Case Number: 3200516/2019

EMPLOYMENT TRIBUNALS

Claimant: **Ms C Hughes**

Respondent: **MacArthys Laboratories Limited T/A Martindale Pharma**

Heard at: **East London Hearing Centre**

On: **Thursday 21 November 2019 & Friday 22 November 2019**

Before: **Employment Judge Jones**

Representation

Claimant: Mr D Welch (Counsel)

Respondent: Mrs D Spencer (HR)

JUDGMENT

The judgment of the Employment Tribunal is that: -

1. **The Claimant made a protected disclosure.**

2. **The Claimant was subjected to two detriments on the grounds of her protected disclosure.**

3. **The complaint of breach of contract fails and is dismissed.**

4. **The complaint of automatic unfair dismissal fails and is dismissed.**

5. **The complaint of unfair dismissal succeeds. The dismissal was procedurally unfair.**

6. **The Claimant is entitled to a remedy for her successful complaints.**

7. **The parties will write to the Tribunal by 1 June with written submissions on the *Polkey* reduction that should be applied to the**

Claimant's remedy, in light of the judgment.

8. The Claimant should also prepare and submit to the Respondent a revised schedule of loss by 1 June 2020.

REASONS

1 The Claimant brought a complaint of unfair dismissal, automatic unfair dismissal, detriment following making public interest disclosures and wrongful dismissal as she was summarily dismissed.

2 The Respondent defended these claims. It was the Respondent's case that the Claimant had been dismissed for gross misconduct.

3 The Tribunal apologises to the parties for the delay in the promulgation of this judgment and reasons. The judge was unwell for most of 2019, which meant that there was a delay in the writing up of this and other judgments.

Evidence

4 The Tribunal had an agreed bundle of documents. It also had witness statements from the Claimant on her behalf and from Amanda Bowden, who was both the shift leader and the Claimant's line manager; Sharon Watkins, shift leader and the person who conducted the investigation; Oliver Rendell, stream manager, who began the investigation; from Susanne Jarvis, stream manager who dismissed the Claimant and lastly, Ian Fairlamb, head of production who heard the Claimant's appeal against dismissal. The Tribunal had live evidence from all those witnesses.

5 From the evidence, the Tribunal makes the following findings of fact. The Tribunal has endeavoured to only make findings on the matters that relate to the issues in the case. The list of issues will be referred to in the second half of this judgment. The findings of fact are those that are relevant to the list of issues.

Findings of Fact

6 The Claimant was employed by the Respondent as a production operator from August 2016. The Respondent is a pharmaceutical company and her role as a production operator, involved operating machinery, assembling and preparing items for production, checking products and ensuring the machinery ran smoothly.

7 The Respondent manufactures pharmaceutical products, medicine, specialising in pain, addiction and critical care. The Respondent employs approximately 350 people on its Romford site.

8 The industry in which the Respondent operates is highly regulated and the medicines that it produces need to be produced and packed in a controlled environment. Initially, the Claimant worked night shifts, the hours of which were 10pm to 6am.

9 In April 2018, the Claimant wrote to the Respondent asking to change from working nights. She asked to be allowed to change to the day, weekend shift instead. There was some further discussion but eventually, the Claimant was allowed to apply for the weekend shift, when it came up and was appointed to it. On 22 May 2018, the Claimant was informed by letter that she had been successful in her appointment to the post of production operator, working weekends in the packing department and that her hours would now be 6am to 6pm, Saturday and Sunday.

10 The Claimant also wanted to work an extra day in the week. The Respondent was unable to give her an additional shift but Mr Rendell's evidence was that instead, the Respondent advised her that she could get trained up on doing different things which would lead to her being paid at different rates and therefore earning more money.

11 The Respondent has a dignity at work policy which was in the bundle of documents. It stated that its purpose was to encourage and maintain a professional and friendly working environment where everyone is free to work without harassment, victimisation or bullying for any reason, and where everyone in the work place is treated with dignity and respect. The policy covered all company employees, permanent and temporary; all job applicants, agency employees, contractors and consultants, suppliers and customers. The policy statement was as follows: -

> *"The company believes that harassment or bullying of any kind is harmful to employees and the company. All employees are expected to behave in a professional manner, respect the feelings of others in the working environment and treat them with dignity and respect. Any behaviour which involves harassment or bullying of any employee, client, customer or visitor to the company is unacceptable and would not be tolerated. All allegations of bullying and harassment will be investigated and, if appropriate, disciplinary action will be taken."*

12 There are definitions of harassment, bullying and victimisation in the policy. It stated that employees in management positions, whether managers or team leaders, must take immediate action if they become aware of harassment or bullying taking place and ensure that they are supportive towards any employee who complains of or reports any incidents of harassment or bullying. The company will not tolerate victimisation of a person for making allegations of bullying or harassment in good faith or supporting someone to make such a complaint. The policy then set out its complaints procedure. Initially, employees were expected to follow an informal procedure where they should immediately tell the individual doing it that their behaviour in question was offensive, unwanted and that they want it to stop. The individual could seek advice and assistance from the human resources (HR) department who could deal with the matter on an informal and confidential basis by speaking to the other individual concerned on the victim's behalf or otherwise.

13 Where informal resolution is not appropriate, is not requested or where the outcome has been unsatisfactory, the employee can then bring a formal complaint. This starts with the complaint being made in writing to either the individual's line manager or where that is not appropriate, to the head of HR setting out the full details of the matters complained of including, if appropriate, names of witnesses and then the evidence relied on. The policy states that it is in the complainer's interest to present her complaint promptly as the investigation could only commence once it had been presented. The matter will then be handed to HR who will arrange for the complaint to be properly and fully investigated and addressed which could result in an investigation or disciplinary action being taken, where appropriate.

14 The Tribunal also had the Respondent's disciplinary policy and procedure-conduct. The policy stated that minor misconduct issues could be resolved informally between the employee and their line manager and that these discussions should be held in private and without undue delay, where there is cause for concern. A note should be kept of any such informal discussions on the employee's personal file.

15 As far as investigations of misconduct is concerned, the policy states that the purpose of an investigation is for the company to establish a fair and balanced view of the facts relating to any disciplinary allegations made against an employee, before deciding whether to proceed with a disciplinary hearing. The amount of investigation required will depend on the nature of the allegations and will vary from case to case. It may involve the interviewer taking statements from the employee and any witnesses, and/or reviewing relevant documents. It stated that a member of the HR team and the line manager will agree on who would be the investigating officer.

16 The policy gave the Respondent the power to suspend the employee from work if appropriate but not to do so for longer that is necessary to investigate the allegations. The company would confirm the arrangements around the suspension to the employee in writing. The policy clearly stated that this kind of suspension is not the disciplinary penalty and does not imply that any decision has already been made about the allegations. The employee will continue to have their full basic salary and benefits during that period.

17 The policy set out what would happen following an investigation. If the company considered that there are grounds for disciplinary action, the employee would be required to attend a disciplinary hearing. The company will inform the employee in writing of the allegations against them, the basis for those allegations, and what the likely range of consequences will be if the company decides after the hearing that the allegations are true. The company will also include the following where appropriate: a summary of relevant information gathered during the investigation; a copy of any relevant documents that will be used at the disciplinary hearing; and, a copy of any relevant witness statements, except where a witness's identity is to be kept confidential, in which case, the Respondent will give as much information as possible while maintaining confidentiality. The employee will be given written notice of the date, time and place of the disciplinary hearing which will be held as soon as reasonably practicable. The policy sets out the employee's right to be accompanied and the procedure at disciplinary hearings. At the disciplinary hearing, the company will go through the allegations against the employee and the evidence that has been

gathered. The employee will be able to respond and present any evidence of their own. The hearing will be chaired by the employee's line manager with a HR representative present to make sure that the correct process is followed. The employee has a right, set out in the policy, to ask relevant witnesses to appear at the hearing, provided, the Respondent company has had sufficient advance notice to arrange their attendance.

18 The policy was silent on the Respondent company producing witnesses to support the allegations made against the employee. The employee will be given the opportunity to respond to any information given by the witness. The policy gave the Respondent the opportunity to adjourn the disciplinary hearing if it believed there was a need to carry out further investigations such as re-interviewing witnesses in the light of any new points the employee made in the hearing and, to give the employee a reasonable opportunity to consider any new information obtained before the hearing is reconvened. The policy required the Respondent to inform the employee in writing of its decision and the reasons for it, as soon as possible after the disciplinary hearing and usually within one week. It also stated a preference for the decision to be explained to the employee in person.

19 The policy set out the range of sanctions that could be imposed if misconduct is found against the employee. The lowest level sanction is an employee improvement note. The policy states that if conduct does not meet acceptable standards the employee will normally be given an improvement notice. This will set out the conduct issue, the improvement that is required, the timescale and any help that may be given. The employee will be advised that it constitutes the first stage of the formal procedure. A record of the improvement note will be kept for 12 months, but will then be considered spent – subject to achievement and sustainment of satisfactory conduct.

20 From there, the policy set out the conditions for the imposition of a first written warning, a final written warning and the most serious sanction of dismissal. Dismissal, the policy stated was usually only appropriate for misconduct during the employee's probationary period; or for further misconduct where there is an active final written warning on the employee's record; or, any gross misconduct regardless of whether there are any active warnings on the employee's record. Gross misconduct will usually be resolved in immediate dismissal without notice or pay in lieu of notice. Some examples of gross misconduct were set out in the policy which included none of which were referred to in the letter of dismissal or the appeal outcome letter.

21 In the section of the policy dealing with appeals against dismissal, it stated that if an employee wished to appeal against disciplinary action, they needed to write in to the Respondent stating their full grounds of appeal, providing evidence to support their claim that the decision was unjust or unfair to HR within 5 days of the date on which they were informed of the action. The company would give the employee written notice of the date, time and place of the appeal hearing which would normally be within a further five days after receiving the appeal. The appeal hearing would not normally be a complete re-hearing of the matter but would usually be a review of the fairness of the original decision in light of the procedure that was followed and any new information that may have come to light. This will be at the company's discretion depending on circumstances of the employee's case. In any event, the policy stated that the appeal will be dealt with as impartially as possible. The appeal hearing would be conducted

impartially by a line manager with no previous involvement in the case, with an HR representative present at the appeal hearing. The employee would have a right to have a companion with them at the appeal hearing.

22 The Respondent may adjourn the appeal hearing if they need to carry out any further investigations in the light of any new points that the employee has raised at the appeal hearing and if so, the employee will be given a reasonable opportunity to consider any new information obtained before the appeal hearing is reconvened. At the end of the appeal hearing, the Respondent may revoke the original decision, or substitute a different sanction. The company would write to the employee to inform her of the final decision as soon as possible and usually within one week of the appeal hearing. Preferably, the company would explain the decision on appeal to the employee in person.

23 The Tribunal finds that on Mr Rendell's instructions, Ms Bowden had previously had discussions with the Claimant about how she could give her additional training so that she could become a tier-2 operator. The Claimant had expressed an interest in having more training and gaining more skills. Ms Bowden's evidence was that the Claimant was an excellent operator and had a passion for getting the job done. However, it was her opinion that the Claimant also occasionally behaved in an erratic and disruptive fashion.

24 Part of the Claimant's duties on a weekend shift was to work on various machines. That included the Brevetti 1, Brevetti 2 and Marcenisi machines, among others. During September/October, the belt on the Brevetti 1 machine was broken. This meant that when the Claimant worked the shift on that machine, she would sometimes have to take trays of ampoules with medicine off one part of a machine and load them unto the second part of the machine which was called the labeller, so that labels could be fixed to them. Sometimes she had assistance to do so and other times not. The machine that was being used was actually two machines held together by a conveyer belt of sorts. There were pictures of a machine in the bundle of documents but after discussion between the parties, it was agreed that this was not the Brevetti machine but was another machine that was similar to it. On or around 15 September 2018, while working in inspection room 3, unloading cages, the Claimant banged her right elbow against a machine.

25 It is likely, that straight after she banged her elbow, she went into the office and spoke to her team leader, Amanda Bowden and a colleague named Katarzyna Andrzejewskja, who was also in the room, about it. The Claimant informed them that she had just banged her elbow on the cage from which she had just taken the tray of ampoules and that it hurt. Katarzyna, who was referred to in this hearing as Kasha, assisted the Claimant in taking her lab coat off so that they could see whether the Claimant's elbow was bleeding. The Claimant told them that she was in pain. There was no bleeding. She put her lab coat back on and went back to work. No record was made of the incident in the accident book or elsewhere.

26 Ms Bowden confirmed that during the same day or around the same time, one of the Claimant's colleagues, Pauline Bagabo, also came in the office to complain that she had banged her elbow on one of the Respondent's machine's or arm. Ms Bowden

did not make a record of that incident either.

27 Mr Rendell and Mr Fairlamb, both more senior managers than Ms Bowden within the organisation, confirmed in this hearing that it would have been appropriate for those matters to have been recorded as accidents at work in the Respondent's accident book and that they ought to have been so recorded.

28 The Claimant attended work on the following day, 16 September. She did not speak to Ms Bowden about her injury although she did speak to Katarzyna. She asked whether it was possible to get someone to put a layer of boxes on a palette for her as that would assist her in doing her work as it would bring the level up. The Respondent organised for someone to put the first layer of boxes on the palette for her, which enabled her to do the rest of her work on the shift.

