DJT

EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr P Baker **AND** Farmers Fresh Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: Birmingham **ON:** 7 & 8 February 2017

BEFORE: EMPLOYMENT JUDGE CONNOLLY

Representation
For Claimant: Mr B Hill, lay representative
For Respondent: Mr N Roberts, Counsel

REASONS

1. By a Claim Form dated 2 August 2016, the claimant brought a claim alleging he had been unfairly dismissed by the respondent. The respondent presented a response in which it contended that the claimant was fairly dismissed for a reason related to his conduct.

The Issues

2. The issues were discussed and agreed by all parties at the outset of the hearing. It was agreed that the respondent dismissed the claimant for a reason relating to his conduct and that the respondent genuinely believed the claimant was guilty of the alleged misconduct. In the circumstances the issues in the unfair dismissal claim were as follows:-

    2.1. Was the claimant fairly or unfairly dismissed in the sense set out in Section 98(4) of the Employment Rights Act, having particular regard to:-
        2.1.1. whether the respondent conducted a reasonable investigation into the alleged misconduct;
        2.1.2. whether the respondent had reasonable grounds to believe that the claimant misconducted himself in the manner alleged;

2.1.3. whether the respondent followed a fair procedure or the procedure was within the range of reasonable procedures open to a reasonable employer in the circumstances.

2.2. Whether any award to the claimant should be adjusted by reducing it to reflect:-

2.2.1. any contributory culpable conduct on the part of the claimant; and/or

2.2.2. under the principles in ***Polkey*** to reflect any prospect that had the respondent acted fairly would have dismissed the claimant in any event.

2.3 Whether any award ought to be increased pursuant to Section 207A of the 1992 Act to reflect the respondent's alleged unreasonable failure to follow the ACAS Code.

3. At the outset, the fairness of the sanction imposed on the claimant was an issue, in particular, by comparison with how other employees were alleged to have been treated. At an early stage in the evidence, however, Mr Hill, on behalf of the claimant, confirmed that the fairness of the sanction was no longer an issue. Remedy was to be determined separately should the claimant succeed.

The Evidence

4. On behalf of the respondent I heard evidence from Mrs Taylor (Quality Assurance Manager) who conducted some part of the investigations; Mr Powell (Director) who also undertook some investigations; Mr Simpson (Director) who took the decision to dismiss the claimant and Mr Lammas (Managing Director) who heard and rejected the claimant's appeal against dismissal. I heard evidence from the claimant on his own behalf and I read witness statements submitted by the claimant from Mr Lambrum, his union representative, Mr Duncombe and Mr Bell who were colleagues of the claimant and a transcript of a recording of at least some of the conversation with another colleague, Mr Molton. I read those pages in the agreed bundle of documents to which I was referred.

The Facts

5. The respondent runs an abattoir company and employs some sixty employees. Eighty per cent of the respondent's workforce are directly employed and some twenty per cent are agency workers. The claimant commenced his employment for the respondent in June 2003 as a Slaughterman and had worked for them in that capacity for over 12 years at the date of his dismissal. The claimant was dismissed on 19 April 2016 for punching another worker.

6. There can be no doubt that an incident occurred on 6 April 2016 involving the claimant and Mr McGuigan, an agency worker. Mr Jeffries, the Slaughter Hall Manager, informed Mrs Taylor that Mr McGuigan had

reported an assault by the claimant to him. Mrs Taylor informed Mr Simpson. Mr Simpson went to the Slaughter Hall where he spoke to Mr McGuigan and established that he wished to make a formal complaint. Mr Simpson then convened a meeting with Mr Jeffries, Mrs Taylor, himself and Mr McGuigan. This resulted in a record being made of Mr McGuigan's complaint. Mr McGuigan alleged that the claimant had been verbally abusing him during the day, that he had walked over to the claimant and told him to shut up. He alleged that the claimant spat at him and punched him in response. Mr McGuigan said he spat back. He said he jumped onto a stand or platform where the claimant was located and the verbal altercation continued until Mr Duncombe intervened. During his discussions with Mr McGuigan, Mr Simpson noted bruising to Mr McGuigan's cheek and nose and blood around his nose. He formed the view that Mr McGuigan was shaken up. His observations caused him to take the view that Mr McGuigan's complaint was credible.

