the outcome of the disciplinary hearing. The respondent also provided copies of Ms Greenwood’s handwritten notes of the hearing.

45. During the hearing, Mr Murray questioned the claimant regarding Ms Edwards’ six main allegations from her statements and interviews.

### ***Allegation 1 – betting on how long Ms Edwards would ‘last’ in the Mixing Shed***

46. Mr Murray asked the claimant about the ‘betting’ allegation. The claimant denied betting on anyone whilst working for the respondent. He stated:

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*"I heard rumoured hearsay in the male changing room. I did make Courtney aware and I did say it in a jokey fashion, but that is me. I did not know until I read Jack's statement that he had spoken to Euan about a bet. And I think when I made her aware there was Omar and I think Jack and James in the Office too."*

47. Mr Marsden stated during the disciplinary that:

*"The day Courtney quit the job or the day after, Jack did say to me [that] he owed Johnny a fiver."*

Mr Murray did not ask either the claimant or Mr Marsden about why that Mr Townend made that comment to Mr Townend and instead moved on to discuss other matters during the disciplinary hearing.

***Allegation 2 – claimant's comments to Ms Edwards and other allegations of bullying***

48. Mr Murray told the claimant that Ms Edwards had accused him of making comments such as *"Oh she has turned up again"* and *"You better be brilliant after all of that training"*.

49. The claimant said that he had only spoke to Ms Edwards around six times at most. The claimant denied making the first comment. He stated that he had joked about Mr Azal' on his return to sick leave, saying *"Oh, is he here again"*. The claimant stated that the second comment was taken out of context. He said that he and Mr Iqbal only had a few days' training when joining the Mixing Shed and that was why he commented that Ms Edwards would be the best trained person in the Mixing Shed.

50. Mr Murray asked the claimant why Ms Edwards mentioned her concerns to other colleagues and was observed to be 'close to tears'. The claimant stated that he did not know. The claimant said that Ms Edwards may have approached other colleagues at the end of the day and that he had never spoken to her for more than a minute.

51. Mr Murray also asked the claimant if he had bullied Ms Edwards. Mr Murray stated:

*"Are you a bully? People have made several comments. Courtney states "He makes me feel intimidated and I have been dreading going on his shift" she also states "Since I stepped down, I have found myself hiding in toilets while the shift changes. This is ridiculous and I am cross with myself but that's to save him walking past me and belittling me."*

52. The claimant denied intimidating Ms Edwards. He also denied the other points raised, including by Mr Azul (regarding jokes that were 'not really jokes'). The claimant responded to the account that Mr Misu gave of an incident between himself and Mr Mizu. The claimant explained that Mr Misu had breached Covid restrictions and that the claimant was concerned because he was caring for his parents at the time. The claimant said that he had shouted at Mr Misu, but denied using the words that Mr Misu alleged.

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53. The claimant said regarding Ms Edwards:

*"I actually think she did not want to do the job. She mentioned it in statement 2 with Kristine "I don't want to do the scraping" there is no mention of bullying. I know Omar does a lot of whispering in the ear to other Mixing Shed operators making them aware that they would have to do more scrap[e]s and more work because I am sensitised. He makes them aware week in, week out. Some people have said I am difficult to work with and when people have come from the outside to work in the mixing, they tell me everyone out there says you're a cunt to work with, but you are a great guy."*

54. The claimant also stated:

*"I want to make it clear that Omar is a lovely guy, but he has done the whispering for years. Dave Smith even called me at home once to explain what Omar was saying to him. I was already allergic prior to you coming (RM) [Mr Murray] to the company. There is always fielding questions, they think I have made it up, that I am allergic, so I get fed up and go "Yeah Yeah I am making it all up"...*

*... I have heard Omar making these comments when I switched shifts. For some reason him and Darren Chesney were saying don't be getting mad if you have to do all Johnny's work. Omar has definitely got an issue with it as he has brought it up multiple times."*

**Allegation 3 – moving Ms Edwards' gloves**

55. The claimant accepted that he moved Ms Edwards' gloves from the 1000 machine where he normally worked. He said that if he went to a work station and someone else's tools and gloves were there, he would move them to the office. The claimant denied putting Ms Edwards' gloves under the sink where they would get wet.

**Allegation 4 – canteen incident**

56. Mr Murray asked the claimant what had happened in the canteen. The claimant said that Mr Townend's statement was correct:

*"...[Jack] wanted to know why Courtney had stepped down because Euan was his mate. I was sweating and I wanted a drink, and I did want to hear it from the horse's mouth and not someone puts a twist on it.*

*...*

*We walked in the canteen, and I went for a drink. I never made eye contact with the lady. There was a comment from Courtney about the money. Then Jack's [demeanour] changed, then her [demeanour] changed and Jack said, "he does scrapes" John Gledhill was there and she said something about "I will tell you to your face" and I said "I did 2 scrapes today sweetheart and I know who's got into you, Omar, I'll have a word with him". And we left."*

**Allegation 5 - sexism**



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57. The claimant denied treating Ms Edwards differently because she was a woman. Mr Murray did not pursue this allegation specifically during the disciplinary hearing .