29 When she spoke to Kasha about pain she was advised that she ought to stop at the chemist on the way home and get some Ibuleve, which is over-the-counter pain medication. By the time the Claimant finished her shift at 6pm she was unable to go to Tesco to get pain medication, as this was a Sunday and it was already closed. She was not able to get to the chemist until the following day. The pharmacist advised the Claimant that she should use an ice pack on her elbow for the pain as well pain medication. The Claimant's arm began swelling a week later and on 23 September, she went to the accident and emergency department of her local hospital.

30 The Claimant worked on what was referred to as the Brevetti 1 machine on Saturday 22 September 2018. This was another machine that was made up of two machines with a transfer belt connecting the two together. Because the belt was broken, it was necessary for production operators to take one tray of ampoules from one part of the machine to the other part of the machine. Usually, the machine can push the tray along itself and the product will get to the labeller. On 22 September, the transfer belt was not working and there was no engineer at work over the weekend who could fix it. The Respondent's witnesses confirmed that at the end of a shift, after the machine has been worked on during the day, operatives were expected to clean the machine before clocking off. The Claimant was involved in cleaning the Brevetti 1 at the end of the shift but, according to Ms Bowden, while cleaning it, she took off the cover that goes over the belt. Ms Bowden told her not to do so and informed her that the breakdown required an engineer to deal with the matter rather than an operative.

31 It is Ms Bowden's evidence that at the end of the shift, she went into the locker room to change and the Claimant was in there, also changing. According to the Claimant, her mobile telephone rang while she was working as her partner called her. When she went into the locker room, she returned the call and was speaking to him when Ms Bowden came into the locker room. It was not clear whether Ms Bowden realised that the Claimant was talking to the mobile phone as in her contemporaneous note that she sent to Mr Rendell dated 23 September 2018, she stated that the Claimant was swearing to herself. Both parties confirmed that the Claimant swore while she was talking on the telephone and referring to someone having told her that she had broken the machine and that it would be her fault that it was broken. It was Ms Bowden's evidence that the Claimant was shouting, angry, speaking loudly and swearing. The Claimant denied that she was speaking loudly or that she hit or kicked

the locker at all. Both parties agree that Ms Bowden spoke to the Claimant and asked her to keep the noise down and told her that if she did not want to talk to her about the matter, they would need to speak about it in the office on the following day.

32 It is likely that the Claimant was speaking loudly on the phone as this is what caused Ms Bowden to speak to her and to ask her to come to the office if there was something about work that she wanted to discuss. It was the Claimant's case in today's hearing that as she was not speaking to Ms Bowden, it had nothing to do with her and Ms Bowden should not have involved herself in the conversation. Ms Bowden is senior to the Claimant and if the Claimant is talking loudly in the locker room, about a work matter which may or may not have involved her, it was appropriate for Ms Bowden to advise the Claimant about the proper way to resolve disputes at work. She was speaking about work matters, in ear shot of her colleagues.

33 The Tribunal finds that when Ms Bowden told the Claimant to "*shush*" and keep the noise down, the Claimant told her that she should not tell her to "*shush*" as she was not a child. There was disagreement between the parties as to whether the Claimant added the word "*fucking*" as part of that response. Ms Bowden told the Claimant that the exchange between them would need to be reported and would become a formal matter. It is her evidence that the Claimant replied with "*let it be reported*". The Claimant denied saying that.

34 Mr Rendell confirmed in his witness statement that he had had a telephone conversation with Ms Bowden on the morning of 22 September and had advised her to speak to the Claimant when she attended work the following morning. If she needed to record a conversation and agree actions, he advised her to use an employee improvement notice form.

35 The Claimant did not attend work on the following day. It had been Ms Bowden's intention, following her conversation with Mr Rendell, to have a conversation with the Claimant about the locker room incident. But the Claimant did not attend work so she did not have an opportunity to do so.

36 The Claimant did not attend work and did not telephone work to report in sick. Although she had Ms Bowden's number, it was her evidence that she had left it at work in the locker room. Ms Bowden decided to formally refer the matter to Mr Rendell.

37 On 23 September, Ms Bowden sent an email to Mr Rendell providing a written record of her version of the events of the previous evening in the locker room. She stated that they had been having trouble getting the Brevetti to work and there was no engineer in at the time. After Ms Bowden and other colleagues had cleaned the machine but still not got it to work, the Claimant was seen taking the cover off the machine. Ms Bowden reported that she said to the Claimant that it had already been cleaned a few times and that it required an engineer to deal with it. She stated that the Claimant was swearing to herself by the lockers and was very aggressive towards her when she approached her. She confirmed that she had told the Claimant to "*shush*" and that the Claimant had replied to her that she should not tell her to "*shush"* as she was not a child. She added the word "*fucking"*. Ms Bowden added that she told the Claimant that the matter would be reported and be a formal matter.

38 She also stated that, she had tried many ways to work in a positive way with the Claimant which had all failed. She stated that the Claimant was a good worker but that the team were finding her a little eccentric at times. She did not request any particular action to be taken by the Respondent but said that:

> *"if she had turned up today I would have spoken with her and placed her on an EIN as this wasn't acceptable behaviour"*

39 Ms Bowden did not refer to the Claimant kicking the locker, as she did in her witness statement and in her live evidence at the Tribunal hearing. She did not refer to the Claimant kicking the locker when she gave her witness statement to Mr Rendell as part of his investigation. She referred instead to the Claimant *"banging and crashing her locker".* In her live evidence to the Tribunal, she was adamant that the Claimant had been 'going crazy' and that she kicked and bashed the bottom locker, that she used her fists to punch the locker and that she swore at her several times during the incident. She confirmed that she did not see any bruising on the Claimant's hands or elsewhere when she left the locker room that day. The Tribunal found Ms Bowden's evidence on this matter to be inconsistent.

40 On the following weekend, Mr Rendell had to attend work to talk to staff about various matters and he decided to use that opportunity to speak to the Claimant, in the presence of an HR representative. Mr Rendell's evidence was that he considered that the Claimant's conduct on the previous weekend raised two separate matters for the Respondent. The first and more important issue for him appeared to be the fact that she did not attend work on the Sunday, 23 September and did not report her absence to the Respondent. The second, issue was the allegation of misconduct in the locker room that he received from Ms Bowden when they spoke and in her email of 23 September.

41 The notes of the meeting that he had with the Claimant, which were taken by Ms Berger of HR; were in the bundle of documents. In the meeting, he asked the Claimant about her non-attendance at work on Sunday 23 September and the Claimant confirmed that she had attended accident and emergency because of hitting her arm on the machine two weeks earlier. The Claimant confirmed that she said the "*fucking machine*" in the locker room and that Ms Bowden had spoken to her like she was a child, which she did not like. She also confirmed that she found the way Ms Bowden spoke to her as dismissive. She informed Mr Rendell that the hospital thought that she may have a torn ligament in her arm and that she had no way to inform the Respondent of this at the time or subsequently. She confirmed that she had Ms Bowden's number.

42 Mr Rendell questioned the Claimant about her failure to let them know she was not coming to work on the Sunday. He informed her that her absence had been recorded as unpaid and unauthorised absence. He also informed the Claimant that the Respondent had a duty of care towards her and that her absence from work would cause concern. The Respondent was also concerned that something that happened on Saturday may have caused her to take Sunday off. The Claimant confirmed that was not the case. The Claimant was advised that if her GP made any

recommendations such as light duties, she should ensure that the GP gave her a note that would advise the Respondent on appropriate action that it could take. She told Mr Rendell that during the shift she had stayed at the top end of the machine where she could put trays on because it was easier. That had made all the difference. She was asked whether she was happier in relation to training and other issues which they had spoken about earlier and she confirmed that she was happier in her employment.

43 Mr Rendell's live evidence was that his conversation with the Claimant on 30 September covered both the incident in the locker room and her non-attendance at work on 23 September. He felt that at the end of the conversation the Claimant understood her conduct. He decided that the issue of the Claimant failing to report her absence should be addressed by the Respondent issuing an employee improvement notice so he asked another manager, Hazin Khalid, who was going to be attending work on a later shift to issue it. Ms Bowden was not going to be at work that evening. Mr Khalid, met with the Claimant during the shift, spoke to her and gave her the employee improvement note. In the note, the Claimant was advised, that not having made contact with the Respondent on 23 September was in breach of the Respondent's policy, as had been discussed with Mr Rendell earlier that day. The Claimant had also breached the Respondent's absence policy for the number of days absent from work within a one-year rolling period as she had been absent for ten days in total. She was informed that any further absences within the next six-months would mean that she had reached the trigger-point which would require the Respondent to conduct an investigation meeting into the matter which could lead to dismissal. The Claimant signed the employee improvement note on 6 October.

44 The employee improvement note did not refer to the incident in the locker room. In his live evidence, Mr Rendell stated that as it was an isolated incident, the Respondent decided that it was not going to take any further action on it. He accepted in cross-examination that at the end of their meeting, the Claimant could have believed that the locker room incident had been dealt with.

45 On Saturday 13 October, the Claimant worked on the Brevetti 1 machine and appeared, to Ms Bowden, to have enjoyed her day at work. She worked well and her team achieved a considerable amount of work that day. It was the Claimant's case that in order to work that day on the Brevetti 1 machine she had to stand on the elephant foot stool. On the following day, Sunday 14 October, Ms Bowden asked the Claimant to go back on that machine to continue working, with two other women, one of whom was to complete the training on how to do the reconciliations and the changeover. It is likely that reconciliation was one of the tasks she had not yet done on that machine. Once she did it, she would have completed her training.

46 In order to do the reconciliation, the Claimant would have had to manually transfer the trays to the labeller as although the machine was working, the belt was not. Initially, at the beginning of the shift, the Claimant and her colleague had another colleague working with them at the machines. This meant that there were three operatives operating the machine then. The additional colleague was a man who was taller than her. He was positioned in the middle of the machine taking the trays off. In the afternoon, he was no longer there as he left once he finished his shift. The Claimant was told that she would be working both ends of the machine. Ms Bowden

asked her to continue working on the machine in the afternoon on her own.

47 It was the Claimant's case that to do so would have meant working above height which she did not want to do. The Tribunal finds that this is likely to be a reference to waist height rather than head height. The Claimant's evidence was that she told Ms Bowden that she could not operate the machine on her own as it would have required her to work in a confined space and that it would be a breach of health and safety. Ms Bowden's evidence was that she did not recall her using those words. The Claimant told her that she believed that she would need to stand on an elephant's foot stool, which was usually in the room, to take the trays of ampoules off the machine and take them to the other end; which she considered dangerous and a health and safety hazard. It was the Respondent's evidence that the Claimant did not need to use the elephant's foot stool for that. The stool was only needed by the engineers when they wanted to get into the deeper areas of the machine in order to clean or service it. However, Ms Bowden's live evidence was that some of the shorter operatives would use it. She also stated that she checked the machine once the Claimant made a complaint to see if she could understand the Claimant's issue. It was her evidence that she was of a similar height to the Claimant but was able to lift the tray from waist height.

48 The Claimant's evidence was that Ms Bowden was very upset with her for refusing to work on the machine that day. She told her that she was letting down the team.

49 Ms Bowden sent an email to Mr Rendell on 14 October, detailing her experience that day with the Claimant and the Brevetti 1 machine. She stated that she did not know what the required height limits were that they could work at. She understood that it was slightly awkward to do what she was asking the Claimant to do but she did not agree that it was a health and safety matter. In her opinion, it was the Claimant's choice to stand on the elephant's foot stool to do the task. Ms Bowden concluded that the Claimant was being disruptive by refusing to work on the machine. She wrote that she explained to the Claimant that this was the way they had to work until the belt was repaired. However, she removed the Claimant from the line once she complained and put her to work in inspection and then on the Marcesini machine instead. Ms Bowden felt that the Claimant was being disruptive as she had asked for the training but to her mind, was now refusing to complete it. Ms Bowden decided to take the Claimant off the Brevetti machine permanently as she felt that the Claimant's attitude was disrupting the work of the team.

50 In the email to Mr Rendell, she wrote that the Claimant mentioned health and safety and that her health was more important that the job and that she would not be doing this job today. She thought that the Claimant had an attitude problem and that the Claimant should not be allowed to pick and choose when she worked on the Brevetti machine. She stated that the Claimant was bringing the team down. She also complained that nothing had been said to the Claimant in the employee improvement note about the Claimant's swearing and "*aggregation"* towards her. it is likely that she meant to write "*aggression*".

51 Ms Bowden told the Tribunal that the Claimant had a habit of tinkering with the

Respondent's machines when she cleaned them. This was not unsafe, as the machines would not be running when she cleaned them but it was beyond her remit as the Respondent had engineers to do the deep clean of the machines. Ms Bowden had previously written to Mr Rendell on 1 September to complain about the Claimant unnecessarily taking apart machines. She referred to the Claimant changing the setting of the spindles and other parts of the Brevetti which meant that someone called Anthony had to take it apart and set it back up from scratch. This was not something that Mr Rendell mentioned to the Claimant in their meeting a few weeks later.

52 It is the Respondent's case that Ms Bowden was approached by one of the Claimant's colleagues, Pauline Bagabo, also on 14 October, with a complaint about the Claimant. Ms Bowden's recollection was that she was going to put the Claimant on inspection but Ms Bagabo told her that she no longer wanted to work with the Claimant. Ms Bowden moved the Claimant to the Marcesini machine instead. It is likely that she asked Ms Bagabo to put her complaints about the Claimant in writing.

