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EMPLOYMENT TRIBUNALS

Claimant: **Mr P Vickers**

Respondent: **ABM Facilities Services UK Ltd**

Heard at: **East London Hearing Centre**

On: **12-14 December 2016; 2-3 March 2017**

Before: **Employment Judge Barrowclough**

Members: **Mr P Quinn**
Mrs S A Taylor

Representation

Claimant: Ms. G. Brice (HR Representative)

Respondent: Ms. M. Anderson (Solicitor)

JUDGMENT

The unanimous judgment of the Employment Tribunal is that the Respondent unfairly dismissed the Claimant, in breach of s.94 Employments Rights Act 1996; but that the Respondent did not directly discriminate against the Claimant because of the protected characteristics of either gender or age. Accordingly, the Claimant's complaint of unfair dismissal succeeds, and there will need to be a remedy hearing, at which the compensation payable to the Claimant will be uplifted by 25% due to the Respondent's unreasonable failure to comply with the relevant ACAS Code of Practice, unless the parties can agree by 31 March 2017 the compensation to be paid to the Claimant; and the complaints of direct age and sex discrimination are dismissed.

REASONS

1 By his claim, presented to the Tribunal on 3 June 2016, the Claimant Mr Philip Vickers, who was born on 9 October 1979, raises three claims against ABM Facilities Services UK Ltd, his former employers, namely (a) unfair dismissal, in breach of s.94

Employment Rights Act 1996, (b) direct sex discrimination, and (c) direct age discrimination, both in breach of s.13 Equality Act 2010. The Respondent accepts that it dismissed the Claimant, asserts that it's reason for doing so was misconduct and that it was reasonable in all the circumstances to dismiss him, and denies that it treated the Claimant less favourably as alleged or at all because of either his gender or his age.

2 We heard this case over the course of a five day hearing, the first three days being 12-14 December 2016, and thereafter on 2-3 March 2017. Having concluded the evidence on the afternoon of 2 March, we heard closing submissions from the parties' representatives on the morning of 3 March, and gave an ex tempore judgment that afternoon. Due to the lack of available time and also of any remedy bundle, the issue of the compensation to be paid to the Claimant was adjourned to the first open day after 28 days, unless the parties are able to reach agreement in relation thereto in the interim.

3 The Claimant was represented at the hearing before us by Ms. G. Brice, an HR professional, and gave evidence in support of his complaints. In addition, Ms Brice called Mr Nick Jewitt, Mr Scott Smith and Mr Kevin Armstrong as witnesses. The Respondent was represented by their solicitor Ms M. Anderson, who called as witnesses the following: (a) Mr Stuart Aungier; (b) Ms Nicola Davies; (c) Mr Mark Wheeler; (d) Mr Courtney Hindle; (e) Mrs Margaret Bell; (f) Mr Kevin Fiddes; and (g) Mr Robert Chatfield.

4 The applicable law in relation to the Claimant's claims is straightforward, was not in dispute before us, and we were not referred to any authorities. In respect of the unfair dismissal claim, it is for the Respondent to prove on a balance of probabilities that their reason for dismissing the Claimant was a potentially fair one, falling within s.98(1)(b) or (2) Employment Rights Act 1996. As noted, the reason relied upon by the Respondent is the Claimant's conduct, commonly described as 'misconduct'. Assuming for the time being that reason is established, then the Tribunal must go on to apply the well-known test set out in ***BHS v Burchell [1980] ICR 303***: did the Respondent have a genuine belief, based upon reasonable grounds and after an appropriate investigation, that the Claimant was guilty of misconduct? If so, did the Respondent adopt and apply a reasonably fair disciplinary procedure, and was dismissal of the Claimant within the range of responses open to a reasonable employer? If misconduct is proved as being the Respondent's reason for dismissal, these are the issues we must then determine.

5 In relation to the Claimant's discrimination claims, direct discrimination is alleged in both instances, the protected characteristics being sex or gender and age. The actual rather than hypothetical comparator relied upon by the Claimant in relation to both claims is Mrs Margaret Bell, a cleaner employed by the Respondent at the Eastgate Shopping Centre who was then aged 60 and was one of the cleaners that the Claimant supervised. Effectively what the Claimant (who was then aged 36) alleges is that he was treated less favourably by the Respondent than it treated Mrs Bell in being disciplined and dismissed for falsifying or fraudulently claiming working hours because of his gender and/or age. The issues for determination by the Tribunal are (a) has the Claimant proved primary facts from which we could properly and fairly conclude, in the absence of a sufficient explanation, that the difference in treatment of the Claimant on the one hand and Mrs Bell on the other was because of the Claimant's sex or gender,

and/or his age? If so, then (b) has the Respondent proved on a balance of probabilities that it's treatment of the Claimant in disciplining and dismissing him was in no sense and to no extent attributable to either of those protected characteristics?