***Allegation 6 - racism***

58. Mr Murray chose not to pursue any allegations of racism with the claimant. Mr Murray stated: *“I don’t think [there] is much evidence in the statements”*.

59. The claimant also raised concerns that he described as ‘racism towards me’, relating to other employees whom he stated ‘verbally abused’ him. Mr Murray asked the claimant if he had *“a problem with Polish people”*. The claimant responded by referring to communication difficulties.

60. The claimant stated during his evidence that parts of the disciplinary hearing notes were missing. He referred to the four examples of the parts of the notes that he thought were incomplete and raised with Mr Paloma during his appeal hearing. These consisted of:

60.1 **Example 1** – *“Mr Murray at the start of the meeting said I have read the documents and I do not see much in here and we can put racism aside and he gestured with his hand. (JF demonstrated the gesture). Mr Murray also said that he never found me in that way at all. I feel that Mr Murray gave me false hope which is clearly unacceptable.”*

60.2 **Example 2** – *“The minutes say yes but I said “No, if I was telling a joke, I am sure a lot of people do”.”*

60.3 **Example 3** – *“Mr Murray has missed whole sections from the disciplinary, he said I didn’t offer an apology to Courtney Edwards. I did offer an apology to her regarding the joke I said to her about the training in the investigation. Mr Murray goes on to say in conclusion, taking all the evidence as a whole, it seems to me that you were indeed bullying Courtney Edwards. I also noted that in the disciplinary you showed no regret or emotion that any of your actions could have been perceived as bullying. This is a complete lie.”*

60.4 **Example 4** – *“Courtney Edwards hiding in the toilet I am disputing whether she was hiding there in the toilets I asked for the clock times to be checked in the meeting. As to whether or not we were both actually here.”*

61. The Tribunal found in relation to those four issues:

61.1 **Example 1** – the notes record that Mr Murray stated that he did not see ‘much evidence’ of racism’.

61.2 **Example 2** (p120) – there was a dispute as to whether or not the notes accurately recorded the claimant’s response relating to whether or not he ‘liked an audience’ when making comments, in response to a particular question from Mr Murray. The Tribunal noted that the typed notes reflected Ms Greenwood’s handwritten notes. However, the Tribunal concluded that

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any discrepancy in the notes here did not have a material impact on the conclusions that Mr Murray reached when dismissing the claimant.

- 61.3 **Example 3 (p121)** – there were no material sections of the disciplinary notes that were missing. The Tribunal compared the typed notes (approximately 5 pages) and handwritten notes (17 pages). Ms Greenwood stated that the notes were not verbatim, but that all key points were noted. The Tribunal concluded that the claimant did not apologise for any distress that his comments may have caused Ms Edwards during the disciplinary hearing. Mr Murray’s outcome letter records:

*“I also noted that in the disciplinary you showed no regret or emotion that any of your actions could have been perceived as bullying. This seemed odd to me as in my experience in these situations people are apologetic.”*

The claimant did not state in his appeal letter that the notes of the disciplinary hearing were inaccurate. He stated in the appeal hearing that: *“I clearly apologised to Mr Murray in the meeting and it is missed from the minutes”*. This contrasts with the notes of the meeting, including the points that the claimant did not query. For example, when Mr Murray asked the claimant why Ms Edwards was close to tears when recounting the claimant’s behaviour towards her, the claimant stated:

*“I am not in her mind, I do not know the reason why, no one has ever witnessed anything and I have never had more than a minute’s conversation with her. I find all this egregious.”*

On the balance of probabilities the Tribunal has concluded that this was not the case because Ms Greenwood’s handwritten notes were consistent in all material respects with the typed notes.

- 61.4 **Example 4** – the Tribunal accepted Ms Greenwood’s and Mr Murray’s evidence that the claimant did not request the clock times to be checked, during the disciplinary meeting. The Tribunal accepts their evidence that the claimant and Ms Edwards’ start and finish times would have overlapped, as is evidenced by the fact that the claimant accepts he had spoken to Ms Edwards when they met briefly at shift changeover times during her training. Also, once Ms Edwards left the Mixing Shed, she reverted to her previous shift which took place at the same time as the claimant’s shift (as evidenced by their discussion in the canteen). The Tribunal also notes that the claimant did not raise any issue regarding checking clock times in his appeal letter.