53 There was an undated letter from Ms Bagabo in the hearing bundle. It has a handwritten notation on it that says that it was received in the HR office on 15 October 2018. In the note, Ms Bagabo stated that she wanted to get along with everyone and enjoy a peaceful work environment but that this had not been possible since the Claimant started working on the weekend shift. She stated that she was uncomfortable because of the Claimant's moaning about everything, all the time. She said that she found the Claimant disrespectful of everyone. She gave a few examples of the types of things the Claimant would say. There were 5 statements noted in the letter. It was not clear when the Claimant was supposed to have made these statements.

54 Ms Bagabo reported that the Claimant expressed feeling hate for at least two colleagues and not being interested in aspects of the job. She quoted the Claimant as having stated *"I do not fear no one other than God and I care less what people think about me including….."* and *"if this was America where people have guns I would have shot so and so"*. Ms Bagabo signed the letter.

55 Although in the hearing she denied telling them to do so, it is likely that Ms Bowden told the other individuals who she alleged were being brought down by the Claimant's behaviour; to raise their concerns in writing. If she had not done so, it would be unusual for there to have been no complaints in writing about the Claimant over the previous two years and then for three complaints to be submitted to management in a period of two days; two of those from people who she said had expressed their concerns to her. Also, Mr Rendell's live evidence was that when he spoke to Ms Bowden on the telephone and she mentioned to him that other people had complaints about the Claimant, he told her that in order for them to be actioned they would need to be put to the Respondent in writing.

56 Ms Bowden's evidence was that she had not seen any of the statements until she came to prepare her witness statement for the hearing.

57 On 14 October, Katarzyna Andrzejewska wrote a letter about the Claimant "to whom it may concern" in which she complained to having *"problems with communication"* with the Claimant. She stated that she found the Claimant

unpredictable and that sometimes the Claimant would give her a *"bad look"*, which she found annoying. She complained that the Claimant sometimes moaned about her health issues or talked a lot which affected her concentration. She said that she advised the Claimant to go to the doctor if she had health problems.

58 On 15 October, the Respondent's security officer, Robert Gittings, emailed Mr Rendell. The email was titled "*arguing on site*". In the email he alleged that the Claimant was arguing at the gatehouse on Sunday morning when she arrived for her shift. He explained that the Claimant had driven in to work and '*had a go'* at a colleague, Karen Collins, who had stopped at the gatehouse to sign in and then, when he told her that all she had to do was drive around Ms Collins, she spoke to him in a loud manner to show her disagreement. He objected to the Claimant raising her voice and causing a scene.

59 By 15 October, Mr Rendell had an email from Ms Bowden, a letter from Ms Bagabo and an email from Mr Gittings, all complaining about the Claimant. At the hearing, the Respondent's case was that these complaints were treated as coming under the Dignity at Work procedure discussed above. However, the statements did not refer to the procedure. It is unlikely that that procedure was in anyone's mind at the time as it is not referred to in any of the documents leading to the Claimant's dismissal. Mr Rendell's evidence was that the letters gave him cause for concern for the safety of the team and he made the decision to suspend the Claimant to allow an investigation to take place. He was particularly concerned about the comment about guns. He felt that they showed that the Claimant was unpredictable and that was an issue for him.

60 On 15 October, Denise Griffiths, the Respondent's HR advisor telephoned the Claimant and informed her that she was suspended. She told the Claimant that she should not attend work on Saturday 20 October and that she would have to attend an investigation meeting on Sunday 21 October. The Claimant recalled being told that the reason for her suspension was the way she had spoken to a lady. She was not given any further details.

61 On 15 October, after a telephone conversation with Pauline Bagabo, the Claimant sent her a text message in which she said that her elbow was still aching and that she was thinking of going to a private GP and suing the Respondent for personal injury at work. She felt that the Respondent needed to be taught a lesson that people's health is important and should not be disregarded. She complained that Ms Bowden never recorded her accident at work but that she was quick to take her to the office for speaking to herself in the locker room. She said that she had been suspended and had been invited to a meeting on Sunday and that she believed that this was because she had told a lady to pull up her car to allow others to get in to the car park. She believed that the real reason was because she had refused to work while standing on the stool for health and safety reasons. A similar text message was forwarded to Mr Rendell and was in the bundle at page 86. In it she also stated that she suspected that if she was sick for one day the Respondent would start disciplinary action that she would put in a claim for non-payment of salary and for personal injury. She reported that Ms Bowden was really upset when she told her that she was not willing to work above her height for health and safety reasons.

62 That text message was forwarded to Mr Rendell; Ms Griffiths, the Respondent's HR advisor; Ms Spencer, the Senior HR Business Partner; and Mr Ian Fairlamb, Head of Production, who later heard the Claimant's appeal against dismissal.

63 On 16 October, the Claimant wrote to Ms Berger in HR. She asked for details of the time of the meeting and to be allowed to be accompanied by an external representative. She stated that the only lady she could recall speaking to when she was last at work was Ms Bowden. She recounted the conversation that she had had with Ms Bowden about working on both ends of the Brevetti 1 machine. She stated that she had been asked to work above height and with her ongoing injury to her right elbow, which she had sustained at work, she did not feel safe standing on a stool to remove a full tray of ampoules. She recounted that Ms Bowden had responded aggressively and asked her why she had not complained the day before. She replied that her elbow was paining her and she did not feel competent and safe to go on the machine again. She stated that she did not feel safe attending a meeting on her own due to the continuous victimisation, bullying and intimidation she had encountered at work for some time.

64 Ms Griffiths wrote to the Claimant on 17 October to confirm her suspension regarding: *"your alleged inappropriate behaviour towards other members of staff".* The letter stated that the suspension was a precautionary measure to allow a fair and impartial investigation to take place. The letter confirmed that the meeting on 21 October was an investigation meeting to be conducted by Mr Rendell. The Claimant was advised that the Respondent hoped that the period of suspension would not last longer than 2 weeks, during which she would be paid full pay. No mention was made of her request to be allowed to be accompanied.

65 Mr Rendell held an investigation meeting with the Claimant on 21 October. He was accompanied by Denise Griffiths of HR. The Claimant denied making the comment about guns and the comment that she hated seeing certain colleagues. She confirmed that it was likely that she said that she did not fear anyone other than God as this is part of her religion. She was asked what happened on 14 October at the gatehouse. She gave her explanation. She stated that she told the lady in the car that if she moved it, the barrier could come down. She then drove around her and went to the gatehouse and signed in. She stated that the security told her that if she turned her radio down the driver of the car might be able to hear her. He did not complain to her about anything else. She said that Ms Bowden intervened at this point and the Claimant told her that it was nothing to do with her. She admitted using her hands while she talked as it was common for her to speak with her hands.

66 Mr Rendell, accompanied by Ms Griffiths of HR spoke to Ms Bagabo on 22 October. Ms Bagabo confirmed that the Claimant did make the statement about guns and that she regularly stated that she hated this or that colleague. She could not recall exactly when the Claimant made these comments but stated that it was when they worked together on nights. She stated that she tried to avoid the Claimant when she could and that she had blocked her number because the Claimant was always complaining and was rude. She stated that she tried to avoid the Claimant as she was disrespectful and rude and complains a lot. She felt that the Claimant was out for a big pay out from the Respondent and that there was nothing that the company could do to

please her.

67 In the hearing the Claimant disputed that she worked with Ms Bagabo when she worked nights. Ms Bowden's evidence was that Ms Bagabo frequently worked overtime and it is possible that they worked together on those occasions. During the disciplinary process, the Claimant confirmed that they had known each other. Ms Bagabo was not interviewed further in the disciplinary process and the Tribunal was informed that she died sometime after.

68 Mr Rendell was away from the business on personal leave between 25 October and 13 November, which meant that he was unable to continue the investigation. The investigation was continued by Sharon Watkins, who was one of the Respondent's shift leaders. Mr Rendell asked her to continue the investigation before he went away.

69 Mr Rendell, as Shift Production Manager, was senior to Ms Watkins who was a shift leader and therefore in the same position as Ms Bowden, although on a different shift.

70 Mr Rendell did not handover any documents to Ms Watkins. Ms Griffiths of HR had notes from Mr Rendell's investigation meetings with the Claimant and Ms Bagabo as she attended those meetings for the purposes of taking notes and providing HR advice. It is likely that she passed those to Ms Watkins. Mr Rendell did not know who decided to refer the Claimant to a disciplinary hearing but assumed that it must have been Ms Jarvis.

71 Ms Watkins took over conduct of the investigation. She had to attend work on the weekend to interview the Claimant's colleagues. Her evidence was that before this investigation, her experience had been in investigating absence. She had never investigated allegations of misconduct before. She was accompanied by Ms Berger of HR in her meetings with staff.

72 She first met with Pauline Bagabo's son, Andy Kinyanjui on 25 October. HR asked the questions and noted the answers. He stated that he was intimidated by the Claimant when he heard her swear in the changing room. He stated that when she acts like that, he does not know how she is going to react and he would usually try to avoid her.

73 On 29 October, Ms Watkins met with Karen Collins. Ms Collins was the person who was had stopped under the barrier while driving into the car park on the morning of 14 October. Although Mr Gittins had made a complaint to the Respondent about the Claimant's conduct, Ms Collins had not made a complaint. Ms Collins confirmed that the Claimant drove in behind her and that her music was loud. She confirmed that the Claimant shouted at her that she could not stop there. She felt that the Claimant had been aggressive as she shouted and did not apologise. She was fast and erratic. She confirmed that the Claimant had not got close to her. She stated that she was shocked at the way the Claimant behaved as it was not what she expected on a Sunday morning.

74 Ms Watkins also spoke to Mr Gittins, the security officer from the car park who made the written complaint. He confirmed that it was not unusual for the Claimant to have her music blaring and that was not the problem. He also stated that it was not so much what she had been saying that day but the way in which she said it. He complained that the Claimant was angry and shouting. When asked about the Claimant's body language, he confirmed that it had been aggressive. He was concerned that it could have been seen by visitors.

75 Ms Watkins spoke to Ms Andrzejewska (Kasha) and to Ms Bowden on 3 November. Kasha confirmed that the Claimant left her feeling stressed. She recounted what happened when she was left with 3 trainees when Anthony was on holiday. She stated that she was explaining how to do the start up when the Claimant stood up and told her not to talk to her anymore and when asked what had happened, told her to "*shut up*" and left the room. This made her feel bad. When the Claimant returned to the room, she was fine. Kasha stated that the Claimant had shouted at a colleague, Nilofer Dawoodani, over a month earlier, in the canteen. She stated that the Claimant had been aggressive to Ms Bowden, was unpredictable when she was training her but that she was a good worker and was keen to learn.

76 Ms Watkins then spoke to Nilofer who confirmed that the Claimant had shouted at her in the canteen for no apparent reason. She said that the Claimant made her uncomfortable by staring at her, without saying anything. Nilofer confirmed that there was an occasion when she heard the Claimant swearing at Ms Bowden in the changing room. She said that Ms Bowden was asking the Claimant to calm down and for her to explain the problem. She recalled that the Claimant used the F word repeatedly and displayed aggressive body language. Nilofer confirmed that the Claimant was a strong personality who came across as powerful and who sometimes made her think that she had done something wrong.

77 Nilofer mentioned that Fahiq Ryan might had witnessed the event in the canteen. When Ms Watkins spoke to him, he could not recall the incident. He stated that he might have had his earphones in. However, he said that based on the Claimant's character he would not be surprised if that had happened. He stated that she was a good worker although she was negative. He wanted her to stop complaining about the company and the managers as he did not want to work in a negative environment.

78 Ms Watkins next interviewed Kim Ellis who had witnessed the incident in the locker room with the Claimant swearing. it is likely that this was the same incident that occurred on 22 September. Kim confirmed that the Claimant swore when she was talking to herself saying that someone told her that they thought she had broken the machine. Ms Bowden was trying to calm her down but she was having none of it. she recalled the Claimant punching the lockers and stamping her feet. She recalled the Claimant saying to Ms Bowden that she should not treat her like an "*F-ing*" child. She said that the Claimant swore at Ms Bowden who remained calm. She felt slightly threatened but there were lots of people around. She said that as the others looked shocked she realised that it was not the usual behaviour. This was her first day on the job so she did wonder what she had come to. She confirmed that the Claimant frequently spoke loudly about her health issues and that she had a negative attitude.

79 When Ms Watkins spoke to Ms Bowden she confirmed that the Claimant had told her when she hit her arm at work but that she had not taken it seriously as there was always something wrong with her. She said that it was hard to talk to the Claimant as she could go from being happy one moment to being angry the next. One would not know what mood she would be in or how she would react. She also stated that she did not feel that she could talk to the Claimant without a witness as she did not feel that she could trust her. She recounted the events of 22 September and confirmed that the Claimant had said that health and safety was more important. The Claimant told her that she did not want to work above height. She stated that because the Claimant mentioned health and safety, she checked the belt on the Wilco machine which the Claimant had previously worked on without problem and saw that this was higher than the belt on the Brevetti 1. She asked the Claimant why could she work on the Wilco without complaint the previous day and the Claimant replied that that was another day.

80 The last person Ms Watkins spoke to was Noah Pellicci. He confirmed that the Claimant got angry and shouted while training him and another colleague. He remembered that she got upset and was in a bad mood. She shouted at Kasha. She then talked to Noah about Kasha behind her back. He stated that the Claimant's behaviour was not always appropriate and that it was different to the way everyone else behaved at work and that he did not always know how to act around her.

81 Ms Watkins handed over any paperwork she had to Ms Berger the end of her investigation. It was her evidence that she had no further involvement. She was clear in her evidence that she did not make the decision that this should progress to disciplinary action. She felt that there was strong evidence to say that it should but she did not make that decision.

