Case No: 2500825/2019

EMPLOYMENT TRIBUNALS

Claimant: Mr J Tait

Respondent: Pizza Express Restaurants Ltd

CERTIFICATE OF CORRECTION
Employment Tribunals Rules of Procedure 2013

Under the provisions of Rule 69, the Judgment sent to the parties on 2 March 2020, is corrected as set out in bold at paragraph 2 below.

Employment Judge **Johnson**

Date 17 March 2020

Important note to parties:
Any dates for the filing of appeals or reviews are not changed by this certificate of correction and corrected judgment. These time limits still run from the date of the original judgment, or original judgment with reasons, when appealing.

THE EMPLOYMENT TRIBUNALS

Claimant: **Mr J Tait**

Respondent: **Pizza Express Restaurants Limited**

Heard at: **North Shields Hearing Centre** **On:** **Monday & Tuesday 10th & 11th February 2020**

Before: **Employment Judge Johnson sitting alone**

Members:

Representation:

Claimant: **Mr J Anderson of Counsel**
Respondent: **Mrs J Linford (Solicitor)**

JUDGMENT

1. The claimant's complaint of unfair dismissal is well-founded and succeeds.

2. The respondent is ordered to pay to the claimant the agreed sum of **£9,500.00** by way of compensation by way of unfair dismissal.

REASONS

1. The claimant was represented by Mr Anderson of Counsel, who called the claimant to give evidence, but no other witnesses. The respondent was represented by its solicitor Mrs Linford, who called to give evidence Miss Livvie McEntee (Restaurant Manager) and Mr Darren Gray (Restaurant Manager). A witness statement was submitted by Ms Gemma Stocks, but Miss Stocks did not attend the hearing. The claimant and the witnesses for the respondent had prepared typed and signed witness statements which were taken "as read" by the tribunal, subject to questions in cross examination and questions from the tribunal judge. There was an agreed bundle of documents marked R1 comprising 153 pages of documents.

2. By a claim form presented on 18th April 2019, the claimant brought complaints of unfair dismissal, unlawful disability discrimination and unlawful race discrimination. At an earlier preliminary hearing, the allegations of unlawful disability discrimination and race discrimination were withdrawn. The only claim to be decided at this Hearing was the claim for unfair dismissal.

Findings of fact

3. The respondent is a sizeable company, with numerous restaurant outlets

throughout the United Kingdom. The claimant was employed by the respondent as a waiter, serving in its Gosforth restaurant. His employment began on 1st January 2011 and ended when he was summarily dismissed on 15th February 2019. In its response form ET3, the respondent states that the claimant was dismissed for gross misconduct, namely "aggressive and intimidating behaviour". The claimant denied any aggressive or intimidating behaviour.

4. The issues to be decided by the tribunal are:-

   4.1 Did the respondent hold a genuine belief that the claimant had committed the act or acts of misconduct alleged?

   4.2 Were there reasonable grounds for that belief?

   4.3 Did the respondent carry out a reasonable investigation into the allegations?

   4.4 Did the respondent follow a fair procedure before deciding to dismiss the claimant?

   4.5 Was the decision to dismiss the claimant one which fell within the range of reasonable responses, open to a reasonable employer in all the circumstances of the case?

5. The incident which formed the subject matter of the disciplinary proceedings against the claimant, took place on 12th January 2019. The claimant was working at the Gosforth restaurant, which was managed by Miss Livvie McEntee and in her absence by Ms Laura Bell. Laura Bell was acting as manager on 12th January.

6. The claimant had asked Livvie McEntee if he could be given a week's holiday with effect from Monday 14th January and believed that his request had been granted by Miss McEntee. The claimant made arrangements for family outings during that week. Towards the end of his shift on 12th January, the claimant went into the office to check the work rota for the following week and discovered that the rota stated that he would be on holiday on Monday 14th, but working for the remainder of the week.

7. The claimant accepted that he became "angry and frustrated", because he had been told by Miss McEntee that he would be granted the week's holiday, whereas the rota showed that he was at work. The claimant took the rota from the pouch on the wall and went back into the restaurant to raise the matter with Laura Bell. Ms Bell's statement to the investigating officer includes the following:-

   > "John came from the office waving a piece of paper shouting "is this the rota for next week?" I asked where he got if from, as I had not been in the office to see it. He was so irate I could not answer. I asked again where from? I had not seen it. He was shouting about how he was supposed to be on holiday next week – I did not know about it. He told me to "come with him" to the office. He showed me the rota. I tried to explain if it wasn't on display, I could not say for sure if it was the approved rota. I came back out onto the floor and explained I could find out, he was still shouting, asking if anything I can do. Was too worked up to answer."

