EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107394/2020 (V)

Final Hearing held remotely by Cloud Video Platform (CVP) on 17, 18 and 19 August 2021

Employment Judge J Shepherd

Ms Malgorzata Krolik	**Claimant** **In Person**
Youngs Seafood Limited	**Respondent** **Represented by:** **Mr M O'Carroll** **Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that (i) the claimant was unfairly dismissed by the respondent; (ii) the respondent shall pay to the claimant a basic award of £4841.90; (iii) the respondent shall pay to the claimant a compensatory award of £2260.54.

The Employment Protection (Recoupment of Benefits) Regulations 1996 apply to this award. The prescribed element is £1648.15 and relates to the period from 28 August 2020 to 2 September 2021.

REASONS

Introduction

1. The claimant commenced ACAS Early Conciliation on 5 October 2020 and the certificate was issued on 21 October 2020. The claimant presented a claim of unfair dismissal to the Tribunal on 20 November 2020. The respondent accepts the claimant was dismissed; their position is that she was dismissed for misconduct, and the dismissal was fair.

2. The issue for the tribunal to consider is the fairness of the dismissal under section 98 of the Employment Rights Act 1996 ('ERA'). This involves considering whether the respondent adopted a fair procedure, and whether the sanction of dismissal was one which fell within the band of reasonable responses open to the employer.

3. For the respondent, the tribunal heard evidence from Ms Alison Hargreaves, Product Development Manager who dealt with the disciplinary hearing and made the decision to dismiss, and Ms Nicola Ballantyne, HR Cluster Lead.

4. The claimant gave evidence on her own behalf. The claimant is Polish and English is her second language. The tribunal also heard evidence from Mr Strzelec, a Machine Operator employed by the respondent at the time of the claimant's dismissal.

5. The tribunal was ably assisted by a Polish interpreter, Miss Labedz, who interpreted the entirety of the proceedings in order to ensure the claimant was able to fully understand and participate in the proceedings.

6. The parties lodged a joint bundle of documents, extending to 108 pages.

Findings in fact

7. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.

8. The respondent is a producer of seafood products. It employs around 2300 employees at several sites across the UK. The claimant was employed at the Livingston site that has circa 250 employees, but can fluctuate up to 500 employees during busy periods.

9. The claimant was employed as a Key Operative within the food production team. There are several different production areas at the Livingston site. The claimant was employed in the High Care Salmon Department (HCS), which is responsible for the processing of cold smoked salmon.

10. The claimant's duties included the packing and slicing of cold smoked salmon. At the time of her dismissal she was in the position of team leader and had been in that position for around 10 months.

11. The claimant's contract of employment has a section entitled 'Alcohol, Drugs, and Solvent Abuse' which states "*It is the policy of the Company to maintain and ensure a safe and healthy working environment for all its employees and to reduce the incidence of injury to person or property. To ensure such the Company prohibits possession, use or sale of alcohol or illegal drugs in the workplace and requires employees to be free of it on Company premises. The use of prohibited substances, whether or not during normal working hours, can result in the inability to perform work satisfaction or work safety. The Company reserve the right to conduct tests (including Random tests) to determine whether an employee is under the influence of prohibited substances. Your acceptance of this contract indicates your agreement to said test(s) being undertaken. Suitably qualified persons will perform the tests. Positive results from or refusal to cooperate with any such tests may result in disciplinary action up to and including summary dismissal*."

12. The respondent also has a 'Substance Misuse Policy'. The policy statement at paragraph 1 provides "*The aim of his policy is to ensure the safety and wellbeing of all employees, workers and visitors by instating clear rules regarding the use and possession of alcohol and substances. Equally, this policy will ensure that individuals with alcohol/ substance dependency issues are encouraged to seek help and that they are supported as much as is*

practically possible." And the reason for the policy is stated to be "*To ensure employees are treated fairly and consistently in respect of substance misuse, whilst giving consideration to individual circumstances and cases of dependency.*"

13. At paragraph 6 of the policy it states "*Where a conduct issue has occurred, the employee may be progressed through the disciplinary procedure. Where a true dependency exists, the company will seek to support the individual as well as practically possible and before any other action is taken."*

