EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mrs N Stevens	AND	N V Hairdressing Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Exeter **ON** 29 April 2019

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: **In person**
For the Respondent: **Mr J Gilberts, Consultant**

JUDGMENT

The judgment of the tribunal is that the claimant was unfairly dismissed but is awarded no compensation.

RESERVED REASONS

1. In this case the claimant Mrs Natalie Stevens claims that she has been unfairly dismissed. The respondent contends that the reason for the dismissal was gross misconduct, and that the dismissal was fair.
2. I have heard from the claimant, and I have heard from Ms M Seaborne, Ms T Herrington and Mrs K Brown on her behalf. On behalf of the respondent I have heard from Mrs N Jones, Ms M Kessel, Ms D Trenoweth and Miss G Attenborough. I was also asked to consider a statement from Mr L Boulton on behalf of the claimant, but I can only attach limited weight to this because he was not here to be questioned on this evidence.
3. There was a degree of conflict on the evidence. I have heard the witnesses give their evidence and have observed their demeanour in the witness box. I found the following facts proven on the balance of probabilities after considering the whole of the evidence,

both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

4. The claimant Mrs Natalie Stevens was a senior hairstylist at the respondent N V Hairdressing Ltd, which is a salon in Falmouth in Cornwall. She was employed for just over 13 years until she was dismissed for gross misconduct by letter dated 16 July 2018. This followed an altercation which took place on 13 July 2018. The unfortunate surrounding circumstances were that former friends and colleagues in the salon had fallen out and more latterly have become involved in something of a bitter dispute.
5. The claimant had been issued with a written statement of the terms and conditions of her employment, which included a written disciplinary procedure. The procedure was rather limited in scope and suggested that instant dismissal would take place if there was a perceived threat to the safety and well-being of the directors, customers or employees of the respondent company, and that employees would have the right to be accompanied by a colleague or trade union representative at any meeting. In addition, a right of appeal was to be offered against any decision to dismiss.
6. The respondent salon was originally founded by Mrs Kim Brown and Mrs Nicola Jones, who both gave evidence today. Mrs Jones bought out Mrs Brown's financial interest in the salon in late 2017 and Mrs Jones then became the sole proprietor of the respondent company. They have since fallen out over the terms of that sale and the value of the interest which was purchased.
7. The claimant was a hard-working and valued employee, with a clean disciplinary record, and who was friendly with Mrs Brown. She was trusted as a key holder of the salon premises. However, her friendship with Mrs Brown appears to have caused some tension between the claimant and Mrs Jones after Mrs Brown had left the respondent, and it became clear that Mrs Brown and Mrs Jones were in dispute. Other more junior members of the salon felt that the claimant had become very negative towards Mrs Jones and sought to undermine her in the workplace.
8. I have heard a considerable amount of evidence from the above witnesses whose loyalties are now divided. Not all of this evidence appeared to be relevant to the current dispute, but what is relevant is that the claimant and Mrs Jones had been on friendly terms. Mrs Jones considered the claimant to be a hard-working employee, and given that two other stylists were on maternity leave, held a valuable position in the salon because of her fee earning potential. Mrs Jones had supported the claimant, for instance by making loans as an advance against future salary, and being prepared at short notice to cancel client appointments on the morning of the claimant's wedding when she was let down at short notice by her own hairdresser.
9. Nonetheless Mrs Jones became concerned about the claimant's increasingly negative attitude and reports from some other members of staff that she was being undermined by the claimant. She decided to address these issues and to raise her concerns with the claimant.
10. Accordingly, on Friday, 13 July 2018 she asked the claimant to accompany her to the staffroom in the salon for a chat. It was not expressed to be a disciplinary hearing, and that was not the respondent's intention. There were only three other people in the salon at that time. They were Ms Kessell, from whom I have heard, who was cutting the hair of a customer namely Mrs M Watkins. Another stylist namely Ms Trenoweth, from whom I have also heard, was also there. The discussion between the claimant and Mrs Jones of the respondent then resulted in an argument in the following circumstances.
11. The claimant's version is that Mrs Jones of the respondent had been aggressive and sworn at her for remaining friendly with Mrs Brown, and effectively taking her side in their dispute. On 13 July 2018 she asked for a quick meeting in the staff room but it was not expressed to be any form of disciplinary procedure. She said that Mrs Jones accused her of "slagging her off to a client". She then demanded that the claimant return the keys to the salon. The claimant says that she complained that she was being treated unfairly and that accusations had been made against her without any supporting evidence and that she had done nothing wrong. She says Mrs Jones was verbally aggressive in reply and said words the effect "I can do whatever the fuck I like". Mrs Jones denies this. The claimant felt that she had been

ambushed by the accusations and that Mrs Jones continued to raise her voice demanding to know how she thought she could continue working there. Mrs Jones accused her of having had a job lined up at a competing salon. She then left the meeting. She accepted at this hearing that she was upset when she left that meeting and may well have slammed the door.