7. Mr Jeffries generated a list of six potential witnesses based on his knowledge of the layout of the slaughter hall and who he thought would have been working in the proximity to the area where the incident occurred. Mr Powell took over the investigations from that point. Mr Powell questioned each of the witnesses identified by Mr Jeffries. Mr Jeffries did not explain to Mr Powell where each individual was working nor did Mr Powell make enquiries with the witnesses in this regard. Mr Powell had limited experience in disciplinary matters and he decided that the best approach, for the sake of consistency, was to ask each witness the same six questions, the most relevant of which being whether they saw or heard an incident and, if so, what they saw or heard. As a result of pursuing this approach Mr Powell simply noted what the witness said and he did not ask any follow-up questions.

8. Mr Powell interviewed Mr Rowe, an agency worker. Mr Rowe said that the claimant threatened Mr McGuigan and Mr McGuigan spat back and the claimant punched him. He described the incident as being immediately preceded by the claimant telling all the contractors they would be out of a job soon. Mr Powell interviewed Mr Stanislawski who was an employee. He stated that the claimant and Mr McGuigan were pushing each other after an earlier disagreement about headphones. Mr Duncombe, an employee, stated that Mr McGuigan accused the claimant of taking his headphones, pulled the claimant's apron and the pair of them had a scuffle on the stand which be broke up. Mr Bell, an agency worker, said he saw the claimant push Mr McGuigan away when he tried to climb onto the stand and Mr Jones, another agency worker, said he saw pulling and pushing between the claimant and Mr McGuigan but did not see either strike the other. He did see that Mr McGuigan had a nosebleed after the incident. There was no evidence from the sixth witness on the list, Mr Molton, Mr Powell explained to the tribunal that was because he did not want to be involved. Mr Powell accepted that Mr Duncombe had seen the whole incident. Mr Powell did not ask Mr Duncombe about any injury, blood or bruising to Mr McGuigan, he did

not explain why not. It may have been a consequence of his fixed question approach.

9. The claimant and Mr McGuigan were suspended for 2 days before being allowed to return to work. The claimant was interviewed on his return, not by Mr Powell, but by Mrs Taylor. He claimed that Mr McGuigan had accused him of taking his headphones, approached him at his workstation, spat in his face and had pulled his apron. The claimant denied spitting at Mr McGuigan or punching him. Thus the evidence compiled showed that neither Mr McGuigan nor the claimant accepted that they made physical contact with the other. One witness said they saw a punch after Mr McGuigan spat at the claimant; four referred to pushing, pulling or scuffling, apparently by both; one said Mr McGuigan pulled the claimant's apron and one saw blood coming from Mr McGuigan's nose. Some of the witnesses described the claimant and Mr McGuigan to be on the stand above eye level when the physical altercation occurred. One described Mr McGuigan to have been climbing onto the stand and some made no mention of the stand at all.

10. The claimant was invited to a disciplinary hearing by letter dated 15 April and was provided with the statements from the witnesses but the names of the statement makers were omitted. In his witness statement Mr Powell explained that he anonymised the statements because he was concerned that the claimant might retaliate. When asked to explain the basis of his concern, he told me it was "because of the seriousness of the investigation and not fully knowing the law, I thought it was sensible as a preventative measure".

11. On an unknown date the claimant approached Mr Powell and asked him to interview three additional witnesses which Mr Powell did on 18 April by using the same standard questions. Those witnesses were all employees, Mr Southwell said Mr McGuigan spat at the claimant and grabbed his apron and that the claimant has his hands up in the air; Mr Summers said he saw the two arguing and Mr Morgan said the same. The claimant was provided with these additional statements on the day of the disciplinary hearing. In evidence the claimant accepted that by the time of the disciplinary hearing all relevant witnesses had been interviewed by the respondent. He also accepted he had been able to identify the makers of the various statements which had been provided to him anonymously as a result of his discussions with colleagues.

12. The disciplinary hearing took place on 19 April. The claimant was represented by his union representative. Mr Powell attended as a note taker. No witnesses were called or questioned. The meeting was very brief. Surprisingly and inappropriately, it was covertly recorded by Mr Powell on his telephone. The claimant stated at the outset of the meeting that he 'never touched him' (referring to Mr McGuigan). Mr Simpson seemed inclined to close the meeting once the claimant stated this. The claimant however volunteered further information, namely, that it was only Mr Rowe who claimed to have seen the punch; none of the other

witnesses corroborated this; he claimed that Mr Rowe would have been facing the wall in the ordinary course of his work looking away from any altercation between himself and Mr McGuigan at the shoulder puller stand and he pointed out that Mr Rowe and Mr McGuigan were friends who lived together in shared caravan accommodation during the week while working for the respondent.

