EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT		**RESPONDENT**
MR R EVANS	**V**	**RWE GENERATION UK PLC**

HELD AT: CARDIFF **ON: HEARING**
20, 21, 22 AND 23 MARCH 2017

BEFORE: EMPLOYMENT JUDGE **W BEARD**
MEMBERS **MRS L BISHOP**
MR W HORNE

REPRESENTATION:
FOR THE CLAIMANT: **Ms P Ashworth (Counsel)**
FOR THE RESPONDENT: **Mr M Winthrop (Solicitor)**

JUDGMENT

The judgment of the tribunal is as follows:

1. The claimant's claim of discrimination pursuant to section 13 Equality Act 2010 is dismissed upon withdrawal.
2. The claimant's claim of unfair dismissal pursuant to section 98 Employment Rights Act 1996 is well founded.
3. The claimant's claim of wrongful dismissal pursuant to common law is well founded.
4. The claimant's claim of unfair dismissal pursuant to section 103A Employment Rights Act 1996 is not well founded and is dismissed.
5. The claimant's claim pursuant to section 47B Employment Rights Act 1996 is not well founded and is dismissed.
6. Pursuant to section 123(6) Employment Rights Act 1996 the claimant contributed to his dismissal to the extent of 50% and the compensation for unfair dismissal is reduced by that extent.
7. The respondent is ordered to pay to the claimant the sum of £19,000.00 (nineteen thousand pounds) as a figure agreed between the parties in compensation of all claims.
8. The respondent is ordered to pay to the claimant the sum of £1,200.00 (one thousand and two hundred pounds) in respect of costs in relation to tribunal fees expended by the claimant.

REASONS

Preliminaries

1. The claimant claims unfair dismissal, relying upon sections 98 and 103A of the Employment Rights Act 1996, wrongful dismissal and a further that he has suffered detriment as a consequence of making a public interest disclosure. The claimant's claim of associative disability discrimination pursuant to sections 13 of the Equality Act 2010 was withdrawn. The respondent denies all claims. The issues between the parties arising from those claims are as follows:
   1.1. Did the claimant make a qualifying and protected disclosures on the dates set out in the schedule?
   1.2. Did the respondent subject the claimant to two disciplinary process because he had made any one or combination of the alleged protected disclosures?
   1.3. Did the respondent dismiss the claimant because he had made any one or combination of the alleged protected disclosures?
   1.4. Was the final written warning given to the claimant in the first disciplinary process "manifestly inappropriate"?
   1.5. Was the process used by the respondent to dismiss the claimant reasonable and, in particular:
      1.5.1. Was the suspension reasonable?
      1.5.2. Was the investigation reasonable?
      1.5.3. Was the setting of the level of the disciplinary at gross misconduct prejudging the severity of the allegations against the claimant?
   1.6. Was the decision to dismiss the claimant within the range of reasonable responses?
   1.7. Was the claimant's conduct an act of gross misconduct repudiating the contract of employment and entitling the respondent to dismiss the claimant summarily?

2. The claimant gave oral evidence and called, Mr Vaughn, Mr Kennington and Mr Carroll (all former work colleagues) to give oral evidence on his behalf. The respondent called Mr Taylor, who gave the claimant a final written warning at the first disciplinary, Mr Scott, who carried out the investigation for the second disciplinary, Mr Greaves, who dismissed the claimant and Mr Thornton, who upheld the decision to dismiss on appeal.

3. The tribunal was also provided with an agreed bundle of documents running to more than 500 pages. The tribunal have read those documents that were referred to in witness statements, cross examination and further questioning and in submissions: we have not read (nor were asked to) the entire bundle.

The facts

4. The respondent is an electricity generating company, it runs, amongst other activities, a power station in Pembroke. The claimant began his employment with the respondent on 5 September 2011. The claimant was

dismissed 22 January 2016. The claimant was employed as a mechanical engineer; it is not controversial that he was highly skilled in this role. The claimant was required to wear personal protective equipment under his contract of employment but was not contractually required to wear a particular uniform or to take unpaid breaks in any particular manner.

