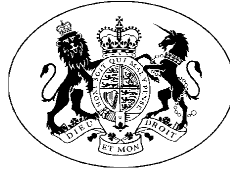

EMPLOYMENT TRIBUNALS

Claimant: Mrs J Hunt

Respondent: Donaldson Filter Components Ltd

Heard at: Leeds **On:** 18 & 19 January 2021

Before: Employment Judge Knowles

Representation
Claimant: Mr Collins, Solicitor
Respondent: Ms Knapton, Solicitor

RESERVED JUDGMENT ON LIABILITY

The Judgment of the Employment Tribunal is that:

1. The Claimant's claim of unfair dismissal is well founded and succeeds.

2. The Claimant's claim of wrongful dismissal is not well founded and is dismissed.

The matter will now proceed to a remedies hearing.

RESERVED REASONS

Issues

1. This case mainly concerns events which transpired on 20 December 2019 when a number of employees from the Respondent gathered, as they traditionally do when the Respondent closes for the Chirstmas period, at Sutton Fields pub in Hull. That day is known to many in England as "Mad Friday". The events which

unfold at that gathering result in two employees, including the Claimant, being dismissed for conduct reasons and another disciplined but not dismissed for their conduct.

2. During internal disciplinary proceedings the Claimant admitted grabbing another employee by the throat at the gathering and the Respondent says she was fairly dismissed for conduct reasons. The Claimant does not dispute grabbing another employee by the throat and pushing them but claims that she acted in self-defence and/or suffered serious provocation and consequently her dismissal was unfair and a breach of her contract relating to notice.

3. The issues for me to determine are as follows.

   a. What was the reason or principal reason for dismissal? The Respondent says the reason was conduct. I will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

   b. If the reason was misconduct, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? I will usually decide, in particular, whether:

      i. there were reasonable grounds for that belief;

      ii. at the time the belief was formed the respondent had carried out a reasonable investigation;

      iii. the respondent otherwise acted in a procedurally fair manner;

      iv. dismissal was within the range of reasonable responses.

4. In relation to the claim of wrongful dismissal:

   a. What was the claimant's notice period? Was the claimant paid for that notice period?

   b. If not, was the claimant guilty of gross misconduct or did the claimant do something so serious that the respondent was entitled to dismiss without notice?

5. In their response and written submissions there was an issue raised by the Respondent concerning whether or not the claim should have been accepted because there is a difference between the name of the Respondent on the ACAS Early Conciliation Certificate (Donaldson Filters Hull) and the actual name of the Respondent. Under Rule 12(2A) of the ET Rules, a Judge accepted the claim when it was made having regarded the difference in name to be a minor error. I confirmed to the Respondent that there is no power within the rules to reject a claim that has already been accepted and that consequently this was not an issue that I would consider.

Evidence

6. This hearing was a fully remote hearing with everyone that participated accessing through HMCTS's Cloud Video Platform.

7. I heard evidence from the following witnesses on behalf of the Respondent:

   a. Ms Dawn Kilgar, Production Shift Manager (the investigating officer)

   b. Mr Nigel Midgley, Production Manager (the disciplining manager)

   c. Ms Claire Anderson, HR Manager UK (who supported the disciplining manager at the disciplinary hearing).

8. Each of the Respondent's witnesses produced a written witness statement.

9. The Respondent produced a witness statement for Tracy Bouston, Strategic Buyer, who heard the Claimant's appeal against her dismissal. Ms Bouston was unable to attend the hearing due to illness but her written witness statement was considered subject to the limited reliance I can place on it due to her being unable to attend.

10. I heard evidence from the Claimant and from her husband, Mr Gary Mackinder. They each produced a written witness statement.

11. The parties produced a bundle of documents, 158 pages in total.

12. The Respondent produced a Skeleton Argument and Written Submissions.

13. The Respondent's case was heard on the first day. The Claimant's case and her submissions were heard on the morning of the second day. The Respondent's submissions were heard in afternoon of the second day. I then reserved my decision to be sent to the parties in writing.

Findings of fact

14. I made the following findings of fact on the balance of probabilities. These findings are not intended to cover all of the evidence heard over the two days of the hearing. These are the material points in evidence which are relevant to the issues and to my determination of the issues. Where a document is referred to and a number or numbers appear thereafter in brackets then unless otherwise stated that is a reference to the page number in the joint bundle of documents.

15. The Respondent manufactures filter components and has 2 sites in Hull employing around 300 employees. The Claimant worked at the production facility as Production Operator on the production line.

