EMPLOYMENT TRIBUNALS

Claimant: **Philip Smith**

Respondent: **Swann Engineering Ltd**

Heard at: **East London Hearing Centre (by CVP)**

On: **13 – 15 July 2022**

Before: **Employment Judge Housego**
Members: **Mr M Wood**
Mr D Hurrell

Representation

Claimant: John Bensley, McKenzie Friend
Respondent: Ms E J Evans-Davis, Solicitor, Peninsula Legal Services Ltd

JUDGMENT

1. **The Claimant was unfairly dismissed by the Respondent.**

2. **The claim for disability discrimination is dismissed.**

3. **The Respondent is ordered to pay to the Claimant the sum of £34,290.08, as set out in Schedule 1 to this judgment.**

4. **The Recoupment Regulations apply to this judgment, as set out in Schedule 2 to this judgment.**

REASONS

Summary of case

1. Following an altercation at work, the Claimant was dismissed. The Respondent says this was gross misconduct. The Claimant denies gross misconduct and, while admitting that he ought to have behaved differently, says that his dismissal was unfair. He says that his mental health is disabling

and that he was discriminated against by reason of it and that reasonable adjustments should have been made to the appeal and were not.

Claims made and relevant law

2. Mr Smith claims unfair dismissal and disability discrimination (direct discrimination in the handling of his appeal and failure to make reasonable adjustments in that appeal). He also claims notice pay.

3. A previous hearing found that Mr Smith qualifies as disabled by mental health problems from 24 August 2020, because the issues were caused by his dismissal. That hearing made no finding as to whether the Respondent knew of it or should have done. The disability discrimination claim can only relate to the appeal, as Mr Smith was not disabled before he was dismissed (because the dismissal was the cause of the disability).

4. Section 13 of the Equality Act 2010:

> "13 Direct discrimination
>
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
>
> (2) ...
>
> (3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.
>
> (4) …

5. Mr Smith also says that the Respondents failed in their obligation to make reasonable adjustments:

> "20 Duty to make adjustments
>
> (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements.
>
> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

6. In respect of a claim for unfair dismissal, the Respondents have to show that the dismissal was for a potentially fair reason[1]. The Respondents say

[1] S98(2) of the Employment Rights Act 1996

this was conduct, which is one of the categories that can be fair[2]. It has to be shown that the dismissal was fair[3]. The employer must follow a fair procedure throughout[4], and dismissal must fall within the range of responses of a reasonable employer[5]. It is unfair to dismiss for gross misconduct automatically[6]. It is not for the Tribunal to substitute its own view of what should have happened, for it is judging whether the actions of the employer were fair, and not deciding what it would have done.

7. The burden of proof as to the reason for dismissal is on the employer, on the balance of probabilities. There is no burden or standard of proof for the Tribunal's assessment of whether it was fair to dismiss[7]. If the dismissal was procedurally unfair the Tribunal has to assess what would have happened if a fair procedure had been followed[8].

8. If the conduct of a successful claimant caused or contributed to the dismissal, the awards may be reduced[9].

9. For the claim of unlawful discrimination the Tribunal must be satisfied that in no sense whatsoever was the appeal procedure tainted by such discrimination. For the discrimination claim, it is for Mr Smith to show reason why there might be discrimination[10], and if he does so then it is for the Respondents to show that it was not.

10. The Respondent denies that notice pay was due, on the basis that this was a gross misconduct dismissal.

Issues

11. The reason given for dismissal was conduct. The Claimant accepts that this was the real reason. The Claimant accepts that there was a genuine belief in the misconduct and that the investigation was fair.

12. The issues for the unfair dismissal case are whether the Respondent had reasonable grounds for its belief that this was gross misconduct and whether the sanction was outside the range of responses of the reasonable employer.

13. There are the issues of the fairness or otherwise of the procedure, and whether, even if dismissal was warranted this was gross misconduct or whether notice was required.

14. A previous hearing decided that the Claimant was disabled from 20 August 2020 (as the issue with mental health was caused by the dismissal). The dismissal itself cannot be disability discrimination, because the disability was caused by the dismissal, and so the disability cannot be the cause of

[2] Also S98(2) of the Employment Rights Act 1996
[3] S98(4) of the Employment Rights Act 1996
[4] Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 CA
[5] Iceland Frozen Foods Ltd v Jones [1982] UKEAT 62_82_2907
[6] Brito-babapulle v Ealing Hospital NHS Trust (Disability Discrimination : Disability) [2013] UKEAT 0358_12_1406
[7] Section 98(4) of the Employment Rights Act 1996
[8] Polkey v AE Dayton Services Ltd [1987] UKHL 8
[9] S122(2) and S123(6) of the Employment Rights Act 1996
[10] Igen v Wong [2005] ICR 931, Madarassy v Nomura International plc [2007] EWCA Civ 33, Laing v Manchester City Council [2006] I.C.R. 159, and Ayodele v Citylink Ltd & Anor [2017] EWCA Civ 1913

the dismissal (as the Claimant was then not dismissed). The disability claim relates to the appeal, and the issues are whether or not the Respondent could or should have known of it, and if yes whether that makes any difference to the assessment of the appeal. The claim for failure to make reasonable adjustments is that the Claimant's daughter should have been allowed to accompany him to the appeal.