82 In live evidence Ms Watkins stated that under the Dignity at Work policy if someone made a complaint that a colleague had been rude to them and they were really distressed about it she would talk to both parties, make notes and see if she could get them to agree a resolution between them. If that was not possible and she needed to take it further, she would advise them to put their complaint in writing.

83 It was not clear to the Tribunal who made the decision that this should proceed to disciplinary action. The Respondent's witnesses who attended the hearing said that they did not know who had made that decision

84 One of the Respondent's stream managers, Susanne Jarvis, was asked by HR to conduct a disciplinary hearing but she did not make the decision that disciplinary action should be taken against the Claimant. That decision had already been taken.

85 Ms Berger from HR wrote to the Claimant on 9 November to inform her that following the completion of the investigation, she was required to attend a formal disciplinary hearing. Ms Watkins did not see the letter before it went out. The Claimant was informed that the hearing was due to take place on 15 November and would be conducted by Susanne Jarvis, production shift manager. Sheila Johnson, an HR consultant, would be in attendance.

86 The Claimant was informed that the purpose of the meeting was to discuss the allegation that on several occasions she had displayed unsatisfactory and unprofessional behaviour that had caused other employees to feel intimidated and threatened.

87 Ms Berger enclosed with the letter copies of the Respondent's disciplinary policy and procedure, copies of the notes from the investigation meetings held by Ms Watkins, an email from Mr Rendell dated 15 October which had the contents of the Claimant's text message to Ms Bagabo, the letter from Ms Bagabo to the Respondent, the letter from Ms Andrzejewska addressed to 'to whom it may concern', and witness statements from Andy, Kim, Fahiq, Kasha, Nilofer, Noah, and Karen. She also attached the statements from Mr Gittens, Ms Bagabo and Ms Bowden.

88 Also attached to the letter were the employee improvement notice, the investigation meeting notes from 30 September, and emails sent to Mr Rendell by Ms Bowden on 1 September, 23 September and 14 October.

89 The letter informed the Claimant that one possible outcome of the disciplinary hearing could be a finding that she had committed gross misconduct which could result in her summary dismissal. She was advised that she had the right to be accompanied by either a work colleague or a trade union representative. She was also advised that she should read the information prior to the disciplinary hearing and bring it with her on the day.

90 The Claimant was not told that she could bring witnesses and the letter did not inform her that the Respondent would not be calling any witnesses.

91 The letter did not contain a summary of the investigation, the information gathered during the investigation or its findings. The documents were simply enclosed with no indication of which of the attached documents were relied on in support of which allegation.

92 Ms Jarvis had the same hearing pack as the Claimant. She had no prior involvement in this matter. She believed that her role was to assess whether there had actually been an inappropriate behaviour by the Claimant.

93 By the time of the disciplinary hearing, the Claimant had not been interviewed about the allegations made by Kasha, Nilofer and Noah. She also did not know that the Respondent was going to revisit the incident that took place in the locker on 22 September.

94 The disciplinary hearing happened on 16 November. The notes of the meeting show that Ms Jarvis approached the disciplinary hearing by focussing on matters grouped under 4 headings: the incident in the locker room on 22 September, the incident on 14 October in the gatehouse, the complaints filed by Kasha, Nilofer and Noah on 14 October on the Claimant's behaviour and the letter HR received from Ms Bagabo on 15 October. She referred in her witness statement to a previous employee improvement note issued to the Claimant when she worked on nights but this was not

in the bundle of documents at the hearing and was not referred to in the hearing.

95 Ms Jarvis decided that she would not discuss with the Claimant the concerns she and Ms Bagabo raised with Ms Bowden when she hurt her arm in September. In her witness statement she stated that as it was a health & safety matter, it was outside of the scope of the disciplinary hearing. She did not ask the Claimant had happened.

96 In the disciplinary hearing, Ms Jarvis asked the Claimant to explain what happened in the locker room on 22 September. She did so. She denied the allegation that she was kicking and bashing lockers and noted that that had not been recorded in Ms Bowden's statement to Mr Rendell on the following day. She denied kicking, punching, bashing on the locker or stamping her feet. She confirmed that she swore once during the incident and not 10 times as reported by Nilofer. The disciplinary meeting was adjourned so that Ms Jarvis and HR could speak to Ms Bowden who confirmed that the Claimant had been bashing the lockers on 22 September and who explained that she did not put that in the original statement to Mr Rendell as she was most concerned about the aggression. She he stated that maybe the Claimant was not kicking.

97 On further consideration, Ms Jarvis removed the allegation of kicking the lockers from her consideration as it had not been specifically mentioned in the statements. However, she concluded that the Claimant had behaved in a violent and aggressive manner in the locker room that day.

98 The Claimant was asked about the incident at the gatehouse on 12 October, which had been reported by Mr Gittins. She explained that she felt that the matter had been blown out of all proportion and that she uses her hands and arms a lot when talking as a way of expressing herself and that she had not made a scene. She denied telling Karen that she could not park there and denied that she shouted.

99 She described the incident in the canteen as friendly banter over lunch and that she had not said shut up to Kasha but had told her not to even look at her lunch as it was a Jamaican lunch and she had set it on the table to get a drink for herself. The Claimant stated that some of the matters complained about her had been made up or had not happened and some were the result of her way of expressing herself being misunderstood as different cultures have a variety of expressions or ways of expressing themselves.

100 The minutes of the disciplinary hearing recorded that the Claimant was particularly upset when asked to comment on the letter from Pauline Bagabo as this was someone with whom she thought she had a friendship and who had asked her to take things back to Jamaica for her when she went there to visit family. She denied saying any of the things stated in Ms Bagabo's letter. She denied saying the word "*hate*" in relation to colleagues and remarked that it was a strong word. She denied referring to guns and shooting and wondered whether people had assumed that she would say these things because she is Jamaican. She stated that there seemed to be a perception that her mannerisms are more aggressive and confrontational than she meant them to be.

101 Ms Johnson commented that if she was perceived as behaving in that way, she must have been. The Claimant denied creating the environment. She stated that some statements were blown out of all proportion and others were lies. In the hearing she stated that no one at work had told her that she came across as creating such an environment and that someone at the Respondent ought to have told her, so she could have had an opportunity to change.

102 Once the meeting resumed after Ms Jarvis and Ms Johnson had spoken to Ms Bowden, Ms Jarvis read out a statement in which she stated that having considered the evidence the Respondent concluded that although the Claimant stated that the aggression was only perceived and not intended, she had come to the conclusion that there had been 4 incidents and 8 complaints about the Claimant which she construed as inappropriate and intimidating behaviour. She said that this was unacceptable and that the outcome of the meeting would be the Claimant's dismissal.

103 In her witness statement, Ms Jarvis explained that her reasons for that decision was that the Claimant had displayed aggression in her actions and had made inappropriate comments that left her colleagues feeling threatened and intimidated and were therefore serious. The Claimant had not accepted how her actions had impacted her colleagues and showed little consideration for her work colleagues and their feelings; and she had denied that some of the events occurred when there was evidence to the contrary. Ms Jarvis confirmed that she did not write the decision letter and that she did not have any input into it.

104 In her live evidence, Ms Jarvis stated that the points that led her to dismiss were the Claimant's conduct in the office and the impact on working relationships. She confirmed that the Claimant said that she was not aware of how she was perceived in the workplace. She had not had the text message from Ms Bagabo in the pack that she considered at the disciplinary hearing and she did not decide whether the Claimant had told Kasha to shut up, as alleged. She agreed with Counsel for the Claimant that the complaint from Kasha on its own would not have amounted to gross misconduct. However, she believed that the locker room incident was the most serious. The gatehouse incident was the next serious as Mr Gittins, an employee of another company, felt it necessary to put in a complaint. She did not decide whether the Claimant had actually made the statements reported by Ms Bagabo but decided that the Claimant had made her feel uncomfortable. Taking them all together, she was convinced that there had been a breakdown of work relationships where the Claimant was concerned and that the Claimant had demonstrated aggression at work. Some of her comments left people feeling intimidated and that was not acceptable. She did not believe that the Respondent would have been able to develop those working relationships if the Claimant remained at work. None of this was set out in the letter of dismissal.

105 The Respondent had never had a situation like this before where people in different departments felt strongly enough about a colleague's conduct to come forward to management.

106 The Respondent wrote to the Claimant on 20 November 2018 with a copy of the minutes of the disciplinary hearing attached and to notify her of the outcome. The

letter was written by Ms Johnson of HR. The letter stated that having reviewed the evidence and reflected on the Claimant's responses in the meeting, Ms Jarvis and HR decided that the appropriate decision was to terminate her contract of employment for gross misconduct with immediate effect. The letter stated that they had considered warnings, sanctions and dismissal with notice but that the significant number of incidents over the recent months and the Claimant's lack of awareness and acceptance of her unsatisfactory behaviour meant that no other disciplinary sanctions were appropriate. The letter did not say what were the act/s committed by the Claimant that constituted gross misconduct.

107 The Claimant was advised of her right to appeal against her dismissal. Her letter of appeal to Mr Fairlamb, Production Manager was dated 21 November. She stated that the statements the Respondent relied on were untrue. She also stated that she believed that she had been victimised based on the health and safety issues she highlighted to her supervisor and because she complained of an injury at work. She complained that many of the statements used in the disciplinary hearing had been obtained after her investigation meeting. She also believed that she had been dismissed because of the text message she sent Pauline Bagabo before her investigation meeting. She queried why, if her colleagues were having these kinds of problems with her, had it not been raised with her before or with the shift supervisor, when there is one on every shift, or with the manager on site on the day; where it could have been addressed.

108 In live evidence, Mr Fairlamb confirmed that he was approached by Sheila Johnson of HR and asked if he would conduct the Claimant's appeal hearing. The Claimant's appeal meeting was heard on 9 January 2019. He was accompanied by Jackie Turner, Senior HR Business Partner.

109 Mr Fairlamb decided to address the health and safety issue first. He asked the Claimant to explain what happened on 22 September in the locker room, which she did. The Claimant pointed out that she would have expected security or the police to be called if she had been behaving in a threatening manner. She denied that she had.

110 The Claimant stated that she believed that the motivation for her dismissal was her complaint about being asked to work above height and that it was a health and safety matter and her complaint that she had hurt her arm on the machine. Although her injury to her arm had not been logged as an accident by the managers, it had been discussed at the time it happened and had been discussed on her return to work, having not attended work on 23 September.

111 The Claimant also explained the Gatehouse incident and pointed out that Karen had not complained but that it was likely that Ms Bowden was upset as she had told her that it was nothing to do with her when she asked what was the issue. The Claimant denied showing aggression to Karen and stated that she did not know her and had never worked with her before. She had simply asked her to move forward so she could get in the car park. When they went in to work after leaving the car park, there was no issue between them and Karen held the door open for her to come in. The Claimant also pointed out that she did not know how to please the Respondent because if she raised her voice, then the complaint was that she shouted but there

were also complaints that she was quiet and said nothing.

112 They discussed the text messages to Pauline Bagabo. By this time the Claimant had revised her assessment of her relationship with Ms Bagabo and told Mr Fairlamb that she was more of an acquaintance.

113 The Claimant mentioned three other people who she believed witnessed the incident in the changing room, who she wanted Ms Fairlamb to speak to. These were Onofre, Chantelle and Joe. He agreed to look further into it and to speak to the decision makers to understand their process and ensure fairness.

114 The Claimant confirmed that she enjoyed her job and wanted to get it back. It was her case that this was related to her complaints about the health and safety issues she raised with Ms Bowden.

115 After the appeal hearing, Mr Fairlamb spoke to Chantelle and Onofre on 13 January. They both denied seeing the incident. By that time Joe had already left the Respondent's employment so Mr Fairlamb was unable to speak to him.

116 There were photos in the hearing bundle showing the height of the Marcesini 1 and 2 machines which were described as being of 37 and 41 inches high. Mr Fairlamb's evidence was that the machines were approximately 3 feet high and therefore would not have presented a problem for the Claimant. He stated that she would not have needed to use the stool to do her work. He stated that it would be more difficult to use the stool to collect ampoules than it would be to just do it. The stool could be used to clean the machine at the end of a batch but did not have to be used to do so. He confirmed that the transfer belt on the machine was broken but confirmed that the Respondent took health and safety seriously.

117 Mr Fairlamb confirmed that both the Claimant and Ms Bagabo complained of being hurt on a machine at work but neither incident had been recorded in the accident book. He confirmed that this was not an adherence to health and safety legislation. He also confirmed that neither incident had been recorded as an accident at work since then. He believed that both incidents were minor. He also confirmed that Ms Bowden was the only person who knew about the accident because as she did not record it, Mr Rendell and Ms Jarvis would not have known about it and so could not have taken action against the Claimant because of it. Kasha also knew about it.

118 He confirmed that he was unclear when the Claimant was alleged to have said those things to Ms Bagabo but as there were also other allegations against the Claimant he decided that he did not need to decide one way or another on those particular allegations.

119 Mr Fairlamb's evidence was that it was his decision to reject the Claimant's appeal but that Jackie Turner wrote the letter to the Claimant dated 17 January notifying her of his decision. He confirmed that he checked the letter before it went out.

120 The letter stated that the injury that the Claimant sustained to her elbow had

not been discussed or considered as part of the disciplinary process and so had not been taken into account in the decision to terminate her employment. Also, that the statements in the Respondent's possession from 8 people raised a concern or complaint regarding the Claimant's behaviour and attitude towards her colleagues. Mr Fairlamb confirmed in live evidence that the threat to shoot people, swearing in the locker room and hitting company property were the points that he considered gross misconduct. It is likely that he did decide that Ms Bagabo accurately reported her conversation with the Claimant. He confirmed the decision to dismiss the Claimant on the grounds of gross misconduct. The letter did not specify what were the act/s of gross misconduct.