12. Mrs Jones of the respondent gave evidence to this hearing to this effect. She felt that following Mrs Brown's departure from the business the claimant became negative towards her despite the fact that she had always been friendly and supportive of the claimant. She began to hear from other members of staff that the claimant was trying to undermine her. She decided to discuss it with the claimant on 13 July 2018. She certainly had no intention of dismissing the claimant because she was a hard-working employee and was earning good fees for the salon, particularly with two other stylists being absent on maternity leave. Mrs Jones says that when she raised with the claimant her concerns about negative comments she immediately became aggressive and shouted in her face words to the effect: "I've been here for 14 fucking years and you can't get rid of me, I'm staying and I'm going to be a whole lot fucking worse". She also suggests that the claimant shouted at her "You treat me differently - it is only because of Kim [Mrs Brown] you're pulling me up on it". Despite the fact that Mrs Jones tried to calm her down the claimant continued to shout and then stormed out of the meeting and slammed the salon door on the way out.
13. Ms Kessell prepared a written statement some four days later on 17 July 2018 in which she confirmed that the claimant had acted loudly and aggressively at Mrs Jones, in the presence of the client whose hair she was cutting at the time. She heard the claimant say to Mrs Jones: "you're fucking childish"; "I worked over 14 fucking years"; and had said to Ms Kessell that she (Ms Kessell) should not stay at the salon, and previously tried to undermine Mrs Jones by saying or she was only interested in the money, and that she never got on with Mrs Jones. In her evidence to this tribunal Ms Kessell confirmed that she heard the claimant shout at Mrs Jones using the swear words indicated above and that the claimant then stormed out of the salon slamming the door on her way.
14. Ms Trenoweth made a contemporaneous statement of these events to the effect that there was shouting coming from the staffroom and she therefore went over to speak to Ms Kessell's client to try to mask the shouting because it was so embarrassing. She reported that she had not heard Mrs Jones shouting and that she tried to keep calm but that the claimant was shouting at Mrs Jones and it was difficult to make out exactly what she was saying. She then stormed out of the salon in tears and slammed the salon door. Ms Trenoweth also commented that previously the claimant had indicated that she wanted to leave the salon and had been undermining Mrs Jones. In her evidence to the tribunal today Ms Trenoweth confirmed that the claimant was shouting so loudly at Mrs Jones that she could be heard in the salon from the staffroom and that throughout the conversation all she could hear was the claimant's voice. Ms Trenoweth said that the claimant sounded so aggressive she was worried for Mrs Jones' safety.
15. The client Mrs Watkins also prepared a simple letter to the effect that during her appointment she had heard shouting coming from the back room from a member of the respondent's staff, but did not hear exactly what was said.
16. Further background evidence on behalf of the claimant is to the effect that Mrs Jones of the respondent did not like the claimant, nor rate her as a hairdresser and said that were it not for Mrs Brown, she would not have been retained in the salon. Mrs Jones denies this.
17. In any event Mrs Jones then considered her position over the weekend, and appears to have taken some advice. As a result of that advice she decided to dismiss the claimant for gross misconduct following her outburst, on the basis that there had been an irretrievable breakdown in trust between them, and that an ongoing working relationship in their small salon would not be possible. She delivered a letter to the claimant on 16 July 2018 which dismissed the claimant with immediate effect. She stated: "I feel the way in which you spoke to me in that you used threatening behaviour which amounts to gross misconduct we are no longer able to continue your employment with NV hairdressing. I would have normally taking you through a disciplinary process but feel this is no longer an option following your statement during that discussion of: "If I was bad before, things are going to

get a whole lot worse, you can't get rid of me, I'm not going anywhere!" I feel this threatening statement by you has led to a complete breakdown in our working relationship and there is no coming back from such a threat, there is no trust remaining for me to continue employing you and any discussion will not resolve this situation…"