6 The factual background of the case can be summarised as follows. The Respondent is a company which provides cleaning, maintenance and security services and personnel at commercial premises throughout the UK, employing approximately 3,500 staff nationwide. One such site is the Eastgate Shopping Centre in Basildon, Essex. The Claimant originally commenced employment there as a cleaner on 28 July 2004 and he was subsequently promoted in about 2009/10 to the role of cleaning supervisor. He worked continuously at the shopping centre for a period of more than 11 years up until his dismissal on 9 February 2016. It is accepted that the Claimant had no disciplinary record of any kind during that employment. One part of the Claimant's duties as a supervisor was to complete and submit monthly time sheets for himself and the team of cleaning staff working on the site for whom he was responsible to the Respondent's payroll department, who would in turn seek authorization or approval from the Respondent's senior site manager before staff were paid. The Claimant was also required to simultaneously send copies of the monthly sheets submitted to his line manager Mr Aungier.

7 Those monthly timesheets were prepared by the Claimant and were based upon his own and the cleaning staff under his supervision manually signing in and out at the commencement and conclusion of their working shifts. In addition, the Respondent operated an electronic clocking in and out system (known as 'LESSR'), whereby individual members of staff were provided with cards which were to be swiped or scanned on arrival and departure to provide a more accurate record than the manual records; albeit the undisputed evidence before us was that the LESSR system was frequently defective and/or non-operational, and therefore was not used and relied upon by the Respondent for the purposes of pay, and staff continued to sign in and out manually. Finally, there was a further automated system available to the Respondent, the shopping centre's ANPR system, which recognised and recorded members of staff's vehicle number plates on arrival at the barrier to the shopping centre carpark (for which staff were provided with season tickets), including their arrival times. Unfortunately that system as well was not able to record accurately the total time spent at work by the Respondent's staff, because the camera positioned by the exit barrier was broken, or at least not working, and had been so for some time, as the Respondent accepted.

8 On 14 October 2015, the Claimant attended an investigatory meeting called by Mr Aungier, the Respondent's soft services manager at the Eastgate shopping centre and the Claimant's line manager, to address a number of issues. These included missing timesheets from the Claimant, his failure to use the LESSR system, apparent anomalies between his working hours and the ANPR records for his vehicle, and a suggestion that he was absent from work for lengthy periods during his working hours. In broad terms, the Claimant then said that he believed he could answer all those issues, but that he would need some time to review the relevant documentation (for example his timesheets) before commenting further. However the following day, the Claimant was suspended on full pay by Mr Aungier for allegedly defrauding the Respondent by falsifying his timesheets for personal gain.

9 On 25 October, the Claimant was called to a disciplinary meeting to be held two days later which was to be chaired by Mr Hindle, then the Respondent's general manager at the shopping centre, in relation to that and a second allegation, namely contacting a work colleague whilst suspended. The allegations were characterised as potentially amounting to gross misconduct, for which the Claimant could be dismissed. However, the Claimant requested a postponement since (a) he was then on pre-booked annual leave, and (b) to enable him to view CCTV footage relied upon by the Respondent. He also asked that Mr Hindle be replaced as the disciplinary chair, on the grounds that he was not impartial. Those requests were granted, and the hearing was re-scheduled to take place on 11 November, to be chaired by Mr Trodden, the area security manager, in place of Mr Hindle. Then on 6 November the Claimant requested further facilities to view once more the ANPR footage relied upon, which was apparently far from clear, and also to be allowed to call witnesses to attend his disciplinary. As a result, the Respondent decided to postpone the hearing indefinitely, and instead appointed Mr Hindle to conduct an investigation into the Claimant's alleged wrongdoing. That involved a number of lengthy meetings between the Claimant and Mr Hindle in December and then January 2016.

10 However on 15 December, the Claimant had lodged a grievance against Mr Aungier, both in relation to the ANPR information he had provided to the Claimant, and because it was alleged that his suspension of the Claimant and the allegations against him were motivated by personal spite on Mr Aungier's part. That led to a grievance meeting conducted by Ms Davies, the Respondent's HR manager, on 22 December, and a grievance outcome letter on 11 January 2016, in which (the Respondent asserts) the Claimant's grievances were not upheld. The Claimant appealed the following day, and a grievance appeal meeting, chaired by another of the Respondent's general managers called Mark Wheeler, took place on 3 February 2016. Mr Wheeler dismissed that appeal for the reasons set out in his letter to the Claimant dated 14 March.

11 Before that, however, the Claimant was invited (on 22 January) to attend a fresh disciplinary hearing arising out of Mr Hindle's investigation, to take place on 27 January and to be chaired by another general manager, Mr Fiddes. The invitation letter set out the fresh disciplinary charges which the Claimant had to meet. They were (a) that on September 1,3 and 6 2015, he had signed in for work at an earlier time than his season ticket and the ANPR carpark footage showed, thereby fraudulently inflating his claimed hours worked; (b) that in June 2015, the Claimant had claimed and been paid for three days holiday which he hadn't in fact taken, thereby inflating his hours by 24.95 hours; and (c) that the Claimant had claimed and been paid for hours at work on 6 & 20 July and 29 August 2015, when his presence at work could not be established or verified. The Respondent asserts that the Claimant already had copies of all the relevant supporting documentation, and that it was not necessary to send him any more.