8. Another waiter, Mr Craig Irwin, was present. His statement to the investigating officer included the following:-

   > "I was in the kitchen when JT came strutting through the restaurant with rota for next week. He was upset and angry, raising his voice at Laura. Upset about not being on holiday or getting contract hours. Laura asked him to

calm down. John was aggressive in manner, having a go at Laura. Laura tried to sort things calmly 3-4 times. John asked if he could go home. Slamming chairs down."

When he was asked about the claimant's body language, Mr Irwin replied, "upset, stomping around".

9. At page 37 in the bundle is a note from the assistant manager Jessica Slesser to Livvie McEntee, in which Ms Slesser states as follows:-

"John raised an issue about his holiday with Laura. Laura informed me that he was very unprofessional when he brought this to her attention and stated that he was shouting. A note was left for me the next day so I could try and sort cover. He approached me about it the next day and still seemed quite annoyed, saying he'd made plans for his week off and even if he was to be in he hasn't been given his contracted hours."

Although unconnected to the incident, Ms Slesser went on to mention that coffee steam arm hadn't been cleaned after use on a few occasions and that "John was quite defensive, saying it wasn't him and after it occurred again I found that it was him so I asked him to ensure it was cleaned after use. It can be easy to forget sometimes but his attitude about it was negative."

10. Miss McEntee was appointed to carry out an investigation into the claimant's conduct. At paragraph 3 of her witness statement to the tribunal, Miss McEntee states as follows:-

"I had been on holiday for a week and when I came back Laura Bell came to see me that she had been on shifts with the claimant and he had been rude to her. I sat down with her and took notes of what she told me. I also spoke to a witness Craig Irwin, and again noted what he told me. He told me the same thing as Laura about what had happened. I also received an e-mail from Jessica Slesser about the claimant's behaviour. I decided to suspend the claimant during the investigation, based on the risk of him behaving in the same way again and this was confirmed in writing on the 21st January 2019.

11. The claimant was suspended by letter on 21st January (page 38). The letter states:-

"I write to confirm that you have been suspended from work on full pay (based on an average of the last twelve weeks) on 21st January, pending the outcome of an investigation into allegations of aggressive behaviour and misconduct."

12. The claimant attended that investigation meeting with Miss McEntee on 23rd January. Notes appear at page 43 – 49 of the bundle. At the very beginning of the interview, Miss McEntee informed the claimant that they were "here to discuss incidents two weeks ago with Laura on Saturday night and general attitude to team and Jess". No specific allegations were put to the claimant at this stage. During the interview the claimant said the following:-

"I apologise if I seemed threatening to Laura. I kicked off. I didn't realise I rose my voice. I have been told I sometimes talk loud. I do apologise if I sounded loud. I have poor hearing so can talk loud. She kept going on and on and that's when I got upset with her."

When asked about his own body language, Miss McEntee put to the claimant that "witnesses have said you were waving the rota in her face". The claimant denied

that. Nowhere in any of the statements of those involved in the incident does anyone say that the claimant was waving the rota in Laura's face.

13. Miss McEntee interviewed Craig Irwin and Laura Bell. Laura Bell states that the claimant was shouting "is this the rota for next week". Ms Bell does state that the claimant "told me to come with him into the office". Ms Bell does not say that the claimant shouted at her to come into the office. Only when asked by Miss McEntee what the claimant's body language was like, did Ms Bell say that it was "aggressive and angry – starting to lose control". Miss McEntee then asked Ms Bell "has he made you feel threatened before"? That question was put even though Ms Bell had never suggested that she felt threatened by the claimant's behaviour. Ms Bell replied that the claimant "can be aggressive or snappy". Mr Irwin's interpretation of the claimant's body language was that he was "upset", stomping around.

14. Having carried out that investigation, Miss McEntee prepared an Investigation Report which appears at page 50 – 51. The report states that her remit "was to establish whether the behaviour of John Tait towards Laura Bell on the 11th of January is to be deemed as gross misconduct and whether his attitude in general during the week commencing the 7th of January amounts to misconduct." In answering questions from Mr Anderson, Miss McEntee was unable to identify exactly when that remit had been prepared, and by whom. The tribunal found it likely that the remit had been prepared at the same time as the report itself.