5. In February 2016 the claimant attended, along with colleagues, a Powerpoint presentation concerning the respondent's plans. The presentation indicated that the claimant along with others would be asked to work along with a contractor, Alstom, on an "outage" project (this was planned maintenance where a power generating system would be shut down). The indication was that those working on the outage would be required to work 11.5 hour days consecutively over a number of weeks, to wear the same uniform overalls as the Alsom staff, would be supervised by Alstom supervisors and would be expected to use the same mess as the Alstom staff during unpaid breaks. The claimant (and his colleague Mr Kennington) understood this to be voluntary at the time and declined to volunteer.

6. It very shortly later became clear that this was not intended to be voluntary, as the respondent's plan was that its employees should become suitably skilled in this form of maintenance so that it would no longer need to contract that outage work to Alstom. The consequence of this is that the claimant, along with others raised a grievance about the requirements placed upon them.

7. It is clear that throughout the grievance process, which went through three stages over a number of months, the key complaint of the claimant and his colleague Mr Kennington, related to an understanding that he was to be sub-contracted to Alstom during this period. It is also clear that the claimant and Mr Kennington were especially keen to retain their identity as employees of the respondent, a status of which they were rightly proud given their and the respondent's commitment to very high standards of health and safety. It is nonetheless also clear that whilst the claimant was raising some matters about health and safety relating to Alstom during this period this was not fundamental to the complaint. We found Mr Kennington a compelling witness in this regard when he spoke about being part of a family and wishing to retain that "security". The major complaints raised by the claimant were about the hours worked, the overalls to be worn and the requirement to use the Alstom mess facilities. For example at page 137 the claimant was asked to highlight concerns related to the grievance and his response at page 139 did not expand on the summary set out by the respondent in that letter at page 137.

8. The grievance process was concluded 21 August 2015. That process concluded that the claimant was required to work on the outage, to wear the uniform and to use the mess facilities of Alstom. There was to be an outage in September 2015 on which the claimant was expected to work. The claimant attempted to arrange holidays during the period of this outage, his request was refused. The claimant had a discussion with a manager, Paul Wilson, about working on the outage. Paul Wilson indicated

that the claimant had refused to work on the outage, the claimant denied that he had done so. A disciplinary investigation into the alleged refusal was undertaken and the matter progressed to a disciplinary hearing.

9. Mr Taylor conducted this disciplinary hearing on 13 October 2015. His conclusion was that the claimant had refused to take part by refusing to work the hours that were required on the shaft line, refusing to wear the uniform overalls and refusing to mess with the Alstom workers. However in the letter setting out the warning he neglected to include the refusal on the hours. He deemed this to be a refusal to comply with a reasonable instruction and that this refusal amounted to gross misconduct. In the course of the hearing the claimant had made clear his disagreement with wearing overalls and using the mess facilities. Once again the claimant raised issues of being unaware of the Alstom health and safety practices; however once again this was more of an aside in the circumstances. Mr Taylor decided that, although it was a finding of gross misconduct, he would only give a final written warning on this occasion because of the claimant's difficult personal circumstances.

10. During cross examination Mr Taylor accepted the proposition that the respondent could not dictate where employees took their unpaid breaks. However he suggested reasons why the respondent considered it important that breaks were taken together, including building team spirit and that workers could be found together and given instructions. He accepted that could only happen outside break times e.g. at the end of breaks otherwise it would be working time. The tribunal gained the impression that this was post event justification for the instruction. In our judgment Mr Taylor considered that this was a high level management instruction and therefore should be complied with. We consider he gave no real thought to the issue during the disciplinary process beyond that.

11. The claimant appealed this decision. He was given the outcome dismissing his appeal at a meeting on the 5 November 2015. At that meeting the claimant was also asked to confirm that he would work on an outage due to start on 12 November 2016. The claimant initially agreed that he would work on the outage but not subject to the requirements that he would wear the Alstom uniform overalls nor use their mess facilities. Later in the meeting he indicated that he would be prepared to work, wear the uniform and mess if he could be given documentation which demonstrated the safety standards to be applied by Alstom were appropriate. Because of this conditional position adopted by the claimant he was suspended at this meeting. However, the claimant was also promised that the documentation would be made available; it never was. It should be made clear that by this stage there was no longer a dispute on the hours to be worked by the claimant; the respondent had accepted that the claimant should only work 6 consecutive shifts of ten hours.