121 The Respondent submitted that it was unusual for it to be in this position as it would normally try to resolve disputes between staff informally, internally. Both Ms Jarvis and Mr Fairlamb talked about the importance to the business of having good working relationships between staff.

122 The Claimant began the early conciliation process on 14 February 2019 and her ACAS early conciliation certificate was issued on 14 February 2019. Her claim at the employment tribunal was issued on 5 March 2019.

123 The Claimant had not found alternative employment by the time of this hearing. Her evidence was that most jobs in this sector required applicants to have 5 years clear job history which she would not have because of her dismissal. She did not believe that she would get a positive reference from the Respondent.

124 The Claimant applied for a number of jobs and registered with agencies like Adecco UK, Reed UK and TXM Recruit Ltd. She began employment as a Production Operator at Camden Town Brewery on 29 April 2019. That position came to an end on 13 June 2019.

125 The Claimant continues to search for Production operator roles. She enjoys this role and has had considerable experience in doing it, having done various production roles since 2000. The Respondent had no complaints about the quality of her work.

Law

126 The Tribunal considered the following law in reaching its judgment in this case.

127 The Claimant brings complaints of unfair dismissal, detriment following the making of a public interest disclosure, automatic unfair dismissal for making public interest disclosures and wrongful dismissal. If she were successful, the Claimant also seeks an uplift to her remedy for failure to comply with the ACAS Code of Practice on Disciplinary and Grievance procedures.

Unfair dismissal

128 In this case, the Tribunal is concerned with the question of determining the reason for the Claimant's dismissal and whether it is one of the reasons set out in

section 98(2) of the Employment Rights Act 1996 (ERA). The burden is on the Respondent to show the reason for the dismissal and that it is a potentially fair reason i.e. that it relates to the Claimant's conduct or capability. The Respondent's case is that the Claimant committed gross misconduct entitling it to dismiss her summarily.

129 A dismissal on the grounds of misconduct can be fair. In order to decide whether it is fair or unfair, the tribunal needs to look at the processes employed by the Respondent leading up to and including the decision to dismiss. In cases concerning the employee's conduct, a three-stage test must be applied by an employer in reaching a decision that the employee has committed the alleged act/s of misconduct. This was most clearly stated in the case of *British Homes Stores Ltd v Burchell [1980] ICR 303*, which has been confirmed in later cases. The court stated that the employer must show that he believed the employee was guilty of misconduct. The tribunal must be satisfied that the employer had had in his mind reasonable grounds which could sustain that belief, and that at the stage at which he formed that belief on those grounds, he had carried out as much of an investigation into the matter as was reasonable in the circumstances.

130 This means that the employer does not need to have conclusive direct proof of the employee's misconduct but only a genuine and reasonable belief of it which has been reasonably tested through an investigation.

131 If the Tribunal concludes from all the evidence that this is the case; then the next step for the Tribunal is to decide whether, taking into account all the relevant circumstances, including the size of the employer's undertaking and the substantial merits of the case, the employer has acted reasonably in treating it as a sufficient reason to dismiss the employee. In determining this, the Tribunal must be mindful not to substitute its own views for that of the employer. Whereas the onus is on the employer to establish that there is a fair reason, the burden in this stage is a neutral one. The Tribunal must ask itself whether what occurred fell within "the range of reasonable responses" of a reasonable employer. The law was set out in the case of *Iceland Frozen Foods v Jones [1982] IRLR 439* where Mr Justice Browne-Wilkinson summarised the law concisely as follows:

> "We consider that the authorities establish that in law the correct approach for the … tribunal to adopt in answering the question posed by [section 98(4)] is as follows:
>
> (1) the starting point should always be the words of section 98(4) themselves;
>
> (2) in apply the section (a) the tribunal must consider the reasonableness of the employer's conduct, not simply whether they (members of the tribunal) consider the dismissal to be fair;
>
> (3) in judging the reasonableness of the employer's conduct (a) tribunal must not substitute its decision as to what was the right course to adopt for that of employer;

> (4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;
>
> (5) the function of the …. Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable response 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."

132 The *Burchell* and *Iceland* tests above, stress the importance of employers carrying out reasonable investigation into any alleged or suspected misconduct. In *Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23, the Court of Appeal stated that the adequacy of an employer's investigation must be analysed in accordance with the objective standards of a reasonable employer. The 'range of reasonable responses' test for determining the fairness of a dismissal therefore also applies to the issue of whether or not the investigation process was sufficient and reasonable in the particular circumstances of the case. According to *Harvey*, "the purpose of the investigation was not to establish whether or not an employee was guilty of the alleged misconduct, but to establish whether there were reasonable grounds for the employer's belief that the employee may have committed the offence, which in turn justified the decision to dismiss".

133 One way of considering the adequacy of the employer's investigation is for a tribunal to consider whether the investigation was fair and proportionate having regard to the employer's capacity and resources. Although an employer must act fairly, the employer is not required to conduct a forensic or quasi-judicial investigation. (*Santamera v Express Cargo Forwarding* [2003] IRLR 273).The adequacy of the investigation should generally be measured against the gravity of the charges facing the employee.

134 In *A v B* [2003] IRLR 405, the EAT suggested that when considering the reasonableness of an investigation, it is relevant to consider the gravity of the charges and the consequences for the employee if proved. Serious allegations of criminal misbehaviour, where disputed, should be the subject of the most careful and conscientious investigation. The person carrying out the investigation should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the individual, i.e. the investigation should not be one-sided or set up to establish guilt: it should be even-handed. This is particularly apt when an employee is suspended and is deprived of the opportunity to contact other staff or witnesses. It will be difficult in such circumstances for an employer to justify not disclosing the content of evidence obtained during the investigation process that may assist the employee's defence. Delays in the investigation process may also affect the reasonableness of the investigation itself and the fairness of the dismissal, especially if the individual's defence may be prejudiced as a result. An employee may be able to challenge the reasonableness of the investigation process if there is evidence that the passage of time has resulted in the fading of memory or recollections of actual or potential

witnesses, or where other witnesses could have been interviewed at an earlier stage who are no longer available.

135 Where there is conflicting evidence between a witness and the employee accused of wrongdoing, there is an onus on the employer to resolve the conflicts by testing the evidence where it was possible to do so. Elias LJ commented in the case of *Roldan v Salford NHS Trust* [2010] ICR 1457 that it is common experience that upon scrutiny, if part of a story begins to unravel, other aspects may do so as well, doubts begin to emerge and impacts upon the interpretation of events. In cases where evidence conflicts, employers should not feel obliged to resolve the conflict. It can be perfectly appropriate for the employer to give the employee the benefit of the doubt and find the case not proved. The Court of Appeal also emphasised that it was particularly important for employers to take their responsibilities seriously in conducting a fair investigation where the employee's reputation, or ability to work in their chosen field, is at stake.

136 *Harvey* states that employees should know who the ultimate decision maker is in any disciplinary situation and have the opportunity to make representations to them. This means that where human resources professionals are relied on to give advice they should be careful to avoid advising on what the appropriate sanction is or deciding whether conduct amounts to gross misconduct.

Protected Disclosures

137 The Claimant's case is that the reason for her dismissal was that she made protected disclosures. She also complained that she suffered detriment as a result of making protected disclosures.

138 In order for disclosures to be considered as protected in accordance with the Employment Rights Act 1996 (ERA) three requirements need to be satisfied. A 'qualifying disclosure' needs to be a disclosure of information, which the employee genuinely and reasonably believes discloses the information; is made in the public interest and is made by the worker in a manner which accords with the scheme set out in the ERA sections 43C-43H.

139 The worker must believe that the disclosure tends to show wrongdoing in one of five specified areas; or deliberate concealment of that wrongdoing. It is not necessary for the information to be true. However, determining whether they are true can assist the tribunal in their assessment of whether the worker held a reasonable belief that the disclosure in question tended to show a relevant failure. (*Darnton v University of Surrey* [2003] IRLR 133.)

140 What sort of information would satisfy the test? In the case of *Kilraine v London Borough of Wandsworth* [2018] ICR 1850 Sales LJ defined the test that had to be applied to determine whether the worker had provided information that complied with the section as whether the disclosure had sufficient factual content and specificity such as is capable of tending to show the wrongdoing alleged and not just a belief that there is wrongdoing. See also *Soh v Imperial College of Science and Technology and*

Medicine EAT0350/14. A belief may be a reasonable belief even if it is wrong. See *Babula v Waltham Forest College* [2007] ICR 1026.

141 Disclosures can be made verbally, in writing or a combination of both. The burden is on the worker to prove that the disclosure was made as alleged. Disclosures can be discerned having regard to a series of communications, viewed as a whole, even when the recipients of those communications are different.

142 Disclosures must also be made to particular people in order for them to be protected. In accordance with section 43(C), disclosures would usually be made to the employee's employer.

143 The ERA sets out 5 statutory categories to which the information must relate if the disclosure is to be one qualifying for protection. The Claimant relies on 43B(1)(d), that the health and safety of any individual has been, is being or is likely to be endangered. In the case of *Norbrook Laboratories (GB) Ltd v Shaw* [2014] ICR 540 EAT, Slade J stated that, unlike the more general paragraph (43B(1)(b) that a person has failed, is failing or likely to fail to comply with a legal obligation) where there must be an actual or likely breach of the relevant obligation by the employer; under 43B(1)(d), there only needs to be the fact or likelihood of that endangering, not any definable legal breach by the employer. In the case of *Fincham v HM Prison Service* 0925/01 the EAT held that the statement *"I feel under constant pressure and stress awaiting the next incident"* was sufficiently detailed in the circumstances to identify the danger the health and safety as it inferred that the worker's own health was at risk.

144 The worker must also have a reasonable belief that the disclosures are in the public interest. The tribunal considered the case of *Chesterton Global Limited (t/a Chestertons) v Nurmohamed* [2017 EWCA Civ. 979 in which a worker's disclosure qualified for protection where there were both personal and public interests involved. It was held that there were two parts to the test: firstly, did the worker genuinely believe at the time they made the disclosure that it was in the public interest and secondly, was it reasonable for him to have done so. "Public interest" is to be construed by a tribunal as it stands and applied as a matter of fact. In so doing the court suggested the following four guidelines as follows: (a) the numbers in the group whose interests the disclosure served; (b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect; (c) the nature of the wrongdoing disclosed - disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people; and lastly (d) the identity of the alleged wrongdoer – the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest, though this should not be taken too far.

145 If a tribunal concludes that the worker is only motivated by self-interest and therefore had no reasonable belief in public interest – even if he could have had such a belief – then it is open to the tribunal to rule that the disclosure does not qualify for

protection.

Detriment

146 It was the Claimant's case that she suffered detriments as a direct consequence of making three protected disclosures about health and safety. Section 47B(1) of the ERA states that a worker has the right not to be subject to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure. The term 'detriment' is not defined in the ERA. Detriment will be established if a reasonable worker would or might take the view that the treatment accorded to them had in all the circumstances been to their detriment.

147 In *Blackbay Ventures Ltd v Gahir* [2014] IRLR 416*, EAT*, Judge Serota gave extensive guidance to tribunals. *Harvey* summarised the section dealing with detriment as follows: once a protected disclosure has been found to exist it needs to be shown that: - the worker has been subjected to a detriment; the detriment arose from an act or deliberate failure to act by the employer, other worker or agent; and the act or omission was done on the ground that the worker had made a protected disclosure.

148 The Tribunal must analyse the mental processes (conscious or unconscious) which caused the employer so to act. The tribunal considered the law in *Fecitt v NHS Manchester* [2012] ICR 372 in which the Court of Appeal stated that it is not necessary that the protected disclosure is the sole or principal reason for the treatment. Once the employee proves that there was a protected disclosure, that there was detriment and that the employer subjected her to that detriment, the burden shifts to the employer to show the ground on which the detrimental treatment was done. (Section 48(2) ERA). Causation will be established unless the employer can show that the protected disclosure played no part whatsoever in its acts or omissions. What was the reason for the treatment? The employer must prove on the balance of probabilities that the protected act did not materially influence (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower.

Automatic Unfair Dismissal

149 The Claimant's case was also that she had been automatically unfairly dismissed because she made a protected disclosure. She makes a claim under Section 103A Employment Rights Act 1996. That section states that an employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

150 When an employee has over two years' service with the employer at the time of her dismissal the burden of proof is on the employer to prove the reason for dismissal but the employee will have to produce sufficient evidence to raise the question of whether the dismissal may have been for an automatically unfair reason.

151 In the case of *Kuzel v Roche Products Ltd* [2008] IRLR 530, *CA* Mummery LJ stated:

> *"The ET must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the ET that the reason was what he asserted it was, it is open to the ET to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the ET must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so.*
>
> *As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not that advanced by either side. In brief, an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced led by the employee on the basis of an automatically unfair dismissal on the basis of a different reason."*

152 In the case of *Salisbury NHS Foundation Trust v Wyeth* [2015] UKEAT/0061/15, it was held that the issue was whether the reason or principal reason for the dismissal was a protected disclosure, thus rendering the dismissal unfair. Judge Eady QC held that in its analysis of the case the employment tribunal must conduct the necessary critical assessment of the employer's reasons for its conduct and properly explain its findings and reasoning in that regard.

153 The reason for the dismissal is the factor or factors operating in the mind of the person making the decision to dismiss or which motivates them to do so.