12 The Claimant's disciplinary hearing in fact went ahead on 4 February 2016, chaired by Mr Fiddes, who was accompanied by a note taker. The Claimant attended together with a work colleague, Ms Alexandra Thomas. At the outset, Mr Fiddes confirmed that the Claimant could not call witnesses, and that the second allegation (above) was no longer being pursued. Mr Fiddes adjourned to consider his decision at the conclusion of the hearing; and on 9 February telephoned the Claimant to inform

him that he had found the two remaining allegations proved, and that he had decided that the Claimant must be summarily dismissed for gross misconduct. A letter setting out Mr Fiddes' reasons and conclusions, and confirming the outcome of the disciplinary hearing, was sent to the Claimant on 17 February.

13 The Claimant appealed against that decision by way of a letter dated 19 February. Mr Chatfield, the Respondent's head of sport and leisure department, was appointed to hear the Claimant's appeal, which took place on 17 March 2016. Following that hearing, when once again no witnesses were permitted, Mr Chatfield made a number of further enquiries, including speaking to individuals relied upon by the Claimant, and the Claimant sent Mr Chatfield further relevant documentation. The appeal hearing was not however reconvened, and on 29 April 2016 Mr Chatfield wrote to the Claimant dismissing his appeal for the reasons set out in that letter.

14 We heard evidence from Mr Aungier. As already noted, it was part of his role to check the timesheets and the resulting claims for pay which were submitted every month by the Claimant on behalf of himself and the cleaning team that he supervised. Mr Aungier told us that he trusted the Claimant, and that they had worked together for a long time at the Eastgate shopping centre. Text messages to which we were taken in the bundle show that the Claimant had informed Mr Aungier on earlier occasions when he had claimed for additional hours to those which he had recorded in his time sheet, for overtime undertaken or work done whilst signed off on holiday, and that no objections had then been raised by Mr Aungier. Mr Aungier had at one time complained when the Claimant had failed to copy him in on a batch of timesheets which he had submitted on behalf of himself and his team direct to the payroll department; and the Claimant had apologised for the oversight and thereafter duly submitted copies; and once again, no action was initiated by Mr Aungier in relation to the Claimant's breach of procedure.

15 It was the Claimant's case and part of his grievance that at the 2015 office Christmas party held in a local pub, Mr Aungier had been overheard by a witness (Mark Bell) stating that either he (Mr Aungier) or the Claimant would have to leave the Respondent's employment; and that that was because the Claimant had objected to and complained to Mr Fitzgerald, who is one of the company's directors and also the operations manager, about Mr Aungier's hiring a friend of his to work for the Respondent at the Eastgate shopping centre. In his evidence to the Tribunal, Mr Aungier denied that he had ever said that or anything like it; and went on to say that he had so informed Ms Davies, the Respondent's HR manager, when she had raised that allegation with him. Mr Aungier had originally been appointed to conduct the disciplinary investigation into the Claimant's alleged fraudulent claims, albeit being replaced in that role by Mr Hindle after the initial disciplinary hearing was postponed; and he said that as part of his investigation he had prepared a schedule which clearly identified the hours or times which the Claimant had fraudulently claimed for, but had not in fact worked. However, Mr Aungier could not produce a copy of any such schedule, which was not in the agreed trial bundle; neither he nor anyone else knew of any reason why any such schedule was not before the Tribunal; and he could not assist the Tribunal by specifying the hours or days fraudulently claimed.

16 Ms Davies is the Respondent's HR manager. At all relevant times, she was one of two in-house HR advisers employed by the Respondent, Ms Davies being based in

Chester and her assistant in London. She told us in her evidence that, despite being the Respondent's senior HR adviser, she was only involved in the Claimant's case in relation to his grievance, which she heard and dismissed; and that she was not involved in the Claimant's protracted disciplinary process. It is therefore noteworthy, and remained unexplained before us, that Ms Davies was copied in by colleagues at the Respondent to a significant number of important documents thereafter, all of which relate to the Claimant's disciplinary suspension, investigation and hearings. It is difficult to see why that should have been the case if, as she says, she played no part in and provided no advice concerning those matters. Ms Davies told us that the Respondent does not permit witnesses to be called by employees at either disciplinary or grievance hearings as a matter of course, despite the provisions of the ACAS Code of Practice and despite the Claimant repeatedly asking to be able to do so during the course of his disciplinary process; but could not tell us why this blanket ban had been adopted. In a direct contradiction of Mr Aungier's evidence, Ms Davies said that whilst she had interviewed Mr Bell as part of the Claimant's grievance, and that Mr Bell had then confirmed having heard Mr Aungier say that either he or the Claimant would have to leave the Respondent's employment as detailed above, she had not subsequently informed Mr Aungier of that remark/allegation – so plainly one or other of them must be wrong. Furthermore, Ms Davies went on to say that she had not accepted that Mr Aungier had actually made any such remark, although she could not explain how or on what basis she had reached that conclusion, particularly since on her version she had never informed Mr Aungier of the allegation or asked him about it, she accepted that Mark Bell was an independent witness, and she could not point to any evidence that might suggest that his recollection was wrong. Finally, Ms Davies accepted that the outcome letter which she sent the Claimant having 'heard' his grievance does not in fact say that she rejected Mr Bell's account or state whether she upheld or dismissed the Claimant's individual grievances (or any of them), although she agreed that her role then was to adjudicate on them. Initially in her oral evidence to the Tribunal, Ms Davies said that she had dismissed *'the majority'* of the Claimant's grievances; however, on further questioning she changed her mind and said that she had in fact dismissed all of them; albeit she accepted that there was no document or anything in writing to confirm either outcome.