**Investigations after disciplinary hearing**

62. Mr Murray and Ms Greenwood met with various managers and team leaders after the disciplinary hearing to discuss some of the allegations made by the claimant regarding ‘verbal abuse’ against him by other employees. They did not inform the claimant that they were meeting those managers and team leaders and did not

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provide him with a copy of the notes of those meetings at any time during the disciplinary or appeal process.

63. The managers and team leaders that they spoke with included

63.1 Ms Lis;

63.2 Ms Tommis;

63.3 Mr Hilton; and

63.4 Mr Daley.

64. Ms Lis stated that the claimant and Mr Cwiakala fell out over taking gloves from the KP. Mr Hilton stated in relation to Mr Cwiakala:

*"I saw Johnny and Pawel squaring up to one another, and Pawel was calling him lazy for taking gloves from the KP. So, Dot and me split them up and I told Johnny to calm down. Johnny told me later Pawel had apologized but only because his wife Cwiakala*

65. Mr Daley stated:

*"Johnny has restricted duties and Omar has a bee in his bonnet, they all have an issue with it. I have heard them all complain. Johnny and Dave Smith wanted to get John Gledhill out of the Mixing Shed when he had restricted duties. People ask how come Johnny can stay in there when John Gledhill has come out. Johnny has complained that Pawel Cwiakala drives on the FLT like a fool. I had to have a word with Pawel. Johnny forcefully told John Gledhill "If you can't do all the jobs in the Mixing Shed you shouldn't be in here". Along with Dave Smith."*

66. The Tribunal asked Mr Murray and Ms Greenwood why the notes of the meetings that took place after the disciplinary hearing were not provided to the claimant, along with the earlier witness interviews. They both accepted that this was an oversight.

67. The Tribunal asked Mr Murray about the impact of the manager and team leader discussions on the decision to dismiss the claimant. The Tribunal accepts Mr Murray's evidence that the main purpose of the further investigations was to check that the claimant was not being subject to a 'campaign to get rid of him' by the witnesses already interviewed. The Tribunal notes that Mr Murray did not rely on the notes of the later investigations as part of his letter explaining the reasons for the claimant's dismissal dated 29 June 2023 (see below).

### Dismissal letter

68. Mr Murray wrote to the claimant on 22 June 2023 and stated that he had been summarily dismissed for gross misconduct. The letter stated:

*"The decision is to terminate your contract with immediate effect, on the grounds of you bullying a fellow employee".*

69. The letter also enclosed copies of the disciplinary hearing minutes and stated that the claimant had the right to appeal against his dismissal.

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70. Mr Murray's letter did not set out the reasons for the claimant's dismissal. The claimant requested written reasons for his dismissal and Mr Murray sent a further letter on 29 June 2023 which included the following statements:

- 70.1 Mr Murray accepted that he could not find any 'direct witnesses' to the claimant bullying Ms Edwards, but he had weighed up the claimant's and Ms Edwards' accounts and concluded that her version of events was accurate;
- 70.2 Mr Murray stated that he had concluded from other witnesses' statements: *"it is clear that a number of your fellow employees consider you to be an unpleasant person to work with"* and cited specific examples of the claimant's behaviour;
- 70.3 Mr Murray also stated that he took into account:
  - 70.3.1 the claimant's lack of 'regret or emotion' that any of his actions could have been perceived as bullying;
  - 70.3.2 the claimant's long service and Mr Murray's previous view of his character: *"in the past I thought very highly of you as I offered you promotion"*.

### Claimant's letter of appeal

71. The claimant appealed against the decision to dismiss him in a letter dated 24 June 2023. He set out the grounds on which he felt his dismissal to be 'unfair':

- 71.1 *"there is no corroborated evidence to support the claim of bullying"*;
- 71.2 *"the decision to dismiss was too harsh a penalty given the circumstances and lack of evidence"*;
- 71.3 *"I have a long service with the company which I feel should have been considered in imposing a penalty lesser than termination of employment. Any previous warnings on my disciplinary record should not have been considered in decision making as they are more than 12 months old."*

### Appeal hearing

72. The respondent arranged for Mr Palomo to hear the claimant's appeal. Mr Marsden accompanied the claimant to the appeal hearing and Ms Greenwood attended to take notes of the hearing.

73. Mr Palomo discussed the claimant's grounds of appeal with him. Ms Greenwood also discussed the four examples in the disciplinary notes that the claimant stated amounted to 'missing evidence', as set out in the Tribunal's findings regarding the disciplinary notes earlier in this judgment.