15. Under the heading "Allegations and Findings" Miss McEntee states that the finding is that the allegation is upheld and states:-

> "On balance of the witness statements provided by both Laura Bell and Craig Irwin, which both agree that John was shouting at Laura and waving a schedule in her face, I find that the behaviour of John described by both employees was aggressive and in violation of Violence at Work policy. Both statements concur that John continuously raised his voice to Laura in the restaurant. There is some disagreement as to whether or not there were customers present to witness his behaviour, however I find that unimportant, as the behaviour itself is unacceptable under any circumstances. John offers that he is a loud person by nature and was upset that his requests were not included in the rota, however I do not find this mitigation is sufficient in these circumstances."

With regard to the allegation of "general attitude during the week commencing 7th January" Miss McEntee again said that the allegation is upheld and says that the assistant manager Jessica Slesser found the claimant's attitude on the matter to be "negative." The claimant goes on to say that "negative attitude displayed is misconduct". She then goes on to say "John again offers a mitigation that he is a loud person by nature, and did express remorse that his behaviour may have come across as rude, but overall I do not find this satisfactory in these events."

Miss McEntee concludes that "there is a disciplinary case for both misconduct and gross misconduct to be heard".

16. The manner of this investigation by Miss McEntee was challenged by Mr Anderson in cross examination. Miss McEntee accepted that none of the witnesses had said that the claimant had waved the rota in Laura Bell's face. Miss McEntee accepted that the respondent does not have a "violence at work" policy. Miss McEntee said she meant to refer to the respondent's Bullying and Harassment (Dignity at Work) policy which appears at page 144 in the bundle. Miss McEntee accepted that Laura Bell's initial complaint was simply that the claimant had been "rude" and that no mention was made of aggressive, intimidating or threatening behaviour. At no stage did Ms Bell state that she had felt threatened or intimidated. It was put to Miss

McEntee that questions to Ms Bell and Mr Irwin were "closed" questions, couched in terms which suggested they should agree with the proposition being put to them by Miss McEntee. Miss McEntee was unable to give any meaningful explanation as to why she had rejected outright the claimant's explanation about this loud voice and how he felt angry and frustrated over the miscommunication relating to his holiday request. Miss McEntee was also unable to explain why she had gone beyond a fact-finding exercise, simply to establish the claimant had said or done or failed to do on the day in question and what was his explanation for so doing or not doing.

17. Miss McEntee concluded that there was a case to answer and the matter was then handed to Mr Darren Gray to conduct a disciplinary hearing. The first letter inviting the claimant to a disciplinary hearing is dated 23rd January and appears at page 53. It states as follows:- "the purpose of the hearing is to discuss allegations of:-

    - Aggressive behaviour
    - Misconduct

    No specific detail is given as to what was the aggressive behaviour or other misconduct. However, the letter does enclose copies of the witness statements from Laura Bell and Craig Irwin, the investigation interview of Mr Tait, the e-mail from Jessica Slesser and Miss McEntee's investigation report. The letter warns that the claimant may face a number of sanctions up and included written warning, final written warning/your dismissal".

18. The claimant did not receive that letter in time to attend the hearing and it was therefore rearranged for 31st January. The letter inviting the claimant to that hearing was dated 27th January and appears at page 56. No further detail is included in that letter about the allegations against the claimant.

19. The disciplinary hearing took place on 31st January. At the very beginning of the hearing, Mr Gray informs the claimant, "the reason you're here is for being aggressive in the workplace. Have you got anything you would like to say?" Again, no specific details are given to the claimant as to what are the precise allegations against him and how what he is alleged to have said or done amounts to "being aggressive in the workplace". When Mr Tait handed in a number of statements which he had prepared for the disciplinary hearing, Mr Irwin says to him, "in regards to your statement, this disciplinary has nothing to do with rota/hours – it is do with your behaviour. All we can work on today is the investigation. We can only consider information we have been given."