Evidence

15. The Claimant gave oral evidence. His daughter Rachel Nash gave unchallenged evidence that on the date of the appeal the Claimant's mental health was poor. For the Respondent, Paul Sims, who witnessed the altercation, Andrew Gregory, who dismissed the Claimant, and Jeff Carlton, managing director, who took the appeal.

16. There was a bundle of documents. This was not a document heavy case.

The hearing

17. The hearing was a video hearing. There were no technical issues. I made a full typed record of proceedings.

The Claimant's case

18. He was not the aggressor. He felt threatened and it was self-defence. Perhaps he had overreacted, but he didn't start it, and all he did was push Mr Fleuty away. The other person had come back at him and was so close to him and shouting that he felt spit on his face. He is older. This was before vaccines, and he had been very concerned by this, so had pushed the other person away. Mr Fleuty had then punched him in the face but he had not responded aggressively. In all the circumstances the dismissal was unfair. He was badly affected by this, and he should have been allowed to take his daughter to the appeal hearing.

The Respondent's case

19. The Respondent had a zero-tolerance approach to violence. The disciplinary policy clearly stated that violence was gross misconduct. The policy said that gross misconduct resulted in dismissal. The Claimant knew what the policy was. The Claimant accepted that he had pushed the other person in the chest hard. This was violent. Dismissal was therefore inevitable, and fair. They had not known of the mental health disability, and nor could they reasonably be expected to have done so.

Submissions

20. I made a full note of the submissions of both representatives. They expanded on the cases summarised above.

Facts found

21. Mr Smith is a welder. He was 58 years of age at the time. He had worked for the Respondent from 01 October 2011, until his summary dismissal for

gross misconduct on 21 August 2020, following an incident on 11 August 2020.

22. Mr Smith is a first aider. Another welder, Kelvin Fleuty, had a problem with one of his eyes. He went to see Mr Smith. It seems it was that Mr Fleuty had wiped his brow with his sleeve and a fragment had got into his eye. Mr Smith told him that he needed to get it checked out and any fragment removed there. Mr Fleuty declined to do so. Mr Smith did not think there was any issue arising from this.

23. However, Mr Fleuty did later go to A&E. He then complained that Mr Smith had failed in his first aider duties in the way he had dealt with his (Mr Fleuty's) eye. Mr Smith knew of this, as Mr Fleuty had lodged an accident report form, which he was told about.

24. The next morning at about 7:10 am, Mr Smith arrived at work early, as was his habit, and went passed the clock in machine, through a small office into a larger one, to fill his kettle to make a cup of coffee. Paul Sims was sitting at the desk in that small office.

25. As Mr Smith returned though the small office Mr Fleuty was there or came into the office. One or other of them accused the other of being *"a liar or bullshitting"* about Mr Fleuty's request for first aid the day before. Mr Smith said that Mr Fleuty said that, and Mr Sims said it was Mr Smith who said it. Mr Gregory was told by Mr Smith that it was Mr Fleuty who had said it, and Mr Gregory seems to have accepted this account (180) because when Mr Smith said that in the dismissal meeting Mr Gregory replied *"But you pushed him on his chest, didn't you?"* and did not challenge Mr Smith's account. Mr Carlton accepted Mr Sims account of it (that Mr Smith had said these words), and the Tribunal so finds. There is no reason to doubt the account of the eyewitness Mr Sims. Neither Mr Gregory nor Mr Carlton thought this of any great significance, and they focussed on the physicality of the incident.

26. Mr Fleuty then came at Mr Smith, and was verbally angry with him, standing very close to him. Mr Smith felt spit landing on him[11] while Mr Fleuty shouted at him. Mr Smith then pushed Mr Fleuty away from him, using the outside of his right forearm. Mr Smith is 6 feet tall and well built. Mr Fleuty is smaller. The push was forceful enough to cause Mr Fleuty to lose his balance. Whether he *"bounced off the wall"* (as Mr Sims said) or stumbled against a desk in front of the wall (as Mr Smith said) is irrelevant. Mr Fleuty then picked himself up, and punched Mr Smith on the jaw. Mr Smith said something to the effect that they should not fight. Paul Sims got up from the desk in the office, and separated them, and sent Mr Smith back to work. Mr Sims said he separated them twice, as after the first time Mr Smith was still in an angry situation with Mr Fleuty. Mr Smith, more than once, told Mr Fleuty not to fight with him (Mr Sims does not dispute this.)

27. Given that this was a matter over in a few moments (the Tribunal thinks Mr Smith's assessment of 5-10 minutes is inaccurate, and that his other oral

[11] The factory was organised into teams ("bubbles") which interacted as little as possible. Masks were not worn within the bubble. It is not possible (or necessary) to wear a mask while welding. Whether they should have been wearing masks is not relevant to this decision. It is clear that at the time none of the three in the small office were wearing masks.

evidence that it was *"over in a flash"* more accurate, and that was Mr Sims' evidence too) it is unsurprising that recollections differ.