154 In the case of *Royal Mail Group Ltd v Jhuti* [2019] UKSC 55 a person in the hierarchy above the Claimant decided that she ought to be dismissed because of her protected disclosures. That reason was hidden behind an invented reason, the employee's poor performance, which the decision-maker adopted. The Court held that it was the tribunal's duty to penetrate through the invention rather than allow it to infect its own determination. The tribunal has to search for the real reason for the dismissal even if that meant attributing to the employer the state of mind of the person who, because of her disclosures, ensured that she was dismissed rather than that of the deceived decision-maker.

Wrongful dismissal

155 The Claimant also complained that the Respondent breached her contract by dismissing her for gross misconduct. The Claimant believed that she should be entitled to notice pay as there was no gross misconduct warranting her summary dismissal.

156 In the case of in *Mbubaegbu v Homerton University Hospital NHS Foundation Trust* UKEAT/0218/17 *(18 May 2018, unreported)* it was held that it is possible for gross misconduct to be established through a series of breaches taken collectively, even if each one in itself would not have passed the threshold. Choudhury J said that the assessment of whether misconduct is sufficiently serious to warrant summary dismissal is that it must be such as to undermine the relationship of trust and confidence between employer and employee. In that case the employer relied on a series of breaches rather than one act of gross misconduct. The employee alleged that the employer had set about collecting ammunition against him. The court said that it was quite possible for a series of acts to demonstrate a pattern of conduct to be of sufficient seriousness to undermine the relationship of trust and confidence between employer and employee.

> *"…that may be so even if the employer is unable to point to any particular act and identify that alone as amounting to gross misconduct.*
>
> *There is no authority to suggest that there must be a single act amounting to gross misconduct before summary dismissal would be justifiable or that it is impermissible to rely on a series of acts, none of which would, by themselves justify dismissal. In such a case ….. it may be that upon examination of a series of acts … the employer finds that it has lost confidence that the employee will not act in that way again. I see no reason why an employer would be acting outside the range of reasonable responses were it to dismiss an employee in whom it had lost trust and confidence in this way."*

The ACAS Code of Practice (2015); and
Discipline and Grievances at work: the ACAS Guide

157 The Code states that it provides basic practical guidance to employers, employees and their representatives and sets out principles for handling disciplinary and grievance situations in the workplace. A failure to follow the Code does not, by itself, make the organisation liable to proceedings however, the Tribunal must take the Code into account when considering relevant cases.

158 The Code states that whenever a disciplinary or grievance process is being followed it is important to deal with issues fairly. The Code identifies the following elements to that:

- employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions;
- employers and employees should act consistently;
- employers should carry out any necessary investigations, to establish the facts of the case;
- employers should inform employees of the basis of the problem and give

them an opportunity to put their case in response before any decisions are made;

- employers should allow an employee to appeal against any formal decision made

159 The Guide provides good practical advice for dealing with discipline and grievances in the workplace and complements the Code. Employment Tribunals are legally required to take the Code into account when considering relevant cases. Tribunals are also able to adjust any compensatory awards made in these cases by up to 25% for unreasonable failure to comply with any provision of the Code. This means that if a tribunal felt that an employer had unreasonably failed to follow the guidance set out in the Code they can increase any award they have made by up to 25%. Conversely, if they feel an employee has unreasonably failed to follow the guidance set out in the Code they can reduce any award they have made by up to 25%.

Applying law to facts

160 The Tribunal will now set out its conclusions on the issues in the case, following the list of issues set out on pages 48 – 50 of the bundle of documents.

161 The Tribunal will consider the issues in a different order as appeared more logical given the issues.

Whistleblowing

Did the Claimant make protected disclosures within the meaning of section 43A of the Employment Rights Act 1996 (ERA)?

162 The Claimant refers to 3 potential disclosures.

163 *On the 14 October the Claimant informed Amanda Bowen that she could not work on the Brevetti 1 machine due to health and safety concerns as she was being required to work above her height.*

163.1 In this Tribunal's judgment, it is highly likely that the Claimant said to Ms Bowen on 14 October that she could not operate the Brevetti 1 machine, operating both ends as she had been asked to. She stated that she could not work on the machine because she would have to stand on the stool to do so and because it would mean working in a confined space and above height; all of which was a health and safety issue for her. She felt that having to step on and off the machine with the tray of ampoules would be a health and safety hazard. Although Ms Bowden denied that the Claimant had referred to health and safety concerns in her objection to working on the machine, that is exactly what she stated in her email to Mr Rendell of the same day and in her statement to Ms Watkins during the investigation. It is this Tribunal's judgment that the Claimant referred to health and safety concerns

when she objected to working on the machine.

163.2 The Claimant spoke to Ms Bowden, who was her line manager and someone above her in the hierarchy. In that context, Ms Bowden was representing the employer.

164 *On 15 October, the Claimant sent a confidential message to Ms Bagabo which was forwarded to Mr Rendell, referring to her conversation with Ms Bowden the previous day and in which she made the statement that Ms Bowden was upset when she told her that she was not working above her height under health and safety.*

164.1 It is this Tribunal's judgment that the Claimant stated in the text message to Ms Bagabo that she had an aching elbow, that she was seeking advice about taking legal action against the Respondent on health and safety grounds and that the real reason for her suspension was that she refused to work while standing on a stool for health and safety reasons. She stated that Ms Bowden was so upset when she told her that under health and safety, she was not going to work above her height.

164.2 That text message was sent to Ms Bagabo who was one of the Claimant's colleagues. She was not a manager and did not represent the Respondent. The Claimant did not know that she would forward the text to Mr Rendell and it is highly unlikely that she expected her to do so.

165 *On 16 October, the Claimant wrote to Ms Berger of HR in which she explained what had happened on 14 October and raised health and safety concerns.*

165.1 In this Tribunal's judgment, the Claimant wrote to Ms Berger in the stated terms. In the email she stated that she had referred to an ongoing injury to her right elbow when she spoke to Ms Bowden.

Were any of these protected disclosures?

166 In this Tribunal's judgment, all three communications concerned the same matter. They all referred to the Claimant's statement to Amanda Bowden on 14 October after she was instructed to work on both ends of the Brevetti 1 machine. The first disclosure were the words spoken during the actual conversation with Ms Bowden, the second was the way the Claimant relayed to contents of the conversation to a colleague, Ms Bagabo and the third was her explanation to HR of what had been said between her and Ms Bowden.

167 Dealing with each in turn

The comments the Claimant made to Ms Bowden on 14 October

168 In the conversation with Ms Bowden on 14 October, the Claimant stated that

her health and safety was likely to be endangered if she had to work on the machine that day; due to the confined space, the need to work above height, and to stand on and off the stool to do the work. Ms Bowden knew about the injury the Claimant had sustained to her elbow as the Claimant had reported it to her when it happened. It is likely that she referred to the pain in her elbow when talking to Ms Bowden on 14 October as another reason why she could not work on that line that day.

169 Those were all the factors that the Claimant believed created a health and safety hazard for her. She told Ms Bowden that she believed that her health and safety was or was likely to be endangered by having to work in those conditions.

Was this a reasonable belief?

170 It is this Tribunal's judgment that the Claimant had a reasonable belief that if she worked that shift with the pain/discomfort in her elbow, coming on and off the stool with a tray of filled ampoules that there was a possibility of there being an accident or of her health and safety being endangered in some way. In this Tribunal's judgment, that was a reasonable belief. The circumstances were that the belt on the machine was not working. Ms Bowden confirmed in her email to Mr Rendell of the same date, that it would have been awkward to do what she had asked the Claimant to do. That was without an injury to her elbow.

171 It is this Tribunal's judgment that the disclosure had a sufficient degree of factual content and specificity to show what the Claimant considered was the health and safety issue and why she considered that her health and safety would be endangered by working on the machine that day. It is this Tribunal's judgment that the Claimant had a genuine and reasonable belief that the disclosure she made on 14 October to Ms Bowden tended to show that her health and safety was likely to endangered.

172 It is also this Tribunal's judgment that the disclosure to Ms Bowden was made to a representative of the company as Ms Bowden was her line manager with the authority of the Respondent behind her.

Did she believe that it was in the public interest?

173 The Claimant was giving Ms Bowden information about her personal situation that day. She had worked on the machine previously without any objection. It was not a wholesale refusal to work or to ever work on that machine again. It related to the particular set of circumstances that day which led her to believe that her health and safety was likely to be endangered if she were to work on it.

174 Applying the principles set out in the *Nurmohamad* case above. The disclosure points to the Respondent's instruction to the Claimant to work on a machine with a broken belt which she believed required her to use a stool to complete the work moving trays of ampoules of pharmaceutical liquid, in a confined space with a painful elbow. The information was personal to the Claimant but also applied to all the other Production operatives who worked on the line as any of them could have found

themselves in this situation.

175 The Respondent confirmed that it worked in a regulated environment and that it is subject to strict guidelines and procedures yet it also confirmed that the transfer belt on the Bravetti 1 was not working and it is likely that it had not just stopped working that day. There had been a delay in getting it fixed. Also, Ms Bowden accepted in the hearing that she was aware that the Claimant and Ms Bagabo had hurt themselves on equipment at work yet she had not recorded either of those incidents as accidents at work. She had not taken those incidents seriously. In her witness statement she denied knowing anything about the Claimant's accident but in her statement in the internal investigation to Ms Watkins, she confirmed that she knew about the accident but dismissed it, as in her opinion, there was always something wrong with the Claimant. That was not an appropriate response to a report of an accident at work. The Claimant immediately came and reported it to her when it happened and it was her duty to record it. Mr Fairlamb confirmed that Ms Bowden's was not an appropriate response. This was a company producing pharmaceutical products operating within strict guidelines that is likely to have included strict health and safety procedures, including how to deal with accidents at work. The health and safety of all the Respondent's workers was therefore an important matter that needed to be taken seriously by all managers, even if it disrupted work on a line.

176 For all those reasons, the Tribunal concludes that the information the Claimant gave to Ms Bowden on 14 October was of a particular set of circumstances that she genuinely and reasonably believed tended to show that her health and safety was likely to be endangered if she worked on the line for that shift. That information applied to the Claimant in her personal circumstances that day but was also of wider application and concerned all the Production Operatives who worked for the Respondent as they all had to work in similar conditions to the Claimant. The health and safety of staff in such an environment is of interest to all staff and to the general public.

177 Taking all those matters into consideration, it is this Tribunal's judgment that the Claimant made a public interest disclosure to Ms Bowden on 14 October.

The statement in the text message to Ms Bagabo on 15 October

178 In this Tribunal's judgment the information contained in the text message to Ms Bagabo was more an allegation by the Claimant that the Respondent had treated her unfairly by ignoring her accident at work and by suspending her for refusing to work while standing on a stool. She does not provide information in the text message that is required by the law. She did not provide information tending to show that the Respondent had endangered or had been likely to endanger her health and safety. She also sent this message to a colleague with no expectation that it would sent on to management.

179 For all those reasons, it is this Tribunal's judgment that the text message on 15 October was not a public interest disclosure.

The statement in the email to Ms Berger

180 In the letter to Ms Berger the Claimant referred to not feeling safe standing on a stool to remove a full tray of ampoules because she would have had to work above height and with the injury that she sustained to her elbow. This is a repeat of the disclosure she made to Ms Bowden. She did not refer to her belief that it would mean having to work in a confined space but otherwise, she provided the same information that she gave to Ms Bowden.

181 It is this Tribunal's judgment that this was a repeat of the earlier disclosure. This time she made the disclosure to HR which is part of the company. It is this Tribunal's judgment that she genuinely believed that working in the way that she was asked to do that day was likely to have endangered her health and safety.

182 It is this Tribunal's judgment that the Claimant genuinely believed that her health and safety was likely to have been endangered on 14 October by Ms Bowden's instruction that she should work on the Bravetti 1 machine that day on her own in the way she described. This was a genuine and a reasonable belief. She made a protected public interest disclosure to Ms Bowden on 14 October. She repeated that disclosure to Ms Berger in an email on 16 October. The Claimant did this in the public interest. There was nothing for her to gain personally from making this disclosure and it was not suggested by the Respondent in the hearing that she had anything to gain by doing so.

183 It is this Tribunal's judgment that the Claimant made a protected disclosure.

Detriments

Did the Claimant suffer the following detriments as a result of making the above protected disclosures?

184 Ms Bowden's decision to stop her from working on the Brevetti 1 machine was a detriment to the Claimant as it would restrict her flexibility as it meant that she would not be able to work on all machines.

185 Ms Bowden's decision made it unlikely that the would become a Tier 2 operator, which is what she wanted to do. She would not have been able to work on all the Respondent's machines.

186 Did she suffer this detriment? In her email to Mr Rendell on 14 October, Ms Bowden told him that because of the Claimant's refusal to work on the machine for that shift she was going to take her off it permanently as she was not allowed to pick and choose when she worked on it. She confirmed this in her statement where she stated that she did so because the Clamant was being disruptive.

187 *Has the Respondent proved on the balance of probabilities that the protected act did not materially influence (in the sense of being more than a trivial influence) the decision to remove her permanently from working on the Bravetti 1? (see Fecitt above).*

188 When the Claimant stood her ground that she felt that it would put her health and safety at risk to work on the machine, Ms Bowden appeared to accept it and put her on a different machine. She then said that she would not allow the Claimant to work on the Bravetti machine again for two reasons – because the Claimant disrupted the shift and because she should not be allowed to pick and choose what machine she worked on. The Respondent did not produce evidence that showed that there was a major disruption of the shift because of the Claimant's actions that day. She was simply moved to work elsewhere and someone else came and worked on the Bravetti. The Tribunal was not clear on what Ms Bowden meant by her description of the Claimant being disruptive as this was not explained. There was no evidence that she was in the habit of trying to choose where she worked. Ms Bowden had also said that the Claimant was a good worker who was keen. The evidence was that she wanted to be trained to do other things in the business and to learn new skills.