18. The claimant replied by letter dated 20 July 2018 disputing the contents of the letter and asking for her final payslip and the relevant tax documentation. By letter dated 24 July 2018 Mrs Jones and the respondent acknowledged the fact that the claimant was disputing her version of events, and offered the claimant an appeal to be heard by someone independent of the respondent. By letter dated 26 July 2018 the claimant referred to the respondent's "blatant disregard for fair and proper procedure" and given that the respondent had confirmed that there was no trust remaining to continue employment that there was no point in submitting any appeal.
19. The claimant then made contact with ACAS during August 2018 and following receipt of and Early Conciliation Certificate she issued these proceedings claiming unfair dismissal on 11 September 2018.
20. Finally, with regard to the events at the meeting in the salon on 13 July 2018, the weight of evidence is in favour of the respondent, and for that reason I prefer the respondent's version of events. I find that at the meeting between the claimant and Mrs Jones of the respondent on 13 July 2018 the claimant used loud, abusive and threatening language to her employer in the presence of two junior employees and a client, and that this was an act of gross misconduct by the claimant.
21. Having established the above facts, I now apply the law.
22. The reason for the dismissal was conduct which is a potentially fair reason for dismissal under section 98 (2) (b) of the Employment Rights Act 1996 ("the Act").
23. I have considered section 98 (4) of the Act which provides "…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".
24. I have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2015 ("the ACAS Code").
25. Compensation for unfair dismissal is dealt with in sections 118 to 126 inclusive of the Act. Potential reductions to the basic award are dealt with in section 122. Section 122(2) provides: "Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce the amount accordingly."
26. The compensatory award is dealt with in section 123. Under section 123(1) "the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer".
27. Potential reductions to the compensatory award are dealt with in section 123. Section 123(6) provides: "where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."
28. I have considered the cases of Post Office v Foley, HSBC Bank Plc (formerly Midland Bank plc) v Madden [2000] IRLR 827 CA; British Home Stores Limited v Burchell [1980] ICR 303 EAT; Iceland Frozen Foods Limited v Jones [1982] IRLR 439 EAT; Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR; and Polkey v A E Dayton Services Ltd [1988] ICR 142 HL. The tribunal directs itself in the light of these cases as follows.

29. The starting point should always be the words of section 98(4) themselves. In applying the section the tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.
30. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances. A helpful approach in most cases of conduct dismissal is to identify three elements (as to the first of which the burden is on the employer; as to the second and third, the burden is neutral): (i) that the employer did believe the employee to have been guilty of misconduct; (ii) that the employer had in mind reasonable grounds on which to sustain that belief; and (iii) that the employer, at the stage (or any rate the final stage) at which it formed that belief on those grounds, had carried out as much investigation as was reasonable in the circumstances of the case. The band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss.
31. In this case, I find that the respondent did believe that the claimant had been guilty of gross misconduct, and that there were reasonable grounds on which to sustain that belief. However, at the time that the respondent took the decision to dismiss the claimant, it had not carried out an adequate or reasonable investigation or disciplinary process. There was no formal disciplinary hearing, and the claimant had not been suspended and had not been given an opportunity to consider her position, nor to state her case against any allegations of gross misconduct in the presence of a colleague or trade union representative. There was no formal disciplinary hearing at the time of the altercation between the parties, and the respondent merely dismissed the claimant by letter following that allocation. There was no right of appeal initially given against dismissal, and although this was offered by way of an independent decision maker, the respondent made it clear by that stage that she considered the working relationship had irretrievably broken down. In the circumstances the claimant could not really be criticised for considering that any appeal would be futile.
32. The dismissal of the claimant did not meet the normal standards of fairness commonplace in good industrial relations, and did not meet the recommendations of the ACAS Code. The investigation was not reasonable in all the circumstances and dismissal at that stage was not within the band of reasonable responses open to the respondent when faced with these facts.
33. Accordingly, I find that even bearing in mind the size and administrative resources of this employer the claimant's dismissal was not fair and reasonable in all the circumstances of the case, and I therefore declare that the claimant has been unfairly dismissed.
34. However, I have found that the claimant committed an act of gross misconduct, and I also find that the claimant's gross misconduct was the cause of her dismissal. I apply section 122(2) of the Act, and I find that the conduct of the complainant before her dismissal was such that it is just and equitable to reduce the amount of the basic award to nil, and I decline to make any basic award. I also apply section 123(6) of the Act, and I find that the dismissal was caused entirely by the actions of the complainant. I therefore reduce the amount of the compensatory award to nil. I therefore decline to award any compensation as a result of the claimant's unfair dismissal, which I consider to be just and equitable in the circumstances of this case.
35. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 ("the Recoupment Regulations") do not apply in this case.
36. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in

relation to those issues are at paragraphs 4 to 20; a concise identification of the relevant law is at paragraphs 22 to 30; how that law has been applied to those findings in order to decide the issues is at paragraphs 31 to 33; and how the amount of the financial award has been calculated is at paragraphs 34 and 35.

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Employment Judge N J Roper
Dated 29 April 2019