16. The Claimant's date of commencement of employment was 3 March 2008. At the time of her dismissal from the Respondent's employment, 13 March 2020, the Claimant had 12 years of continuous service with the Respondent. The Claimant worked on the Respondent's late shift (they also operate early and night shifts).

17. The Claimant signed a contract of employment upon commencement (37a). That incorporates the Respondent's Employee Handbook by reference. The

Claimant received a copy of that with the contract and signed to confirm that. The Employee Handbook contains a disciplinary and grievance procedure (37i-37m), an equal opportunities policy (38) and a Bullying and Harassment Policy (39). The latter confirms that the Respondent considers verbal or physical assault to be harassment which may result in disciplinary action up to and including dismissal. The Claimant acknowledged that she knows that to be the case.

18. In or around January 2019 there was an altercation between the Claimant and another employee, Ms Katarzyna Tworek. The Claimant says that Ms Tworek was belittling her over her performance of her duties and told Ms Tworek that she was coming close to wanting to punch her. The Claimant left that confrontation and spoke to her shift manager, Mr Kemp. He told them both they had to work together. The Claimant apologised. The Claimant had another employee work in between her and Ms Tworek from that point forwards. From that point forwards the Claimant and Ms Tworek got on with their work but did not get on with each other. No disciplinary action was taken in relation to this matter, nor does the Respondent suggest that any was envisaged at the time.

19. On 28 August 2019 Ms Tworek was driving a car which hit the Claimant's husband who was riding a bike. The Claimant's husband suffered a broken skull, a bleed on the brain and a fracture. The Claimant and her husband hold Ms Tworek responsible for the accident and for the Claimant's husband's injuries.

20. On 20 December 2019 the Claimant is on holiday leave and the Claimant's husband on sick leave due to his injuries. Nonetheless they both attend the Sutton Field's pub. Some time after they arrive, Ms Tworek arrives with Ms Lisa Mellor, another of the Respondent's employees.

21. After the Respondent re-opens in the New Year in 2021, on 6 January 2021 Ms Tworek submits to the Respondent a written grievance (40-41). A number of allegations are made against the Claimant and Mr Paul Bettney, another employee of the Respondent.

22. In her grievance letter, Ms Tworek makes a number of accusations that the Claimant has been responsible for making numerous false comments about her to other work colleagues. She continues that "*In December 2019, on Friday, when I was in the Pub with work colleges, Julie H came to me and attacked me orally (calling me names into my face, on front of Donaldson people and other people present in the Pub) and when I thought that her aggressive behaviour is getting worse and she will attack me any minute, then Lisa Mellor stood my side and Julie H. grabbed her neck and slap Lisa M into her face. Julie H. lost her tempo and she start to be offensive and aggressive to every person which stand by me on that Friday. Short moment later Gary M, came to me and standing face to face to me, he started shouting.'do you remember me' few times. He was furious as well. Then Paul B. started with very racist and inappropriate comments. about me. He was shouting and arguing with Lisa Mellor Lynn Claxton and Monika Szczygielska that I, polish b... driving at 40mph hit Garry because I can't drive and what I'm doing. here.*"

23. The Respondent, specifically Ms Kilgar, holds a grievance hearing with Ms Tworek (42-45). A date has not been provided for this meeting. At the hearing Ms Tworek also complains about the events which took place in January 2019. Further details are provided of the other allegations. Ms Kilgar closes the meeting by confirming that the grievance would be investigated.

24. Between 21 January 2021 and 28 February 2021 Ms Kilgar undertakes 29 investigatory interviews. The Claimant is interviewed 3 times. 25 people are interviewed in total. The transcripts of the interview are contained between pages 50 and 122 in the bundle.

25. In making my findings of fact in relation to fairness I must assess what the Respondent had in its mind when it decided to dismiss the Claimant. It is not for me to substitute my own conclusion for that of the employer.

26. The Respondent has produced little evidence in relation to the output of the investigation. The investigation clearly produced a great deal of information to be considered.

27. Ms Kilgar's evidence to me in her witness statement is as follows:

"*The Claimant's statements are at pages 66 to 68 of the bundle and 120 to 122 of the bundle. In the Claimant's first statement she says that she grabbed Lisa Mellor by the throat [page 66 of the bundle third paragraph from the bottom of the page]. In the second statement [pages 120 to 122 of the bundle] I asked the Claimant some extra questions about any other altercations she had had with Katarzyna Tworek. The Claimant's partner Gary Mackinder was also interviewed [page 94 to 96 of the bundle]. He also said that the Claimant grabbed Katarzyna by the throat [page 94, fourth paragraph from the bottom of the page]. My investigation also revealed evidence of regular comments and swearing by the claimant towards Katarzyna at work. [Pages 50-52, 59-62, 86, 118-119 of the bundle] it definitely needed to be addressed via a disciplinary."*