20. Throughout the hearing, the claimant repeats that he frequently speaks loud due to a hearing defect and acknowledges that when he becomes upset and frustrated, he voice can become loud to the extent that he describes it as "bellowing". The claimant describes his feelings as "I was upset but I wouldn't say angry. More frustration than anger". The claimant apologises on several occasions saying, "I apologise if I came across like that – but I did not mean to, nor did I intend to. I am a lot bigger than Laura so I did not realise how I came across." When asked if his frustration was good reason to act the way he did, the claimant said, "it is not acceptable but it is understandable – I was frustrated due to my request not being followed. There were several incidents where my request was not honoured." When asked "when you get frustrated, how do you act?", the claimant replied, "I raise my voice – I don't smash anything - I don't slam doors – I become speechless – sometimes I raise my voice."

21. It was put to the claimant that, "there is a report that you slammed chairs - did you do that?" The claimant replied, "I did not slam any chairs. I didn't touch the chairs."

22. Mr Gray put to the claimant that the investigation report said that he was "close to Laura's face" holding the rota. The claimant denied being close to Laura's face.

23. Elsewhere in the interview, the claimant says:-

> "I did raise my voice – my voice is quite bellowing. I did not deliberately raise my voice. It raised due to the situation. I do not realise how loud my voice is. I would have remembered if I screamed and shouted."

Nowhere in any other statements did anyone say that the claimant "screamed and shouted".

The claimant goes on to say "I did not come across in an appropriate manner. I have a tendency to talk with my hands so that can come across as threatening. I did not get angry. I have a loud voice naturally I did not shout and I did not scream.

It was put to the claimant by Mr Gray, "they have said that you got angry. You were losing control – why do you say you only raised your voice?" The claimant replied, "I did move a chair over and that could have been perceived as slamming but that is it."

24. Mr Gray then put to the claimant the following question, "have you read the Violence at Work Act?" to which the claimant replied, "no I haven't". Mr Gray says "I have got three employees saying they found you angry aggressive and losing control – are you saying they took this from a loud voice?" The claimant replies that "I did not mean to come across as rude – I apologise for the way I have come across."

25. Following that meeting, Mr Gray again spoke to Laura Bell and Livvie McEntee to clarify the replies he had been given by the claimant. The claimant was not given an opportunity to comment upon what either of those people said to Mr Gray

26. By letter dated 15th February (page 83 – 84) Mr Gray informed the claimant that he had decided to dismiss the claimant. The letter states as follows:-

> "I am writing to confirm my decision to summarily dismiss you for gross misconduct. The reason for this is:-
>
> i) Aggressive behaviour in the workplace against a fellow employee which resulted in you shouting angrily and aggressively towards Laura Bell.
>
> ii) Inappropriate use of company property.

27. Mr Gray states in the letter that he had checked the claimant's personnel file and could find no reference to him having a hearing deficit which could make his voice loud and says as a result, "I will not be using this as mitigating circumstances". With regard to the stacking/slamming of the chairs, Mr Gray informs the claimant as follows:-

> "I've investigated further and asked Laura "can I have more detail on when you said John was stacking and slamming chairs"? Laura has stated "it was making more noise than it should as he was slamming them against each other." Craig was asked "in your investigation interview John was slamming down chairs could it be that this was just stacking chairs?" He stated "No. There's just stacking chairs which people do, he was slamming them.""

28. Mr Gray's conclusion in his letter is as follows:-

"Taking into account everyone's statement including your own, I believe that you did in fact slam the chairs which is also in appropriate behaviour. You also stated "I did not mean to come across that way and I apologise for raising my voice. I did not mean to intimidate her". I believe that your actions could be taken as intimidating and inappropriate for the workplace and in line with Pizza Express policy "shoutin is deemed as workplace violence."

29. Under rigorous cross examination from Mr Anderson, Mr Gray accepted that nowhere in any of the respondent's policies does it state that, "shouting is deemed as workplace violence". Mr Gray accepted that shouting of itself would not ordinarily be classified as any kind of misconduct. Mr Gray accepted examples of when members of staff would have to raise their voices or shout at each other so as to be heard over the noise created by a restaurant full of people. Mr Gray was unable to identify anywhere in the respondent's policy where shouting could properly be categorised as such an offence. Mr Gray tried to suggest that this behaviour fell within the definition of "conduct that is physical, verbal or non-verbal". It was put to Mr Gray that Laura Bell had never complained about anything which had actually been said to her by the claimant, only that he had raised his voice and shouted. Mr Gray accepted that there was nothing in what the claimant is alleged to have said which could amount to bullying or harassment. All the claimant was trying to do was to clarify the accuracy of the work rota for the week when he was supposed to be on holiday. Mr Gray accepted that the claimant was likely to have been frustrated and even angry at the relevant time. However, Mr Gray refused to accept that this may have been a meaningful explanation for the claimant raising his voice and he refused to accept that it could amount to mitigation. Mr Gray went on to say that he found the claimant's behaviour during the disciplinary hearing to be itself "aggressive and intimidating". This was because the claimant was demonstrating how he "strutted" when walking through the restaurant and in so doing came close to Mr Gray's desk and leaned over Mr Gray. In his evidence, Mr Gray described this as behaviour which took place "throughout the meeting", yet Mr Gray had to accept that this particular incident could only have happened for a matter of seconds. Nowhere in the notes of the meeting is there any record of Mr Gray feeling intimidated or threatened nor does he mention that to the claimant.