189 The Respondent has failed to show that the protected disclosure played no part whatsoever in Ms Bowden's decision to remove the Claimant permanently from working on the Bravetti, thereby reducing her chances of becoming a Tier 2 operator. It is likely that Ms Bowden's decision was a direct response to the Claimant's disclosure.

190 The Respondent has failed to prove that on balance, the protected act did not materially influence Ms Bowden's decision to remove the Claimant permanently from the Bravetti. It is highly likely that it did.

191 This part of the claim succeeds.

The decision to bring disciplinary proceedings against the Claimant

192 The decision to bring disciplinary proceedings against the Claimant was a detriment to her. It was the start of the process that would ultimately lead to her dismissal. The Respondent chose to bring disciplinary proceedings rather than try to resolve informally any issues there may have been between her and her colleagues or between her and Ms Bowden. That was a detriment to the Claimant.

193 The Respondent was unable to tell the Tribunal who made the decision to bring disciplinary proceedings against the Claimant.

194 Mr Rendell began the investigation because of complaints from Ms Bowden and from Ms Bagabo and Kasha who she had advised that they should present written complaints to the company about the Claimant. Mr Rendell did not complete the investigation and did not make the decision to instigate disciplinary proceedings as he was on leave when that decision was taken.

195 The evidence shows that there was never a positive decision taken by anyone to instigate disciplinary proceedings and instead, the process was simply allowed to run on from the investigation to a disciplinary hearing without any manager having taken a look at the statements from the investigation and assessing them. There does not appear to have been an assessment of whether there was a case for the Claimant to answer in relation to the allegations contained in the statements or whether these

complaints could be addressed in a different way under the Respondent's policies. The other possibility was that the Respondent failed to identify the decision maker to the Tribunal.

196 The Respondent was clear in the hearing that HR would never have made the decision to bring disciplinary proceedings as it is a decision that has to be made by a manager. The Tribunal was not told who that manager was.

Has the Respondent proved on balance that the Claimant's protected disclosure did not materially influence its decision to bring disciplinary proceedings against the Claimant?

197 No. the Respondent has failed to do so. Firstly, the Tribunal did not have any evidence on who made the decision or what was in the mind of the decision-maker as the Respondent presented no evidence on this and failed to identify who made the decision. The Respondent has therefore failed to show that the protected disclosure played no part whatsoever in the decision to bring disciplinary proceedings on the Claimant.

198 Secondly, the decision to bring disciplinary proceedings against the Claimant was in all likelihood based on Ms Bowden's email of 14 October and the letters from Ms Bagabo, Kasha and Mr Gittins, all received around the same time, which she advised them to send to the Respondent to formally raise complaints about the Claimant. If it is correct that there was no definite decision at the end of the investigation to bring disciplinary proceedings as opposed to any other form of action and the disciplinary action simply followed on from the investigation; the disciplinary proceedings against the Claimant was based on those statements. It is highly likely that the disclosure had more than a trivial influence on Ms Bowden's mind when she advised those individuals to formalise those issues in writing to the Respondent rather than speaking to the Claimant, as the Dignity at work policy recommends as the first stage of resolving these kinds of issues.

199 The Respondent has failed to discharge its burden in relation to this aspect of the claim. This part of the Claimant's claim succeeds.

The unreasonable and unfair way in which the disciplinary proceedings were conducted

200 The disciplinary proceedings were conducted in an unfair and unreasonable way. Some of the facts that demonstrate this are as follows: - the Claimant was not told that the incident in the locker room would be revisited in these disciplinary proceedings. It was not discussed with her in the investigation meeting with Mr Rendell. It was not clear to the Tribunal when the decision was taken to include the locker room incident in these proceedings and whether it was after the Respondent considered Ms Bowden's 14 October email further or when it received Ms Bagabo's letter/text messages.

201 The Claimant was not told that Ms Watkins was taking over the investigation

from Mr Rendell.

202 In the letter of invitation to the disciplinary hearing, the Respondent failed to tell the Claimant which of the enclosed documents were being relied on to support the allegation that she had behaved in a way that was intimidating and threatening – both of which are quite serious charges. Without that information she was hampered in her preparation for the disciplinary hearing. If she knew certain charges were being progressed she could have considered whether to bring witnesses. That was not a matter that was covered in the invitation letter. At the disciplinary hearing, the Claimant disputed all the allegations. Apart from Ms Bowden, the Respondent failed to go back to the individuals who made the most serious allegations against the Claimant to confirm their statements and they were not called to the disciplinary hearing so that she could challenge them. Ms Bagabo did not provide dates in her letter. It was likely that if the Claimant made those statements she did so a long time prior to them being raised. One of the questions that may have been asked was - why had she not raised this sooner if she took these threats seriously?

203 The Claimant did not have an opportunity to the Respondent on the statements provided by Kasha, Nilofer and Noah. It was not clear what weight Ms Watkins and Ms Jarvis put on those statements and how Ms Jarvis considered them in coming to her conclusion that the Claimant had committed gross misconduct. The Respondent failed to clarify what were the incidents of gross misconduct and what were simply misconduct. The Respondent did that at the Tribunal hearing but not at the time of dismissal.

204 Mr Fairlamb failed to identify what he considered to be gross misconduct.

Has the Respondent proved on balance that the protected disclosure played no part whatsoever in the unreasonable and unfair way in which it conducted the disciplinary proceedings?

205 It is this Tribunal's finding that Ms Jarvis did not know about the Claimant's complaint on 22 September that her health and safety was likely to be endangered if she worked on the Brevetti 1 machine that day. By the time she came to conduct the disciplinary hearing she was aware that there was a health and safety issue but decided that it was not relevant to the disciplinary matters and did not discuss it with the Claimant. The Claimant's email to Ms Bagabo was not forwarded to Ms Jarvis and she did not work with the Claimant or Ms Bowden.

206 The HR department was copied in to the Claimant's text message to Ms Bagabo when it was forwarded by Mr Rendell. Ms Griffiths and Ms Berger assisted with the investigation, prepared the papers and advised the managers on the appropriate way of dealing with these matters. HR were aware of the protected disclosure. Ms Johnson attended the disciplinary hearing, advised Ms Jarvis and wrote the letter of dismissal without input from Ms Jarvis.

207 As the Respondent had an HR department the Tribunal would not have expected the disciplinary proceedings to have been conducted in this way. The

Claimant was hampered in being able to defend herself against the allegations brought against her and was not given sufficient information at the time to be able to respond. However, there was no evidence to show that HR acted in this way because the Claimant made a protected disclosure.

208 The Respondent's evidence was that, even though it had an HR department it was unfamiliar with dealing with misconduct or alleged misconduct in these terms. Prior to this investigation, Ms Watkins had only ever investigated attendance issues. Ms Jarvis and Mr Fairlamb had been involved in disciplinary proceedings before this one but it is this Tribunal's judgment that they were not totally responsible for the shortcomings identified above. Everyone placed great reliance on the HR team. The investigation notes were passed back to HR and the pace was set and organisation of the disciplinary proceedings were done solely by the HR team. It is likely that the lack of experience of conducting conduct disciplinary proceedings, and of sufficient expertise within the HR team caused the disciplinary proceedings to be conducted in the unfair and unreasonable way identified above.

209 On balance, the Respondent has shown that the protected disclosure played no part whatsoever in the unfair and inappropriate way that the disciplinary proceedings were conducted.

210 This part of the complaint fails.

The finding of gross misconduct.

211 The finding of gross misconduct was a detriment to the Claimant. It led Ms Jarvis to consider, with advice from HR, that summary dismissal was an appropriate sanction. The question here is whether the decision that the Claimant had committed gross misconduct was the result of the Claimant making the protected disclosure.

212 The evidence showed that Ms Jarvis and Mr Fairlamb believed that the Claimant had caused her colleagues to feel uncomfortable at work and she had behaved in a way that left people feeling intimidated and threatened. Ms Jarvis believed that the Claimant had behaved in a way that was unacceptable to the Respondent as a business, which disrupted the team. She also believed that the Respondent would be unable to mend the broken working relationships between the Claimant and Ms Bowden and the Claimant and Ms Bagabo who asked not to have to work with her on 23 September as well as with the other colleagues who gave statements.

213 Although they did not make a clear finding that it was said, Mrs Jarvis and later, Mr Fairlamb considered on balance that she said something like - if this was America where people have guns she would have shot so and so – which gave them cause for concern. That was one of the allegations in Ms Bagabo's letter which caused Mr Rendell to suspend the Claimant and was one of the main points, together with the Claimant's conduct in the locker room and the car park, that Ms Jarvis and Mr Fairlamb stressed at the hearing as being the reasons for her dismissal.

214 Whether this was a fair reason for dismissal will be dealt with later in this judgment. As far as the protected disclosure detriment claim is concerned, it is this Tribunal's judgment that the Respondent proved on balance that its decision that the Claimant had committed gross misconduct was based on Ms Jarvis' and Mr Fairlamb' assessment of the allegations contained in the statements they considered at their hearings. That related to the Claimant's conduct in the locker room, the statement that if this was America she would get a gun and would consider shooting colleagues, the altercation in the car park/gatehouse which caused an employee of another company, Mr Gittins to complain in writing to the Respondent; and the way in which she made colleagues feel uncomfortable, threatened and intimidated. Those were the matters that weighed heavily on Ms Jarvis' mind when she concluded the disciplinary hearing.

215 In this Tribunal's judgment, the Respondent proved on balance that the Claimant's protected disclosure did not materially influence its decision to make a finding of gross misconduct.

216 The disciplinary proceedings were no longer anything to do with Ms Bowden once the statements were handed in to the HR office. The Respondent has proved on balance that the finding of gross misconduct was made on the basis of Ms Jarvis' interpretation of the evidence that she had before her and the advice she received from HR. Mr Fairlamb simply confirmed her decision.

217 That part of her complaint fails.

218 The Claimant has succeeded in her complaint that two of the detriments she suffered were as a result of making a protected disclosure.

Unfair Dismissal

219 *Has the Respondent demonstrated that the reason or principal reason for dismissal was* conduct *or otherwise a prescribed reason under section 98 of the Employment Rights Act (ERA) 1996?*

219.1 It was the Respondent's case that the Claimant was dismissed for gross misconduct. However, at the time of dismissal, the Respondent did not identify the act or acts of misconduct that it considered to constitute gross misconduct and warrant summary dismissal as an appropriate sanction.

219.2 The letter confirming the suspension referred to the Claimant's inappropriate behaviour towards her colleagues. It did not refer to specific instances of inappropriate behaviour. The invitation letter to the disciplinary hearing attached copies of the Respondent's policies, meeting notes, witness statements and emails and alleged that the Claimant had displayed unsatisfactory and unprofessional behaviour that had caused other employees to feel intimidated and threatened. There was no assessment of that evidence which set out the Respondent's reasons for referring this matter for a disciplinary hearing

as opposed to any other way of addressing the issues.

219.3 Following the disciplinary hearing, the letter of dismissal informed the Claimant that she was being dismissed because there had been a number of significant incidents over the previous months; together with her lack of awareness and acceptance of her unsatisfactory behaviour. Those incidents were not listed and there was no longer a reference to intimidation and threatening behaviour. The minutes were divided under four headings and those were the 4 matters that Ms Jarvis relied on in her live evidence. The letter notifying the Claimant of the outcome to her appeal referred to their being numerous complaints about her behaviour and attitude towards her colleagues. There was no longer any mention of incidents or of intimidation and threatening behaviour in that letter and those complaints were not set out.

219.4 The common thread of all the documents produced in the disciplinary process was misconduct - although of varying forms and degrees of seriousness. In this Tribunal's judgment, it is likely that the managers who conducted the disciplinary process believed that the Claimant had committed or was about to commit or could commit misconduct or further misconduct. What that misconduct was or could be could have been made clearer at the time of the Claimant's dismissal. But it is likely that Ms Jarvis had misconduct in her mind when she dismissed the Claimant.

219.5 In this Tribunal's judgment, the Respondent has shown that the reason for the Claimant's dismissal was misconduct.

220 *If the Respondent has discharged the burden of proof upon it as to the reason for dismissal then, applying the statutory test at section 98(4) ERA 1996, was the dismissal fair or unfair in all the circumstances (including the size and administrative resources of the Respondent's undertaking), having regard to the equity and substantial merits of the case. Using the following 3 principles from the case of BHS v Burchell:*

220.1 *Did the Respondent have a genuine belief in the Claimant's guilt?*

220.2 *Was that belief formed on reasonable grounds?*

220.3 *At the time that it came to that belief, had the Respondent carried out a reasonable investigation?*

221 When Ms Jarvis made the decision to dismiss the Claimant she believed that the Claimant was guilty of gross misconduct. When she informed the Claimant at the end of the disciplinary hearing that she was going to be dismissed, she referred to 4 incidents and 8 complaints. Apart from the way in which the minutes of the disciplinary hearing are set out, those were never identified at the time of the dismissal.