28. The matter was referred to a disciplinary hearing to be heard by Mr Midgley. He wrote an invitation letter to her 9 March 2020. The letter (123-124) states as follows:

> *I write following an incident that is alleged to have occurred on the 20"1 December 2019 in the Sutton Fields Public House. It is alleged that during the course of the evening you made physical contact with Lisa Mellor, grabbing her by the throat. It is further alleged that your behaviour and language could have been perceived as aggressive and intimidating towards Katarzyna Tworek.*
>
> *When asked about the matter you stated 'I can't really remember I had a few drinks, I was saying to LM you have a fucking nerve you inviting KT to your house and I went to grab her, I grabbed her by the throat'. You also stated that you had said to KT 'you have some nerve coming in this pub'.*
>
> *On investigating the matter, it became apparent that there have been possible previous altercations involving yourself and Katarzyna Tworek between January 2019 and March 2019. it is alleged that during this time period, when working in CCV you had threatened to punch KT in the head. When asked about the matter you admitted that you did say this and that immediately afterwards you left the room before doing something that you would regret.*
>
> *I require you to attend a disciplinary hearing to discuss the allegations made against you, namely that you have breached the company's Bullying and*

Harassment policy through the use of verbal and physical assault on more than one occassion. I must make you aware that the matter could be considered gross misconduct, meaning that your dismissal from the business is a possible outcome of this hearing.

The disciplinary hearing will be held on Friday 13th March 2020 at 12.30pm in meeting room 1. Please wait in reception prior to the meeting. The meeting will be conducted by myself Nigel Midgley. Production Manager with Claire Anderson, HR Manager in attendance.

You do have the right to be accompanied at the hearing by a representative who can be a co- worker, a member of the Company Council or a Trade Union Representative. if you decide to have Trade Union representation, I must ask that you inform me of this prior to the meeting.

For your information. I have included a copy of all supporting documentation relevant to this matter, inclusive of a copy of the Bullying and Harassment Policy.

29. The hearing takes place 13 March 2020. The Claimant is accompanied by Mr Carl Bovill. Mr Midgley and Ms Anderson are in attendance. The notes (125-126) are brief. The Claimant makes a point that a lot that is in the statements is not true and that she has not said a lot of what has been said. She stated that she pushed Ms Mellor away because she came for her, she did not grab her, and added it was in self-defence. The Claimant goes through some of the statements highlighting points she disputed. Then the note records:

"NM confirmed that he has heard a number of points from .lH, all of which centre around points in various statements which are contested and the fact that JH is saying that she didn't grab LM she pushed her away in self defence. NM asked if there was anything further to consider. CB said there was not, JH emphasised the point that she did not do most of what has been said and that she was just defending herself.

Adjourn: 2.35
Reconvene: 1.53

NM advised that he has gone through all of the statements and has taken time to listen to and reflect on what JH had to say in the meeting today. NM confirmed that in terms of his decision, he considered the matter to be gross misconduct, and as such the outcome would result in JH dismissal form the business. NM referred to the history, specifically the incident that occurred in the CCV room whereby threatening behaviour occurred in the workplace. NM stated that the accident has triggered a number of behaviours and that whilst JH disputes some of this, certain elements in each of the statements can be corroborated. NM also stated that he cannot now accept JH claims that she pushed LM back as the words in her own statement at the time confirmed that JH did in fact grab LM. NM reiterated that the company treat bullying and harassment extremely seriously and will handle any breaches accordingly.

CB asked NM if he really felt this was bullying and harassment. NM confirmed that his decision has been made, JH will receive all details in writing and will have the opportunity to appeal in writing within 5 working days. NM confirmed that in order to appeal this need to be in writing and full grounds for the appeal must be detailed

in the letter."

30. It is clear that verbally Mr Midgley therefore relied on (a) the incident in the CCV room, (b) a number of other behaviours which he felt were corroborate and (c) the grabbing of Ms Mellor's throat as bullying and harassment constituting gross misconduct.

31. A disciplinary outcome letter is sent 17 March 2020 (127-128). This states as follows in terms of the substantive decision to dismiss:

It also transpired that there have been previous altercations involving yourself and Katarzyna Tworek between January 2019 and March 2019, when working in CCV you had allegedly threatened to punch Katarzyna in the head.