17 Mr Mark Wheeler heard the grievance appeal. Once again, the Claimant was not allowed to call witnesses, despite his request. Mr Wheeler said that he spoke to those identified by the Claimant as being relevant to the issues raised following the grievance appeal hearing; but it is significant that he made no notes of his interviews with any such witnesses, nor did he subsequently submit draft statements to any of them for amendment and approval, nor was the Claimant made aware of any such interviews or of what was then discussed. Mr Wheeler said that he adopted that course on the advice of someone in the Respondent's HR department; he could not say who, but it can only have been either Ms Davies or her assistant; and, given her seniority and her previous involvement in the Claimant's grievance, we think it more likely to have been Ms Davies. In any event, Mr Wheeler did not uphold any of the Claimant's individual grievances.

18 Mr Hindle was at the relevant time the Respondent's general manager for the Eastgate shopping centre, although he has since left their employ, and he was appointed to conduct the disciplinary investigation into the Claimant's alleged fraudulent claims in succession to Mr Aungier. As part of that investigation, Mr Hindle

conducted three extremely lengthy interviews with the Claimant in December 2015 and January 2016, taken together lasting between 10 and 12 hours in total; and extensive notes of those meetings were produced and are included in the trial bundle. Mr Hindle accepted that, as those notes of interview make plain, he repeatedly told the Claimant during their meetings that he did not accept or believe any of the explanations put forward by the Claimant in relation to his alleged misconduct and fraudulent claims; that he (Mr Hindle) was convinced that the Claimant was lying and that he had been defrauding the Respondent, and that he told the Claimant so and that he should come clean and admit his misconduct; albeit the Claimant refused to do so. Despite the approach he adopted over the course of those interviews, Mr Hindle asked us to accept that his investigation was in fact as described by him at page 164b in the bundle, merely *'an impartial fact finding exercise preparatory to the disciplinary hearing'*. Mr Hindle sent copies of the email documentation he generated over the course of his investigation to Ms Davies and Mr Aungier, as well as to Mr Fitzgerald. Notwithstanding his lengthy investigation, Mr Hindle could not, or at least did not, produce any summary of the steps he had taken, the individuals interviewed, or his conclusions and recommendations. All that was forthcoming from his labours were a number of spreadsheets, the thrust and details of which were by no means clear, together with the three disciplinary allegations or charges the Claimant had to face and answer, as set out above and in the (second) disciplinary invitation to the Claimant at page 198 in the bundle, the original disciplinary charges previously put forward having been abandoned by the Respondent.

19 In his evidence, Mr Hindle told us that the one of the points made by the Claimant during the investigation meetings was that he had claimed and been paid for working through his lunch breaks and for coming into work when signed off on leave, and that whilst Mr Hindle was not altogether happy with those practices, he felt he had to accept the Claimant's explanations because they had been going on for so long, because the Respondent's management had not picked up on them before, and because they could, he thought, be regarded as custom and practice. Mr Hindle agreed that he had provided a verbal briefing on the case for his colleague Mr Fiddes, the general manager of another site serviced by the Respondent, who was to chair the Claimant's disciplinary hearing, when they met and talked for about 40 minutes at the Eastgate shopping centre, approximately one week before that hearing. Mr Hindle says that he did that because he believed that the case was complex (and of course he had failed to provide any written summary of his investigation), and that he had then walked Mr Fiddes, who had not previously visited that shopping centre, around the site; and also that he had subsequently met Mr Fiddes and escorted him to the disciplinary hearing itself, which took place on 4 February 2016. Mr Hindle accepted that what he had provided Mr Fiddes with at their initial meeting were essentially his views on the Claimant's case and the disciplinary charges which he had drafted, in the absence of any written investigation report or summary; that the Claimant was inevitably unaware of what was then said since he was not present; and that the Claimant was not informed of the meeting between Messrs Hindle and Fiddes the week before his disciplinary hearing.

20 Mrs Margaret Bell is as noted the comparator relied on by the Claimant in relation to his discrimination claims. She is and was a cleaner who has worked at the Eastgate shopping centre for a very long time, even longer than the Claimant's 11 years there. Mrs Bell told us that she had never been interviewed or appraised by

any of the Respondent's managers with the Claimant being present, and indeed that she had never had an appraisal and never been subjected to any disciplinary process in relation to the hours she worked and/or the sums she claimed and was paid. The signing in and out and LESSR records in the bundle that she was taken to show that whilst Mrs Bell always signed in manually as starting work at 08:00 hours and finishing at 18:00 hours, in fact she arrived and then left work at slightly different times, albeit generally close to her manually recorded start and finish times. In fact, over the three month period for which records were produced and which are in the bundle, it seems that Mrs Bell was recorded by the LESSR system as having been at work for slightly longer in total than the cumulative time she entered manually and was paid for: if anything, Mrs Bell has been underpaid by the Respondent, if only marginally.