12. The respondent's policy on suspension is set out at p.421 of our bundle. In summary suspension is considered appropriate only in specific

circumstances, the only one of which that is relevant to the claimant was that the allegation if substantiated would amount to gross misconduct.

13. Mr Scott conducted an investigation into the allegation that the claimant had refused to obey a reasonable management instruction. He simply enquired whether the claimant had refused as was set out in the notes of the meeting of 5 November 2015; he made no enquiry as to whether the instruction was reasonable because he considered that the grievance and earlier disciplinary process had settled that matter.

14. Mr Greaves conducted the disciplinary hearing. His decision to dismiss the claimant was on the basis that the claimant had refused to work wearing the uniform overalls and using the mess facilities.
    14.1. He told us that he took no account whatsoever of the grievance process and the previous disciplinary process. His conclusion was based solely on the claimant's refusal at the 5 November meeting.
    14.2. He told us that he considered that refusal to amount to gross misconduct.
    14.3. He concluded that the claimant had been told that he would not receive the documentation mentioned in the November meeting. In cross examination, he was completely unable to explain on what evidence he reached this conclusion.
    14.4. Whilst in cross examination he accepted that the respondent could not dictate where the employees spent unpaid break times he considered that the refusal still amounted to gross misconduct.
    14.5. He told us that he gave both the refusal to wear the uniform and the failure to use the mess facilities equal weight.
    14.6. We took the view that his answers to questions betrayed the fact that he had not considered the seriousness of the allegations but as they had been labelled gross misconduct he considered them to be so.
    14.7. This was particularly apparent when Mr Greaves answered questions about the disciplinary policy. The only explanation he could give as to the seriousness of the claimant's conduct was the importance to the respondent of the claimant gaining these skills. However, he could not relate that explanation as to how it specifically impacted on the question of wearing the overalls and using the mess.

15. Mr Thornton conducted the appeal. His approach was not to begin again but to test Mr Greaves decision and deal with anything the claimant brought forward. He gave no consideration to any alternative outcomes to dismissal. Further in our judgment, he simply adopted Mr Greaves responses, when asked in cross examination about the seriousness of the allegations against the claimant. The tribunal came to the conclusion that he had given no previous thought to that matter. In our judgment he considered that this had been labelled gross misconduct and he gave no further thought to questions of seriousness.

The Law

16. The Employment Rights Act (ERA)1996 provides:

16.1. In section 43A: *(i)n this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H*.

16.2. In section 43B: *(1)In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following—*

> *---*
>
> *(b)that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*
>
> *---*
>
> *(d)that the health or safety of any individual has been, is being or is likely to be endangered,*
>
> *---*

16.3. In section 43C*: (1)A qualifying disclosure is made in accordance with this section if the worker makes the disclosure in good faith—*

(a) to his employer, or

17. In ***Bolton School v Evans [2007] ICR 641*** it is made clear that it is the disclosure of information that gives rise to the protection.

17.1. Therefore if disclosure is made in a manner which gives rise to the employer treating the employee to his detriment, then the tribunal must examine whether it is the disclosure or the conduct that give rise to the detrimental treatment.

17.2. In Martin v Devonshire Solicitors ***[2011] ICR 352*** (a case dealing with victimisation but which has some resonance with the issues in public interest disclosure cases) it was held that the question in a victimisation claim is what was the "reason" for the respondent's act or omission. If it is because the claimant had done a protected act, the respondent is liable for victimisation. However it sets out that there will be cases where an employer has dismissed an employee (or subjected him to some other detriment) in response to the doing of a protected act but where as a matter of common sense the reason was not the complaint as such but some feature of it which can properly be treated as separable.

17.3. In ***Fecitt & Ors v NHS Manchester EWCA Civ 1190*** Elias LJ held that liability arises if the protected disclosure is a material (more than trivial) factor in the employer's decision to subject the claimant to a detrimental act.

17.4. The PID provisions also raise issues on the burden of proof. In respect of detriment there is a reversal of the burden of proof once a claimant has proved that they have made a protected disclosure and suffered a subsequent detriment, section 48(2) Employment Rights Act (ERA) 1996 places the burden of proof on the respondent to prove, on the balance of probabilities, that the treatment was "*in no sense whatsoever"* on the ground of the protected disclosure.