When asked about the matter during the investigation you stated that you 'can't really remember I had a few drinks, I was saying to LM you have a fucking nerve you inviting KT to your house and I went to grab her'. During the disciplinary hearing your recollection of events had changed somewhat as you then claimed that you did not in fact grab LM, you pushed her away in self defence. You also stated that facts in many of the statements provided by a number of people were not true.

In considering the matter I did not find it plausible for you to change your view on the matter in the hearing. The fact that you admitted to grabbing Lisa Mellor, coupled with a number of statements that support this, left me to conclude that this did in fact occur. On reviewing the statements provided, it is my belief that there was sufficient evidence for me to conclude that on the night in question you behaved in a way that was aggressive and intimidating.

When asked about the history of the relationship between yourself and Katarzyna Tworek, you were also very open during the investigation. You admitted to shouting and swearing and stated that you had apologised to her for this behaviour. It is clear from the statement provided by the Shift Manager at the time that there were concerns over threatening behaviour from yourself towards the lady in question.

It is my belief that the actions outlined above. that have been thoroughly investigated and discussed, are a serious breach of Donaldson expectations in terms of Bullying and Harassment. As a result, my decision is that your employment with Donaldson Filter Components Limited is terminated immediately for gross misconduct.

32. The letter does not refer to other behaviours, it refers only to the incidents in January 2019 and on 20 December 2019 as breaches of the Respondent's bullying and harassment policy and gross misconduct.

33. Mr Midgley has been asked to explain his reasons for dismissing the Claimant in cross examination. He was questioned about several of the statements which appear to place responsibility for the confrontation between the Claimant and Ms Mellor upon Ms Mellor rather than the Claimant. Several of them suggested Ms Mellor provoked the Claimant. Mr Midgley stated that there was nothing provocative enough to warrant grabbing someone by the throat. He stated you have to view the matter as a whole. He stated that there were many statements with different views, but that the telling factor, the key one, was that the Claimant grabbed Ms Mellor by the throat. Asked was it not relevant why that

mattered, Mr Midgley simply stated he took all of the statements into account. He stated evidence of serious provocation would not have made a difference. He stated that emotional pressure that the Claimant was facing did not lead him to believe that would allow you to grab someone by the throat. He accepted Ms Mellor was disciplined but could not recall why. He was challenged concerning the Claimant's 12 years unblemished record. He stated that she grabbed someone by the throat, that the overriding factor is that she grabbed someone by the throat. He stated that he felt that he did not have any other option than to dismiss the Claimant. He accepted that he took into account the January 2019 matter and that there was some history. He stated he felt it was an important part of the backstory that the Claimant had threatened to knock her block off then grabbing her by the throat. He had to be reminded that the incidents involved two different people. Mr Midgley repeatedly referred to the overriding factor, the telling factor, that the Claimant grabbed someone by the throat. Mr Midgley was asked whether once he had decided that the Claimant grabbed someone by the throat dismissal was inevitable, he stated he concluded that on the evidence. Asked about his consideration of alternatives to dismissal he stated he could not remember but he took everything into account. Asked again what alternatives to dismissal he considered he stated he would always consider that based on the information. Asked what he considered, he stated all of the information. Asked what alternatives to dismissal he considered he stated every alternative, and came to that conclusion. Asked to give examples of the alternatives he considered he stated that he looked at the level of penalty in the guidance and saw that bullying and aggression warranted dismissal. He accepted that had there being no grabbing of the throat, the Claimant would not have been dismissed.

34. In my conclusion, on the balance of probabilities, Mr Midgley dismissed the Claimant for conduct reasons, principally the Claimant grabbing Ms Mellor by the throat. As he put it, this was the overriding, telling factor.

35. I conclude, on the balance of probabilities, that Mr Midgley did not consider any matters of mitigation because he did not feel that anything could mitigate the conduct he found.

36. I further find on the balance of probabilities that Mr Midgley did not consider any alternatives to dismissal because the Respondent's policy stated that bullying and harassment warranted dismissal.

37. A right of appeal was given and the Claimant exercised her right to appeal. The appeal was heard by Ms Bouston on 27 March 2020 and the Claimant was accompanied by her husband at that hearing. The decision to dismiss was upheld by Ms Bouston.

Submissions

Claimant's submissions

38. On behalf of the Claimant, Mr Collins made the following submissions.

39. I was not addressed on the law which Mr Collins acknowledged was well travelled and he described this as a straightforward conduct dismissal.

40. He noted that the Respondent presented a bare sheen over the top of their investigation statements. The evidence was bland, lacking in detail, and lacked

insight. When questioning got difficult, the Respondent's witnesses seemed to fall back on prepared simplistic response. The ultimate decision, as Mr Midgley accepted, as it appears from dismissal letter, was focused on the grabbing of Ms Mellor around the throat. You only get to that after a very confused walk around history and bad feeling. There is no real information about the decision making process. They simply state that they considered all the information and applied the policy.