74. The other key points discussed during the appeal hearing included:

- 74.1 the claimant pointed to issues which he stated were inconsistencies in the witness statements (for example between Mr Iqbal and Mr Misu's statements);

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- 74.2 some of the allegations raised in the statements regarding events that were unrelated to Ms Edwards happened years ago; and
- 74.3 the claimant stated that the respondent had not given him the same level of HR support that the respondent provided to Ms Edwards.

### Ms Kinvig's statement

75. Before the respondent decided on the appeal outcome, a third party employee working in the respondent's canteen (Ms Kinvig) approached Ms Greenwood regarding her concerns about the claimant's behaviour. These concerns did not relate to the specific incidents of which Ms Edwards complained. Ms Greenwood decided to take a statement from Ms Kinvig on 30 June 2023. However, this statement was not relied on by the respondent during the appeal hearing or as part of the appeal outcome and no copy was supplied to the claimant until these proceedings.

### Appeal outcome

76. Mr Palomo wrote to the claimant on 26 July 2023 confirming that he had rejected the claimant's appeal. The key reasons why he rejected the claimant's appeal were:
- 76.1 Ms Edwards and other witnesses were interviewed more than once because further information came to light during the investigation;
- 76.2 the claimant was given the opportunity to 'fully explain' his version of events during the disciplinary hearing and further investigations were carried out with additional witnesses named by the claimant during the hearing;
- 76.3 the witnesses' accounts were "*consistent and clearly describe Ms Edwards as being upset by what had transpired and identifying you as having bullied her*", including the claimant's involvement in betting on 'how long Ms Edwards would last' in the Mixing Shed;
- 76.4 several witnesses reported other "*poor or unacceptable behaviour*" from the claimant which Mr Palomo described as '*similar to the conduct...to that stated by Ms Edwards*'. Mr Palomo noted that: "*Four of them (with reports of a fifth person feeling the same) go so far as to state that they do not want to work with you because of how you behave*" and provided specific examples. Mr Palomo concluded that: "*the above paints a picture of a pattern of poor behaviour over a long period of time, that other employees have felt that they had no choice but to endure or risk becoming the next target*";
- 76.5 the claimant had "*clearly been given credibility in respect of the allegations of racism made against you*", because Mr Murray did not uphold the allegations of racism against the claimant despite witnesses' reports of racist comments made by the claimant. Mr Palomo also noted that when the claimant was asked whether he "*had a problem with Polish colleagues*", the claimant responded "*I have a problem with people who come to work. They should*

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*learn the language to be able to communicate correctly and not be speaking half English”;*

76.6 Mr Murray had taken into account the claimant’s length of service and did not take into account any expired warnings.

77. Mr Palomo concluded:

*“As a result, the business can no longer trust that you will treat your colleagues professionally and with respect or have confidence that you will not behave in this way again. You showed no remorse, concern, or even real awareness in either the disciplinary or appeal hearings that what you may consider to be "jokes and banter" can have a significant impact on those on the receiving end. You seem to have misunderstood the point that Mr Murray was making in his outcome letter about showing compassion where your actions have caused upset to another, whether intended or not, and largely felt that the decision was unfair because you had apologised on one occasion for making comments about Ms Edwards' training needs. It was telling that, during the appeal hearing, your biggest concern was that your apology to Mr Murray had not been recorded in the hearing minutes, but you had no sympathy for your colleagues' impressions.*

*It also appears that your relationships have irretrievably broken down with a number of other staff who have expressed that they do not wish to work with you due to your behaviour over a long period of time.*

*Irrespective of whether or not you agree with the reasons given, as a result of your behaviour and conduct in the workplace, it is clear to me that you cannot reasonably come back to work within the team, and therefore I agree with Mr Murray that dismissal was the appropriate sanction in the circumstances.”*

### **Ms Greenwood’s role in the disciplinary and appeal process**

78. The Tribunal noted that Ms Greenwood carried out the disciplinary investigation, but was also involved in the disciplinary and appeal processes. The Tribunal accepted that Ms Greenwood’s role in the disciplinary and appeal hearings was that of note-taker and a secretarial role in typing up the outcome letters, rather than decision maker, although she did speak directly with the claimant during the appeal hearing when he queried the accuracy of the disciplinary hearing minutes.

79. The Tribunal notes that as a matter of good practice, Ms Greenwood’s involvement should have been limited to the investigation only. However, the Tribunal accepts that the respondent is a relatively small employer (with less than 100 staff in the UK) and that Ms Greenwood is the sole HR and administrative resource for the respondent in the UK.