14. Paragraph 7 – 'Policy Principles' provides "…*The policy also forbids any individual to work or to attend work while under the influence of alcohol/ substances. These rules are put in place to ensure that the company meets health & safety regulations, runs an efficient operation and maintains absolute business/ product integrity*". The policy provides that employees must "*Report to work completely fit (with respect to alcohol and substances) and must not be under the influence or after effects of these substances to any degree. Any employee that deliberately breaches these rules will have committed a disciplinary offence which is potentially unlawful. This could result in the individual being prosecuted. Serious breaches to this policy will be deemed gross misconduct and will be dealt with in accordance to the company's disciplinary procedure. To this end: Substance abuse that affects the conduct of an employee may be dealt with under the disciplinary procedure….Any employee that has a genuine dependency on alcohol/ substances will be offered support.*"

15. At para 9.3 of the policy it states "*For individuals that are suspected of reporting to work unfit, the following indications (non exhaustive) may help confirm an individual is under the influence of a substance and therefore unfit for work:"* The list of indications includes *"The smell of alcohol from an individual" and "A change in behavior*".

16. Under the heading 'Managing Substance Abuse Problems' the policy provides "*11.1 Where an employee demonstrates a genuine dependency on alcohol and substances. The company will endeavour to help and support the*

employee, giving them a reasonable opportunity to overcome the problem. There is an expectation that individuals will co-operate and work with the company on any dependency issues. Any employee that seeks the assistance of the company will be guaranteed absolute confidentiality. 11.3 In the first instance, individuals will be asked to visit their general practitioner for advice and guidance. The company may also refer the employee to the company's occupational health service/ mental health service to support the individual. The company may request for access to medical records and rehabilitation programs…"

17. The respondent operates a disciplinary procedure. That procedure provides, in respect of the investigation stage: "*At any investigation meeting, the following points should be considered: Give the employee a full opportunity to explain their version of events. The Investigating Officer should ask probing question about any evidence collated or statements gained and try to probe out any relevant information.*" In respect of the Disciplinary Hearing the procedure provides "*Before or during the disciplinary hearing, if new facts emerge, it may be necessary to adjourn the meeting. This will allow for further investigation*." Under the heading 'Disciplinary Outcome' the procedure provides "*In deciding on the appropriate action the Chair should consider the following points: 7.7.1 Consider every case on its individual merit as each case will have its own circumstances, context and root cause. Therefore, the Chair should consider any mitigating circumstances. 7.7.2 Consider 'consistency in conduct' ie how have similar cases been viewed and managed by the company in the past. 7.7.3 Consider the employees employment history, particularly in cases of misconduct, as warnings should be issued incrementally. 7.7.4 Consider the facts of the case and base decisions on firm findings rather than anecdote. A Chair should have 'reasonable belief' of a malpractice when issuing warnings."* At paragraph 7.8.7 the procedure provides "*Summary Dismissal – If conduct or performance falls severely below the company's standard then it may be justified to dismiss an employee immediately following a disciplinary investigation/ hearing."* In the Appendices to the Disciplinary Procedure under the heading 'Gross Misconduct' it states "*Employees are advised that acts of Gross Misconduct will result in summary*

dismissal unless there are mitigating circumstances. Gross Misconduct acts include, but may not be limited to, the following:…The use, selling, handling or being under the influence of alcohol or drugs whilst at work that has not been prescribed or is illegal."

18. On 17 August 2020 the claimant attended work at 2pm on a shift that was due to last until 10pm. At the commencement of her shift there was an employee briefing carried out by Alex Forrest, Operations Manager. During that briefing, the claimant and her colleagues were told that the respondent would be changing the old production line machine for a new one, and that the employees working on the production line would need to take holiday whilst the work was carried out. The employees were also informed that there would be shift changes to allow the project work to be carried out. The claimant was unhappy about this because she considered it was not the first time that the company had told employees on the back shift to take their holidays at particular times, and the claimant likes to use her holidays to spend time with her children and grandchildren. As she was angry about this, she loudly protested, interrupting the briefing with words to the effect of: "No Alex, no holidays". At the same time she lifted her hat, giving the appearance that she was going to remove her hair covering. The removal of a hair covering in an area of food production would be deemed by the respondent as a matter for disciplinary action. The claimant did not in fact remove her hair covering, she left the briefing and went to the production line to commence work.

19. After the briefing, Mr Forrest spoke with Rolands Piekmans (HCS Team Manager) and Iain Wallace (HCS Backshift Advanced Operator) and asked them to ask the claimant to come to the label area in HCS so that he could speak to her about her outburst during the employee briefing. Mr Piekmans is Polish and was therefore able to interpret for the claimant.

20. Mr Piekmans and Mr Wallace brought the claimant to the label store area where Mr Forrest spoke to her and told her that it was not acceptable behaviour to have interrupted him in that manner whilst giving an employee

briefing. The claimant apologised and Mr Forrest accepted her apology but made it clear that any further outburst or similar behaviours would lead to a conversation with HR. Mr Forrest then went off to deal with another matter.

