EMPLOYMENT TRIBUNALS

Claimant: **De Bockary**

Respondent: **Iss Mediclean Ltd**

Held at: **London South Employment Tribunal by video hearing**

On: **11 and 12 February 2021**

Before: **Employment Judge L Burge**

Representation
Claimant: Ms Sidossis, Counsel
Respondent: Mr Moon, Consultant

RESERVED JUDGMENT

1. The Claimant was unfairly dismissed by the Respondent.

2. There shall be a reduction to the basic and compensatory awards of 50% on the grounds of contributory fault, an uplift to the compensatory award of 20% for failure to follow the ACAS Code and a *Polkey* reduction to the compensatory award of 20%.

3. If the parties cannot agree, the Tribunal will decide the remedy for unfair dismissal at a further hearing on 21 July 2021.

REASONS

Introduction

1. The Claimant was employed by the Respondent from 1 January 2000 until she was dismissed on 14 September 2018 for alleged misconduct.

The evidence

2. Akhilesh Allan Mungroo (Manager and Decision Maker in respect of first

disciplinary process), Nicholas Lones (Compliance Manager and Dismissing Officer) and Russell Sherry (General Manager and Appeal Officer) gave evidence on behalf of the Respondent. The Claimant, Binta Be Bockary gave evidence on her own behalf.

3. The Tribunal was referred during the hearing to documents in a hearing bundle of 171 pages. A further bundle relating to mitigation was provided to the Tribunal of 64 pages.

4. Ms Sidossis provided the Tribunal with written submissions, Mr Moon provided written closing submissions and both Ms Sidossis and Mr Moon gave oral closing submissions.

Issues for the Tribunal to decide

5. At the beginning of the hearing the Tribunal agreed with the parties that the issues to be decided were those as set out by Employment Judge Mason at a Preliminary Hearing on 24 June 2020:

    a. Was the Claimant dismissed for a potentially fair reason in accordance with s.98(1) of the Employment Rights Act 1996 ("ERA")? The Respondent relies on conduct which is a potentially fair reason (s.98(2)(b) ERA).

    b. Did the Respondent act reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the Claimant? This is to be determined in accordance with equity and the merits of the case (s98(4) ERA).

    c. In accordance with the test in *British Home Stores v Burchell* [1980] ICR 303, has the Respondent shown that:
        i. it had a genuine belief that the Claimant was guilty of misconduct?;
        ii. it had in its mind reasonable grounds upon which to sustain that belief?; and
        iii. at the stage at which that belief was formed, it had carried out as much investigation into the matter as was reasonable in the circumstances?

    d. Did the procedure followed and the decision to dismiss fall within the range of reasonable responses open to a reasonable employer in the same circumstances?

    e. If the Claimant's dismissal was unfair, is the Claimant entitled to a Basic Award and/or a Compensatory Award, and, if so, should there be any of the following adjustments:
        i. a reduction in the Compensatory Award on the basis the Claimant has mitigated, or failed to take all reasonable steps to mitigate, her loss?
        ii. any adjustment to the Compensatory Award as a consequence of any failure (by either side) to follow procedures under the ACAS code?

iii. any reduction or limit in the Compensatory Award to reflect the chance that the Claimant would have been dismissed in any event and that any procedural errors accordingly made no difference to the outcome in accordance with *Polkey*? and/or
iv. any reduction in either award to reflect any contributory fault on the Claimant's behalf towards her own dismissal?

Findings of Fact

6. The Respondent offers a range of facilities management services throughout the UK with particular expertise in the public sector. The Respondent employs approximately 10,000 people in Great Britain. The Claimant was initially employed as a Hostess and then promoted to Supervisor on 12 January 2018. Her place of work was the Queen Elizabeth Hospital where 400 of the Respondent's employees worked.

The First Disciplinary Process: April/May 2018

7. In April 2018 an employee, Abolade Odunsi, had been accused of taking patient food. He initially said that he had been given it by his mother, Olufunmilayo Odunsi. Another employee, Shoshana Dawkins, came forward to say that she had heard the Claimant tell Mr Odunsi to "tell them that it was end of meal service". Three managers gave evidence that Mr Odunsi had then changed his story. Mr Mungroo was the Decision Maker in relation to the first disciplinary process. The Claimant said that she had only had one conversation with Mr Odunsi and that had taken place in front of Mr Hutton, the investigator, where she had expressed her sympathies for Mr Odunsi and she said that in response Mr Hutton said he would address it. The Claimant asked Mr Mungroo to speak to Teresa Pearce, an experienced Union representative, and he did so during the break of the disciplinary hearing. Mr Mungeroo says, and it is accepted by the Tribunal that Ms Pearce said that she did not want to get involved.