21 We heard from Mr Fiddes, who conducted the Claimant's disciplinary hearing. He is based in Doncaster and is a stranger to the other people in this case. He accepted that he had only disclosed to the Claimant relevant documentation concerning the disciplinary hearing the day before it took place. He did not inform the Claimant at the hearing that he had had quite a lengthy meeting with Mr Hindle at which Mr Hindle told him about the case during the previous week; or that he had been met and accompanied to the disciplinary hearing by Mr Hindle. In response to the Claimant's email at page 200C, sent two days before the hearing, asking to review the ANPR documentation and other matters and to allow him to call witnesses, Mr Fiddes replied in his brief response that it was important that he as the decision-maker remained impartial and uninvolved with the parties prior to the disciplinary hearing; despite his earlier meeting with Mr Hindle. He did not allow the Claimant to make an opening statement at the hearing, as he wished to do.

22 In relation to the first charge against the Claimant (essentially that he had claimed and been paid for hours he had not worked on September 1, 3 and 6 2015), and on looking at the summary of relevant times and information which had been prepared by Mr Hindle (page 304A), Mr Fiddes agreed that it showed that the Claimant had in fact worked longer hours than he had been paid for on each of those days; and he could not explain to the Tribunal why he had upheld that charge at the disciplinary hearing. He accepted in his evidence that it had been wrong to do so, and that the Claimant had in fact provided an adequate explanation in relation to that charge. As already noted, Mr Fiddes had indicated at the outset of the hearing that the second charge against the Claimant was not being pursued. In respect of the third charge, that the Claimant had claimed and been paid for three days (6 & 20 July, 29 August 2015) when he was not actually on site or at work, Mr Fiddes told us that the Claimant had volunteered at the hearing, Mr Fiddes believed for the first time, that he had mistakenly claimed to be at work on 29 August when in fact he had not been. In fact it is plain from the agreed record of Mr Hindle's second investigatory interview with the Claimant on 16 December 2015 that the Claimant had then said that his claim for 29 August was an error on his part; so Mr Fiddes was mistaken, and the Respondent was aware of the Claimant's position before the disciplinary charges against him were formulated. Concerning the Claimant's assertions that he had been at work on both 6 and 20 July that year, Mr Fiddes did not accept that the text messages which he was shown by the Claimant, apparently between himself and work colleagues on those two days, proved that the Claimant, had been at work on those days and he upheld the allegation. Mr Fiddes did not bother to speak to Mr Armstrong following the disciplinary hearing and before reaching his decision, Mr Armstrong having been the apparent recipient of

a text from the Claimant on 20 July which seems to suggest that both of them were working on that day. Mr Fiddes accepted in his evidence that from the text message it looks like the Claimant was on site on 20 July; but said that he based his decision on the fact that the Claimant had not swiped in using the LESSR system, despite the Claimant's having said that his card had been non-operational for 6 months; and because the ANPR number plate recognition system did not record the Claimant as leaving the car park, albeit the relevant camera was not then working.

23 Mr Chatfield heard the appeal. Having heard Mr Fiddes' evidence, and the concession made by him in relation to the first charge against the Claimant in the light of the document at page 304A, Mr Chatfield advanced the novel suggestion in his own evidence to the Tribunal that whilst that document on its face suggests that the Claimant had been at work during and beyond his scheduled hours, he could have been somewhere else in the shopping centre, for example in a coffee shop or shopping at ASDA. Such an allegation had never been made or explored earlier, there was no evidence before us to support it, and wisely it was not pursued by Ms Anderson on the Respondent's behalf; but it is in our view indicative of the lengths that the Respondent was and is prepared to go to blacken the Claimant's name and condemn him. Additionally, there were a number of significant differences between Mr Chatfield's oral evidence and what he said, and confirmed as being truthful and accurate, in his witness statement. In his evidence to the Tribunal, Mr Chatfield said that he did ask the Claimant at his appeal hearing whether or not he had worked an extra day free of charge to make up for his mistaken claim in relation to 29 August; but he accepted that there was no record of any such question (or of any response) in the notes taken of the appeal, which he described as being accurate, and which had been compiled by a note taker. Secondly, in paragraph 25 of his witness statement Mr Chatfield states that he did in fact interview Margaret Bell, the comparator relied upon by the Claimant, following the appeal hearing, and that the statement apparently from Mrs Bell at page 284 had been generated and drafted as a result of their conversation. Initially, when this topic was explored in cross-examination, Mr Chatfield maintained that that account was accurate. However he then changed his mind, and admitted that he had not seen or interviewed Mrs Bell following the appeal or indeed at any stage. Quite apart from the impact on Mr Chatfield's credibility as a truthful and reliable witness, that change of heart leaves the circumstances in which the purported statement from Mrs Bell came into being wholly unexplained. In relation to the Claimant's suggestion that it had been agreed with Mr Jewitt, the Respondent's former general manager at the shopping centre, that agreed overtime was to be paid at time and a half, which is raised at page 136B in the bundle, Mr Chatfield said that he was not aware of any such arrangement in relation to overtime having been agreed between the Claimant and Mr Jewitt; but he did not take the time or trouble to approach Mr Jewitt (or anyone else in the Respondent's management team) following the appeal hearing to discover whether or not this was so. In fact, as Mr Jewitt told the Tribunal in his evidence, such an arrangement was indeed in place.