21. Immediately after this conversation, the claimant was emotional and crying, Mr Piekmans comforted her by giving her a hug and the claimant then walked away and returned to her work. Mr Piekmans then reported to Mr Wallace that he could smell alcohol on the claimant.

22. Shortly afterwards Mr Wallace approached the claimant and asked her, in English, if she had been drinking. The claimant told Mr Wallace that she had drunk three beers the night before and had gone to sleep around 5am. Due to the language barrier between the two, Mr Wallace was not sure whether the claimant was telling him that she had had 5 drinks, or had referred to 5am.

23. The claimant was then taken to the office to speak with Jamie Glidden, the Health and Safety Manager. Mr Glidden told the claimant that the company had reason to believe that she was under the influence of alcohol. The claimant replied 'I have had one, no three beers before work this morning as I have had trouble sleeping and that is maybe why you smell the alcohol. I feel ok and lots of other people drink too.' During the conversation the claimant noticed that there was an alcohol breathalyser test on the table. The claimant asked Mr Glidden if he wanted her to blow into the test machine and he told her that there was no need to do so as she had admitted herself that she had had three beers. Mr Glidden then informed the claimant that the company had a zero tolerance approach to alcohol on the site and asked the claimant to remain where she was whilst he went to get HR.

24. Ms Ballantyne then attended and explained that, as there were allegations that the claimant was under the influence of alcohol, she was to be suspended on full pay whilst the allegations were investigated.

25. By letter dated 18 August 2020 the respondent confirmed the claimant's suspension and stated that the allegation was 'That on Monday 17 August

2020 that you attended work under the influence of alcohol.' The letter also invited the claimant to an investigatory hearing on 21 August 2020.

26. The investigatory hearing was conducted by Mr O'Donnell, Stores and Despatch Manager. He asked the claimant whether she remembered the statement she had given on Monday. The claimant stated that she did remember what she had said, that she had been drinking from 5 – 6am but now she was saying it was earlier than that. She again stated that she had drunk 3 beers. In response to questions from Mr O'Donnell about whether she had difficulty sleeping she explained she did, due to problems back in Poland with the house she had inherited from her mother. She explained that she had called her GP after being suspended but they were not doing face to face meetings. Mr O'Donnell put to the claimant that she was saying she had drunk 3 beers some 8 to 9 hours before work and asked her whether she was saying she was not under the influence of alcohol? The claimant replied: 'I don't think I was under the influence, I might of just smelt of alcohol'. Mr O'Donnell asked the claimant how the company would know that the next time she had issues she wouldn't turn to alcohol to cope? The claimant started to cry, she explained she had already taken steps, and phoned her GP. She told Mr O'Donnell that she had an alcohol problem, but always tried to give 100% and to do her best. She stated that she needed support to deal with this.

27. The claimant was then invited to a disciplinary hearing on 27 August 2020. The hearing was conducted by Alison Hargreaves, with Nicola Ballantyne in attendance to take notes and provide HR advice. The notes of the meeting ran to only one and a half pages and Ms Hargreaves explained in evidence that they were verbatim notes, so the hearing was very short.

28. Ms Hargreaves asked the claimant if she had had 3 beers between 5 and 6am? The claimant replied 'No I had 3 beers the night before, but I went to bed between 5am and 6am, I did not drink the beers in that time. I have a big family issue and I could not sleep, and I did not have anything to eat. That is why people smelt alcohol.' Ms Hargreaves asked the claimant if she was

under the influence at all, to which the claimant replied 'No, I felt normal, I did my work and I was filling in the paperwork.' In response to further questioning the claimant said that she had a problem with alcohol when she is stressed, that at the moment she is stressed all the time, but she only drinks when she has a problem. The claimant also volunteered that she had menopause problems too but did not want to say because of the men in the room. The claimant said she thought she may have a problem but she had made steps to address it with her GP practice. She explained she had had depression and wanted to fix the problem and that she would come back to work with a good attitude. The claimant stated that she would go to the GP and sort out her menopause issues stating: 'My rage is not good and will not happen again'. Ms Hargreaves understood from this that the claimant felt that the menopause was having an influence on her emotions, but Ms Hargreaves did not ask the claimant any further questions about this.

29. The claimant explained that she did not want to lose her job, she had worked for the respondent for 11 years and did her best to help people. She told Ms Hargreaves that she would do anything to fix this situation and be a good employee.