8. In his witness statement Mr Mungroo said that while the Claimant denied having told Mr Odunsi to say it was the end of meal service he decided that, on the balance of probabilities, this was why Mr Odunsi had changed his story. He had therefore believed Ms Dawkins over the Claimant.

9. The Respondent's Handbook contains a "Rules of Conduct" section and states that breaches of the rules highlighted in bold text will be regarded as Gross Misconduct and may result in summary dismissal. One such highlighted section was 5(p):

"Employees must submit true and accurate records and returns (e.g. lock cards, time sheets) and must not knowingly make any false oral or written statements on or in connection with company documents, accident or incident investigations, application for employment or medical examinations."

10. The Respondent issued a final written warning to the Claimant on 29 May 2018. In cross examination Mr Mungroo said that interfering with an investigation was gross misconduct and that he believed a final written

warning was warranted. The Claimant did not appeal. In her witness statement she said she did not appeal because she was concerned about the possibility of a worse sanction being given and she was happy to still have her job.

The Second Disciplinary Process: July - September 2018

11. Marilyn Gosling raised a complaint stating that on 7 July 2018 the Claimant "proceeded to scream at me, banging on the table, walking towards me threateningly pointing her hands at me and hitting on the table to intimidate me and asked those in the room to warn me". Present at the alleged incident were the Claimant, Ms Gosling, Regina Djondo, Mercy Acquah, Eve Annum, Beatrice Osei, David Jarvis and Tossin Akinsicku.

12. The background to this incident was that the previous day Fola, a supervisor, had asked Ms Gosling to speak to Ms Djondo (cook) and tell her not to cook food for other employees. Following this conversation, Ms Djondo called Tony Osei-Ababio (their manager) to complain about Ms Gosling approaching her. Mr Osei-Ababio spoke to the Claimant on 7 July 2018, and asked her to find out what had happened.

13. During the investigation, a letter from Beatrice Osei was obtained. She said that the Claimant called Ms Gosling out of the group and:

> *asked "what gives you the right to tell Gifty's sister (Regina) what to do? Gifty has a good marriage, Gifty has a husband who loves her". The manner in which she said these things made it clear that she was trying to imply [Ms Gosling] did not have these things and was mocking her because of it"*

14. Ms Osei was present for some of the alleged incident, but left prior to its conclusion saying that the situation made her feel extremely uncomfortable, she did not appreciate Ms Gosling being singled out and insulted in front of a group.

15. The investigation was conducted by Denis O'Leary. When interviewed on 11 July 2018 Ms Gosling (the complainant) said the Claimant had asked why she had told Ms Djondo not to give food and when she told her that she was warning her not to do it the Claimant started shouting at her and that the Claimant "was banging table and her chest and shouting saying Gifty has good marriage". When asked how this made her feel, she said "very threatened".

16. Ms Djondo was interviewed on 11 July 2018 but Mr O'Leary did not ask any questions about the incident, instead he concentrated on trying to find out if she had cooked for other employees.

17. On 11 July 2018 Ms Odunsi was interviewed about a letter she had provided but she was not asked about the incident that had occurred on 7 July 2018.

18. On 12 July 2018 David Jarvis was interviewed. Mr O'Leary informed Mr Jarvis that "I have had a report that [the Claimant] was acting in an

aggressive way towards [Ms Gosling]" to which he said "they were both shouting I can't really remember but [the Claimant] wanted to know what was going on from [Ms Gosling]". The investigating officer then said "And others have said [the Claimant] was attacking [Ms Gosling]". To this, Mr Jarvis accepted the Claimant was verbally attacking Ms Gosling, and said that they were both loud. Mr O'Leary asked Mr Jarvis "Who was the aggressor and who gathered the group together?". Mr Jarvis responded that it was the Claimant, although it was not clear whether he was referring to the aggressive part of the question or the gathering of the group. Mr O'Leary then said "so it was almost like a mini mob confronting [Ms Gosling]".