24 Mr Chatfield did not accept the account given by Mr Armstrong (who attended the appeal hearing as the Claimant's companion) in relation to the text messages between himself and the Claimant on 20 July because Mr Armstrong was a friend of the Claimant's, and therefore his evidence was not trustworthy, albeit there was no other evidence to gainsay it. Mr Chatfield said that he believed that the text messages he saw relating to both 6 and 20 July, which he accepted tended to show that the

Claimant was in fact at work on both days, were concocted or fabricated; although he accepted that he did not say so either during the appeal hearing or in his lengthy appeal outcome letter. Even if the first charge against the Claimant was proven, Mr Chatfield accepted that on its own it did not amount to gross misconduct. Finally, Mr Chatfield accepted that he was sent and reviewed the training records (page 108 onwards), received from the Claimant following the appeal hearing but before he reached and communicated his decision. Whilst those documents suggest that the Claimant was at work on 6 & 20 July 2015, holding training sessions with members of his team, who apparently signed and dated the records, Mr Chatfield said that he spoke to a number of those members of staff apparently involved, and concluded that the Claimant had in fact inserted or altered the recorded dates on the training documents (albeit they were signed by the relevant witnesses) as part of a planned deception; but accepted that he came to that conclusion without reconvening the appeal or in any way involving the Claimant or allowing him to make further representations.

25 The Claimant confirmed and stood by the accuracy of his witness statement, in which he denied that he had ever intentionally defrauded the Respondent by knowingly claiming and being paid for hours or days which he had not actually worked; that his claim for being at work on August 29 2015 was a mistake, and that he had made up for that by working a day and not claiming for it. He invited the Tribunal to draw the inference that the reason for the disparity in his treatment by the Respondent when compared with how they had treated Mrs Bell in relation to time recording and claiming issues was attributable to his gender or age. Nothing new or in contradiction of what the Claimant stated in his statement emerged in the course of cross-examination or his oral evidence generally.

26 Mr Jewitt, the former general manager of the Eastgate shopping centre gave evidence on the Claimant's behalf. He said that in his experience it was a more or less universal practice at all levels of the Respondent's staff working at that shopping centre for hours manually entered at the beginning and end of work shifts to be rounded up or down, albeit modestly, and not to correspond exactly with their actual start or finish times, which would be more accurately recorded by the LESSR system, when it was working which, he said, was by no means always. That applied both to cleaners and to security guards and personnel, all of whom were paid on an hourly basis and in accordance with monthly timesheets that were submitted to payroll; but also to managers working at the premises, including Mr Aungier who Mr Jewitt specifically mentioned, who were paid on a salaried basis and who were absent from work for an occasional half day. Mr Jewitt said that Margaret Bell's recorded and claimed hours of work had been an issue and a matter of concern to the Respondent's on site managers for some time, including when he had been general manager there; and that the Respondent had tried to address that issue with Mrs Bell, but had effectively been 'warned off' doing so by the Respondent's client, the owners of the shopping centre, who, more or less uniquely in his considerable experience, had been very protective of staff who had been working at the shopping centre for a very long time, such as Mrs Bell. None of that evidence was challenged or disputed by Ms Anderson.

27 Mr Jewitt's unchallenged evidence was that if the Respondent wanted to question or investigate one particular member of staff's recorded hours and/or attendance at work, then it would only be fair and reasonable for all their staff working

at the shopping centre to be subject to a similar investigation or process, since everyone working for the Respondent there operated and behaved in the same way, in terms of rounding hours and on occasion legitimately claiming for hours worked but not recorded. That was borne out by the documentation we were taken to in the bundle. The LESSR swiping in and out records reveal that almost always there would be discrepancies or differences, although usually not very significant ones, between the times manually recorded by the Respondent's staff (including both the Claimant and Mrs Bell) and the corresponding LESSR entries, even though it was common ground that the signing in/out book and the LESSR swipe apparatus were next to each other in the same office at the centre. Additionally, both Mr Jewitt and others, including the Claimant, would occasionally undertake work on arrival at the centre some considerable time before signing in for reasons of urgency or convenience, for example when requested to come to the site to deal with an urgent problem or in a remote part of the shopping centre; and sometimes on such occasions those in a managerial or supervisory role would not sign in at all. Overall, the undisputed picture that emerged from Mr Jewitt's evidence was that there existed a state of affairs whereby members of staff's recorded hours were not used or regarded by anyone within the Respondent as being a necessarily definitive guide to the hours actually worked by them. The other point to be noted about Mr Jewitt's evidence is that he would generally visit the Eastgate shopping centre site on a Monday, which habitually was the Claimant's day off; and he told us that it was not uncommon for him to then see the Claimant working on site. Both 6 and 20 July 2015 were Mondays.