30. Ms Hargreaves had not previously dealt with any other disciplinary cases relating to employees allegedly attending work under the influence of alcohol. She did not review the Substance Misuse Policy prior to the disciplinary hearing but reviewed it during her decision making process. Ms Hargreaves did not refer the claimant to the respondent's occupational health provider prior to making her decision, nor did Ms Ballantyne consider the possibility of advising Ms Hargreaves to take that step. Ms Hargreaves concluded that she did not believe the claimant when she said she had a problem with alcohol and felt that this was being used as an excuse for her behaviour and being under the influence.

31. Following the disciplinary hearing, Ms Hargreaves did not carry out any further investigations. She reached the decision to dismiss the Claimant for gross misconduct. Ms Hargreaves considered that the claimant's evidence in

the disciplinary hearing that the claimant had drunk 3 beers before going to bed at 5 or 6am was contradictory to her initial statements and Ms Hargreaves found that in her original comments the claimant had said to Mr Gledhill that she had had 5 drinks and that this was later changed to 3 drinks. This finding by Ms Hargreaves was contrary to the evidence. Mr Gledhill's statement from his discussion with the claimant on 17 August 2020 made no reference to the claimant telling him that she had drunk 5 beers.

32. The claimant appealed the decision to dismiss her. She set out 3 grounds of appeal in her letter of appeal dated 3 September 2020:

a. That the dismissal decision was too harsh.

b. That the company's Substance Misuse Policy states that the respondent should support employees, that before her dismissal she had never heard of the Substance Misuse Policy and that she had never approached her employer for help as she was aware of the company's zero tolerance approach to alcohol, and that now the company was aware of her drinking problem, it should be treated as a health problem rather than an immediate cause for dismissal or disciplinary action.

c. That she had worked for Macrae/ Youngs for 11 years, that she is a valued and hard working employee who is doing everything in her power to overcome her alcohol problem but needs her employer's help as well. That she was honest during the investigation and disciplinary that she was drinking the night before and has never denied that. She was embarrassed that she was an alcoholic, but that she believed she was able to overcome her drinking problem and return to work. That she appreciated that this was a serious action on her part, which resulted in her dismissal, but the company should take account of her length of service, mitigating circumstances, her alcohol problem and that she was unable to sleep and, rather than punish her with dismissal, look to reinstate her with some kind of sanctions and support in relation to her alcohol problem.

33. The claimant attended an appeal hearing on 9 September 2020 with Mr Russell Allan, Site Director – Fraserburgh and Livingston. The HR representative in attendance was Helen Deveraux.

34. The claimant's union representative, Mr Donnelly, set out the claimant's grounds of appeal. He explained that the claimant was adamant that she was not under the influence of alcohol. She admitted to having 3 beers. He asserted that the decision to dismiss was made too quickly and was based on the assumption that the claimant had been drinking before work. He asserted that the claimant should be referred to occupational health. The claimant was scared to admit she had a problem but had since sought help for her alcohol dependency.

35. Mr Allan stated during the appeal hearing that the claimant had admitted that she had been unable to accept her dependency but this event had triggered the claimant to seek help, that he could see that she was upset and disappointed, and that she showed genuine remorse which she also demonstrated by seeking help and support.

36. Mr Allan also stated '*I need to consider the case in reference to the policy, in which one section states that action must be taken if an employee is unfit for work due to being under the influence of alcohol, and another states that support, where sought, shall be given to individuals with an alcohol dependency. In this disciplinary we need to consider two opposing views. The first is that you were caught in the act and took action afterwards in order to mitigate punishment. The second is that this underlying issue has resulted in an incident for which you show genuine remorse, and which has triggered you to act. I must decide which view to take.'*

37. Mr Allan concluded the hearing by stating that he needed time to reflect and decide the right thing to do. He said he would arrive at the decision as soon as possible, that it may take a couple of days but not weeks, and the claimant would be notified in writing.

38. The claimant received the appeal decision on 21 September 2020, almost two weeks after the hearing. Mr Allan had been unwell for some time, indeed he remains seriously unwell which is why he was unable to attend before the tribunal to give evidence. At the time of dealing with the claimant's appeal he was in and out of the office receiving treatment and that was the reason for the delay in giving the appeal decision.