19. Having provided the letter, on 12 July 2018 Ms Osei was also interviewed. She said that the Claimant called everyone together and then the Claimant "started on" Ms Gosling, she was "very aggressive" "she said what gives you the right to tell [Ms Djondo] not to give food". She repeated that the Claimant had been "very" aggressive". Mr O'Leary summarised her interview as "So from what you saw and in your opinion [the Claimant] was the aggressor and was nasty and volatile to Marilyn". Ms Osei had not used the words 'nasty' or 'volatile', these words had come from Mr O'Leary himself. When asked why Mr Jarvis was there Ms Osei said that the Claimant had called them all together".

20. Ms Djondo was interviewed again on 16 July 2018. Once again the interview focused on her cooking food for others, which she admitted to. Once again, Mr O'Leary did not ask her about the incident with the Claimant, even though she had been present.

21. On 16 July 2018 Ms Annum was interviewed. When asked what was being said during the alleged incident she said "You know Denis t [sic] is said go in one ear out the other they were all talking". She did not make any mention of the Claimant's behaviour. Mr O'Leary asked "Was [the Claimant] aggressive?" to which she replied "African people talk very loud they were all talking at once".

22. The Claimant was suspended on 16 July 2018. She was invited to a formal investigation meeting for the following allegations:

    a. Shouting and abusive to your work colleague
    b. Bullying and belittling your workplace colleague
    c. Threatening and intimidating your workplace colleague.

23. An investigation meeting took place on 19 July 2018. The Claimant explained that her manager had told her to speak to Ms Djondo and Ms Gosling to find out what had taken place. She said she couldn't talk to her on her own as she "had to be careful" so she called Ms Acquah and Ms Annum as witnesses. She denied being aggressive towards Ms Gosling, and said that "We Africans talk very loud".

24. The Claimant's evidence was inconsistent about who she called to the meeting. She repeatedly said she wanted a witness with her. She initially said that she wanted Ms Acquah and Ms Annum as witnesses, then Ms Djondo and then later she said that she only called Ms Osei as the others

were already there. In her witness statement she said that she called the meeting. The staff, on the whole, say they were summoned by the Claimant or words to that effect. The Tribunal finds as a fact that the Claimant summoned Ms Gosling, Ms Djondo, Ms Acquah, Ms Annum, Ms Osei, Mr Jarvis and Ms Akinsicku to the meeting.

25. An investigation report was written on the same day by Mr O'Leary and it concluded that:

"…after speaking to all the people present on that day the majority confirmed that [the Claimant] acted in an aggressive bullying manner towards [Ms Gosling]. Which has caused [Ms Gosling] distress in the work place. As investigating officer I believe that as a supervisor she has abused her authority by calling a number of people off their areas to witness one member of staff being humiliated."

26. The Tribunal finds that the investigation report was misleading. Mr O'Leary had not yet interviewed everyone present and the majority of the people had not confirmed that the Claimant had acted in an aggressive bullying manner. Following this report, further investigation interviews took place. Tossin Akinsicku was interviewed on 20 July 2018 and she said twice that the Claimant did not act aggressively towards Ms Gosling. Ms Acquah was also interviewed on 20 July 2018 and when asked by the investigating officer "Was [the Claimant] raising her voice and shouting" she said "No no". Mr O'Leary then said "So what would you say if I told you I have 4 statements that say [the Claimant] was loud and aggressive?" to which Ms Acquah replied "It just the way she talks". The Tribunal finds as a fact that it was not true that Mr O'Leary had 4 statements saying the Claimant was loud and aggressive.

27. On 23 July 2018 Mr O'Leary wrote to the Claimant informing her there was a case to answer. On 6 August 2018 she was invited to a disciplinary meeting for the following alleged breaches of conduct:

"Section 5 General

(o) Employees must not engage in any insubordinate, insulting or violent behaviour and must not injure, threaten or attempt to injure any other person.

(p) Employees must not engage in any behaviour such as intimidation, harassment, victimisation or bullying likely to cause distress or anxiety to any other person."

28. Both (o) and (p) were in bold, denoting that they were considered to be gross misconduct.

29. Mr Lones was appointed as the Decision Maker. He was working at a different hospital and was unfamiliar operationally with the Queen Elizabeth Hospital and the staff that were involved in the disciplinary process. The Tribunal finds as a fact that he was independent. Mr Lonas gave evidence that as part of his preparation he did a tick chart of who was supportive and

noted that several had denied that the Claimant had been aggressive.