30. It was put to Mr Gray that he should have addressed his mind to the possibility of other sanctions rather than the ultimate sanction of dismissal. Examples included a warning, a final written warning or even transfer to another restaurant. Mr Gray insisted that he had considered those matters, but felt it inappropriate because he would simply be transferring the problem to another restaurant. Nowhere in the minutes or his letter does Mr Gray mention that he did in fact consider other possibilities to dismissal. Nowhere in the letter does Mr Gray make any specific findings of fact as to what the claimant had said or done which amounted to gross misconduct. The comment in his letter that "shouting is deemed as workplace violence" is plainly wrong.

31. The claimant appealed his dismissal by letter dated 19th February. The appeal was heard before Miss Gemma Stocks on 4th March. Miss Stocks statement was presented to the tribunal, but Miss Stocks did not attend the hearing. No explanation was given to the tribunal as why she was not present. Mr Anderson indicated that he wished to challenge the contents of Miss Stocks statement. The statement is not signed. The lady was not present to answer questions in cross examination. The tribunal was satisfied that little, if any, weight should be attached to the statement in those circumstances. In any event, the statement contains 9 paragraphs on 2 sides of A4 paper. At paragraph 5, Miss Stocks cites that the claimant produced a doctor's note relating to his hearing deficit and how this may impact upon the loudness of his voice. Miss Stocks goes on to say that the claimant

was "very animated during the meeting, he raised his voice at points and I could see he was getting more animated and angry as his voice got louder." At paragraph 6, Miss Stocks states, "Having considered everything I had, I felt that the evidence from the time and his behaviour in the first disciplinary meeting as well as his behaviour in the appeal meeting indicated that there was probably that the allegations were true". At paragraph 7 Miss Stocks states "We have a consistent approach to intimidating behaviour regardless of whether the person is male or female". At paragraph 8 she states, "I had no concerns about how Darren conducted the disciplinary meetings". Miss Stocks dismissed the appeal.

32. The purpose of an appeal of course is to enable the employee to challenge both the investigation and the disciplinary outcome. It is also the employer's opportunity to put right any defect within the investigation process or the disciplinary process. The statement from Miss Stocks contains little evidence which was of assistance to the employment tribunal in considering any of those matters. Miss Stocks letter dismissing the appeal is dated 4th March and appears at page 99, and states as follows:-

> "I am writing to confirm my decision to uphold the disciplinary decision of Darren Gray taken on 15th February to summarily dismiss you without notice for gross misconduct. The reasons for this are:-
>
> - It is my belief that you did shout at Laura Bell, as by your own admission you raised your voice due to being upset. I also believe that you did slam the chairs in the back section of the restaurant before you left.
>
> - It is my belief that both of these actions constitute aggressive and unprofessional behaviour.
>
> I have taken into consideration that you have said you have a loud voice, however at no point have you been accused of shouting until this day. I believe that this situation was the cause of the change in the level of your voice. I have also taken into consideration a letter from your doctor stating that your hearing would be impacted with a wax build up. I don't feel this would cause the aggression in tone witnessed by both Laura Bell and Craig Irwin."

33. The claimant presented his complaint to the employment tribunal on 18th April 2019.

<u>The law</u>

34. The claimant's right not to be unfairly dismissed is set out in Sections 94 and 98 of the Employment Rights Act 1996.

Section 94 The right

> (1) An employee has the right not to be unfairly dismissed by his employer.
> (2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).