39. The claimant's appeal was not upheld and the decision to dismiss therefore remained. Mr Allan did not discuss with Ms Ballantyne his rationale for his decision to reject the appeal and the tribunal therefore heard no evidence about that rationale. Mr Allan simply gave Ms Ballantyne the bullet points set out in the appeal letter that were:

a. '*You came to work under the influence of alcohol on Monday 17 August 2020, as a consequence your behaviour and conduct was not acceptable in front of colleagues.*

b. *You came to work under the influence of alcohol which in a factory environment puts not only yourself and other colleagues at risk of injury.*

c. *You did not seek help for your alcohol issues till after the incident on the 17th August 2020.'*

40. Since her dismissal the claimant has continued to seek help for her alcohol problem with her GP. The claimant does not drink alcohol any more. She was able to find new employment commencing on 5 October 2020.

Relevant law

41. An employee has the right not to be dismissed unfairly in terms of Section 94 of the Employment Rights Act 1996 (ERA).

42. Section 98 of the ERA provides that it is for the employer to establish the reason for dismissal. In terms of Section 98(2)(b) conduct is a potentially fair reason for dismissal.

43. Section 98(4) provides:

'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.

44. The tribunal reminded itself that, while the initial burden of proof rests with the respondent to establish the reason for dismissal, the burden of proof in considering the reasonableness of the dismissal under section 98(4) is neutral.

45. The tribunal also reminded itself that an objective test of reasonableness applies to the respondent's conduct of a disciplinary investigation (**Sainsbury's Supermarket Ltd v Hitt [2003] ICR 111**).

46. In considering a dismissal for misconduct the starting point for the tribunal is the case of **British Home Stores v Burchell 1980 ICR 303**. What was said in that case was:

'What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the grounds of misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief, that the employer did believe it. Secondly, that

the employer had in his mind reasonable grounds on which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all circumstances of the case.'

47. In terms of the decision to dismiss, the sanction imposed requires to be one which fell within the band of reasonable responses open to an employer in the circumstances – **Iceland Frozen Foods v Jones [1982] IRLR 439**

Claimant's submissions

48. The claimant set out her submissions in writing, in Polish, and the interpreter translated them orally during the hearing. The claimant stated that she thought her employer's decision to dismiss was too severe. That in accordance with their Substance Misuse Policy, the employer should endeavour to support a person with an alcohol problem as much as it is practically possible before undertaking any other actions and only then undertake disciplinary proceedings as a last report. That although she had informed her employer she was seeking help for her alcohol problem, and provided evidence of this with a letter from her GP, the respondent had not helped her with overcoming the problem, instead punishing her with losing her job.

49. She submitted that it was very difficult for people with a drink problem to admit it to themselves, that before her dismissal she had never heard of the Substance Misuse Policy, that she knew about the zero tolerance policy regarding alcohol at work and that is why she had never turned to her employer for help.

50. The claimant referred to her length of service and the fact that she had been honest with her employer during the investigation and disciplinary proceedings, that she had drunk beer the night before her shift, and had never denied that. The claimant acknowledged that this was a serious action on her part which had led to her dismissal but the respondent should have taken into

consideration her length of service, mitigating circumstances, that she had a problem with alcohol and difficulties with sleeping, and instead of punishing her in the form of dismissal could have given her a chance. The claimant confirmed that she wished to seek reinstatement.

Respondent's submissions

51. Mr O'Carroll, on behalf of the respondent, set out his submissions in writing so they are not repeated here. In summary, he submitted that the procedure followed was fair, that the respondent formed a genuine belief that the misconduct had occurred and had reasonable grounds for holding such a belief. It mattered not that the claimant felt able to continue with her duties. She was admittedly under the influence of alcohol whilst at work and in terms of the strict policy which applied ("to any degree") the claimant was in clear breach of it. The claimant had attended work on 17 August 2020 at 2pm having been drinking alcohol earlier that day at approximately 4am.

52. Mr O'Carroll submitted that the respondent had carried out as much investigation as was reasonable in the circumstances. He submitted that, due to health and safety implications, the respondent had no option but to dismiss.

53. Mr O'Carroll submitted that the claimant had not approached her GP for assistance until after the incident and by that stage it was too late to avail herself of the supportive provisions of the Substance Misuse Policy because she had already fallen foul of the prohibition. In his words 'The assistance provisions of SMP cannot be invoked after the event as some sort of get out of jail free card in order to avoid the consequences of gross misconduct.'

54. Mr O'Carroll asserts that, if the claimant was unfairly dismissed, she would have been dismissed in any event at some point shortly after August 2020. He asserts that if the incident of 17 August 2020 had not occurred, the claimant would not have had the 'wake up call' necessary to alter her behaviour and would have been disciplined for the same misconduct at some later point.

55. Mr O'Carroll also asserts that the claimant accepted that her behaviour had caused her dismissal and that in the event of a finding of unfair dismissal, a 100% reduction for contributory fault would be appropriate.