30. A disciplinary hearing took place on 4 September 2018 and was conducted by Mr Lones, Decision Maker. The Claimant was accompanied by John Lewis, her Union representative. Mr Lones explored with the Claimant why so many people were gathered. The Claimant and Mr Lewis raised that Mr O'Leary's questioning was inappropriate. The Claimant said it was a coincidence that so many people were gathered and that she had only called Ms Osei but Mr Lones pointed out this was contradicted in the statements. The Claimant said that she had been a supervisor for 3 years, that some may call her loud, that she had not had problems before, only with Fola (another supervisor). The Claimant said that she would not take the same action again, she would learn from this. During this meeting it was made clear, and the Tribunal finds as fact, that in (almost) 18 years of service she had not faced similar issues, and in 3 years as a manager she talked to people a lot as part of her role without a problem and that she had not received any training when she was promoted to the supervisory position.

31. Following the hearing Mr Lones gave evidence that he reviewed the Claimant's personnel file which contained a final written warning in relation to conduct 5(q). Mr Lones had a lengthy discussion with Chris Feeney, Head of People and Culture and said he "wrestled" with what decision to make because he did "not take the decision to terminate someone's employment lightly". Mr Lones said in his witness statement that he would not have dismissed the Claimant for this offence alone, toyed with the idea of issuing a further final written warning but concluded that a concurrent warning did not feel appropriate as "there is no place for bullying, harassment and intimidation and this behaviour needed to be tackled". Mr Lones' oral evidence was consistent with this. In cross examination Mr Lones said that this was something that should have been dealt with on a one to one basis and that the statements showed that there was a calling together of a group. In re-examination Mr Lones said that it was not simply a question of whether the Claimant was aggressive, it was the manner in which the meeting was called and that the meeting was conducted in a way that would cause distress to an individual. He did not speak to any of the witnesses involved, other than the Claimant.

32. The Claimant was dismissed with notice by letter dated 12 September 2018. Mr Lones concluded that the Claimant had engaged in serious misconduct, that as a supervisor she had not acted appropriately, she should have conducted a series of one to one meetings, it was reasonable to expect that over the previous 3 years she should have acquired the necessary experience to deal with operational matters in a calm and effective manner. He continued that the Claimant had allowed herself to become immersed in a 'free for all' and although she had claimed this was a cultural issue as a supervisor she should have conducted herself professionally. Mr Lones concluded that she personally had been involved in heated discussions and displayed behaviours not appropriate to her position. He was satisfied on the balance of probabilities that she had acted inappropriately, acting in an aggressive manner that was both intimidating and insulting and likely to cause distress to others.

33. The Claimant appealed the decision to dismiss her in a letter dated 17 September 2018. Her points of appeal were that:

    a. the evidence had not been given proper consideration, Mr O'Leary's questioning was deliberately leading and he put words into people's mouths. Equal weight had not been put into those witnesses who supported the Claimant's version of events;
    b. the outcome did not give sufficient consideration to the cultural behaviour of those at the meeting and instead sought to appoint blame on the basis of behaviour and a manner of speaking that was common place for those concerned.
    c. The outcome was too harsh and did not give sufficient consideration to the fact she was trying to address a workplace issue in her supervisory role. She had only had mentoring training on rota and check in but no formal training as a supervisor and the management of staff.

34. On the same day, 57 employees signed a petition, asking the Respondent to re-instate the Claimant.

35. In the Tribunal the parties agreed that the Claimant's role as supervisor did not include any disciplinary responsibilities.

36. An appeal meeting took place on 1 November 2018, chaired by Mr Sherry. At the meeting the Claimant was asked by Mr Sherry whether she had previously had to have an informal chat with a member of staff to "nip something in the bud" such as lateness. The Claimant replied that she had never been in that situation. She said that only one hostess came in late and that she helped her by taking the trolley to the ward if she called me to tell me she was going to be late. In relation to the cultural behaviour the Claimant said that "when I talk they say I am shouting. Even [Mr O'Leary] tells me to stop shouting. They say we are shouting but that is how we talk". Mr Sherry accepted that there were leading questions during the investigation but did not accept that Mr O'Leary deliberately led the witnesses or put words into people's mouths. He did not speak to any of the witnesses involved, other than the Claimant.