### **WRONGFUL DISMISSAL – ADDITIONAL FINDINGS OF FACT**

80. The claimant has claimed both unfair dismissal and wrongful dismissal. The respondent clarified during the hearing that the only conduct by the claimant that they maintain amounts to a repudiatory breach of contract was the conduct that was

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the subject of Ms Edwards' complaint. The Tribunal has to make its own findings of fact relating to the claimant's claim of wrongful dismissal, regarding what did the claimant said or did in relation to Ms Edwards only. The Tribunal has therefore not made any findings of fact relating to conduct by the claimant towards other employees for the purposes of the wrongful dismissal claim, as set out in the witness interviews during the respondent's investigation, disciplinary and appeal process.

81. The Tribunal has considered the relevant documents (including the witness statements) and the claimant's oral evidence during this hearing. The Tribunal has also considered the witness evidence of Ms Greenwood and Mr Murray, particularly regarding Ms Edwards' demeanour during the disciplinary investigation. Mr Palomo's evidence was of less weight for the wrongful dismissal claim because he did not speak to either the claimant or Ms Edwards at or around the time of the relevant events, although the Tribunal has taken into account his evidence regarding the claimant's demeanour during the appeal hearing.

82. The Tribunal notes that:

82.1 as at the date of this hearing, Ms Edwards no longer works for the respondent and the respondent has not attempted to contact her to ask if she would be willing to provide witness evidence in these proceedings;

82.2 ten of the other witnesses interviewed still work for the respondent, but the respondent did not seek to call them as witnesses because they were not aware that they could do so. The claimant also did not seek to call any witnesses. In this respect, the Tribunal notes that both parties have been represented by solicitors during these proceedings.

83. The Tribunal therefore has to decide the appropriate weight to place on the evidence available to it when reaching its conclusions on the factual allegations which form part of the wrongful dismissal claim. The Tribunal then has to conclude whether or not any matters that happened amounted to a repudiatory breach of contract by the claimant (commonly known as 'gross misconduct'), having considered the relevant law.

84. The Tribunal has concluded on the balance of probabilities, taking into account the available evidence for this hearing:

84.1 the claimant was involved in 'betting' on whether or not Ms Edwards would 'last' in her role in the Mixing Shed. However, Mr Townend instigated the bet. The key reasons for this conclusion are:

84.1.1 Mr Townend in his written statements and the claimant in his evidence both denied that the claimant was involved in 'betting'. Mr Townend is recorded in his first statement on 5 June 2023 as saying:

*"JT was aware that there were bets placed on whether CE would last in the Mixing Shed and express it was a joke and mainly*

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*himself that instigated it. He was not aware of JF saying “We all have money on whether she will stick it”. “*

Mr Townend also stated in his second statement on 7 June 2023 that:

*“I mainly instigated the joke or betting a couple of days after Courtney had said “If you can do this job, then anybody can do it”...So I was speaking to Euan and telling him what Courtney and said so I said to him “I bet £10 she won’t last two months...I don’t recall having any conversations with Johnny about taking a bet.”*

The Tribunal notes that the respondent did not state that they had taken any disciplinary action against Mr Townend regarding his role in the ‘bet’;

- 84.1.2 the claimant stated that he informed Ms Edwards that other colleagues had been involved in a bet, as recorded in the disciplinary hearing notes:

*“I heard rumoured hearsay in the male changing room. I did make Courtney aware and I did say it in a jokey fashion but that is me. I did not know until I read Jack’s statement that he had spoken to Euan about a bet. And I think when I made her aware there was Omar and I think Jack and James in the Office too.”*

- 84.1.3 Mr Marsden (who accompanied the claimant to the disciplinary hearing) had previously said during his statement:

*“I have heard that there was a bet on [Ms Edwards] lasting in the Mixing Shed, and I believe it was Johnny [the claimant] and Jack [Townend].”;*

- 84.1.4 Mr Murray asked Mr Marsden about the betting issue during the disciplinary hearing and Mr Marsden stated that:

*“The day Courtney quit the job or the day after, Jack [Townend] did say to me, he owed Johnny a fiver.”*

However, Mr Murray did not ask Mr Marsden any further questions on this point and neither Mr Marsden nor the claimant commented further on this issue during the disciplinary hearing.

- 84.2 the claimant commented on the fact that Ms Edwards had received more training on the Mixing Shed processes, than the existing employees in the Mixing Shed because the claimant and the other staff had only been trained for a few days. The claimant accepted during the disciplinary hearing: *“I did say you will be the best trained one in there.”* The claimant stated during cross-examination that if Ms Edwards had raised this as an issue at the time, he would have apologised to her;



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84.3 the Tribunal concluded that the claimant did move Ms Edwards' gloves because she had left them on a work station that he was due to use. However, the Tribunal concluded that the claimant did not place Ms Edwards' gloves under the sink in the Mixing Shed office so that they would get wet because none of the other employees working with Ms Edwards during that shift saw that they had been left under the sink. The Tribunal notes that the Mixing Shed office is a very small area and that if Ms Edwards' gloves (being a smaller size than those used by other staff) had been placed under the sink, then other shift staff (including Mr Iqbal) would have observed that this had been done when they picked up their tools from the office at the start of the shift;