28. Mr Gregory called for initial statements from all. Mr Smith wrote one (175). It is brief. Mr Smith said, as the Tribunal accepts, that he was shaken by these events. He is not a lawyer. It is not to be expected that his one-page account on a piece of paper brought to him with a red pen to write it with is to be considered as a full account of what happened. Mr Gregory dismissed Mr Fleuty the same day. Mr Fleuty accepted that he had punched Mr Smith in the face and would have to go. He was aggressive and threatening as he left the workplace. Mr Gregory knew that was the case, at the time.

29. On 14 August 2020 Mr Gregory suspended Mr Smith. On 17 August 2020 Natalie Hilton, HR and Payroll Manager, wrote to tell him there would be a disciplinary hearing on 19 August 2020. The letter said that the meeting would:

"*discuss the following matters of concern:*

> *• Alleged serious breach of company rules and procedures in respect of the Health & Safety of fellow workers, namely it is alleged that on the 11th August 2020 without reasonable excuse, you were engaged in violent conduct resulting in a physical altercation with another party (Kelvin Fleuty) whilst on Company property.*

If these allegations are substantiated, we will regard them as gross misconduct."

30. On 21 August 2020 Natalie Hilton wrote to the Claimant (referring to it as *"my decision"*, but in fact setting out the decision made by Mr Gregory). This said:

"At the hearing your explanations were:

> *• You entered the Supervisors office on the morning of the 11th August to fill your kettle, ready for the working day. Upon your return, Kelvin had entered the office and began shouting at you regarding the previous day. You state that Kelvin got in your face, and your response was to say 'back, back, Kelvin back' and move him back using your forearm. You admit that Kelvin threw a punch in your direction, but it did not connect with your jaw, and that you don't think he meant it and that you were not separated by the Supervisor (Paul Sims) for failing to ignore his instruction when asked to leave the office and return to your work space, however you state that you left when asked the first time.*

I consider your explanation to be unsatisfactory because when asked in the meeting if you could have shoved Kelvin with such force that he hit the wall behind, you responded to say that you cannot remember, that you moved him with your arm, and said 'Kelvin, don't fight'. However, witness statements and further evidence showing Kelvin's injuries sustained would suggest that only a shove with such force behind it could have accounted for the marks on his neck."

31. The decision was:

"Having carefully reviewed the circumstances and considered your responses, I have decided that your conduct has resulted in a fundamental breach of your contractual terms which irrevocably destroys the trust and confidence necessary to continue the employment relationship. The appropriate sanction to this breach is summary dismissal. ***I have referred to our standard disciplinary procedure when making this decision, which does not permit recourse to a lesser disciplinary sanction****."* [emphasis added].

32. Mr Smith appealed by letter of 24 August 2020. His mental health suffered a precipitous decline, such that he was unable to drive, and was barely lucid. He added to his letter by a further letter. This was undated but was sent (and received) before the appeal hearing on 02 September 2020. There were 9 points identified. Number 8 was:

"8• You feel disappointed in the dismissal outcome due to an incident which was initiated by another member of staff- [this was in the original. It was augmented as follows] *I feel disappointed in the severity of the outcome- given that this was an isolated incident, which occurred as a direct result of the verbal aggression and threatening behaviour that I was subjected to. At a time when employees should be practicing social distancing,* ***I could feel spit landing on my face from Kelvin*** *being in my face and felt the invasion of my personal space was very threatening."* [emphasis added]

33. Mr Smith also challenged the evidential weight to be given to a photograph provided by Mr Fleuty (173) of his chest showing a red mark, strawberry shaped, perhaps 3cm long at or near the suprasternal notch. (In reply to early questions in cross examination Mr Smith's evidence was that burns and arc related injuries were not infrequent, and that he currently had such a burn having had his shirt open because of the heat. Mr Smith is correct in saying that the evidential weight of the photograph does need to be considered. It was accepted by Mr Gregory as being a bruise caused by Mr Smith.)

34. At the appeal Mr Smith was, in the vernacular, in a bit of a state. Mr Carlton left Ms Hilton to try to calm Mr Smith. This took 30 minutes. He offered to adjourn the hearing but had previously refused to allow Mr Smith's daughter Rachel Nash, who had driven him to the appeal, to be his companion. Mr Smith just wanted it over and declined the offer of an adjournment. Mr Smith did not repeat his request for his daughter to accompany him.

35. Mr Carlton dismissed the appeal, by letter dated 04 September 2020 (196-7). He dealt with Mr Smith's points as follows:

"• Witness Statements were taken from all parties who were present at the time of the incident. Individual discussions were held with both yourself and Kelvin on the same morning before you were suspended on full pay.

• There has now been sufficient time between the incident and the appeal hearing. You downplayed the force of your physical actions. You did not

deny that they occurred. You also claim that the verbal abuse was initiated by Kelvin.

• The disciplinary procedure was issued to you by Natalie Hilton via email on Tuesday 18th August, prior to the original hearing, and you concede that you may not have opened the email attachment.