37. The decision to dismiss the Claimant was upheld. The appeal letter did not mention the Claimant's long service, her near unblemished record, or the fact that she had received no training in her role as a supervisor. In cross examination Mr Sherry said that he did take her long service into account and that, in his view, in her long years of service she would have picked up a lot.

38. Both Mr Lones and Mr Sherry gave evidence, that is accepted, that they would not have dismissed the Claimant had she not had a live final written warning on her file.

Legal principles relevant to the claims

Unfair dismissal

39. Section 94 of the Employment Rights Act 1996 ("ERA") confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that she was dismissed by the Respondent under section 95, but the Respondent must show the reason for dismissing the Claimant (within section 95(1)(a) ERA). S.98 ERA deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within s.98(2).

> *s.98 (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.*

40. The second part of the test is that, if the Respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the Respondent acted fairly or unfairly in dismissing for that reason:

> *s.98 (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.*

41. The employer bears the burden of proving the reason for dismissal whereas the burden of proving the fairness of the dismissal is neutral. The burden of proof on employers to prove the reason for dismissal is not a heavy one. The employer does not have to prove that the reason actually did justify the dismissal because that is a matter for the Tribunal to assess when considering the question of reasonableness. As Lord Justice Griffiths put it

in *Gilham and ors v Kent County Council (No.2)* 1985 ICR 233:

> *"The hurdle over which the employer has to jump at this stage of an inquiry into an unfair dismissal complaint is designed to deter employers from dismissing employees for some trivial or unworthy reason. If he does so, the dismissal is deemed unfair without the need to look further into its merits. But if on the face of it the reason could justify the dismissal, then it passes as a substantial reason, and the inquiry moves on to [S.98(4)], and the question of reasonableness".*

42. In the case of *British Home Stores v Burchell* [1978] IRLR 379 EAT, the court said that a dismissal for misconduct will only be fair if, at the time of dismissal:

    (1) the employer believed the employee to be guilty of misconduct;
    (2) the employer had reasonable grounds for believing that the employee was guilty of that misconduct; and
    (3) at the time it held that belief, it had carried out as much investigation as was reasonable.

43. In the case of *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439 EAT, guidance was given that the function of the Employment Tribunal was to decide whether in the particular circumstances the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair. If the dismissal falls outside the band, it is unfair.

44. In the case of *Sainsburys Supermarket Ltd v Hitt* [2003] IRLR 23 CA, guidance was given that the band of reasonable responses applies to both the procedures adopted by the employer as well as the dismissal.

45. The Court of Appeal in London Ambulance *NHS Trust v Small* [2009] IRLR 563 warned that when determining the issue of liability, a Tribunal should confine its consideration of the facts to those found by the employer at the time of dismissal. It should be careful not to substitute its own view for that of the employer regarding the reasonableness of the dismissal for misconduct. In *Foley v Post Office; Midland Bank plc v Madden* [2000] IRLR 82 the court said it is irrelevant whether or not the Tribunal would have dismissed the employee, or investigated things differently, if it had been in the employer's shoes: the Tribunal must not "substitute its view" for that of the employer.

46. The Employment Appeal Tribunal in *Clark v. Civil Aviation Authority* [1991] IRLR 412 laid out some general guidelines as to what a fair procedure requires. But even if such procedures are not strictly complied with a dismissal may nevertheless be fair – where, for example, the procedural defect is not intrinsically unfair and the procedures overall are fair: *Fuller v. Lloyd's Bank plc* [1991] IRLR 336. 50. An employment tribunal must take a broad view as to whether procedural failings have impacted upon the fairness of an investigation and process, rather than limiting its consideration to the impact of the failings on the particular allegation of misconduct, see *Tykocki v. Royal Bournemouth and Christchurch Hospitals*

NHS Foundation Trust UKEAT/0081/16 dated 17 October 2016.