84.4 the claimant and Mr Townend approached Ms Edwards in the canteen to ask why she had left her role in the Mixing Shed. However, the conversation was led by Mr Townend and not by the claimant. The claimant's account of the conversation during cross-examination was consistent with his account and that of Mr Townend in the disciplinary proceedings. The Tribunal preferred the claimant's evidence because the respondent was able to cross-examine him during these proceedings and therefore test his evidence. The Tribunal notes that:

84.4.1 Ms Edwards is recorded as saying in her second interview on 1 June 2023:

*"CE is not accusing Jack Townend he is just Johnny's shadow.*

...

*When he found out that i had stepped down Johnny and Jack made a point of coming into the canteen where I was sitting, I saw them looking in the window and when they saw that I was there they both came in and came up to me. Johnny said "So have you left then"? I knew he had come in to gloat 100%, John Gledhill was also in there at the time so he might have heard some of what was said. Jack didn't say anything he just stood with Johnny".*

84.4.2 Mr Gledhill stated that he saw Ms Edwards, Mr Townend and the claimant in the canteen, that the claimant was 'doing the talking' but that he did not hear what was said. Mr Gledhill said:

*"JF was doing the talking and CE was replying, and it sounded like she was sticking up for herself as she said something like "I will tell you to your face" but I can imagine what he had been saying to her we all know what he is like".*

However, Mr Gledhill did not overhear the conversation because he stated: *"I didn't really pay any attention to what they were saying".*

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84.4.3 Mr Townend stated:

*"...it was my idea to go to the canteen...I wanted to go and find out why she had given the job up and Johnny said 'Ok I want to find out as well'...I was curious and Johnny wanted to come along to find out too."*

*"We walked in and I said "3 weeks what's happened there?" as a joke. Courtney smiled at first and then got defensive, she said she is not doing it for the money all the scraping and cleaning so I said fair enough and then I left and went back to the Mixing Shed...Johnny followed shortly after...he did not say anything whilst I was there."*

84.4.4 The claimant stated during the disciplinary hearing in response to Mr Murray's questions:

*"I wish I had never gone. I think what Jack said in his statement was right, he wanted to know why Courtney had stepped down because Euan was his mate. I was sweating and I wanted a drink, and I did want to hear it from the horse's mouth and not someone puts a twist on it."*

*"We walked in the canteen, and I went for a drink. I never made eye contact with the lady. There was a comment from Courtney about the money. Then Jack's demeanor [sic] changed, then her demeanor [sic] changed and Jack said, "he does scrapes" John Gledhill was there and she said something about "I will tell you to your face" and I said "I did 2 scrapes today sweetheart and I know who's got into you, Omar, I'll have a word with him". And we left."*

85. Mr Murray and Ms Greenwood also recounted observing that Ms Edwards was 'in tears' when she gave her account of the claimant's behaviour towards her. However, the respondent accepted that neither they nor any of the other witnesses interviewed (with the exception of Mr Townend for the canteen incident) were present at the time of the claimant's behaviour of which Ms Edwards complained.

## RELEVANT LAW

86. The Tribunal has considered the caselaw and legislation set out below, together with any additional submissions made by the parties.

### **UNFAIR DISMISSAL (s98 Employment Rights Act 1996)**

87. The claimant has brought a claim for unfair dismissal and wrongful dismissal. When considering the unfair dismissal claim, the Tribunal must decide whether the

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respondent had reasonable grounds for believing that the claimant carried out the acts of misconduct alleged, having followed a reasonable process. The Tribunal does not have to decide whether the claimant in fact carried out the acts of misconduct alleged for the purposes of his unfair dismissal claim.

88. The right not to be unfairly dismissed is set out in the Employment Rights Act 1996 (the “**ERA 1996**”):

**Section 94**

*(1) An employee has the right not to be unfairly dismissed by his employer...*

**Section 98**

*(1) In determining...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...a reason falling within subsection (2)...*

*(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 a sufficient reason for dismissing the employee, and*

*(b) shall be determined in accordance with equity and the substantial merits of the case...”*

89. The respondent has also pleaded in the alternative that the reason for the claimant's dismissal was ‘some other substantial reason’ within the meaning of s98(1)(b) of the ERA 1996.

90. Where the employer's reason for dismissing the employee relates to the employee's conduct, the tribunal must first consider whether the respondent has established that its reason (or if more than one its principal reason) for dismissing the employee, was for a reason related to his or her conduct. The tribunal then goes on to consider the fairness of the dismissal for that reason, taking into account the guidance in *British Home Stores Limited v Burchell* [1980] ICR 303.