41. There is nothing to show why Mr Midgley reached a conclusion that the Claimant was guilty of an unprovoked assault, of inappropriate action, and why that conduct could only be dealt with by dismissal.

42. The Respondent now tries to resurrect the January 2019 incident in the CCV room. Mr Kelly's interviews clearly show that was not an incident having any lasting repercussions.

43. Despite it not featuring as an issue at the time, it is now resurrected, used as indicating bad character.

44. The elephant in the room, the accident, charges are going to crown court, clearly something serious happened. The Claimant's husband was seriously injured, fractured bones, bleeding on the brain, memory loss. Ms Tworek is known to be speeding out of the car park. This is a close packed workplace environment.

45. The Respondent is trying in hindsight trying to justify a decision they are confused about.

46. There is a blindness, page 40, letter from KT, in that she gives an account about how the Claimant attacked her orally and slapped Ms Mellor in the face. No witnesses said anything about Ms Mellor being slapped in the face. Ms Tworek accepts later in her interview that she did not witness the event. This must call her account into question, but the Respondent apply blind trust.

47. There are plenty of witnesses Owens, Walmsley, who said Ms Mellor was the aggressor. She was described as toxic, she would put petrol on a fire, she was stirring, jigging, drags Ms Trowek over to the Claimant and her husband, they begin taking photos in front of Mr Mackinder, they were causing trouble.

48. The Claimant was already suffering, she had her husband seriously injured. He's there at the pub and he's upset. Ms Mellor was getting right up into people's faces. All of that is not really considered by the Respondent.

49. The Respondent's witnesses shrugged it off, "there were lots of different accounts".

50. The decision maker should separate them to each side, the partisan views, but any decision maker must seek and look for independent views. The Respondent just doesn't do that at any point. Instead we are left with the blandest of witness statements.

51. The disciplining officer did not consider why the grabbing of Ms Mellor's neck happened. An assault can have a defence, for example self defence is an absolute defence.

52. Serious provocation is a significant mitigating factor.

53. Mr Kalagasidis and Mr Whitefoot suggest both Ms Mellor and the Claimant were displaying angry behaviour. Mr Midgley conducted the disciplinary hearing for Ms Mellor and issued a written warning. There is clearly something he was culpable of. This has never been communicated to the Claimant, never disclosed, and was never considered at the disciplinary or appeal.

54. Nobody asked why the Claimant, with 12 years unblemished record, why does she suddenly act in this way. Then CCV room incident into account. Conflated to cover the same person. Mr Midgley thought the alleged person to be punched and person grabbed were the same. This was over a year ago with no disciplinary coming out of it. At it's height it was a flare up of temper, a personality clash.

55. There was a complete and utter failure to consider alternatives to dismissal. Mr Midley didn't appear to know the alternatives. It is a case on the train tracks. The Claimant admitted grabbing Ms Mellor by the throat, she was heading for dismissal.

56. Mr Collins repeated comments concerning the Respondent's bland reasoning for the dismissal and criticised the disciplinary invitation for suggesting that there was more than one allegation of verbal and physical assault whereas at most the allegations in January 2019 and December 2019 are a single instance of each. He submitted that the real allegation is at the top of the page, the grabbing of the neck. The rest is the Respondent trying to justify itself and dump a cloud on the Claimant.

57. At the disciplinary hearing there was no separation of allegations in the discussion. The focus is about Ms Mellor, Ms Tworek appears to take a back seat. The disciplinary outcome letter is bland and focused Ms Mellor apart from the January 2019 incident about which there weren't concerns. They occurred before the accident. The Claimant sorted that issue by moving away.

58. Was it really bullying and harassment, it was a confused situation, the Claimant was stressed, pressured and prodded.

59. The Claimant accepts that the event on 20 December 2019 was an "extension of the workplace". It is still a mitigating factor that there were no incidents in the workplace. Here we have alcohol, bad feeling, a clear attempt to stir things up, and serious mitigating features that should have affected the decision to dismiss.

60. The decision was outside the band of reasonable responses. The Claimant had a 12-year work record, with no previous disciplinary. The Respondent took a blind approach which resulted in an unfair dismissal.

61. Mr Collins accepted that there was no independent evidence in the witness statements from other people supporting the Claimant's case that she acted in self-defence. He noted however that the Respondent could have obtained further evidence in the form of a statement from an employee at the pub and from seeking their CCTV evidence but chose not to do so.