13. Mr Simpson preferred the version of events given by Mr McGuigan and Mr Rowe essentially for two reasons: first, he noted that a number of the witnesses namely Duncombe, Stanislawski and Jones described pushing, pulling or a scuffle which he felt was not consistent with the claimant's version that he did not touch Mr McGuigan. Although he accepted the evidence of those witnesses in that regard, Mr Simpson did not however feel that the evidence of those witnesses indicated that the claimant had not punched Mr McGuigan or that Mr McGuigan had been physical with the claimant. This was despite the fact that Mr Duncombe undoubtedly saw the whole incident and made no reference to a punch. Mr Simpson took the view that there was a history of tension between the agency workers and employees and a tendency amongst some to seek to support one of their own. He felt this meant the witnesses had not been forthcoming about any punch. He also took into account Mr Powell's concern that witnesses could have been intimidated by the claimant. He did not feel the possibility of bias because of loyalty to one's own group of workers applied in the same way to the evidence Mr Rowe gave in support of Mr McGuigan but he did not clearly explain why not.

14. Secondly, Mr Simpson relied on his own observations when he spoke to Mr McGuigan on 6 April, namely, the appearance of bruising and blood, that he seemed shaken up and that his complaints were credible. He did not inform the claimant of his observations on 6 April or ask the claimant to comment on them in the disciplinary hearing.In evidence Mr Simpson accepted that it was strange that blood was still visible about an hour and a half after the incident and strange that Mr Duncombe, the foreman and registered first aider did not comment on this or treat Mr McGuigan if he had been injured in the altercation. He was asked why the first aider Mr Duncombe was not asked about this fact if the investigation was a thorough one and he simply said he could not answer that. Mr Simpson said he was generally not assisted by the 18 April statements because he found them too limited in detail. He was unable to say where any witness was located at the time of the incident.

15. The claimant appealed and his appeal was heard by Mr Lammas. Mr Lammas' analysis was similar to that of Mr Simpson. He found the first set of statements to be vague; that there was as he said in evidence "not a lot to them" and that Mr Powell could possibly have asked more. He was surprised that the employed workers had not been more supportive of the claimant as a fellow employee in dispute with an agency worker if the claimant was right because he also perceived there was a tension between agency workers and employees and a tendency for each to

support their own. He concluded that the reason why the other witnesses made no reference to a punch was either because they did not see it or they did not want to give information damaging to a colleague. He did not know where each of the witnesses were allocated at the time of the incident. At the same time, as rejecting the evidence of those witnesses as to a punch, he went on to rely on the evidence of those same witnesses that there was some physical contact between Mr McGuigan and the claimant and found that inconsistent with the claimant's version of events. For that reason he found Mr McGuigan and Mr Rowe more reliable than the claimant. He did not accept that there was any risk of bias on the part of Mr Rowe: when asked about this he simply said he had Mr Rowe's witness statement which he took to be true. Mr Lammas departed from Mr Simpson's analysis a little when he considered the 18 April statements: he took the view that they had less weight because it was unlikely that they would have been able to see what happened because Mr Powell had interviewed all of those who could see as directed by Mr Jeffries.

16. I understand that Mr McGuigan received a final written warning for his part in the altercation although I have not been provided with any documents in relation to his disciplinary proceedings nor any details as to when, why and from whom he received his final written warning.

17. Since the internal proceedings concluded the claimant has obtained further statements; firstly in or about August 2016 he obtained statements from Messrs Pope, Davies and Jones who were all new witnesses; secondly, in or about October 2016 he obtained additional statements from Messrs Jones and Duncombe who had provided statements to the original investigation. Mr Duncombe gives a somewhat fuller account than he did to the original investigation where he described Mr McGuigan as being on the floor beside the stand when he pulled the claimant's apron and that Mr McGuigan jumped onto the stand to continue the confrontation. He expressly confirms that he did not see any blood from Mr McGuigan's nose or he would have attended to him to in his capacity as a first aider and because it would have been inappropriate to allow him to return to the line working with animal product while he was bleeding. Mr Jones states that he saw blood by Mr McGuigan's nose some 3 hours after the incident after Mr McGuigan left work in addition to stating he saw Mr McGuigan pull the claimant's apron.