• You were not issued a copy of Paul Sims witness statement prior to the original hearing, but you were provided with a copy during that meeting which you did not take home. You were also issued a copy via email prior to the appeal hearing. You did not question or contradict the content of that witness statement during the appeal hearing.

• There was a small delay in issuing the original hearing outcome to you (24 hours) to ensure that correct decision had been reached. This is not unreasonable, and a holding email was issued to you advising of the delay and when you would receive the decision.

• Your appeal for clemency was based on your long service and, in your judgement, high output and punctual attendance.

• The injury that Kelvin sustained was consistent with Paul Sims statement and the photo had been taken by Paul Sims as a record of the injury."

36. It can be seen that the penultimate point does not deal with the issue (point 8 above) of spit landing on his face.

37. On 11 August 2020 (the timing is a coincidence) the Respondent published a new Covid risk assessment (204 *et seq*). The first lockdown started on 24 March 2020 (in effect it was from about 19 March), and was eased a little on 04 July 2020, but there were still very strict restrictions on what people could or could not do (lawfully). That policy assessed harm at 5, the maximum, meaning possibility of fatality. It expressed the likelihood of occurrence at 3 or 4. This flagged the risk up as red, because any score of 15 and above was red. The score was obtained by multiplying the two scores. There were extensive Covid adjustments in place so as to reduce the risk of occurrence to an acceptable level. Part of that was a requirement of a 2m social distance, or if that was not possible a minimum of 1m plus other measures.

38. This was before there were any vaccines. Before the first lockdown deaths from Covid-19 were running at nearly 1,000 a week. Lockdown diminished that as no-one went anywhere for 3 months. Mr Smith was in his late 50s. He had a real (and reasonable) fear of death from Covid-19.

39. The Respondent has a disciplinary policy. The policy has a section on gross misconduct (149). It states that:

"*RULES COVERING GROSS MISCONDUCT*

Occurrences of gross misconduct are very rare because ***the penalty is dismissal without notice*** *and without any previous warning being issued.*

It is not possible to provide an exhaustive list of examples of gross misconduct. However, any behaviour or negligence resulting in a fundamental breach of contractual terms that irrevocably destroys the trust and confidence necessary to continue the employment relationship will constitute gross misconduct. Examples of offences that will normally be deemed as gross misconduct include serious instances of:-

a. …

b. physical violence or bullying; …" [emphasis added]

40. A table below this, of increasing seriousness states that the disciplinary action **will be** [emphasis added] based on the following procedure. At the foot of the table is *"GROSS MISCONDUCT DISMISSAL"*.

41. In fact, there is provision for discretion to vary this table, at point 2, reproduced below. This was not understood by Mr Gregory or by Mr Carlton:

"We retain discretion in respect of the disciplinary procedures to take account of your length of service and to vary the procedures accordingly. If you have a short amount of service you may not be in receipt of any warnings before dismissal but you will retain the right to a disciplinary hearing and you will have the right of appeal."

42. It is apparent from the policy and in the evidence of Mr Gregory and of Mr Carlton that they considered that anyone found guilty of gross misconduct will automatically be dismissed, regardless of previous disciplinary history. While the letter from Natalie Hilton qualified the allegations as *"without reasonable excuse"* the question of whether there was reasonable excuse was not considered.

Conclusions

43. The dismissal was for a conduct reason. The Claimant does not say that this was not the genuine reason. That is a potentially fair reason.

44. The Respondent had a genuine belief in that misconduct. Although there was some difference in the accounts, Mr Smith has always accepted that he was in an altercation with Mr Fleuty, in the course of which he pushed Mr Fleuty hard, such that (on Mr Smith's account) he was propelled backwards at pace sufficient to cause him to fall after colliding with a desk. There were reasonable grounds for that belief, given Mr Sims independent eyewitness account. Mr Gregory conducted a reasonable investigation. He got statements from Mr Fleuty and from Mr Smith immediately and from Mr Sims the next day. Accordingly, the Respondent passes the *Burchell* test.

45. The Respondent does not pass the test for a fair procedure throughout, as in *Hitt*. This is for three reasons:

45.1. Mr Gregory was absolutely clear that once he had decided that Mr Smith was guilty of gross misconduct the policy gave him no leeway at all, and he had to dismiss Mr Smith. In fact the policy does give decision maker discretion, but Mr Gregory was clear that the policy

required him to dismiss Mr Smith, whatever mitigation or other circumstances existed.

45.2. Mr Carlton thought the same. If Mr Gregory was right about gross misconduct then he believed his review could not impose a lesser sanction.

45.3. Mr Smith's daughter was not allowed to be Mr Smith's companion at the appeal. Mr Smith did not have the right to have her there, as she was not a work colleague or trade union representative. But it was unfair to exclude her. Mr Smith was not in a union. There was no work colleague he wanted to accompany him. His mental health had collapsed at the time. His daughter spent 45 minutes on the phone to Natalie Hilton before the hearing telling her all about it. Natalie Hilton was at the appeal. It is not relevant that Mr Smith had not asked for a companion at the disciplinary hearing. His mental health was not then affected. Nor is it less unfair because Mr Smith did not repeat the request at the hearing (when his daughter was outside, having driven him there). There was no reason for Mr Smith to think that Mr Carlton might have come to a different conclusion (and he would not have done).