Previous warnings

47. In the case of *Wincanton Group Plc v Stone (formerly known as Joyce) and another (respondents)* [2013] IRLR 178, the Employment Appeal Tribunal stated that where an earlier warning was issues in good faith:

> "… *It is not to go behind a warning to take into account the factual circumstances giving rise to the warning. There may be a considerable difference between the circumstances giving rise to the first warning and those now being considered. Just as a degree of similarity will tend in favour of a more severe penalty, so a degree of dissimilarity may, in appropriate circumstances, tend the other way. There may be some particular feature related to the conduct or to the individual that may contextualise the earlier warning. An employer, and therefore tribunal should be alert to give proper value to all those matters. It could not sensibly be suggested that if an employee, for instance, were successively convicted of a number of separate acts of misconduct, each quite different from the other but each justifying a warning, then the employer would not be entitled to have regard to the totality of the employee's behaviour. In the case of a final warning, the usual approach will be to regard any further misconduct as usually resulting in dismissal, though not necessarily inevitably so, whatever the nature of that later misconduct… Finally, a tribunal must always remember that it is the employer's act that is to be considered in the light of s.98(4) and that a final written warning always implies, subject only to the individual terms of a contract, that any misconduct of whatever nature will often and usually be met with dismissal, and it is likely to be by way of exception that that will not occur.*"

Compensation

48. If an unfair dismissal complaint is well founded, remedy is determined by sections 112 onwards of the ERA. Where re-employment is not sought compensation is awarded by means of a basic and compensatory award.

49. The compensatory award can be reduced if the Tribunal considers that a fair procedure might have led to the same result, even if that would have taken longer (*Polkey v A E Dayton Services Limited)* [1988] ICR 142.

50. S.124A ERA provides for adjustments to the compensatory award if a party has failed to comply with the ACAS Code of Practice on Discipline and Grievance Procedures (2015).

51. The basic award is a mathematical formula determined by s.119 ERA. Under section 122(2) it can be reduced because of the employee's conduct:

"Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further

reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly".

52. A reduction to the compensatory award is primarily governed by section 123(6):

"*Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding…"*

53. The leading authority on deductions for contributory fault under section 123(6) remains the decision of the Court of Appeal in *Nelson v British Broadcasting Corporation (No. 2)* [1980] ICR 111. It said that the Tribunal must be satisfied that the relevant action by the Claimant was culpable or blameworthy, that it caused or contributed to the dismissal, and that it would be just and equitable to reduce the award.

Analysis and conclusions

54. The Respondent dismissed the Claimant for conduct, a potentially fair reason under s.98(2) ERA. No other reason was suggested by either party in the Tribunal. The Respondent's management, Mr Lones and Mr Sherry held a genuine belief that the Claimant was guilty of misconduct. Their evidence was clear about why they dismissed, the dismissal and appeal letters were unequivocal.

55. The final written warning in this case was valid, the Claimant had not appealed and there was no indication that it had not been issued in good faith. However, the previous misconduct was different in that it was based on dishonesty, not behaviour. Both Mr Lones and Mr Sherry would not have dismissed the Claimant had she not had a live final written warning on her file. In accordance with *Wincanton* the fact that the subsequent misconduct was of a different nature to the previous misconduct means the penalty is likely to be less severe than if the misconduct was of a similar character but as a final written warning had been issued, any further misconduct would be *likely* to be met with dismissal, not dismissing would be by way of exception.

56. Was the dismissal fair? In accordance with s.98(4)(a) ERA, the question is whether it was reasonable for the employer to treat the conduct in question, taken together with the circumstances of the final written warning, as sufficient to dismiss the claimant. S.98(4)(b) states that it must be determined in accordance with equity and the substantial merits of the case.

57. The Respondent is a relatively large employer – it has 10,000 employees in Great Britain and employs 400 employees at the Hospital where the Claimant worked. The Respondent has a People and Culture team and at least one in-house lawyer.

58. The ACAS Code of Practice on Discipline and Grievance Procedures (2015) requires the Respondent to carry out disciplinary procedures fairly. This

includes the investigation, disciplinary and appeal process. The investigation needs to, fairly, establish the facts of the case. That did not happen in this case. The ACAS Guides go into more detail about how investigations should be carried out, including that "it is important to keep an open mind and look for evidence which supports the employee's case as well as evidence against".