17.5. The tribunal must answer these questions when considering the burden of proof in a PID dismissal case. Has the claimant shown that there is a real issue that the reason advanced by the respondent is not the real reason for dismissal? If so, has the respondent proved his reason for dismissal? If not, has the employer disproved the section

103A reason advanced by the claimant? If not the dismissal is for the section 103A reason. This is set out in ***Kuzel v Roche [2008] IRLR 530*** on that approach it is possible to find that an employer has disproved the section 103A reason without establishing its own reason (i.e. both reasons advanced are not the real reason for dismissal).

17.6. In the case of unfair dismissal we will have to consider whether the disclosure of information was the sole or principle reason for dismissal. In both case we will have to ask whether the conduct relied upon by the respondent is properly separable from the provision of information. We must be careful that the sheer number of incidents of disclosure does not cloud our judgment as to that essential question.

18. Detriment is to be considered in the same manner as it would for discrimination cases i.e. that a reasonable worker would or might take the view that he had been disadvantaged in the circumstances in which he thereafter had to work ***Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285.*** There is support for this approach to be found in ***Pinnington v The City & County of Swansea and Anr. UKEAT/0561/03*** where HHJ McMullen refers to ***Shamoon*** in dealing with the issue of detriment (paragraph 81) albeit obiter and also in **Dr I M Korashi V Abertawe Bro Morgannwg University Local Health Board *UKEAT/0424/09***

19. There must be a link between the detrimental treatment or dismissal and the disclosure. Also this must be "deliberate" in the sense of a conscious or unconscious motivation on the part of the respondent ***London Borough of Harrow v Knight [2003] IRLR 140.*** In ***A –v- Chief Constable of West Midlands Police UKEAT/0313/14*** an Employment Tribunal rejected the claimant's complaint of victimisation. The EAT dismissed the appeal and in particular because it indicated that it was difficult to contemplate how a failure to hear a complaint fully could be caused by the making of the complaint in the first place.

20. Section 43B of the Employment Rights Act 1996 provides.

> *(1) In this Part a " qualifying disclosure " means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—*
> *(b)that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*
> *(d)that the health or safety of any individual has been, is being or is likely to be endangered,*

In accordance with the current statute the claimant must, therefore, raise public interest disclosure matters as a public interest issue and not solely in pursuit of a personal complaint or as some collateral issue.

21. With regard to unfair dismissal, the relevant legislation begins with section 98 of the Employment Rights Act 1996, which provides:

> *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 is either a reason falling within subsection 2 or some other substantial reason of a kind such as to justify the dismissal of any 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) in any other case where the employer has fulfilled the requirements of subsection 1, the determination of the question of 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 employers 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*

22. The respondent is required under Section 98 of the Employment Rights Act 1996 to prove the reason for dismissal. Thereafter, the burden of proof is equal between the respondent and the claimant in respect of the fairness of dismissal.

23. The respondent relies on conduct as the reason for dismissal. Guidance has been given to Tribunals in dealing with misconduct cases beginning with that given in ***Burchell v British Home Stores [1978] IRLR 379*** as updated in ***Iceland Frozen Foods Ltd v Jones [1982] IRLR 439; ICR 17***. Which guides tribunals to consider the following: whether the respondent has a genuine belief in the misconduct; whether that genuine belief is sustainable on the basis of the evidence that was before the respondent; whether that evidence was gained by such investigation as was reasonable in all the circumstances of the case. Finally the tribunal must consider whether, in short, the punishment fits the crime, in other words whether dismissal was a reasonable decision to take given the genuine belief and the evidence upon which it was based.

24. The examination the issue of reasonableness is based on the band of reasonable responses; that range includes the lenient and the harsh but fair employer. ***Sainsburys Supermarkets Ltd* v *Hitt [*2003*] IRLR 23*** makes it clear that the test to be applied to the extent of an investigation carried out by an employer is also the band of reasonable responses.