45.4. Even had Mr Smith had a companion he would still not have had a fair appeal. Mr Smith needed someone to speak for him. Mr Carlton's wholly erroneous stance was that a companion could listen, and the employee can speak to the companion during the hearing, but that the companion was not allowed to present the appeal, ask questions of any witness or sum up. In fact, a companion can do all these things, and the only thing the companion cannot do is answer questions for the employee.

46. Accordingly, the dismissal was unfair.

47. The headnote of *Brito-babapulle* explains the error made:

> *"… the ET went straight from a conclusion that there was gross misconduct to a decision that dismissal for that reason was inevitably within the band of reasonable responses. It did not ask whether the employer's decision was nonetheless unfair as being unreasonable in the light of all the personal mitigation available to the Claimant, since it appeared to think that the conclusion that there was gross misconduct inevitably answered the question of fairness."*

48. This is the error into which the Respondent fell. Plainly their policy needs to be rewritten as its managers consider that they must dismiss everyone, without exception if there is a gross misconduct finding. It cannot be a justification for a decision to dismiss that breaches case law that is the policy of the employer. Policies are trumped by case law. This policy leads to dismissals which are unfair.

49. Mr Smith accepted that he had pushed Mr Fleuty too hard. It was reasonable for the Respondent to consider this was misconduct. The Tribunal does not remake the decision of the employer. It was not unreasonable of the

Respondent to consider this gross misconduct. The issue is with the sanction.

50. The Tribunal next considered whether a fair dismissal could have resulted had the Respondent used a fair procedure. Mr Gregory and Mr Carlton say that on the facts of the case, as they understood them to be, it made no difference. The Tribunal considered a *Polkey*[12] reduction in compensation.

51. The Tribunal considered that a fair procedure would not result in dismissal, and so makes no *Polkey* reduction.

52. The reasons the Tribunal thought this was the case were:

    52.1. Mr Smith had been an employee for 8½ years and had an unblemished record.

    52.2. He was – is – a very good welder and they are hard to find. Neither Mr Gregory nor Mr Carlton wanted to dismiss Mr Smith and did so only because they thought they had no alternative.

    52.3. The Respondent's pleaded case[13] is that it was (as Mr Smith said) Mr Fleuty *"encroached"* upon Mr Smith's personal space.

    52.4. Before pushing Mr Fleuty away Mr Smith had several times asked him to respect his personal space.

    52.5. This is consistently described by the Respondent as a push, and while plainly it was forcible it was not a punch.

    52.6. After that Mr Fleuty punched Mr Smith in the face. Mr Smith did not retaliate but said "Don't fight" several times.

    52.7. Mr Smith raised his concern about Covid-19 in his meeting with Mr Gregory, but Mr Gregory did not pick up the point. Mr Gregory put it clearly in his letter to Mr Carlton, but in Mr Carlton's annotations on the reasons for the appeal Mr Carlton ignored it completely, saying only that the appeal was no more than an appeal for clemency. This was only a few weeks after the total lockdown ended, and before vaccines. Mr Smith did not make much of this at the time, but it is obvious that Mr Smith was very worried by this, and with good reason.

    52.8. Mr Smith not only referred to Covid-19, but to Mr Fleuty's spit hitting him in the face while he was being shouted at. Certainly, this was a

[12] Polkey v AE Dayton Services Ltd [1987] UKHL 8

[13] Bundle of documents page 26, Grounds of Resistance paragraphs 8 and 9:

"8. It is the Respondent's understanding that Mr Fluety approached the Claimant and encroached his personal space, protesting that he was not lying. The Claimant responded by requesting Mr Fleuty respected social distancing measures. It is asserted that the Claimant then forcefully pushed Mr Fleuty resulting in him hitting the office wall.

9. It is accepted that Mr Fleuty retaliated and threw a punch which hit the Claimant in the face. It is the Respondent's position that Claimant pushed Mr Fleuty across the office, with force. Mr Sims immediately intervened and separated both individuals whilst they were both shouting insults at one another."

feature of the appeal. It is a major mitigation factor. At the time an extreme and swift reaction was entirely reasonable.

52.9. While Mr Smith started the argument by calling Mr Fleuty *"a liar and a bullshitter"* it was Mr Fleuty who confronted Mr Smith in a physical way, and provoked Mr Smith into pushing him away.

52.10. The Respondent has a zero-tolerance policy about matters of violence. In many ways this is laudable. However, it is not fair to equate a zero tolerance of violence with automatic dismissal whatever the surrounding circumstances (such as self-defence). Ms Hilton recognised that in her letter requiring Mr Smith to attend a disciplinary meeting, but Mr Gregory and Mr Carlton did not.

52.11. The new Covid security policy was dated 11 August 2020, and the Respondent's employees had been trained in it. There was supposed to be 2m separation at all times, and if that was not possible the minimum separation was to be 1m, with other risk reduction measures as well. This was a really big deal at the time.