Respondent's submissions

62. On behalf of the Respondent, Ms Knapton made the following submissions.

63. Ms Tworek 's grievance was at the least concerning. The Respondent had to investigate. They carried out 29 interviews in addition to Ms Tworek. This takes time. There were 3 disciplinary processes. 2 resulted in a dismissal, one of which was the Claimant. The main event is 20 December 2019. The Claimant admits to grabbing Ms Mellor by the throat. In her interviews she doesn't say that was in self-defence. The grabbing is confirmed by her husband. She does not have an unblemished record, she had previously been at the point of punching Ms Tworek in the face. The Claimant is faced with a disciplinary. In the face of this she changes her story. She now alleges self-defence. The Claimant was witnessed by others to be violent that night. She is not the innocent victim as she suggests. The Claimant grabbed Ms Mellor by the throat.

64. The Claimant' representative was allowed to speak at the disciplinary hearing. The Claimant said her representative was allowed to ask questions.

65. The reason for the dismissal was conduct – grabbing LM around the neck.

66. The Respondent believed the conduct had been committed, the Claimant admitted the conduct.

67. It was investigated through speaking to more than 20 people, most of whom were at the pub on 20 December 2019. The Respondent did not need to obtain CCTV, or speak to the pub manager, this was not a criminal investigation. There was a confession. The Respondent is reasonable in believing there was an act of misconduct.

68. The Claimant was given the opportunity and took the opportunity to appeal. She was given the opportunity to submit thoughts verbally and in writing.

69. In relation to Alternatives to dismissal, the Respondent's comprehensive procedure intrinsically establishes that the Respondent considered alternatives. They did not relish the decision. They had to consider the violent action, her record was far from unblemished. There was overwhelming evidence of assault of one employee by another. This was a breach of the Respondent's bullying and harassment policy.

70. There was no inconsistent treatment, Ms Mellor was disciplined and Mr Bettney dismissed.

71. You could only conclude that it was fair. Please see the Respondent's written closing submissions.

72. I have considered the Respondent's written submissions.

73. The Respondent recites their evidential case and the relevant law. I have read those but will not recite them again. I have heard the evidence and I am aware of the law that they cite. Their substantive submissions begin on page 12 of their written submissions.

74. The Respondent's submissions deal with a failure to follow the ACAS Code of Practice but no such failure has been placed in evidence or submissions by the Claimant.

75. The Respondent submits that they were correct to characterise the conduct as gross misconduct and that the Claimant's violent act towards Ms Mellor can only be characterised as deliberate wrongdoing amounting to a wilful repudiation of the express or implied terms of the Claimant's contract with the Respondent (not least the requirements of the bullying and harassment policy) (*Sandwell & West Birmingham Hospitals NHS Trust v Westwood* UKEAT/0032/09 [para 111 and 113]).

76. The Respondent submits that the disciplinary process was carried out in a timely manner however delay is not a point put to me by the Claimant in evidence or submissions.

77. The Respondent states that the findings of the investigation highlighted not only the physical violence on 20 December 2019 but a history of threatened violence and aggression from the Claimant which were rightly considered by the Respondent. The Respondent was entitled to take such an approach [*London Borough of Brent v Fuller* UKEAT/0453/09 para 21].

78. The Respondent repeats the above submission concerning alternatives to dismissal (intrinsically established by a comprehensive disciplinary procedure).

79. They reiterate their oral submission about consistency of treatment.

80. The Respondent makes submissions about whether or not the event on 20 December 2019 was an extension of the workplace. However, the Claimant conceded this point in her submissions.

81. The Respondent submits that the wrongful dismissal claim is answered by the Claimant's contract, the incorporation of the bullying and harassment policy, the admission of physical and verbal violence to Ms Mellor and Ms Tworek and therefore the Respondent had sufficient evidence to conclude that the Claimant's actions constituted the end to the employment relationship and entitled the Respondent to dismiss the Claimant without notice for gross misconduct.

The Law

82. Section 98 of the Employment Rights Act 1996 sets out how this Tribunal should approach the question of whether a dismissal is fair. There are two stages.

83. First, the employer must show the reason for the dismissal and that it is one of the five potentially fair reasons set out in sections 98(1) and 98(2).

84. Second, provided the respondent is successful at the first stage we must then consider whether the employer acted reasonably in dismissing the employee for that reason under section 98(4).

85. A reason for dismissal is a set of facts known to the employer or belief held by him which caused him to dismiss the employee (**Abernethy v Mott Hey & Anderson [1974] IRLR 213 CA**).