25. Therefore the process the tribunal must engage in is to look at the evidence as it was before the respondent at the time of the decision, and decide whether that evidence is sufficient for a reasonable employer to

hold the belief in the claimant's misconduct. Then to ask whether the investigation was reasonable in a ***Sainsbury*** sense. Tribunals are warned to avoid what is referred to as the substitution mindset. Mummery LJ said in the ***London Ambulance Service NHS Trust v Small [2009] IRLR 563 CA*** :

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

26. However the tribunal must also consider the limits set out by Longmore LJ in ***Bowater v North West London Hospitals NHS Trust [2011] IRLR 331*** where he said:

> *I agree with Stanley Burnton that dismissal of the appellant for her lewd comment was outside the range of reasonable responses open to a reasonable employer in the circumstances of the case. The Employment Appeal Tribunal decided that the Employment Tribunal has substituted it's own judgment for that of the judgment to which the employer had come but the employer cannot be the final arbiter of it's own conduct in dismissing an employee, it is for the Employment Tribunal to make it's judgment always bearing in mind that the test is whether the dismissal is within the range of reasonable options open to a reasonable employer. The Employment Tribunal made it more than plain that that was the test which they were applying.*

Therefore, making it clear that the answer to the question of whether it is an *objectively* reasonable decision remains the tribunal's to deliver.

27. The Employment Rights Act 1996 provides as follows:

> *Section 122*
>
> *----------(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and*

> *equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.*
>
> *Section 123*
>
> *----------(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.*

The case law dealing with the issue began with ***Nelson v BBC (No 2) [1980] ICR 110*** which guides me to look at the conduct of the claimant as I find it to be, and ask whether the claimant's conduct caused or contributed to his dismissal. The tribunal must consider whether there is blameworthy and causative conduct. Blameworthy in this sense can encompass behaving perversely, foolishly or in a bloody-minded manner. It must however be improper behaviour and not simply unreasonable.

Analysis

28. Did the claimant make a qualifying and protected disclosures on the dates set out in the schedule? The tribunal consider that the public interest disclosure claims are best addressed by examining those claims on the presumption that the claimant has established that the alleged disclosures were made and were qualifying and protected but without deciding the same.

29. We deal with the next two issues together. Did the respondent dismiss the claimant because he had made any one or any combination of the alleged protected disclosures? The respondent has established that the reason for the claimant's dismissal was conduct, and therefore the claimant cannot establish the section 103A ERA 1996 claim. Did the respondent subject the claimant to two disciplinary process because he had made any one or any combination of the alleged protected disclosures? The claimant was subjected to the disciplinary processes because the respondent considered that the claimant had refused to follow a management instruction, not because he had raised health and safety issues.
    29.1. Accepting that a disciplinary process, improperly instituted, can amount to a detriment, we consider a properly instituted disciplinary process which forms part of the employment contract cannot be said to be a detriment.
    29.2. The respondent has established that the process was commenced as a result of a genuine concern as to the conduct of the claimant. Under the terms of the claimant's contract of employment the respondent was entitled to explore, through the disciplinary process, whether that issue of conduct was proven.
        29.2.1. The decision to institute the disciplinary process was taken at a stage where the grievance process had been resolved, albeit not to the claimant's satisfaction.

29.2.2. That grievance process had been concentrated on issues other than health and safety. The decisions made in that process related to those other issues and not health and safety.

29.2.3. It was clear from the grievance decision that the claimant should take part in the outage wearing the uniform overalls and using the mess facilities.

29.2.4. The claimant was indicating at the start of each disciplinary process that he was not prepared to work on the outage wearing the Alstom overalls and using their mess facilities.

29.2.5. Therefore, the reason for starting the process was not because the claimant had raised a health and safety matter but because he was unwilling to comply with those conditions.

29.2.6. In our judgment starting and continuing the two disciplinary processes were for those reasons.

29.2.7. The decision to give the claimant a final written warning in the first disciplinary process was based on those two matters and one additional issue, that of a refusal to work the 11.5 hour consecutive shifts. The decision was not made because the claimant had raised issues of health and safety.

29.2.8. The decision to dismiss the claimant and the decision to dismiss the appeal from that decision was made on the basis that the claimant had refused to comply with the instructions on uniform and the use of mess facilities. These decisions were not made because the claimant had raised issues of health and safety.

29.3. Additionally, in our judgment, health and safety as an issue grew in importance to the claimant as the process progressed. It was raised by him not as a reason for drawing health and safety matters to the respondent's attention but as a means of creating further barriers to the respondent requiring the claimant to wear the overalls and mess with Alstom. We conclude, in those circumstances, that the matters were raised for personal collateral reasons and were not raised in the public interest.