28 We heard brief and once again substantially unchallenged evidence from Mr Smith and Mr Armstrong, the Claimant's former colleagues, who are both still employed by the Respondent as cleaners at the Eastgate shopping centre. Both of them said that they were working at the centre on the dates (respectively 6 and 20 July 2015) when they are recorded as having met and undertaken training sessions with the Claimant in his capacity as a supervisor, and when their presence at work is confirmed by both the signing in/out records and by the LESSR system. Both stated that those training sessions with the Claimant had then taken place, that they had signed their respective entries for those dates and sessions in the training record, and that they had confirmed those facts to Mr Chatfield when he had approached them individually following the Claimant's appeal hearing.

29 We consider first the Claimant's claim of unfair dismissal. Since dismissal is accepted, the first question is whether the Respondent has proved on a balance of probabilities that its reason for dismissing the Claimant was misconduct. In our unanimous judgment, they have failed to do so.

30 We find that the Respondent's overall approach and evidence in relation to the Claimant's grievance and the disciplinary proceedings against him is so riddled with inconsistencies, contradictions, fundamental procedural unfairness and plainly unjustified conclusions that it calls into question and undermines the whole basis of their case before the Tribunal. Unusually in our experience, it is not so much a case of trying to discover what (if anything) went wrong with an employer's approach to an alleged disciplinary matter, but rather of trying to identify anything that was reasonable or right. Most of the problems with the Respondent's approach will be self-evident from our recitation of the relevant evidence above, and we highlight hereafter only the most egregious examples.

31 The fact that the schedule allegedly prepared by Mr Aungier, clearly setting out the hours or days for which he believed the Claimant had submitted fraudulent claims for pay, has never been produced and that its existence or contents are not referred to in any of the documents to which we were taken makes us question whether it ever existed, and also the reliability of Mr Aungier's evidence. Secondly, we very much doubt that Ms Davies did not inform Mr Aungier of the alleged remarks which, she accepts, Mr Bell told her he had heard him make, as Ms Davies told us. There seems every reason to have done so, and no logical explanation for why she would not. Additionally, on what possible basis did Ms Davies reject or at least not accept what Mr Bell said he had overheard? She could provide no explanation in her oral evidence, and none is mentioned in her grievance outcome letter which, as noted, signally fails to provide any grievance outcome. We found Ms Davies to be an unsatisfactory and unreliable witness, and we simply do not accept her evidence that she had no involvement whatsoever in the Claimant's case other than in relation to his grievance.

32 If, as the Respondent asserts, it had a settled and established policy that witnesses were not allowed to be called by their employees at disciplinary hearings, then for an undertaking of the size of the Respondent, we would expect to see a clear statement to that effect in their disciplinary procedures, or at least evidence to substantiate that such an approach had been adopted in the past. Yet there was no such evidence, and it is striking that the original disciplinary process against the Claimant was only halted, very much at the eleventh hour, when he informed the Respondent that he wished to call witnesses at his forthcoming hearing. It is also significant in our view that the Respondent should then commence a fresh 'disciplinary investigation', having been on the point of a final hearing and where no new facts or matters had emerged to justify or warrant such a step.

33 If Mr Hindle was not thought to have been sufficiently impartial to conduct the Claimant's disciplinary hearing, as the Claimant alleged, and had to be replaced by Mr Fiddes, then it is virtually impossible to see how it could be appropriate that he should conduct the (second) 'disciplinary investigation', which, as Mr Hindle himself pointed out, is meant to be *'an impartial fact-finding exercise'.* Mr Hindle's partiality is in fact made very clear in the record of his lengthy interviews with the Claimant, where he seems to have thought it right to adopt the role of prosecuting counsel in a criminal case. There is also the manifest unfairness to the Claimant of Mr Hindle's meeting with Mr Fiddes the week before the latter conducted his disciplinary hearing, when the Claimant was neither informed nor present, and when Mr Hindle shared his knowledge of the Claimant's case, which no doubt included his already strongly expressed opinions as to the Claimant's culpability, and in the complete absence of any written summary or report on his investigation.

34 The fact that Mr Fiddes could not explain how he had found the first charge against the Claimant to have been proved in the light of the Respondent's own document (page 304A), and now accepted that he had been wrong to do so, has already been noted. What is equally significant in our judgment is that, in respect of the remaining allegation against the Claimant, Mr Fiddes mistakenly believed that the Claimant had only 'owned up' to his invalid claim to have worked on August 29 at his disciplinary hearing; and that Mr Fiddes completely failed to contact the Claimant's

witnesses (Messrs. Smith and Armstrong, who of course had not been allowed to attend the disciplinary hearing) following that hearing, as the Respondent's procedure for dealing with witnesses apparently mandated, when (as the Claimant had told him) they could have provided obviously relevant evidence about whether the Claimant had in fact been at work on 6 & 20 July 2015. Mr Fiddes lack of rigour or basic fairness in relation to both matters persuades us that the disciplinary hearing was nothing more than a sham.