18. Thirdly and finally, the claimant transcribed a covert recording of a discussion with Mr Molton.

Relevant Law

19. It is accepted in this case that the respondent dismissed the claimant because it genuinely believed he was guilty of misconduct. This is potentially a fair reason under Section 98(2), so my task is to determine whether that dismissal was fair or unfair in accordance with Section

98(4) of the Employment Rights Act 1996 and I remind myself of the wording of the same. I also remind myself that neither party bears the burden of proving that the dismissal was fair or unfair. In determining the issue of fairness I take into account the guidance in British Home Stores Ltd -v- Burchell 1980 ICR 303, EAT, as supplemented in Iceland Frozen Food -v- Jones 1983 ICR 17, EAT that it is helpful to consider whether the respondent held their belief in the claimant's misconduct on reasonable grounds after a reasonable investigation. I also remind myself that in adjudicating on the unfair dismissal claim I should not ask myself whether I would have investigated in the same way or whether I would have concluded that the claimant punched Mr McGuigan; that would amount to simply substituting my decision for that of the respondent. I readily acknowledge that in many cases there will be a band of reasonable responses and room for entirely proper differences of opinion amongst reasonable employers as to what is a reasonable way to deal with the situation. It is my task to judge objectively how a reasonable employer would have behaved in the circumstances of this case and that concept of a range of reasonable responses applies as much to the process the employer follows as the decision itself. It is also important in my view to bear in mind, however, that the employer is not the sole arbiter of what is reasonable. There is an important role for the tribunal in identifying the limits of what is reasonable in any particular circumstances.

20. Section 122(2) and Section 123(1) and Section 123(6) of the Employment Rights Act 1996 are the relevant sections in relation to contributory conduct and *Polkey*. My task on contributory conduct is to make a finding as to whether the claimant has conducted himself in a manner which can be said to be culpable or blameworthy and whether such conduct has caused or contributed to his dismissal and, if so, to take a view whether any reduction in his award is appropriate to reflect that. Should I find the dismissal unfair, my task under the principles in *Polkey* is to assess the prospect that the claimant would or might have been fairly dismissed by this employer had the relevant unfairness not occurred. In so doing I must recognise as set out in a case called Software 2000 Ltd -v- Andrews 2007 ICR 825, EAT that there will be circumstances where the nature of the evidence is so unreliable that the tribunal might reasonably take the view that the exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made and that is a matter for impression in judgment for me. I should also have regard to any material and reliable evidence that might assist me in fixing just and equitable compensation even if there are limits to the extent to which I can confidently predict what might have been. I must appreciate that a degree of uncertainty is an inevitable feature of this exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.

21. With regard to adjustments for failure to comply with the ACAS Code on Disciplinary Procedures (2015) the relevant law is obviously contained in

the code itself and the provision that governs any uplift is Section 207A TULR(C)A 1992.

Conclusions

22. It is not in dispute that the respondent dismissed the claimant because Mr Simpson (and Mr Lammas) believed that he had punched McGuigan nor is it in dispute that this is a potentially fair reason related to conduct. What is in dispute is whether the respondent conducted reas investigation into the issue and whether it had reasonable grounds to believe that the claimant punched McGuigan having conducted a reasonable investigation and followed a reasonable process.

Reasonable Investigation

23. I start with the reasonableness of the respondent's investigation.The claimant's concerns in respect of the adequacy of the investigation were, firstly, that the witness statements obtained by Mr Powell were insufficiently detailed as to exactly what the witness saw Mr McGuigan and the claimant do, where the witnesses were standing, where the claimant and Mr McGuigan were located at the time of any alleged punch (on top of the stand or at floor level or one on each), whether there was any physical contact and whether there was any visible injury to Mr McGuigan after he and the claimant had been separated. In addition, the claimant complained that the nature or extent of any injury was not adequately documented or investigated with those who had seen the incident or seen Mr McGuigan immediately afterwards.