86. It is sufficient that the employer genuinely believed on reasonable grounds that the employee was guilty of misconduct. The employer does not have to prove the offence (**Alidair Limited v Taylor [1978] ICR 445 CA**).

87. Guidance applicable to cases of misconduct was given by the EAT in **British Home Stores Limited v Burchell [1980] ICR 303**. The issue of fairness involves three elements:

1. Whether the employer believed the employee was guilty of misconduct, and

2. Had in his mind reasonable grounds upon which to sustain that belief, and

3. At the stage at which he formed that belief on those grounds, he had carried out as much investigation into the matter was reasonable in the circumstances of the case.

88. This guidance must be read in the light of **Boys & Girls Welfare Society v McDonald [1996] IRLR 129 EAT** which reminds the Tribunal that in considering the question of fairness for the purposes of section 98(4) the burden of proof is neutral.

89. I also reminded myself of the decision in **Iceland Frozen Foods Limited v Jones [1982] IRLR 439 EAT** that the function of the Employment 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 responses which a reasonable employer might have adopted.

90. In **Brito-Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854** the Employment Appeal Tribunal held that:

> *"the logical jump from gross misconduct to the proposition that the dismissal must then inevitably fall within the range of reasonable responses gave no room for considering whether, though the misconduct was gross and dismissal almost inevitable, there were mitigating factors that might be such that dismissal was not reasonable. The tribunal's function was to look at the trust's conclusion. It was not sufficient to point to the fact that the trust considered the mitigation and rejected it, largely upon the basis that the failure to observe the verbal notice and the letter undermined it, because a tribunal could not abdicate its function to that of the employer. It was the tribunal's task to assess whether the employer's behaviour was reasonable having regard to the reason for dismissal. It had to consider the whole of the circumstances with regard to equity and the substantial merits of the case. But that general assessment necessarily included a consideration of those matters that might mitigate, such as long service, the consequences of dismissal and a previous unblemished record. For that reason, there had*

been an error of direction to itself by the tribunal. The case would be remitted to the same tribunal, which had to take a proper approach in asking whether the gross misconduct justified dismissal in the light of all the mitigation available personally to B."

91. The Respondent has directed me to **Chief Constable of Lincolnshire v Stubbs. [1999] I.C.R. 547 (1998)** in which the Employment Appeal Tribunal held that "*although the two incidents took place away from the actual work place [in a public house], they occurred during work based social gatherings. In that context they could be seen as occurring in the course of employment in an extended version of the work place, Tower Boot Co Ltd v Jones [1997] 2 All E.R. 406, [1996] 12 WLUK 162 and W v Commissioner of Police of the Metropolis [1997] I.C.R. 1073, [1997] 7 WLUK 88 applied… each case will depend upon its own facts*".

92. The Court of Appeal in **Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23** held that the range of reasonable responses test applies to both, the decision to dismiss and to the procedure by which that decision is reached.

93. In determining the fairness of dismissal on grounds of misconduct we have regard to the provisions of the ACAS Code of Practice on disciplinary practice and procedure as well as the overall principals of natural justice and fair hearings.

94. Under Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, an award may be increased or reduced where the employer or employer unreasonably fails to follow the ACAS code. The amount of the adjustment is up to 25% in the following circumstances:

- the claim concerns a matter to which a relevant code of practice applies
- the employer or employee has failed to comply with the code
- the failure was unreasonable, and
- the tribunal considers it just and equitable in all the circumstances to make an adjustment.

95. Under section 122(2) of the ERA 1996, 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.

96. Section 122(2) of the Employment Rights Act 1996 provides that **"***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."*

97. In respect of any compensatory, section 123(6) provides that 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.

In **Nelson v. BBC (No. 2) 1980 ICR 110 CA**, it was held that three factors must be satisfied if the tribunal is to find contributory conduct:

1. The relevant action must be culpable or blameworthy.
2. It must have actually caused or contributed to the dismissal.
3. It must be just and equitable to reduce the award by the proportion specified.

98. Under section 123(1), the tribunal may also make a reduction to the compensatory award where it considers it just and equitable having regard to the loss sustained by the employee. Under this section, employers often argue that an employee might have been dismissed had a fair procedure been followed, either at the time of or after the dismissal occurred and therefore this should be reflected by reducing or limiting the duration covered by a compensatory award. This is known as the **Polkey** principle (**Polkey v AE Dayton Services Ltd [1988] ICR 142 House of Lords**).