59. Mr O'Leary did not conduct the investigation fairly. He used partial, inflammatory language ("nasty and volatile" and "a mini mob"), misled a witness about how many supporting statements he had ("So what would you say if I told you I have 4 statements that say [the Claimant] was loud and aggressive?") and he came to the conclusion that there was a case to answer without having asked half of the 6 witnesses for their version of the incident (the Claimant and Complainant aside, he had not yet asked Ms Djondo, Ms Acquah and Ms Akinsicku). Further, there was no reconsideration of whether there was a case to answer when Mr O'Leary interviewed Ms Acquah and Ms Akinsicku and both supported the Claimant's version of events saying that the Claimant did not act aggressively towards Ms Gosling and that "It just the way she talks".

60. Mr O'Leary did not look for evidence to support the Claimant's case. He did not, for example ask whether the Claimant and Ms Gosling were shouting at each other, whether the Claimant's assertion "we Africans talk very loud" properly described the incident and he did not investigate how other similar issues have been dealt with or what training and/or guidance had been available to the Claimant. Taking into account equity and the substantial merits of the case, the investigation was outside the band of reasonable responses and the disciplinary and appeal processes did not rectify the unfairness because they based the facts on the biased investigation report.

61. The investigation report says that the Claimant "acted in an aggressive bullying manner", that she "abused her authority by calling a number of people off their areas to witness one member of staff being humiliated". The invitation to the disciplinary hearing says that the Claimant "called several members of staff off their work areas to attend the main kitchen area where it is alleged [she] verbally assaulted [Ms] Gosling, behaving in an intimidating manner shouting and banging a table." In the letter of dismissal the allegations then changed to:

"you did not act appropriately when you called the meeting … you allowed yourself to become immersed in a 'free for all' … I firmly believe that you personally involved yourself in heated discussions...Having read all statements.. I am satisfied that on the balance of probability you acted inappropriately, acting in an aggressive manner that was both intimidating and likely to cause distress to others."

62. Mr Lones does not explain how he arrived at that conclusion despite only one witness (Ms Osei) (other than the complainant) confirming that the Claimant was aggressive. He does not say why it is that he discounted the three witnesses (Ms Annum, Ms Akinsicku and Ms Acquah) who said that the Claimant was not aggressive. Mr Lones also does not explain why it is his view that, with no training, the Claimant is expected to have acquired

the necessary experience to deal with operational matters in a calm and effective manner, particularly given that the witnesses say how loud the Claimant and others are.

63. The Tribunal must remind itself that it is not for the Tribunal to decide whether or not it would have dismissed the Claimant had it been in the employer's shoes. However for the above reasons, the Tribunal cannot be satisfied that the conduct in question was, taken together with the circumstances of the final written warning, sufficient to dismiss the claimant in accordance with s.98(4). While Mr Sherry recognised the inappropriateness of the Investigator's questioning, he did not seek to rectify the underlying fairness, for example, by undertaking his own enquiries from the witnesses.

64. It is difficult for a Tribunal to enter into the realms of what might have happened had a fair disciplinary process been followed. Nevertheless it is necessary in order to decide on whether a *Polkey* deduction is warranted. Had the investigation been fair, where the investigator used unbiased questioning and fact finding in relation to the Claimant's assertions, as well as the complainants, the report would be likely to have found that:

    a. the Claimant inappropriately called the group of staff together to investigate the issue;
    b. the meeting escalated so that members of the group were shouting at each other;
    c. the complainant felt intimidated; and
    d. that the Claimant as a supervisor should not have approached the issue in this way, nor participated in the shouting.

65. The cultural norms within the workplace combined with the Claimant's long service and the lack of management training would be likely (60%) to have led to the recommendation that the Claimant be given a warning, apologise and undertake management training in order for her to understand what the appropriate approach should have been. The remaining likely outcomes would be 20% final written warning, and 20% dismissal. The Claimant's compensatory award should therefore be reduced by 20%.

66. Given the inherent unfairness of the investigation and subsequent disciplinary process basing its findings on the unfair investigation report, the Claimant should be awarded a 20% uplift in her compensatory award.

67. In relation to contributory conduct, the Claimant did contribute to her dismissal – she should not have called a meeting to explore with Ms Gosling what had happened and she should not have got involved in the shouting. Taking in to account the failure of the Respondent to provide proper training to a supervisor, it is just and equitable to reduce the Claimant's basic award and compensatory award by 50%.

68. For all the above reasons, the Tribunal concludes that the Claimant has been unfairly dismissed.

Employment Judge **L Burge**
Date 14 February 2021

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