24. I have considered what a reasonable employer would have done in terms of a reasonable investigation in these circumstances. I have weighed the fact that this respondent is a relatively small employer: some 60 employees with no qualified human resource support. Equally, however, I have noted Mr Powell's own evidence in his witness statement that he understood this to be a very serious allegation against the claimant capable of amounting to a criminal offence. It seems to me that where there is such a serious allegation and where there emerge a number of different and inconsistent accounts, in order to enable a decision maker to fairly distinguish between them it is incumbent upon a reasonable employer to go into further detail on the location of the witnesses, their opportunities to observe clearly and from what point in the premises, exactly what they saw in terms of physical contact from each of their protagonists, where the protagonists were located and whether they observed any physical injury. If a physical injury was visible to Mr Simpson and presumably to Mrs Taylor on 6 April during the meeting with Mr McGuigan, it ought reasonably to have been noted in the interview notes with Mr McGuigan and Mr Powell ought, had the respondent been acting as a reasonable employer, to have been asked to investigate it with the other witnesses or even to photograph it. My conclusion is that the level of detail of this investigation fell below the standard of a reasonable employer. My conclusion is reinforced by Mr

Simpson's comment that he did not find the second set of statements useful because the information in them was too limited and Mr Lammas' comments that the statements were vague without a lot to them. That, in my view, reflected the adequacy of the investigation and the questioning rather than the adequacy of the evidence that would have been available had more detailed questions been asked. In my view a reasonable employer would not have prioritised administering standard questions above securing details from the witnesses. Mr Powell ought reasonably either to have asked for further detail or Mr Simpson or Mr Lammas in light of their concerns about the witness statements ought to have asked for further detail to be obtained for them. This further detail could have been obtained at an investigation stage by follow-up questions or by having the witnesses attend the disciplinary hearing. It may be that either course would have been open to a reasonable employer, however, by one means or another I take the view that a reasonable employer should have investigated this incident and injury in greater detail with the witnesses.

25. The claimant was also concerned that not all relevant witnesses had been identified by the respondent but I do not find that this caused or contributed to any unfairness in his dismissal because the claimant was not able to identify what additional witnesses ought to have been interviewed and, ultimately, he accepted in cross examination that all relevant witnesses were interviewed.

Reasonable Grounds for Conclusions

26. In terms of whether there were reasonable grounds for concluding that the claimant punched Mr McGuigan, it follows that, if the investigation is not reasonable such that the evidence is unreasonably limited in detail, Mr Simpson could not have reasonable grounds for his belief that the claimant punched Mr McGuigan by relying on that evidence. Even if I am wrong about the adequacy of the investigation, I did not find Mr Simpson's approach to the evidence to be reasonable. He found witnesses such as Messrs Duncombe, Jones and Stanislawski reliable when they said there was contact and that their evidence undermined the claimant's while at the same time concluding they were not reliable in not giving a full and frank account when they did not give evidence of a punch. Mr Simpson relied on supposition as to their loyalties that were never explored with the witnesses themselves and he relied on Mr Powell's alleged concerns about intimidation of witnesses by the claimant which had no reasonable foundation. Mr Simpson did not explain how he took the same difficulties with loyalties into account when weighing up Mr Rowe's evidence. I take the view that the course Mr Simpson plotted was not a course which a reasonable employer was reasonably entitled to take. Firstly, a reasonable employer could not in my view simultaneously hold the view that the evidence was sufficiently reliable to contradict the claimant but sufficiently unreliable not to indicate that which it said on its face, namely, each contributed to a degree of physical contact. Secondly, a reasonable employer was not in

my view entitled to make assumptions about the reliability of the evidence based on loyalties and potential intimidation without exploring with the witnesses whether there was such a history of tension, what the evidence was of that, the cause of it, whether they felt under pressure of were free or willing to say what had occurred and, if not, why not. The idea that the claimant was or may have been intimidating witnesses and influencing what they had to say simply had no foundation. It was also inconsistent with the claimant being permitted to return to work from suspension and to mingle freely with the witnesses. Thirdly, in my view a reasonable employer would not have applied these concerns about bias through loyalty only to the employed staff without applying it equally to the agency staff in form of Mr Rowe or, at the very least, investigating the relationship between Mr McGuigan and Mr Rowe. Further, Mr Simpson did not explain why the evidence that there had been contact between both individuals in the form of pushing and pulling on a scuffle did not also undermine Mr McGuigan's evidence. Finally, in my view, a reasonable employer would not have preferred the evidence of Mr Rowe without first establishing precisely where he was located, his distance from the incident in question, the direction he was facing, whether he was facing the incident and from what point during the disturbance.