56. On reinstatement, he asserts that it would not be practicable as the respondent has lost trust and confidence in the claimant and it would send a message to the remainder of the workforce that it is permissible to be under the influence of alcohol at work and still be reinstated which would undermine the respondent's policies.

Comments on the evidence

57. The claimant asserted that she was aware of other employees having attended work significantly under the influence of alcohol but having been allowed to continue in the workplace. Ms Ballantyne had no knowledge of any such incident having taken place. The claimant's evidence was that management was unaware of such incidents. The tribunal did not have sufficient evidence before it to reach any findings on this issue or on the claimant's submissions on consistency of treatment.

Decision

58. There are three limbs to the test set down in Burchell.

59. The first is that the employer had a genuine belief in the claimant's guilt.

60. The claimant was dismissed for being under the influence of alcohol at work. The tribunal is satisfied, on the evidence before it, that Ms Hargreaves did have a genuine belief that the claimant was under the influence of alcohol when she attended for work at 2pm on 17 August 2020.

61. The second is that the respondent's belief was based on reasonable grounds. Ms Hargreaves had before her evidence that the claimant smelt of alcohol and that her behaviour during the employee briefing was out of character. On balance therefore, the tribunal is satisfied that the respondent had reasonable grounds for that belief. However, the tribunal is not satisfied that Ms Hargreaves had reasonable grounds for the belief that the claimant was being

untruthful about her alcohol problem, or that the claimant's accounts about the amount of alcohol she had drunk had been inconsistent. These matters were clearly relevant to the decision that was taken to dismiss the claimant, and therefore inform the decision as to whether the decision to dismiss was reasonable in all the circumstances of the case. The tribunal's findings on that issue are set out below.

62. The third limb of the Burchell test is whether, at the point when the respondent formed their belief, they had carried out a reasonable investigation. This includes consideration of whether the respondents had adopted a reasonable procedure.

63. The tribunal is not satisfied that the respondent carried out a reasonable investigation in this case. At no stage during the investigation, disciplinary or appeal hearings was the claimant asked any probing questions as to why she had interrupted the employee briefing. The respondent did not therefore follow the guidance in its own disciplinary procedure.

64. It was simply assumed by the respondent that she had behaved out of character because she was under the influence of alcohol and it relied upon this assumption to conclude that the claimant was guilty of misconduct justifying dismissal. In fact, the claimant was upset about the prospect of not being able to use her holidays to see her children and grandchildren.

65. During the disciplinary hearing the claimant raised the fact that she was having menopause problems and stated that her 'rage was not good'. Despite Ms Hargreaves acknowledging in evidence that she understood from this that the claimant felt that the menopause was having an influence on her emotions, she asked the claimant no questions about this at all, nor did she refer the claimant to occupational health to explore whether this might have contributed to her behaviour on 17 August 2020.

66. Neither Ms Hargreaves nor Ms Ballantyne even considered referring the claimant occupational health to report on the claimant's problem with alcohol, despite the claimant producing evidence that she was now seeking help for

her alcohol problem from her GP. The respondent's own Substance Misuse Policy suggests that a referral to occupational health may be appropriate. Without further investigation, Ms Hargreaves rejected the claimant's assertion that she had an alcohol problem as being simply an excuse for her behaviour after the event.

67. The respondent made no investigations as to what extent the claimant may have been under the influence of alcohol and how this may have affected her at work. In particular, the claimant's evidence that she had offered to undertake the alcohol test that Mr Glidden had readily available on 17 August 2020 but was refused the opportunity to do so because she had admitted drinking 3 beers, was not challenged by the respondent. The tribunal considers that this issue is plainly relevant to the question of whether it was within the range of reasonable responses to dismiss the claimant for being under the influence of alcohol.

68. The evidence before the respondent was that the claimant had consumed 3 beers between 8 and 10 hours before starting work at 2pm and had slept for a number of hours after consuming the alcohol. The respondent appeared to place significant emphasis on its 'zero tolerance' approach to alcohol and upon the fact that the claimant had consumed the alcohol on 'the same day' as attending work. The tribunal notes that this is equivalent to an employee consuming 3 beers by 11pm at night, sleeping for a number of hours, and then attending work at 9am the following day. It was not reasonable for the respondent to conclude that the claimant posed a health and safety risk to herself or other employees on this basis without further investigation.

69. Finally, the tribunal considered whether the decision to dismiss was one which fell outwith the band of reasonable responses open to the respondents.