53. There are some negative matters, but they are not such as to make dismissal reasonable. They are:

53.1. Mr Smith started the row.

53.2. The reaction of Mr Smith was forcible, and he could have achieved the same result with less physicality, or by turning his back on Mr Fleuty nor stepping backwards.

53.3. After Mr Sims separated them after Mr Fleuty hit Mr Smith, the row continued with Mr Smith shouting, and Mr Sims had to separate them again.

54. The Tribunal carefully considered S 98(4) of the Employment Rights Act 1996.

55. It is not fair to dismiss someone because of a policy of zero tolerance of any form of violence, whatever the circumstances. Someone attacked has the right to defend himself. It was not disproportionate to push Mr Fleuty away in these circumstances. Mr Smith did not retaliate when hit in the jaw by Mr Fleuty, but on the contrary urged Mr Fleuty not to fight. However the Tribunal does not substitute its own view for that of the employer, and considers the sanction on the basis that the push was gross misconduct, because it was a hard push.

56. Even as gross misconduct dismissal is outwith S98(4), which requires a Tribunal to apply the following test:

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

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

57. Applying the test of S98(4) to these circumstances the Tribunal finds that there would have been no dismissal.

58. They negative points are not such as to lead to the conclusion that the decision to dismiss Mr Smith was within the range of responses of the Respondent. In particular, it is a counsel of perfection to blame Mr Smith for not walking away from Mr Fleuty, who would have been highly likely to follow him. It is plain that Mr Smith's action was an instinctive response to Mr Fleuty's aggressive harangue delivered at close quarters, continuing after Mr Smith protested.

59. The Respondent says the Claimant was not that bothered by Covid-19 and said he would continue to come to work if he got it as he would not want to lose his earnings. They say if he was that concerned why was he in the office with others? The first point was not pleaded, and nor is it in any witness statement and was not put to Mr Smith. It is irrelevant to Mr Smith not wishing to get Covid in the first place. He is in his late 50s and so at greater risk than younger people. The second is factually wrong. The small office is 4½ m x 3m. Only Mr Sims was in it when Mr Smith walked through it to the other office where he could fill his kettle. Mr Sims invited Mr Fleuty into that office (when he saw Mr Fleuty clocking in outside his door), and then Mr Smith walked back into the small office through the other door, having filled his kettle. There was no other exit route for him to take.

60. This is not to substitute the Tribunal's view for that of the Respondent. The Tribunal has borne in mind and applied the guidance in paragraph 61 of Newbound v Thames Water Utilities Ltd [2015] EWCA Civ 677 (03 July 2015):

"61. The "band of reasonable responses" has been a stock phrase in employment law for over thirty years, but the band is not infinitely wide. It is important not to overlook s 98(4)(b) of the 1996 Act, which directs employment tribunals to decide the question of whether the employer has acted reasonably or unreasonably in deciding to dismiss "in accordance with equity and the substantial merits of the case". This provision, originally contained in s 24(6) of the Industrial Relations Act 1971, indicates that in creating the statutory cause of action of unfair dismissal Parliament did not intend the tribunal's consideration of a case of this kind to be a matter of procedural box-ticking. As EJ Bedeau noted, an employment tribunal is entitled to find that dismissal was outside the band of reasonable responses without being accused of placing itself in the position of the employer. The authority he cited as an example among decisions of this court was Bowater v NW London Hospitals NHS Trust [2011] IRLR 331, where Stanley Burnton LJ said:

> *"The appellant's conduct was rightly made the subject of disciplinary action. It is right that the ET, the EAT and this court should respect the opinions of the experienced professionals who decided that summary dismissal was appropriate. However, having done so, it was for the ET to decide whether their views represented a reasonable response to the appellant's conduct. It did so. In agreement with the majority of the ET, I consider that summary dismissal was wholly unreasonable in the circumstances of this case."*

61. However, those factors do fall for consideration in deciding whether there should be a reduction in compensation by reason of contributory conduct[14].

62. Mr Smith contributed to his dismissal. He pushed Mr Fleuty away from him with some force. After Mr Fleuty hit him he engaged in a shouting match with Mr Fleuty which Mr Sims ended by intervening. The Tribunal puts this at one third and reduces the awards by this percentage.

Uplift

63. The Respondent followed the Acas code. The dismissal was unfair, but the procedure followed was that set out in the Code. There was an investigation, a hearing and an appeal conducted by appropriate people. No uplift is appropriate.

Disability discrimination

64. The previous hearing decided that Mr Smith was disabled from 24 August 2020. As Mr Smith's own oral evidence was that he did not then appreciate that he qualified as disabled, it is unrealistic to consider that Mr Carlton should have known. While Mr Smith's distress was apparent to him even if he should have appreciated that it could be to the extent that it was disabling, he could not have known that it would be likely to last 12 months. The disability discrimination claim is therefore dismissed. The Tribunal has dealt with the issue about Mr Smith's daughter being his companion elsewhere.

Notice pay claim

65. The dismissal was without notice. Mr Smith is entitled to 8 weeks' pay as he was not paid the notice pay to which the Employment Rights Act 1996 entitles him (of one week's pay for each full year worked).