91. In a case where an employee is dismissed because the employer suspects or believes that he or she has committed an act of misconduct, in determining whether that dismissal is unfair the tribunal has to decide whether the employer entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. The employer must demonstrate three elements:

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- 91.1 the fact of that belief – i.e. that the employer did believe it;
- 91.2 that the employer had in its mind reasonable grounds upon which to sustain that belief; and
- 91.3 the employer had carried out as much investigation into the matter as was reasonable in all the circumstances of the case, at the time at which it formed that belief.
92. The Tribunal is required to apply a band of reasonable responses test as laid down in *Iceland Frozen Foods Limited v Jones* [1983] ICR 17. It is not for the Tribunal to decide whether the Tribunal would have dismissed the employee, as set out in the *Iceland* case at paragraph 24:
- “(i) the starting point should always be the words of Section 98 for themselves;*
- (ii) in applying the section the 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;*
- (iii) in judging the reasonableness of the employer’s conduct, the tribunal must not substitute its decision as to what was the right cause to adopt, for that of the employer*
- (iv) 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;*
- (v) 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 a dismissal falls outside the band, it is unfair.”*
93. The ACAS code of practice on disciplinary and grievance procedures states as follows:
- “(9) If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence which may include any witness statements with the notification.”*
94. Other provisions of the ACAS code of practice include provisions relating to the disciplinary and appeal processes themselves. These have not been set out in detail in this judgment in the interests of brevity.
95. The Court of Appeal held that the range of reasonable responses test applies to the reasonableness of any investigation carried out, as well as other procedural and substantive aspects of the decision to dismiss an employee for misconduct (*Sainsburys Supermarkets Ltd v Hitt* [2003] ICR 111(CA)).

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96. In *Taylor v OCS Group Limited* [2006] IRLR 613, the Court of Appeal said that if an early stage of a disciplinary process is defective and unfair in some way, then it does not matter whether an internal appeal is technically a rehearing or a review, only whether the disciplinary process as a whole is fair. The Court of Appeal stated that the Tribunal must examine any subsequent proceedings with particular care. Their purpose in so doing will be to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision maker, the overall process was fair, notwithstanding any deficiencies at an early stage.

## WRONGFUL DISMISSAL (NOTICE PAY)

97. A claim for wrongful dismissal is a breach of contract claim for notice pay. The Tribunal's contractual jurisdiction is governed by section 3 of the Employment Tribunals Act (ETA) 1996 together with the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 SI 1994/1623.

98. An employer must provide notice of an employee's dismissal (either statutory notice under s86 of the Employment Rights Act 1996 or their contractual notice period, whichever is the greater) unless an employee has committed gross misconduct, entitling the employer to dismiss the employee without notice or pay in lieu of notice. Gross misconduct for these purposes means conduct so serious as to amount to a repudiatory breach of contract, entitling the employer to summarily terminate the contract (see, for example, the EAT's decision in *Enable Care and Home Support Ltd v Pearson* 0366/09).

99. The test for wrongful dismissal is therefore different to that of unfair dismissal. The reasonableness or otherwise of an employer's actions is irrelevant for the purposes of deciding a wrongful dismissal claim.

100. When deciding whether or not an employee was wrongfully dismissed, the Tribunal must reach its own factual findings on two key points:

100.1 whether or not any misconduct alleged in fact occurred or not; and

100.2 if so, whether the misconduct that the Tribunal finds occurred was serious enough to amount to gross misconduct (i.e. a repudiatory breach of contract).

(See, for example, *British Heart Foundation v Roy* (Debarred UKEAT/0049/15).

## APPLICATION OF THE LAW TO THE FACTS

101. We applied the law to our findings of fact and reached the conclusions set out below.

## UNFAIR DISMISSAL

### *Reason for dismissal*

## RESERVED JUDGMENT

102. The Tribunal concluded that the reason for the claimant's dismissal was that the respondent believed that the claimant's conduct towards Ms Edwards constituted gross misconduct. The claimant did not plead any alternative reasons for his dismissal, having been represented by solicitors from the start of these proceedings until the week before this hearing, and did not make any application to amend his claim during this hearing.

### ***Investigation, disciplinary and appeal process***

103. The respondent complied with the steps outlined in the ACAS Code of Practice. The Tribunal notes that the Code of Practice itself focuses on the procedural steps taken by an employer during the disciplinary process, rather than the substantive fairness of a dismissal. The claimant's complaints focussed on the substantive fairness of his dismissal.