Section 98 General

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show--

(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it--

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)--

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)--

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

35. It is trite law that there are only three basic requirements of natural justice, which have to be complied with during the proceedings of the disciplinary enquiry:-

- Firstly the person should know the nature of the accusation against him
- The person should be given an opportunity to state his case
- The tribunal should act in good faith

36. The determination of the question whether any particular kind of conduct falls within the category of “gross misconduct” warranting summary dismissal involves an evaluation of the primary facts and an exercise of judgment. It is sufficient for the employer if he can in all the circumstances regard what the employee did as being something which was seriously inconsistent or incompatible with his duty in the business in which he was engaged. In simple terms, gross misconduct must involve a breach of the employer’s standards or rules that is so serious that it could lead to immediate dismissal without notice.

37. An employee should only be found guilty of the offence with which he has been charged. It is a basic proposition that the charge against the employee facing

dismissal should be precisely framed and that evidence should be confined to the particulars given in the charge or allegation. Care must be taken with the framing of a disciplinary charge and the circumstances in which it is permissible to go beyond that charge in a decision to take disciplinary action are very limited. Where care has clearly been taken to frame a charge formerly and put it formerly to the employee, the normal result must be that it is only matters charged which can form the basis for a dismissal [**Strouthous v London Underground Limited – 2004 IRLR636 - Court of Appeal].**

38. In a case where an employee is dismissed because the employer suspects or believes that he has committed an act of misconduct, in determining whether that dismissal is unfair the employment tribunal has to decide whether the employer who discharged the employee on the ground of misconduct in question, entertained a reasonable suspension amounting to a belief in the guilt of the employee or that misconduct at that time. This involves three elements. First, there must be established by the employer the fact of that belief – that the employer did believe it. Second, it must be shown that the employer had in his mind reasonable grounds upon which to sustain that belief. And third, the employer at the stage at which he formed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case [**British Home Stores Limited v Burchell – 1978 IRLR379].**

39. Employers suspecting an employee of misconduct justifying dismissal cannot justify their dismissal simply by stating an honest belief in his guilt. There must be reasonable grounds and they must act reasonably in all the circumstances, having regard to equity and the substantial merits of the case. They do not have regard to equity in particular if they do not give him a fair opportunity of explaining before dismissing him. And they do not have regard to equity or the substantial merits of the case if they jump to conclusions which it would have been reasonable to postpone in all the circumstances until they had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. That means that they must act reasonably in all the circumstances, and must make reasonable enquiries appropriate to the circumstances. If they form their belief hastily and act hastily upon it, without making the appropriate enquiries or giving the employee a fair opportunity himself, their belief is not based on reasonable grounds and they are not acting reasonably [**Weddell v Tepper 1980 IRLR96].**

40. The question to be determined is not whether, by an objective standard, the employer's belief that the employee was guilty of the misconduct in question was well-founded, but whether the employer believed that the employee was guilty and were entitled so to believe, having regard to the investigation carried out **[Scottish Midland Co-operative Society Limited v Cullion – 1991 IRLR261].**

41. The range of reasonable responses test applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances, as it does to other procedural and substantive aspects of the decisions to dismiss a person from his employment for a conduct reason [**Sainsburys Supermarkets Limited v Hitt – 2003 IRLR23].**

42. The "band of reasonable responses" has been a stock phrase in employment law for some considerable time, but the band is not infinitely wide. It is important not to overlook **Section 98 (4) (b) of the 1996 Act,** which directs the tribunal to decide the question of whether the employer has acted reasonably or unreasonably in deciding to dismiss, "in accordance with equity and substantial merits of the case." The tribunal is entitled to find that the dismissal was outside the band of reasonable responses without being accused of placing itself in the position of the employer. An employer is entitled to take into account not only the nature of the conduct and the surrounding facts, but also any mitigating personal circumstances affecting the

employee concerns. The attitude of the employee to his conduct may be a relevant factor in deciding whether repetition is likely." **[Brown v Thames v Water Utilities Limited – 2015 EWCA-CIV-677].**

43. The tribunal must consider by the objective standards of the hypothetical reasonable employer, rather than by reference to its own subjective views, whether the employer has acted within a band or range of reasonable responses to the particular misconduct found of the particular employee. If it has, then the employer's decision to dismiss will be reasonable. But that is not the same thing as saying that a decision of an employer to dismiss would only be regarded as unreasonable if it is shown to be perverse. The tribunal must not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt, for that of the employer. The tribunal must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. The tribunal must focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any appeal process) and not on whether in fact the employee has suffered an injustice. [**Orr v Milton Keynes Council – 2011 EWCA-CIV-62].**