Compensation

Notice pay

66. Mr Smith had worked 8 years and so was entitled to 8 weeks' notice. The award is based on gross contractual pay (so without overtime). His pay was £483.20 gross. That is **£3,865.60**. It is not subject to reduction, because it is a contractual right.

[14] S122(2) and S123(6) of the Employment Rights Act 1996

Unfair dismissal

67. The basic award is for 9 years' service. This is because Mr Smith was dismissed without notice. He should have received 8 weeks' notice. Had he done so that would have taken him past the anniversary of the start of his employment, and so to 9 full years. For all that period Mr Smith was over 41. The award is therefore 1½ weeks' pay for each year, so 13.5 weeks' pay (again on gross weekly pay without overtime). 13.5 x £483.20 is £6,523.20, which is reduced by one third to **£4,348.80**.

68. Section 123 of the **Employment Rights Act 1996**, so far as relevant, provides:

"123 Compensatory award

(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

(2) The loss referred to in subsection (1) shall be taken to include-

(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and
(b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal."

69. In his judgment of EJ Fowell after the hearing of 31 March 2022 found that Mr Smith was disabled by mental health problems and that those problems were caused by his dismissal. The judgment is:

"1. The claimant was not disabled at the time of his dismissal. His disability dates from on or around 24 August 2020 and was a reaction to his dismissal, so he was disabled at the time of his appeal hearing."

The reason is at paragraph 15;

"I conclude from this that the acute stress reaction occurred, at the earliest, on 24 August 2020, following the news of his dismissal. That was two days before he saw his GP for medication (Citalopram). Hence, he was not disabled at the time of his dismissal hearing but he was at the time of his appeal hearing on 2 September. Not only did he present in an agitated state that day, very much as observed by the hospital and by his GP, but this was noted by the respondent at the time."

70. The compensatory award starts from the expiry of notice pay. Mr Smith was unwell for the whole of the notice period. He obtained a job starting 01 March 2022, which was made permanent on 01 June 2022. His loss stopped on 01 March 2022. The Claimant sought compensation for the entire period

from dismissal to the start of that job. That is 21 August 2020 – 01 March 2022.

71. The Respondent says:

71.1. Welder jobs, even in the pandemic, have been easy to get, as the number of people able to do this work does not meet the demand. It should not have taken long to get a job.

71.2. It looked, from the documents, as if the Claimant had done some work in that period.

71.3. Insofar as he could not work at all because he was ill he had suffered no loss attributable to being dismissed. How that illness was caused was not part of the compensation to be awarded.

72. However, the Lexis-Nexis guidance on the topic is:

Loss of earnings after dismissal caused by illness or other incapacity

In assessing the compensatory award, the wording of the statute requires that the tribunal must have regard to 'the loss sustained by the complainant in consequence of the dismissal'. It follows that loss that the complainant has sustained which is ***not*** *'in consequence of the dismissal' will not be relevant.*

Obviously, if an illness (eg depression) is entirely caused by the dismissal, then losses arising as a result will fall to be compensated in the compensatory award. However sometimes the situation will be less straightforward.

For example, it will sometimes be the case that by the time the dismissal occurs, there has already been a significant history of poor relations between the employer and the employee. In some such cases, the employer's poor treatment of the employee during the pre-dismissal period may have made the employee unwell, and that illness may still be afflicting the employee at the time of dismissal and indeed after it.

In other cases, an employee may have become unwell through no fault of the employer, and then been unwell for an extended period, culminating in dismissal due to the extended sickness absence, once again with the illness continuing after the date of the dismissal.

In either such situation, where the employee brings and wins an unfair dismissal claim, the employee may be losing earnings after the dismissal because the ongoing illness is preventing alternative employment.

However, whether or not the illness was originally, pre-dismissal, caused by the employer (that factor is irrelevant in this context), the unfair dismissal compensatory award can only take account of lost earnings after the dismissal insofar as that loss was caused by the dismissal itself. It follows that where an illness pre-dates

the dismissal and carries on after it, loss of earnings post-dismissal may only be compensated in an unfair dismissal claim if, and to the extent that, it can be shown that:

• the occurrence of the dismissal (rather than anything that occurred pre-dismissal) has caused the illness, or

• the occurrence of the dismissal caused the pre-dismissal illness to get worse and/or to last for longer than it would have done had the dismissal not occurred

Where, for example, a claimant is ill prior to dismissal, but the dismissal itself makes their condition worse so that it lasts for much longer than it would have done had the dismissal not occurred, the tribunal will need to decide what proportion of the resultant post-dismissal lost earnings should be compensated for in the compensatory award, as any part of that loss that is not caused by the dismissal must be discounted.

Working out the extent to which the dismissal had caused or exacerbated post-dismissal illness, and distinguishing that from the extent to which a post-dismissal illness was caused by other, pre-dismissal causes (whether or not the employer is also to blame for them) is often tricky and may in some cases require expert medical evidence for a proper evaluation."

73. The case law behind this is Wood v. Mitchell SA Ltd [2010] UKEAT 0018_10_1203.

74. It is a finding of fact by this Tribunal at a previous hearing that Mr Smith is disabled by mental health issues caused by the Respondent. There is a judicial finding of fact that this is the case, and a description of the condition.