70. The Tribunal began by considering the case of **Iceland Frozen Foods Ltd v Jones 1982 ICR 17**. What was said in that case was:

1. The starting point should always be the words of section 57(3) themselves;

2. In applying the section an Industrial Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Industrial Tribunal) consider the dismissal to be fair;

3. In judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;

4. In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another reasonably take another;

5. The function of the Industrial 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. If the dismissal falls within the band the dismissal is fair; if the dismissal falls out with the band it is unfair.

71. The Tribunal therefore has to be careful not to substitute its view, but rather to apply the objective test of a reasonable employer.

72. Applying that test, the Tribunal finds that the decision to dismiss the claimant in all of the circumstances of this case did fall out with the band of reasonable responses.

73. The respondent placed an unreasonable amount of emphasis on the fact that the claimant had not admitted to her drink problem prior to the incident on 17 August 2020. Nothing in the respondent's Substance Misuse Policy requires an employee to raise the issue with their employer prior to an incident of this nature taking place. To the contrary, the policy explicitly provides at para 9.5 that '*If a manager suspects an employee has a substance abuse problem, the manager should consider raising the issue with the employee, with the aim of intervening on any potential lapse. Should an employer suspect an employee has an alcohol/ substance dependency, then they should contact the HR*

department for support.' The policy provides that where an individual demonstrates a genuine dependency on alcohol the company will endeavour to help and support the employee and give them a reasonable opportunity to overcome the problem. It does not stipulate that this will not apply if the employee only demonstrates that dependency having already been accused of being under the influence of alcohol whilst at work. The respondent had no reasonable grounds to believe that the claimant was being untruthful about her alcohol dependency. There was some inconsistency in their evidence as to whether they accepted she had an alcohol problem or not. Ms Hargreaves stated that she had found that the claimant was not being truthful, and the tribunal finds that she had no grounds for that finding. Mr Allan, on hearing the appeal, appears to have accepted the claimant's evidence in this regard.

74. The tribunal finds that the claimant had demonstrated a genuine dependency on alcohol, having evidenced seeking help from her GP immediately after the incident, and the respondent failed to carry out a reasonable investigation into this by failing to refer the claimant to occupational health. The respondent did not consider providing support to the claimant for her alcohol problem, deciding instead to proceed straight to the disciplinary procedure and dismissal. In doing so, it did not act in accordance with its own policies.

75. The evidence before the respondent, based on an inadequate investigation, did not reveal that the claimant's conduct had fallen severely below the company's standards. The respondent also did not take adequate account of mitigating circumstances, or the length of the claimant's service and clear disciplinary record. Ms Hargreaves did not consider the possibility of any alternative sanctions to summary dismissal.

76. The tribunal finds that the respondent's decision to dismiss the claimant fell outwith the range of reasonable responses.

77. The tribunal finds that, in all the circumstances of the case, the decision to dismiss the claimant was unfair.

Contributory fault

78. Where a tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable have regard to that finding (section 123(6) ERA 1996). Where the tribunal considers that any conduct of the claimant before the dismissal was such that it would be just and equitable to reduce the amount of the basic award to any extent, the tribunal shall reduce that amount accordingly (s.122(2) ERA 1996).

79. The claimant accepted under cross examination that she had been under the influence of alcohol when attending at work on 17 August 2020. The tribunal finds that the claimant did contribute to her dismissal in attending work smelling of alcohol and in having failed to seek assistance from her employer with regard to her alcohol problem at an earlier stage, although the tribunal also notes that the claimant was unaware of the Substance Misuse Policy until she was provided with a copy after her dismissal but before the appeal, and was therefore unaware that assistance might be given to her if she did seek help. In all of the circumstances, the tribunal considers that it would be just and equitable to reduce the amount of the compensatory award by 25%. The tribunal does not consider it just and equitable to reduce the amount of the basic award to any extent.

Polkey reduction

80. The respondent submitted that any award of compensation should be reduced in accordance with the principle in **Polkey v AE Dayton Services Ltd 1988 ICR 142** on the basis that the claimant would have been dismissed for the same or similar conduct in any event shortly after August 2020. The tribunal was not persuaded that in all the circumstances of the case a Polkey reduction would be just and equitable. The claimant's dismissal was found to be unfair

because no reasonable investigation had been carried out and that the summary dismissal fell outside the band of reasonable responses. The tribunal concluded that the respondent had failed to implement its own Substance Misuse Policy. The tribunal finds that, had it done so, the claimant could have been supported to deal with her alcohol problem thereby avoiding any further possible instances of misconduct of this nature. This was not a case in which the Tribunal was satisfied that it was possible to conclude that the claimant would have been dismissed in any event.