Conclusion

44. The tribunal in this case found that the respondent's investigation into the allegations against the claimant was unreasonable in all the circumstances of the case. The tribunal found that no reasonable employer would have categorised the claimant's behaviour on 12th January 2019 as "gross misconduct". Taking into account the claimant's genuine frustration, bordering upon anger, at the respondent's failure to honour its assurance about his holidays, no reasonable employer would have concluded that the claimant raising his voice could amount to anything approaching gross misconduct. Nowhere does Laura Bell take any exception to what was said to her by the claimant. In other words, the words used caused no offence whatsoever. The tribunal found that Miss McEntee`s categorisation of the claimant "waving the rota in Laura's face" was an unnecessary exaggeration of the true situation. There was no enquiry into whether the claimant had simply raised his voice or whether he was shouting. No explanation was given or enquiry carried out as to how loud someone must be, before their behaviour could be categorised as misconduct. There is nothing in any of the statements from the persons present to suggest that the claimant's voice had reached such a volume that it was either intimidating or threatening. The nature of the questions put to the witnesses by Miss McEntee strongly suggested that there was an unfair and unreasonable bias towards establishing facts which could lead to disciplinary action against the claimant, without undertaking the equal responsibility of ascertaining the facts which may exculpate the employee. The tribunal found that Miss McEntee's investigation was flawed in that there was no proper remit established from the outset. Matters unrelated to the incident itself were introduced unnecessarily and unfairly. The claimant's explanation as to why he had raised his voice or even slammed the chair, were either unfairly ignored or unreasonably discounted. The wording of Miss McEntee's report suggests that had overstepped the investigating officer's role of establishing the facts, by giving an indication that she considered that the claimant's behaviour did amount to gross misconduct.

45. The disciplinary hearing itself was similarly flawed. Mr Gray failed to establish or record exactly what the allegations were against the claimant. Whilst the tribunal found that the claimant was probably fully aware of the matters which led to the disciplinary process, the charges were never properly framed as they are required to be. Their generalisation meant that the respondent was able to introduce matters which had not previously been the subject matter of the investigation or the disciplinary hearing.

46. Mr Gray accepted in questions from the tribunal that ordinarily no employee would be dismissed for shouting, nor would any employee be dismissed for slamming a chair. Mr Gray accepted that the categorisation in his letter of dismissal that "shouting is deemed as workplace violence" is plainly wrong. In those circumstances, there could be no genuine belief on Mr Gray's part that the claimant had committed any act of misconduct. There was certainly no reasonable grounds for that belief and indeed there could be no such reasonable grounds as there had not been a reasonable investigation.

47. This was an employee with 8 years' service and who had no live disciplinary matters on his record. The tribunal found that, in all the circumstances of the case, no reasonable employer would have dismissed its employee in those circumstances. This dismissal fell outside the range or reasonable responses open to a reasonable employer in all the circumstances. The respondent's dismissal of the claimant was therefore unfair.

48. In accordance with Section 122 (2) and 123 (6), the employment tribunal must consider the extent of which, if any, the claimant has contributed towards his dismissal by his own conduct. The claimant has throughout the process and indeed throughout these proceedings conceded that he raised his voice on 12th January 2019 when discussing the holiday rota with Laura Bell. The claimant accepts that his behaviour was unacceptable and accepts that it may have appeared to be threatening or intimidating to Laura Bell. He accepts that he may have made unnecessary noise in stacking the chairs. The claimant readily accepted that his reaction to the rota was inappropriate in all the circumstances. The tribunal was satisfied that the claimant had to some extent contributed towards the circumstances which led to the disciplinary process which in turn led to his dismissal. The tribunal was satisfied that the compensation to be awarded to the claimant should be reduced by 35% to reflect the extent of the claimant's contribution towards his own dismissal.

49. Having delivered those findings to the parties, the parties were able to agree the compensation payable to the claimant, in the total sum of £9,500.

EMPLOYMENT JUDGE JOHNSON

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 28 February 2020

JUDGMENT SENT TO THE PARTIES ON 2 March 2020
AND ENTERED IN THE REGISTER

Miss K Featherstone
FOR THE TRIBUNAL