29.4. On that basis, the tribunal conclude that the claimant's claims under sections 103A and 47B of the Employment Rights Act 1996 are not well founded and in consequence we dismiss them.

30. Was the claimant's conduct an act of gross misconduct repudiating the contract of employment and entitling the respondent to dismiss the claimant summarily? We do not consider that the claimant's refusal to wear a particular uniform and to use particular messing facilities amount to a repudiatory breach of the implied term of co-operation.

30.1. For the requirement of co-operation to exist there must be either be an express contractual requirement to (in the circumstances of this case) follow an instruction or, alternatively, be a set of circumstances where following the instruction is in some way reasonably tangential to the contract terms. This is especially important when the requirement is related to times when the claimant is not working or being paid for work.

30.2. There clearly may be circumstances (both general and particular) when an instruction should be considered to engage the

implied term, despite not being an express term of a contract. This can even be the case when an individual is not being paid to work.

30.2.1. Dealing with general circumstances an instruction not to behave poorly outside of work causing the reputation of an employer to be damaged is a paradigm example of such circumstances.

30.2.2. In respect of "particular circumstances" where, for example, there is a clean room environment an expectation that employees should take unpaid breaks in a particular place might be of special importance. This would again engage the implied term.

30.3. Here the respondent has indicated that the claimant would be working as part of team which was carrying out work on the shaft line. The work was being carried out by employees of Alstom and the claimant was to be supervised by employees of Alstom. For the purposes of identification of those involved in that work the respondent's expectation was that individuals would wear the same uniform.

30.4. There is a specific requirement in the claimant's terms and conditions of employment that he wear personal protective equipment.

30.5. We consider, in those circumstances, instructing the claimant to wear equipment which would be provided by the respondent (or its contractors) and which would identify the claimant as part of a workforce undertaking work on the shaft line was a reasonable instruction. In our judgment, the instruction was tangential to the contract and engaged the implied term.

30.6. In the circumstances of this case the reasons given by the respondent for the claimant to use the Alstom mess facilities were not accepted by the tribunal. In our judgment, the reality was that no real thought was given to the reasons for requiring the claimant to mess in a particular area.

30.7. Whilst we are of the view that this instruction could potentially engage the implied term, on the evidence we have heard it has not been demonstrated that the implied term was engaged. We do not consider it reasonable to enforce socialisation between work colleagues without good reason. On that basis, we do not consider the claimant's refusal unreasonable in the circumstances.

30.8. The claimant's dismissal was based on both aspects of his refusal equally; it amounts to an anticipatory breach even if it is a breach at all.

30.9. We do not consider that the claimant in refusing to wear overalls on the conditional basis he put forward was acting in a manner which amounted to a repudiatory anticipatory breach of contract; it was not an act of gross misconduct. This is particularly so when the substance of the claimant's conditional position was that he be shown health and safety relevant documentation and where the respondent had promised to provide that documentation to the claimant.

31. Was the final written warning given to the claimant in the first disciplinary process "manifestly inappropriate"? We do not consider this to be a

question relevant to our judgment as the decision to dismiss was made ignoring the existence of the final written warning.