27. I have a further concern about Mr Simpson's decision because, in my view, in essence, he acted both as witness and judge in the disciplinary decision. At the very outset of the investigation, he took part in the investigatory interview with Mr McGuigan he saw what he thought to be an injury to Mr McGuigan. He observed what he thought was evidence of injury, he formed the view that Mr McGuigan seemed shaken and his complaint was credible and he accepted that he took these observations into account in reaching the decision to dismiss the claimant. In my view this was a course which fell outside the range of reasonable courses open to a reasonable employer. A reasonable employer, even a small reasonable employer would either have ensured that Mr Simpson did not become embroiled in the investigation meeting with the complainant knowing that he was likely to deal with the disciplinary or, in the alternative, having become embroiled in the investigation a reasonable employer would have ensured that he continued to be the investigating manager and, for example, Mr Powell conducted the disciplinary hearing. This unfairness was exacerbated by the fact that Mr Simpson did not explain to the claimant at the hearing that he personally had observed what he thought to be injuries to Mr McGuigan's face and Mr McGuigan's shaken reaction and that he felt these observations could be relevant to his decision in order to give the claimant a fair opportunity to comment on them and explain them as the claimant may have seen fit.

28. I do not accept that these various aspects of unfairness were cured by the appeal to Mr Lammas or that, as a result of the appeal, the process overall was a fair one. The inadequacy of the witness statements certainly was not remedied. The weighing of the evidence by Mr Lammas was largely the same as that adopted by Mr Simpson and, objectively judged, in my view Mr Lammas fell into the unreasonable

errors in his approach to the evidence as I have identified in respect of Mr Simpson (save in respect of the injury).

Reasonable Procedure

29. The claimant raised three concerns as to the procedure adopted by the respondent: anonymised statements, not being permitted to cross-examine witnesses or ask questions and Mr Simpson being the decision maker having been involved in the original investigatory meeting. Each of thee he contended rendered the dismissal unfair. In respect of the anonymisation of witness statements, I accept that there was no reasonable basis on which to anonymise them as some sort of preventative measure and it seemed to me that Mr Powell largely accepted this. I do not however find that, on its own, sufficient to render the decision unfair because the claimant had managed to establish the identity of the makers of the statements before the hearing.

30. In respect of calling witnesses to the disciplinary hearing, I accept that a reasonable employer may have chosen not to do so in this environment. If, however, witnesses were not called, it was in my view incumbent upon a reasonable employer to obtain more detailed evidence by a more detailed investigation. The witness statements were not a reasonable basis on which to proceed because of the lack of detail on relevant issues as I have set out above. In respect of the claimant's third concern that it was not reasonable to have Mr Simpson make the decision, I have also dealt with that above.

Overall

31. I am conscious that a balance needs to be struck between a small employer and the difficulties they face and the rights of an employee who faces serious charges and the loss of his livelihood when determining the level of investigation and analysis required. I am not seeking to require an employer to embark on some sort of quasi judicial investigation or overly sophisticated analysis. This employer was inexperienced in these matters. In my view a reasonable employer could and should have done more to establish who saw what and from where and to weigh the different versions based on the evidence rather than on supposition about intimidation and loyalties.

Contributory Conduct

32. In relation to contributory conduct, my approach differs from that set out above: I no longer have to assess the reasonableness of a party's actions. I have to form my own view on the balance of probabilities as to whether the claimant did or did not conduct himself in a culpable or blameworthy manner that contributed to his dismissal. In this regard the burden is on the respondent to satisfy me that the claimant has so conducted himself. The respondent relies on two matters: first it invites me to find that the claimant probably did punch Mr McGuigan and, secondly, it invites me to find that the claimant was dishonest during the disciplinary process.

33. On the first issue, I have not heard from any of those directly involved, I have been critical of the reasonableness of the investigation, the detail of the evidence and the analysis of that evidence. In the circumstances I cannot be satisfied on the balance of probabilities on the evidence I have heard that the claimant did punch Mr McGuigan and I decline to make any reduction on that basis.