104. The Tribunal notes that there were parts of the investigation, disciplinary and appeal process that did not amount to best practice. For example:

104.1 Ms Greenwood carried out the investigation but also had some involvement in the disciplinary and appeal process (as set out in the findings of fact above);

104.2 the claimant was not provided with copies of the managers' and team leaders' statements until these proceedings.

105. However, the Tribunal concluded that the respondent's process was fair, taken in the round and taking into consideration the respondent's size and administrative resources. In particular:

105.1 the respondent carried out a thorough investigation of the incidents raised by Ms Edwards and interviewed multiple witnesses, including those referred to by the claimant;

105.2 the claimant was supplied with sufficient information to understand the allegations made against him by Ms Edwards and was given adequate opportunity to respond to those allegations during the disciplinary hearing;

105.3 the claimant was accompanied by Mr Marsden at both hearings and Mr Marsden had the opportunity to make representations on the claimant's behalf;

105.4 Mr Murray and Mr Palomo were of sufficient seniority to reach independent decisions on the disciplinary outcome.

### ***Was the sanction of dismissal within the range of reasonable responses?***

106. The Tribunal notes that the Tribunal must not 'substitute' its own view of whether or not dismissal was the right sanction in these circumstances. The 'band of reasonable responses' test means that a range of employers may consider a range of actions to be appropriate. The question is not, therefore, whether dismissal was the sanction that the Tribunal itself might have selected. Instead, the question for the

## RESERVED JUDGMENT

Tribunal is whether or not dismissal was a 'reasonable response' to the claimant's conduct.

107. The Tribunal has concluded that dismissal was within the range of reasonable responses open to the respondent for the following key reasons:

107.1 Mr Murray noted that there were no "direct witnesses" to the events, but concluded that there was no reason for Ms Edwards to accuse the claimant of bullying her, confide in other people regarding the claimant's behaviour, decide to stop working in the Mixing Shed, appear distressed and state that she was 'hiding in the toilets' to avoid the claimant;

107.2 Mr Murray concluded that the behaviour that Ms Edwards complained of was consistent with the accounts from other witnesses of different incidents relating to the claimant;

107.3 Mr Murray was entitled to reach that conclusion on the basis of the information available from the respondent's investigation and the claimant's response to questions during the disciplinary hearing;

107.4 In reaching the decision to dismiss the claimant without notice, Mr Murray took into account the claimant's long service and stated that "*in the past I thought very highly of you*". He did not take into account any expired warnings.

108. The claimant's claim of unfair dismissal therefore fails and is dismissed.

## WRONGFUL DISMISSAL

109. As noted above, the Tribunal must apply a different test when deciding whether or not the claimant was wrongfully dismissed. Wrongful dismissal is a contractual claim and the questions are:

109.1 Did the claimant carry out the conduct alleged? The conduct alleged here relates to the behaviour of which Ms Edwards complains only.

109.2 If so, did the conduct which the Tribunal finds happened amount to a serious breach of contract, entitling the respondent to dismiss the claimant without notice?

110. The Tribunal has concluded that the claimant was wrongfully dismissed by the respondent for the following key reasons:

110.1 the Tribunal has to take account of the documentary evidence and the evidence provided during this Tribunal hearing (i.e. the Tribunal witness statements and the witnesses' oral evidence). However, the Tribunal places greater weight on the evidence of witnesses who attend the Tribunal hearing because their evidence can be tested during cross-examination and by the Tribunal's own questions;

## RESERVED JUDGMENT

110.2 the Tribunal concluded in its factual findings (set out in more detail earlier in this judgment) that the claimant:

110.2.1 was involved in 'betting' on how long Ms Edwards would remain in her role in the Mixing Shed, but that Mr Townend instigated the betting. The Tribunal also notes that the respondent did not state that it had taken any disciplinary action against Mr Townend regarding the 'betting';

110.2.2 commented that Ms Edwards would be the 'best trained' member of staff in the Mixing Shed because she had received more days' training than other existing staff;

110.2.3 moved Ms Edwards' gloves when they were left on the work station that he needed to use, but did not place them under the sink; and

110.2.4 went to the canteen with Mr Townend to ask Ms Edwards why she had left her role in the Mixing Shed, but that Mr Townend conducted the majority of the conversation;

110.3 the Tribunal concluded that the involvement in 'betting' and the conversation in the canteen could be viewed as misconduct. However, the Tribunal concluded that these were not sufficient to amount to a serious breach of contract, entitling the respondent to dismiss the claimant without notice.

111. The claimant's claim for wrongful dismissal therefore succeeds and he is awarded his twelve weeks' notice pay.

## CONCLUSIONS

112. The claimant's claim of unfair dismissal fails and is dismissed.

113. The claimant's claim for wrongful dismissal succeeds and he is awarded his twelve weeks' notice pay.

**Employment Judge Deeley  
15 April 2024**