32. Was the process used by the respondent reasonable considering the following matters: the suspension decision, the investigation carried out, and asking whether there was a pre-judgment as to the seriousness of the conduct of the claimant. We consider that in all three of those aspects the decision to dismiss was flawed.
    32.1. The respondent has established that conduct was the reason for dismissal. The respondent considered that the claimant's conduct, which it relied upon in dismissing the claimant, remained the same throughout the grievance and both disciplinary processes.
    32.2. However, in factual terms, the claimant's position evolved over time. Whilst the claimant continued to refuse to follow a management instruction, both the extent of that instruction and the conditionality of the claimant's refusal altered between the initial grievance and the dismissal decision.
    32.3. Given what we have set out above as to the seriousness of the claimant's conditional refusal we do not consider that the decision to suspend the claimant was in keeping with the respondent's disciplinary policy.
        32.3.1. The reason for suspension in this case must relate to the respondent's policy requirement that the conduct was serious enough to amount to gross misconduct (there is no indication that any other of the prescribed circumstances in the policy existed).
        32.3.2. We have heard no evidence from those who made the decision to suspend as to their thought processes leading up to that decision.
        32.3.3. We have seen no documentary evidence which demonstrates the reasoning of those who made the decision to suspend the claimant.
        32.3.4. Suspension should not be a "knee jerk" reaction even when gross misconduct is under consideration.
        32.3.5. We do not consider that the approach taken by the respondent was reasonable. We have heard no evidence which would indicate why suspension was a necessary or even desirable step. The claimant had maintained a more intransigent position on these matters previously and had not been suspended at any earlier stage.
    32.4. In similar terms the evolution of the claimant's position means that the refusal being investigated had differences from the refusal at an earlier stage.
        32.4.1. In those circumstances a decision to limit the investigation to whether there was a factual refusal and not to even consider the reasonableness of the claimant's conditional refusal at that stage was not within the bands of reasonable choices.
        32.4.2. Further to this there was no examination at all that the claimant had previously been disciplined over hours of work in addition to the other two matters.

32.4.3. This is particularly so as, in effect, the investigation was endorsing the previous categorisation of the claimant's conduct as gross misconduct.

32.4.4. It is axiomatic that the reason for the claimant's refusal would be relevant to the issue of the seriousness of his conduct. The conditional nature of his refusal and the promise of the provision of documentation is therefore relevant as part of the investigation; this was not explored with the claimant or with those who suspended the claimant.

32.5. We concluded that Mr Greaves gave no independent thought as to the category of seriousness into which the claimant's conduct fell. It is not so much that Mr Greaves pre-judged the seriousness of the claimant's conduct but that he applied no judgment to the issue at all. That is not a reasonable procedural approach of a decision maker in circumstances where the suspension and investigation process had simply approached the matter on the basis that it was gross misconduct without analysis at all.

33. Was the decision to dismiss the claimant within the range of reasonable responses? We consider that it was not. Whilst it is perfectly possible for a respondent to reasonably conclude that conduct which the tribunal does not consider to be gross misconduct, is gross misconduct, such a decision must fall within the band of reasonable responses.

33.1. In this case the decision to dismiss was on the basis that both the refusal to wear uniform and the refusal to use mess facilities was gross misconduct, there was no reliance on the earlier warning.

33.2. The requirement to wear uniform was, we have found, a reasonable instruction. The requirement to use certain facilities at breaks was not.

33.3. It might have been reasonable for the respondent to conclude that the former was misconduct based on a breach of the implied term of co-operation.

33.4. In our judgment, based on the answers given by the respondent's witnesses that they were aware that the respondent could not insist on breaks being taken at a specific place, it was not reasonable to conclude that the latter was misconduct. In our judgment, no reasonable employer would have viewed that as misconduct given an acceptance of a right to take unpaid breaks elsewhere.

33.5. Therefore, it cannot be reasonable to consider that the claimant's conduct was such to warrant dismissal in relying on both matters together.

33.6. We are of the view that there was no evidence upon which Mr Greaves was entitled to draw the conclusion that no promise to provide documentation had been made to the claimant.

33.7. Further, we are of the view that it was not reasonable for the respondent to consider the failure to wear uniform, in circumstances where the claimant had made his position conditional and the respondent had said it would meet that condition, as amounting to gross misconduct at that stage. A reasonable employer would, at the

very least, meet the condition as promised and then gauge the response of the claimant.

33.8. In the circumstances our conclusion is that the claimant's claim of unfair dismissal is well founded.

34. We next consider the issue of contribution. The claimant refused to wear the uniform. He did so over a considerable period of time. Although he made his position conditional at the end it was still a perverse stance to adopt. In his evidence the claimant spoke of the condition of the uniforms, he did not wait to see the condition of the uniforms and then complain. It is right that the claimant simply did not want to be seen part of the Alstom organisation but wanted to be identified with his own employer. Given the circumstances this stance was to say the least "bloody-minded". In our judgment given that this formed a significant part of the respondent's reason for dismissal, a reduction of 50% for contribution is appropriate.

Judgment posted to the parties on

3 April 2017

EMPLOYMENT JUDGE W BEARD

For the staff of the tribunal office

Dated: 29 April 2017

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