34. As to the second issue, the respondent invites me to find that the claimant was dishonest during the disciplinary process in claiming not to have touched Mr McGuigan at all and that this contributed to his dismissal. I take the view based on the preponderance of documentary evidence that the evidence I have heard from the claimant, that it is likely that the claimant made contact with, tussled, pushed or pulled Mr McGuigan. I do not know because of inadequacies in the investigation, however, whether that was in response to Mr McGuigan pulling his apron, spitting at him, approaching him aggressively or what the precise circumstances were. I accept, however, that the claimant was not straightforward in this regard in his disciplinary hearing or appeal. I note that his union representative put forward a case based on a potential tussle, pushing, pulling or scuffle but that the claimant disavowed that. That, to my mind flies in the face of the majority of the evidence from the witnesses whose witness statements I have. I accept that conduct on the part of the claimant is culpable and it contributed in part to the respondent taking what I found to be an unreasonably simplistic analysis of the evidence. In the circumstances, I am satisfied it is just and equitable to reduce the claimant's award by a modest amount to reflect that. I take the view that the appropriate reduction for such contribution is 20%.

Polkey

35. I find that the investigation failed below the standard you would expect from a reasonable employer as did the analysis of the evidence. In the circumstances it is neither appropriate nor possible for me to reliably make any findings as to what might have happened had a reasonable investigation been conducted or more detailed evidence been obtained. I can see, for example, that closer examination of the issue of injury with Mr Duncombe would have revealed evidence that he did not see an injury otherwise he would have dealt with it, a feature Mr Simpson accepted was odd. I do not know what further investigation of the location of the witnesses, the details of the physical contact, possible bias in the evidence given would have revealed. In the circumstances it is simply too speculative for me to make any reduction to reflect the risk that the claimant would have been fairly dismissed in any event.

Section 207A adjustment

36. Finally, the claimant asked me to increase his damages for what he says was a breach of the ACAS code. Mr Hill directed me to paragraph 5 of the ACAS code, in relation to investigations and invited me to find that all necessary investigations were not undertaken and this constituted an

unreasonable failure to follow / comply with the code and argued that I should increase compensation accordingly. I preferred Mr Roberts' submission on this point. I find that the Code of Practice is primarily concerned with ensuring that an investigation is undertaken, not with the quality of the same. The code provides that it is important to carry out all necessary investigations without unreasonable delay. It does not a contain a requirement that the investigation falls within the range of reasonable investigations required of a reasonable employer. In the circumstances I am not satisfied that the respondent has failed to follow the code, still less that the failure is unreasonable or that it would have been just and equitable to uplift an award to reflect the same.

37. Even if I had found a breach of the code (and I note that it is arguable that the failure to split cleanly the role of investigator and decision maker could amount to a breach of the code), I am not satisfied that with an employer of this size who did not have access to specialist advice it would have been just and equitable to increase the award in light of any such failure.

38. It remains only for me to say that I have been greatly assisted by both the representatives. I thank Mr Hill for his composure, for his focus on the most relevant issues and Mr Roberts for his targeted cross-examination and extremely helpful closing submissions.

REMEDY

39. I heard evidence on remedy separately to liability and heard only from the claimant on this issue.

Relevant Facts

40. The Claimant is 46 years of age. He left school in about 1986 aged 15/16 years with no formal qualifications. He worked for 10/11 years as a butcher, he then worked for a couple of years as a self-employed DJ before returning to the meat business and working for an auctioneers cutting meat until 2003. It was then he began his employment with the respondent for whom he worked for over 12 years. He has not previously experienced any lengthy breaks in his employment history. The claimant has difficulty with reading and writing.

41. The claimant was dismissed on 19 April 2016, approximately 42 weeks ago. He has not obtained alternative employment since that date save 2 days casual work for a friend. The claimant's evidence as to his search for alternative employment was vague, at best. He disclosed approximately 5 months records with the Job Centre which showed he applied for 2 jobs in the meat industry, 1 job cleaning vending machines and that he made inquiries in respect of a role involving kitchen fitting. The last job for which the claimant applied was just before Christmas and was in a butchers in the meat industry. He got through to interview

and was given a start date but the offer was withdrawn before that start date fell due. The claimant said that affected his mental state and he has seen a doctor who has told him he has slight depression. He did not produce any documentary evidence in this regard. The claimant gave inconsistent evidence as to whether he still considered himself fit for work but, ultimately, I understood the claimant's evidence to be that he was fit for and was still looking for work but had not made any applications since before Christmas.