Reinstatement

81. Under section 113 of the 1996 Act, if the tribunal finds that the claimant has been unfairly dismissed, it can order reinstatement or reengagement, or where no award for reinstatement or reengagement is made, it can award compensation under section 112(4) if the 1996 Act.

82. In accordance with s.112 ERA the tribunal asked the claimant, in the event that there was a finding that she had been unfairly dismissed, if she wished the tribunal to make an order for reinstatement or reengagement. The claimant stated that she did wish to be reinstated. She had been employed by the respondent for 11 years and had enjoyed her job so she would like to return to it.

83. The respondent had not been anticipating this response as the claimant had given no indication in her claim form that she would be seeking reinstatement. The tribunal therefore permitted Ms Ballantyne to be recalled as a witness to given evidence on this issue.

84. The tribunal concluded that a reinstatement or reengagement order would not be appropriate in this case. The tribunal found that it would be practicable for the respondent to comply with an order for reinstatement. However, the tribunal considered that it would not be just to order reinstatement as the claimant's conduct had contributed to her dismissal.

85. The tribunal therefore went on to consider the issue of compensation. Section 118 of the 1996 Act states that compensation is made up of a basic award and a compensatory award.

Basic Award

86. A basic award is based on age, length of service and gross weekly wage (section 119).

87. The claimant's schedule of loss asserts that her gross weekly wage was £393 per week. The respondent's schedule of loss asserts that her gross weekly wage was £345.85. I accept the respondent's assertion as to the gross weekly wage based upon the evidence set out in the payslips included in the bundle. Both parties were agreed that the claimant had 11 full years of service and that the claimant was aged 47 at the date of termination. The claimant is entitled to 1.5 weeks' pay for each complete year of employment aged 41 and over and 1 week's pay for each complete year of employment when between the ages of 22 and 40 inclusive. The claimant is therefore entitled to a basic award of (14 weeks x £345.85) **£4841.90.**

Compensatory Award

88. Section 123(1) of the ERA states that the compensatory award is such amount as the tribunal considers just and equitable having regard to the loss sustained by the claimant in consequence of dismissal in so far as that loss is attributable to action taken by the employer. This generally includes loss of earnings up to the date of the hearing (after deducting any earnings from alternative employment), an assessment of future loss, and if appropriate a figure representing loss of statutory rights.

89. The claimant has sought to mitigate her losses, obtaining alternative employment on 5 October 2020.

90. Based upon the claimant's payslips included in the bundle, the claimant's average net earnings with the respondent were £288.92 per week.

91. There was a period of 5 weeks between the effective date of termination on 28 August 2020 and the claimant commencing her new job on 5 October 2020. The claimant therefore sustained net losses in this period in the total sum of (£288.92 x 5) **£1444.60.**

92. The tribunal finds, on the basis of the pay information provided by the claimant at pg 99 – 100 of the bundle of documents, that the average weekly net earnings in her new employment are £272.90 per week. This is a shortfall of £16.02 per week. The period of past loss from 5 October 2020 to the date of this judgment is a total period of 47 weeks. The tribunal has therefore suffered losses from 5 October 2020 to today in the sum of (47 x £16.02) **£752.94**.

93. The tribunal finds that it is likely that the claimant will be able to fully mitigate her losses within a further 6 months (by 2 March 2021). The claimant will therefore suffer future loss of earnings over a period of 26 weeks in the sum of (26 x £16.02) **£416.52**.

94. The tribunal finds that the claimant is entitled to the sum of £**400** in compensation of loss of her statutory rights.

95. The total compensatory award, before deductions, is therefore **£3014.06**.

96. The tribunal then applies the deduction of 25% for its finding of contributory fault, resulting in a total compensatory award of **£2260.54.**

Recoupment

97. The prescribed period is the effective date of termination (28 August 2020) to the date this judgment is sent to the parties (2 September 2021).

98. The prescribed element consists of the loss of wages for the prescribed period. That figure, taking account of the deduction for contributory fault, is **£1648.15**.

99. The total sum of all awards made by the tribunal is **£7102.44.**

100. As the claimant has been in receipt of benefits, the relevant department will serve a notice on the respondent stating how much is due to be repaid to it in respect of those benefits. In the meantime, the respondent should pay to the claimant the amount by which the monetary award exceeds the prescribed element, namely (£7102.44 - £1648.15) **£5454.29.**

Employment Judge: **J Shepherd**
Date of Judgment: **02 September 2021**
Sent to the parties: **08 September 2021**