75. The Tribunal accepted the evidence of Mr Smith that he was unable to work until he commenced his new job. There was an absence of medical evidence post the dismissal. However, it was clear that the decline in Mr Smith's health was sudden and steep, an acute stress reaction. We know that Mr Smith is still very much under the care of the NHS community specialist mental health team. There is no other reason suggested to account for this illness.

76. We know also that Mr Smith had a 100% attendance record with the Respondent. Mr Smith is a hardworking man. The Respondent was sorry to lose him as he was such a good worker. There is every reason to think that he would return to work as soon as he could, and no reason to think that he did not do so.

77. Therefore, it is just and equitable for the Respondent to compensate him for the entirety of his period of unemployment. This also has the consequence that the Respondent will repay to the State some of the financial support which has been given to Mr Smith during his illness, by application of the Recoupment Regulations.

78. The calculation was performed by the employmentlawclaimstoolkit program, so that provided the correct data was input the calculation will be correct.

79. By reason of the capping of the award, the effect of the length of the period of compensation is greatly reduced. The cap is, of course, of the monetary amount and not on the period for which compensation is awarded.

80. The gross annual salary is taken from the Respondent's Counter Schedule of Loss.

81. The gross and net weekly pay is taken from the Claimant's Schedule of Loss, figures from the P45 for money earned from 06 April 2020 – 21 August 2020. The overtime was not contractual but was a matter of routine, undertaken week after week as an integral part of his working week. There is no reason to think it would have been less between dismissal and new job. It is appropriate to use the figures actually earned. Again, the capping of the award (based on the contractual salary) reduces the effect of the monetary values.

Schedule 1 – Award

IN THE EMPLOYMENT TRIBUNALS **CASE NO: 3220569/2020** **BETWEEN** **Philip Smith** **AND** **Swann Engineering Group Ltd**	
1. Details	
Date of birth of claimant	23/10/1963
Date started employment	01/10/2011
Effective Date of Termination	21/08/2020
Period of continuous service (years)	8
Age at Effective Date of Termination	56
Date new equivalent job started or expected to start	01/03/2022
Remedy hearing date	15/07/2022
Date by which employer should no longer be liable	01/03/2022

Contractual notice period (weeks)	8
Statutory notice period (weeks)	8
Net weekly pay at EDT	604.77
Gross weekly pay at EDT	690.80
Gross annual pay at EDT	25,126.40
2. Basic award	
Basic award Number of qualifying weeks (12) x Gross weekly pay (538.00)	6,456.00
Less contributory fault (basic award) @ 33%	-2,130.48
Less redundancy pay already awarded	0.00
Total basic award	**4,325.52**
3. Damages for wrongful dismissal	
Loss of earnings Damages period (8) x Net weekly pay (604.77)	4,838.16
Plus failure by employer to follow statutory procedures @ 0%	.00
Less failure by employee to follow statutory procedures @ 0%	0.00
Less accelerated payment (wrongful) @ 0%	0.00
Plus interest (damages) @ 0%	0.00
Total damages	**4,838.16**
4. Compensatory award (immediate loss)	
Loss of net earnings Number of weeks (71.6) x Net weekly pay (604.77)	43,301.53
Plus loss of statutory rights	500.00
Less payment in lieu	0.00
Total compensation (immediate loss)	**43,801.53**

5. Adjustments to total compensatory award	
Less Polkey deduction @ 0%	0.00
Plus failure by employer to follow statutory procedures @ 0%	0.00
Less failure by employee to follow statutory procedures @ 0%	0.00
Less deduction for making a protected disclosure in bad faith @ 0%	0.00
Less contributory fault (compensation award) @ 33%	-14,454.50
Accelerated payment @ 0%	0.00
Compensatory award before adjustments	**43,801.53**
Total adjustments to the compensatory award	**-14,454.50**
Compensatory award after adjustments	**29,347.03**
6. Summary totals	
Basic award	4,325.52
Wrongful dismissal	4,838.16
Compensation award including statutory rights	29,347.03
Total	**38,510.71**
7. Grossing up	
Tax free allowance (£30,000 - any redundancy pay)	30,000.00
Basic + additional awards	4,325.52
Balance of tax free allowance	25,674.48
Compensatory award + wrongful dismissal	34,185.19
Figure to be grossed up	8,510.71
GROSSED UP TOTAL	**44,184.52**
AFTER COMPENSATION CAP OF £25,126.40 (GROSS ANNUAL PAY)	**£34,290.08**

Schedule 2 – Recoupment

IN THE EMPLOYMENT TRIBUNALS CASE NO: 3220569 2020

BETWEEN

PHILIP SMITH
AND
SWANN ENGINEERING GROUP LTD

RECOUPMENT

Recoupment

Prescribed period17/10/2020 to 15/07/2022

Compensation cap applied

Total award	£34,290.08
Prescribed element	£19,499.73
Balance	£14,790.35

Compensation cap not applied

Total award	£44,184.52
Prescribed element	£29,012.03
Balance	£15,172.49

Employment Judge Housego
Dated: 15 July 2022