222 There were the following issues with the Respondent's disciplinary process: -

222.1 The Respondent was unable to identify who made the decision to refer the matter to a disciplinary hearing.

222.2 Although the Respondent's disciplinary process stated that the company would provide a summary of the relevant information gathered during the investigation before moving to a disciplinary hearing, that did not happen. The Claimant was sent a bundle of documents with the letter of invitation to the disciplinary hearing but there was no summary of the investigation in the letter. The letter did not identify which allegations were considered to be gross misconduct, which were being pursued as such and on what basis. This was important because the Claimant was entitled to know which allegations were considered the most serious.

222.3 Mr Rendell had not notified her that the Respondent was proposing to do revisit the incident that occurred on 22 September when he met her for his investigation meeting so she would have been unaware of it. The immediate reason for doing so was not made clear in the letter of invitation to the disciplinary hearing. From the facts above, one reason could have been Ms Bowden's statement in the email of 14 October that she was unhappy that the Claimant's swearing and aggression had not been mentioned in the employee improvement notice issued to the Claimant by Mr Khalid.

222.4 On 22 September, Ms Bowden spoke to Mr Rendell about the incident. He advised her to talk to the Claimant about it on the following day and issue an employee improvement notice, if necessary. In her email of 23 September, after the Claimant failed to attend work, Ms Bowden stated that her intention was that if the Claimant had attended work, she would have given her an employee improvement notice. In saying so she was referring to the Claimant's conduct in the locker room. It is likely that the Claimant slammed/bashed her locker and swore in the locker room incident. It is unlikely that she also kicked the locker door. Ms Bowden retracted that allegation when Ms Jarvis spoke to her. She went back to that allegation in the hearing but the Tribunal did not find that evidence credible. The Tribunal relies instead on her contemporaneous evidence in her email of 23 September, which she sent having been present for the Claimant's conduct in the locker room. In it she stated that the Claimant had been aggressive and had sworn. Her comment in the email was that it would have been appropriate for the Claimant to have been issued with an employee improvement notice for that incident.

222.5 Another reason for revisiting the 22 September issue was given in the hearing. The Respondent's position was that it chose to revisit it because other matters had come to light subsequently which made it consider that this was a pattern of behaviour. That was not set out in the letter of invitation or the other documents. There were no dates in the statements provided by Kasha, Nilofer and Noah but they do all state that

the Claimant was unpredictable and that she made them feel uncomfortable by screaming or shouting on that and other occasions.

222.6 The complaint from Mr Gittins was about something that happened on 14 October and therefore after the locker room incident. Mr Gittins' complaint was that the Claimant shouted at both he and Ms Ellis. Ms Ellis did not complain about the car park incident. When Ms Ellis was asked about the Claimant she confirmed that she talked loudly and had a negative attitude. Her statement did not refer to the incident in the car park.

222.7 In the circumstances, it was not outside the band of reasonable responses for the Respondent to wish to consider at the disciplinary hearing whether the Claimant's actions in the locker room in getting so angry that she either bashed her locker or slammed the locker door and swore at least once; was similar to the conduct she was alleged to have displayed in the car park/gatehouse by shouting at a colleague that she did not know or on other occasions when she made other colleagues feel threatened or was unpredictable and aggressive. It could not be said that in those circumstances that, in the light of the later allegations, no other Respondent would have revisited the earlier incident and looked at it again at the disciplinary hearing.

223 The Respondent failed to make clear to the Claimant at the end of the disciplinary process what acts of misconduct were considered proved against her and what was unproven; what was considered gross misconduct or misconduct and why it was considered reasonable to summarily dismiss her. Those are required aspects of a fair dismissal.

224 The Respondent had an HR team. There were HR advisors and a senior HR business partner who assisted the managers in this case. The Respondent was clear in the hearing that HR would not have taken the decision to refer this matter to a disciplinary hearing but it was also evident that the HR team assisted the managers throughout this process. Although the business was clearly inexperienced at misconduct dismissals, the Respondent had appropriate administrative resources.

225 The letter of suspension referred to alleged inappropriate behaviour. When the Claimant was interviewed by Mr Rendell she was asked about the complaints from Mr Gittins and Ms Bagabo. It was appropriate, as the investigation progressed, for the Respondent to speak to other members of staff while investigating those allegations against the Claimant. Ms Watkins followed all the lines of enquiry which came up from the people she spoke to. However, the Claimant did not have an opportunity to comment on the additional statements and the allegations they contained. Also, there was no assessment of the evidence that came from the investigation and a decision on what allegations the Respondent wished to take forward to a disciplinary hearing against the Claimant.

226 That means that the disciplinary hearing would have been the first time the Claimant got an opportunity to discuss the allegations against her from Kasha, Noah

and Nilofer. This would be the only opportunity the Respondent had to find out what her response was to those allegations. The letter of dismissal did not record Ms Jarvis' conclusions on those matters. At the time of her dismissal, the Claimant would not have known whether Ms Jarvis took into account the new statements when she decided that the Claimant should be dismissed for gross misconduct. Their allegations were that the Claimant sometimes looked at people the wrong way, frequently shouted or showed aggression at work and that she had a negative attitude which affected them.

227 The Respondent had the option of going back to those individuals to put the Claimant's case to them but did not do so. After Ms Jarvis spoke to Ms Bowden she decided that it was unlikely that the Claimant had kicked the locker. Although that is contained in the minutes, it is not reflected in the decision letter. If she had spoken to the others, there is a slim possibility that there may have been further changes in the case against the Claimant.

228 The Respondent failed to identify which allegations were of gross misconduct and proven and which were of misconduct and/or not proven. In the hearing, Ms Jarvis identified the allegation from Kasha as not warranting summary dismissal and therefore more likely to be an act of misconduct rather than of gross misconduct. She also removed the allegation of kicking the locker from her consideration of the incident on 22 September after speaking to Ms Bowden. These details were not included in the letter of dismissal.

229 It was necessary for the Respondent to clarify in the outcome letter, which allegations had been found likely to have happened and which were no longer going to be proceeded with. This was relevant to the question of the reasonable belief and the reasonableness of the dismissal because there were a series of allegations, some of which were more serious than others and the Respondent's classification of the allegations was different between the letters informing her of her suspension, inviting her to the disciplinary hearing, notifying her of the outcome to the disciplinary hearing and after her appeal.

230 This was not remedied by the appeal as Mr Fairlamb did not set out the reason why he confirmed the dismissal or give any details of the Claimant's misconduct but instead, referred to there being 4 separate incidents that raised a concern about her behaviour and attitude towards her colleagues. It was not clear what those were and whether they were all of gross misconduct. It is likely that they were the same as Ms Jarvis found as he did not deviate from her findings.

231 The decision to summarily dismiss the Claimant for gross misconduct. Ms Jarvis stated that the significant number of incidents together with the Claimant's lack of awareness and acceptance of her unsatisfactory behaviour led her to decide that there was no other disciplinary sanction that was appropriate. The Tribunal accepts Ms Jarvis' evidence that the main issue for her were the incident in the locker room and the incident in the car park as they both show the Claimant displaying aggression. Ms Jarvis did not decide on each alleged comment but believed that overall, the Claimant made inappropriate comments that left her colleagues feeling threatened and intimidated and which were therefore serious.

232 Ms Jarvis grouped all the allegations together in her mind and came to a decision that this was gross misconduct. As these were serious allegations and because the Claimant disputed them, it would have been fair for her to be told what conclusions Respondent came to on each allegation.

233 For the reasons set out above, the dismissal was procedurally unfair.

234 The Respondent also failed to follow the ACAS Guidelines in that it failed to assess the investigation and tell her why it had decided that this was a disciplinary matter. This was a failure to inform the Claimant of the basis of the problem and give her an opportunity to put her case in response before any decisions were made. It failed to tell her that the locker room incident would be brought into these proceedings. It failed to tell her which allegations were found proved and which not.

235 In the circumstances, it is the Tribunal's judgment that the Claimant was unfairly dismissed as the Respondent failed to follow a fair disciplinary procedure.

236 In this Tribunal's judgment, the dismissal was procedurally unfair.

If the dismissal is found to be procedurally unfair would the dismissal have been fair but for the procedural failing?

237 Although this was not specifically identified in either the disciplinary or the appeal outcome letters, it is this Tribunal's judgment from the evidence that it is likely that both managers, Ms Jarvis and Mr Fairlamb considered that the Claimant made a statement similar to the one alleged by Ms Bagabo that if this was America she would be able to get a gun and shoot colleagues. They found that unacceptable. Also, that she was aggressive in the locker room and demonstrated this by bashing or slamming the locker door and swearing in earshot of her manager and other colleagues. They also found it likely that she shouted at colleagues in the car park/gatehouse. Other colleagues stated that she made them feel uncomfortable, that she displayed negative behaviour and that she often shouted at colleagues, which they found to be intimidating. It was open to them on the evidence to come to those conclusions and to consider that she had committed misconduct.

238 It was also, as already stated, within the band of reasonable responses for an employer to reconsider an earlier conduct matter where it later realises that it was not a one-off incident but was part of a pattern of behaviour which gives it cause for concern. The locker room incident was dealt with in September but it was not unreasonable for the Respondent to revisit it once it received allegations of a similar nature. What was unfair was the fact that it never told the Claimant that it was doing so.

239 It is therefore this Tribunal's judgment that there is a % chance that if the Respondent had followed a fair procedure it would have come to the conclusion that the Claimant had committed serious misconduct warranting dismissal.

240 The parties are to make written submissions to the Tribunal on the size of the *Polkey* reduction in this case.

Whether, in the circumstances, the Claimant's dismissal was automatically unfair under section 103A ERA 1996.

241 The Claimant failed to show that the Respondent had in mind her protected disclosure when it made the decision to dismiss her for gross misconduct. The evidence shows that the matters in Ms Jarvis' mind were the allegations of misconduct against the Claimant and the Claimant's attitude to those allegations which was to not acknowledge her colleagues' concerns.

242 The Respondent had an unprecedented number of complaints about the Claimant. Some were encouraged by Ms Bowden but there was no evidence that she wrote them or collected them and put them to the Respondent. Ms Bagabo was someone with whom the Claimant was acquainted and yet she had concerns over statements the Claimant about work, her colleagues and her general negative attitude towards the business; which she was prepared to put in writing to the Respondent.

243 The Respondent had those matters in mind when it made the decision to dismiss the Claimant. Mr Fairlamb confirmed Ms Jarvis' decision.

244 The claim of automatic unfair dismissal fails and is dismissed.

Notice Pay

245 Did the Respondent prove that the Claimant had committed gross misconduct which meant that it could dismiss her summarily?

246 When an employee commits a fundamental breach of contract by her conduct and the employer accepts that breach, the employer is entitled to dismiss the employee summarily. Usually, an employment contract will set out examples of conduct which would be considered gross misconduct which would warrant summary dismissal.

247 Although the Claimant's contract did have such a clause, the examples of conduct identified did not include the conduct for which she was dismissed. Furthermore, the Respondent did not identify any item in that list as describing the conduct for which the Claimant was dismissed.

248 Looking at the allegations contained in the statements, if the Respondent accept everything said in them the conduct that could be identified would have been as follows:

248.1 Aggressive conduct in the locker room

248.2 Swearing in the locker room in the presence of her line manager and colleagues

248.3 Threatening that if she was in America she would have got a gun and shot so and so

248.4 Shouting in the car park

248.5 Shouting/screaming in the canteen

248.6 Being negative, erratic and angry for no apparent reason

249 The Respondent did not rely on one incident as the Claimant repudiatory breach of contract but a cumulation of acts, most significantly, the conduct in the locker room, the statement about guns and the conduct in the car park.

250 The Claimant had not directly threatened anyone or physically assaulted anyone. However, she had talked about shooting particular people - if this was America and she had a gun. It is highly likely that she had conducted herself aggressively in the locker room when she swore and slammed/bashed a locker in the presence of her manager and colleagues. On balance, it is highly likely that she had shouted a colleague in the canteen. It is this Tribunal's judgment that this was conduct that could undermine the trust and confidence between employer and employee.

251 The Respondent took into account the Claimant's responses to the allegations in the disciplinary hearing. It is likely that she was surprised by the Respondent's decision to revisit the incident on 22 September. She had not yet had an opportunity to comment on the contents of the statements from Nilofer, Noah and Kasha although she would have seen them before as they were enclosed with the letter of invitation to the disciplinary hearing. The Respondent took into account her responses at the disciplinary hearing. The letter of dismissal confirms that the Respondent considered that her lack of awareness and her refusal to accept the impact of her conduct contributed to Ms Jarvis' decision that the trust and confidence in this employment relationship had been undermined to the degree that it could not be repaired.

252 The allegations contained in the statements, letters and emails that the Respondent considered at the disciplinary hearing were serious allegations. They were that the Claimant had conducted herself in an aggressive manner at work. The Claimant did not perceive herself as behaving in that way but the Respondent had a few statements that confirmed that her colleagues experienced her as negative, sometimes threatening, shouting and swearing.

253 In those circumstances, the Respondent is entitled to consider that such conduct is unacceptable in the workplace and that it undermines the relationship of trust and confidence between employer and employee. Even though the Respondent failed to follow a fair procedure in coming to the decision to dismiss the Claimant, it is likely, on balance, that she did behave in the way alleged and that it was appropriate to summarily dismiss her for gross misconduct.

254 The Claimant has succeeded in her complaint that she suffered two detriments because she made a protected disclosure.

255 The Claimant's dismissal was procedurally unfair.

256 The complaint of breach of contract fails and is dismissed.

257 The complaint of automatic unfair dismissal fails and is dismissed.

258 The parties are to make written representations by **1 June** so that the Tribunal can decide on the Polkey reduction and the remedy due to the Claimant.

Employment Judge Jones
Date: 4 May 2020