42. In terms of the type of work for which the claimant is suitable, he accepts he is suitable for butchery or slaughterman roles by his experience and for unskilled labouring. In terms of his travel to work area, he accepts that a role within a 20 mile radius of his home would be suitable. In terms of the methods that he has used to search for work, he has not registered with any agencies and he gave inconsistent evidence as to whether he has used the internet in order to search internet based job sites. It seems from page 179 of the bundle that he did indeed do so but it was not clear on the claimant's evidence whether he needed his wife to assist him. On either view, he is able to access the internet himself or through the agency of others. His search for work has been primarily through friends and a 'Slaughterman' site where some 300 members exchange news of vacancies and work, amongst other things.

43. The respondent produced 4 job ads which were open for application on one randomly selected day in October 2016: one was a nationwide advert, the others were in the claimant's local area or accessible by public transport. The respondent argued that the claimant failed to mitigate his loss by failing to register for agencies, check for jobs online, check the newspapers or actively apply for jobs which the respondent contended were plainly available. The claimant argued that the job market was difficult particularly for an individual with reading and writing difficulties and no formal qualifications. He said he had struggled to accept his dismissal.

Relevant Law

44. There is little law relevant to the issue I have to determine save it is right to say that the compensatory award should reflect the actual losses which the claimant has suffered or is likely to suffer as a consequence of being unfairly dismissed(s.123(1) ERA 1996). In terms of the duty to mitigate one's loss, the duty is the claimant's and it is to use reasonable efforts to mitigate his loss; the burden is on the respondent to prove that the claimant has failed to comply with that duty.

Conclusions

45. I have a relative dearth of evidence on the claimant's efforts to mitigate his loss and the job market. I have done what I can based on the limited information provided by both sides.

46. In relation to the basic award and the sum for loss of statutory rights they have been agreed and so I have awarded them in the amended sums sought by the claimant:

Basic Award	£6,706
Loss of statutory rights	£450

47. In respect of loss of earnings, I find that in the 6 months after the termination of the claimant's employment and before any suggestion that he had become ill, the claimant did not make reasonable efforts to apply for jobs and mitigate his losses. I am conscious that the job market can be difficult and the process of applying for jobs gruelling and unrewarding but in my view the claimant did not do enough to identify and apply for vacancies. He failed to use the tools which a reasonable job searcher would use, namely the internet, his local papers, websites, email alerts and he failed to register with agencies. I appreciate that it was less easy for a claimant with difficulties reading and writing but I am satisfied that he had family members, Job Centre staff and a network of those in the industry who would and could have assisted him if he had asked.

48. The more difficult question is, if the claimant had reasonably applied himself to this search, when would he reasonably have obtained employment and would it have been equivalent. In this regard, it seems to me that the claimant may well have spent longer than an average employee on the open labour market because he had a history of dismissal for gross misconduct, he had difficulties with reading and writing and he had a lack of formal qualifications even in his specialist area. I have balanced that, however, against the evidence that, in only 4 applications in a 6 month period the claimant got as far as an offer of a job in one. I have also considered the snapshot of job availability provided by the respondent which, although limited, tends to show that there were a reasonable number of jobs for which the claimant could have applied.

49. In the circumstances I have come to the conclusion that, if the claimant had made reasonable efforts to register with agencies, used internet based sites, applied for temporary positions etc it is likely he would have secured equivalent employment in the healthy trading period in the last quarter of 2016 and by mid October 2016, as an average point in that period. That is a period of approximately 26 weeks (6 months), after his dismissal. On that basis I make an award to the claimant of 26 weeks' loss of earnings running at £424.00 per week to reflect both his net loss of earnings and his pension contribution. I have deducted his 2 days earnings of £200 and have come to the total sum of £10,824.00. There is also a loss of profit share suffered during this period in the agreed amount of £560.

Compensatory award	
Loss of earnings	
(26 x £424) - £200 =	10,824
Loss of Profit Share	560

Loss of statutory rights	450
	11,834

50. Both the basic and compensatory award fall to be reduced to reflect the claimant's contributory conduct giving the following awards:

Basic	6,706 x 80%	5,364.80
Compensatory	11,834 x 80%	9,467.20
Total Award:		£14,832.00

Employment Judge Connolly
9th March 2017