Conclusions

99. What was the reason or principal reason for dismissal? The Respondent says the reason was conduct. I need to decide whether the respondent genuinely believed the claimant had committed misconduct. I made a finding of fact earlier that the principal reason for dismissal was for conduct reasons, principally the Claimant grabbing Ms Mellor by the throat which was, as Mr Midgley put it, was overriding, telling factor. The Claimant has not asserted that she was dismissed for another reason. Conduct was in my conclusion the reason the Respondent dismissed the Claimant and conduct is a potentially fair reason for dismissal.

100. Were there reasonable grounds for that belief? There were reasonable grounds for believing that the Claimant grabbed Ms Mellor, a fellow work colleague, by the throat. The Claimant admitted that conduct. The Claimant raised self-defence at the disciplinary hearing but had not raised it in her three earlier interviews. There is no evidence put before me in this hearing which corroborates her account of self-defence, that Ms Mellor ‘went for her’. I do not find that on the balance of probabilities the Claimant acted in self-defence.

101. At the time the belief was formed had the respondent carried out a reasonable investigation? In my conclusion the Respondent had carried out an extensive investigation by interviewing each person identified as a potentially relevant witness as the investigation progressed. They could have sought the CCTV evidence from the pub, they could have sought to interview employees from the pub. One can always suggest further avenues of investigation. However the investigation was, as I stated, extensive and in my conclusion could not be described as falling outside the band of reasonable investigations which may have been undertake by any reasonable employer.

102. Did the respondent otherwise act in a procedurally fair manner? In my conclusion the process was procedurally fair. The essential requirements under the ACAS Code of Practice on disciplinary matters were met by the Respondent.

The Respondent sought to establish the facts through an extensive investigation, they informed the Claimant of the problem through an invitation to a disciplinary hearing, the employee was advised of and exercised her right to be accompanied and was provided with the output from the investigation and a copy of the relevant policy, a meeting was held, a decision was made and the decision was set out in writing. The Claimant was granted and exercised her right to appeal. The Claimant agreed in evidence that at each hearing she was afforded the right to state her case. I heard evidence criticising the Respondent for what the Claimant's companion was allowed to do in the disciplinary hearing but the Claimant accepted that the notes were accurate and there is nothing evident in the notes outside of the basic requirements of a fair hearing.

103. Was dismissal within the range of reasonable responses? In my conclusion dismissal was not within the range of reasonable responses which a reasonable employer may have adopted. As I have found in my findings of fact, there was no engagement by the Respondent with or consideration of mitigating factors by the Respondent including the Claimant's 12 years' service, the fact that she had never been disciplined before, the degree to which the accident involving her husband and his injuries had impacted upon her behaviour and no findings were made by the Respondent in relation to provocation by either Ms Mellor or Ms Tworek. Mr Midgley's evidence indicates that he felt he did not need to consider any of those matters because, as he put it, none of these matters would justify the grabbing of someone by the throat. Mr Midgley did not consider alternatives to dismissal for the same reason. He simply believed that he applied the Respondent's policy that bullying and harassment, physical or verbal violence, were gross misconduct warranting dismissal. The Respondent's policy is not that strong, it states that they may lead to disciplinary action up to and including dismissal, not that they will automatically mean dismissal. Mr Midgley, in my conclusion, acted on tramlines once the Claimant had admitted that she grabbed Ms Mellor's throat and thereby ignored any consideration of potential alternatives to dismissal. There was no specific consideration of any points in mitigation available to the Claimant. In those circumstances, I conclude that the dismissal was not within the range of reasonable responses which a reasonable employer may have adopted. The Respondent did not act reasonably in all the circumstances in treating the Claimant's conduct in grabbing Ms Mellor's throat as a sufficient reason to dismiss the Claimant through its failure to specifically consider and assess points of mitigation open to the Claimant or to consider alternatives to dismissal.

104. The Claimant's claim of unfair dismissal is well founded.

105. There may be matters that the parties wish to raise in relation to issues of contributory conduct and whether or not the Claimant may have been dismissed in any event under the Polkey principle. They can be resolved one way or the other at the remedies hearing.

106. In my conclusion the Claimant's act of grabbing Ms Mellor's throat was a serious matter entitling the Respondent to dismiss the Claimant without notice. It was an act of physical violence and was deliberate. There was no breach of contract. I do not criticise the Respondent's finding that the conduct should be characterised as gross misconduct. That may appear to be contrary to my finding that the dismissal was unfair. However, my finding of unfair dismissal concerns whether or not that the Respondent acted reasonably in treating that as a sufficient reason to dismiss the Claimant, notwithstanding the fact there was conduct which

may be described as gross misconduct. A finding of gross misconduct does not automatically mean that a dismissal will be reasonable and fair.

Employment Judge Knowles

20 January 2021