35 The problems with Mr Chatfield's evidence have already been noted, and we do not rehearse them here, save only to say that his willingness to ignore apparently hard or objective evidence (the timed and dated text messages between the Claimant and Messrs. Smith and Armstrong and the training records) and to conclude, in the absence of any supporting evidence or any reconvened hearing and despite confirmation from the two cleaners that the training entries were genuine, that such evidence had been fabricated or concocted, confirms the overall impression we took from Mr Chatfield's evidence to the Tribunal: he wished to condemn the Claimant at all costs and in spite of any or all evidence to the contrary. Here again we have to say that we did not find Mr Chatfield to be a convincing or reliable witness.

36 Overall, we are led by this catalogue of failures and fundamental unfairness by the Respondent in their dealings with the Claimant to the conclusion that his dismissal had nothing to do with any perceived or actual misconduct, and that in fact they had a separate agenda, which seems to have been that because the Claimant had made a fuss about Mr Aungier's recruitment of a friend of his, including complaining to the relevant company director, he had to go. It follows therefore that the Respondent has failed to prove that the Claimant's dismissal was for a potentially fair reason, and accordingly his dismissal is unfair. Given our findings and the Respondent's repeatedly ignoring or flouting the basic requirements of fairness towards their employees, not least their refusal to allow the Claimant to call relevant witnesses at his disciplinary hearings, it is in our view appropriate that the compensation payable to him by the Respondent be subject to a 25% uplift on the Respondent as we find being in breach of the ACAS Code of Conduct on Disciplinary & Grievance Procedures 2009.

37 In the event that we were wrong in coming to that conclusion, then we make plain that we would in any event go on to find that the Claimant's dismissal for misconduct was unfair. For essentially the same reasons that are set out above, we would find that the Respondent did not have a genuine belief that the Claimant was guilty of misconduct, that any such belief was not on reasonable grounds, and that the Respondent did not undertake an appropriate disciplinary investigation. Additionally, the Respondent did not adopt a reasonably fair disciplinary procedure, and dismissal was not within the range of reasonable responses.

38 Once again for the avoidance of doubt, we make clear that we accept the Claimant's evidence, supported by both Mr Smith and Mr Armstrong and by contemporaneous documents and other evidence, including the relevant text messages texts, the signing in and out sheets and the LESSR records (since the system was operational on both days) that he was in fact at work on 6 and 20 July 2015; that the Claimant openly accepted at his meeting with Mr Hindle on 16 December 2015 that he had made a mistake in claiming to have been at work on 29 August that year; and that those incorrectly paid hours were compensated for, in the sense that the Claimant undertook unpaid but duly recorded overtime to at least the

value of the day's work on 29 August for which he was paid.

39 We also accept the evidence that Mr Jewitt gave to the Tribunal, which we found particularly helpful in providing an informed yet reasonably detached and objective overview of the reality of working for the Respondent at the Eastgate shopping centre.

40 We can deal with the Claimant's discrimination claims much more succinctly. We have already set out the well-established approach to be adopted towards allegations of direct discrimination – less favourable treatment when compared to an actual or hypothetical comparator – and Ms Anderson on behalf of the Respondent accepted, sensibly in our view, that the Claimant has proved facts from which, in the absence of a sufficient explanation, we could properly infer that the Claimant was treated less favourably by the Respondent than it treated Margaret Bell, his chosen comparator, in relation to hours allegedly worked and paid for; and that accordingly the burden of proof passes to the Respondent. Has it been proved that the difference in their treatment by the Respondent was not in any way because of the difference in gender or age between the Claimant and Mrs Bell? Unusually and ironically, the most compelling evidence we heard in relation to this issue came from one of the Claimant's witnesses, Mr Jewitt, about whose evidence we have already commented favourably. In unchallenged evidence, he told us that when he was the Respondent's general manager at the shopping centre, Mrs Bell's recorded and claimed for hours were indeed a matter of concern, which the Respondent wished to address with her; but that it was prevented from doing so by the shopping centre's owners, the Respondent's client, who adopted an extremely protective attitude towards Mrs Bell and others who had like her been working at the site for many years. In other words, any difference in treatment of the Claimant and Mrs Bell was nothing to do with the Respondent and, if anything, against their wishes. There seems no reason not to accept that account, and we have little hesitation in doing so, since it is in accordance with what we have found to be the most likely reason for the Respondent's treatment of the Claimant, namely the fact that he had lodged a formal complaint about Mr Aungier's recruitment of a friend of his to work at the shopping centre. Finally, it is also noteworthy that there is no mention by the Respondent in any of the documentation that we have seen to either the Claimant's gender or age. Overall, we are in no doubt that neither the Claimant's age nor his gender had anything at all to do with his treatment by the Respondent in being disciplined and dismissed. Accordingly, the complaints of age and sex discrimination must fail and be dismissed.

41 In the result, the Claimant's claim of unfair dismissal succeeds, and there will need to be a remedy hearing if the parties cannot agree the compensation payable to him; but his discrimination claims are dismissed.

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Employment Judge Barrowclough

31 March 2017