EMPLOYMENT TRIBUNALS

Claimant: Mr A Gorry

Respondent: Stena Line PTE Limited

HELD AT: Liverpool **ON:** 31 January 2019, 1 February 2019 & 18 February 2019 (in chambers)

BEFORE: Employment Judge Shotter

REPRESENTATION:

Claimant: Mr Mensah, counsel
Respondent: Mr T Haddon, solicitor

JUDGMENT

The judgment of the Tribunal was that:

1. The claimant was unfairly dismissed, his claim for unfair dismissal is well-founded and is adjourned to a remedy hearing the date of which the parties will be advised in due course.

2. The claimant was culpable and blameworthy and contributed towards his dismissal. It is just and equitable to reduce the basic and compensatory award by 25%.

REASONS

Preamble

1. In a claim form received on the 27 September 2018 following ACAS early conciliation between the 1 August 2018 to 1 September 2018, the claimant who had been continuously employed as an onboard services manager between 1 January 1995 and 10 May 2018 claimed that he had been unfairly dismissed having been issued with a written warning for the same allegation on 30 March 2018. The

claimant also maintained that the respondent could not under natural justice and "re judicata" discipline him for the same offence, no reasonable employer would have dismissed, the dismissal arose as a result of his colleague's ("CB") grievance, the dismissing officer (Ailish Jamieson) had not viewed the CCTV with the claimant, the letters inviting the claimant to the investigation and disciplinary hearing did not contain allegations of put the claimant on notice that he would be dismissed for gross misconduct, had failed to take into account mitigation and the decision did not fall within the band of reasonable responses. The claimant also alleges that some 12-months earlier CB had been assaulted by another employee with whom she was having a relationship, and that employee was not disciplined.

2. The respondent denies the claimant's claim of unfair dismissal on the basis that he had committed an act of gross misconduct and under Section 7 of the Code of conduct, disciplinary action which takes place on board is separate from disciplinary action taken off-shore, and the fact a written warning was issued does not render the dismissal unfair. Recommendations were sent to the respondent who made the decision "on the evidence, including the CCTV footage, and the impact the incident had on CB…who continues to be unfit for work."

3. The Tribunal heard evidence from the claimant on his own behalf and on behalf of the respondent it heard from Lindsey Herrington who recommended the claimant's dismissal, and Sarah Simpson, who heard the appeal and recommend that it should be dismissed. It was submitted by Mr Haddon that the claimant had accepted elements of his witness statement were incorrect as the letter inviting him to the disciplinary hearing referred to dismissal being a possible outcome and the investigation report was attached that set out the allegations. Mr Haddon is also correct that the claimant attempted to distance himself from his appeal letter, and he gave evidence that he could recall how CB behaved during the incident but not that he had pushed her arm until viewing the CCTV evidence with Captain Millar. The Tribunal took the view that his recollection of the part he had played in the incident as opposed to CB's refusal and her behaviour, did not reflect a lack of credibility or disingenuousness on the claimant's part. The physical impact of the claimant pushing CB on the arm was very quick, and immediately before he turned to pick up a radio he had dropped on the floor. The procedural allegations relating to the disciplinary invite letter are misconceived but that does not necessarily reflect the claimant is not telling the truth. Under cross-examination he explained that as a written warning had already been issued he did not expect to be dismissed, and the Tribunal found it credible that he believed this to be the case despite the reference in the disciplinary invite letter to dismissal.

4. The issues were agreed between the parties were not straightforward and are as follows:

Unfair Dismissal

a. The Respondent accepts that the Claimant was dismissed.

b. The Respondent asserts that the Claimant was dismissed on the grounds of conduct, namely assault (including threatening behaviour) contrary to section 7.1 of the Merchant Navy Code of Conduct.

c. The Respondent accepts that the Claimant had already been subject to a formal warning by Master Millar for the incident on 29th March 2018 (p.70-71)

In the light of this, was it unfair to re-open the proceedings?

Christou & Anor v London Borough of Haringey [2013] EWCA Civ 178

i. Was conduct the reason for the Claimant's dismissal?

1. There is no dispute that the reason for the Claimant's dismissal was assault.

ii. Did the Respondent have a genuine belief in the misconduct of the Claimant?

iii. Was that belief reached after a reasonable investigation?

1. The Claimant claimed that the investigation was not reasonable because: -

a. Ailish Jamieson was guided by what CB's representative wanted as an outcome to the investigation;

b. Ailish Jamieson did not take CB's actions into account during the investigation;

c. Ailish Jamieson did not watch the CCTV footage with the Claimant during the investigation;

d. The issues in CB's grievance were not put to the Claimant;

e. Ailish Jamieson did not advise the Claimant what constituted 'assault'.

iv. If so, was the sanction imposed on the Claimant within the band of reasonable responses of a reasonable employer?

1. The Claimant asserted that the sanction imposed was not within the band of reasonable responses for the following reasons: -

a. The Respondent commenced an on-shore investigation and disciplinary process, when the Claimant's behaviour had already been the subject of an on-board investigation and disciplinary process;

b. The letter inviting the Claimant to the disciplinary hearing did not contain sufficient detail;

c. The note taker at the disciplinary hearing, Alistair Clarkson, was involved in the decision-making process;

d. The notes of the disciplinary hearing lack detail;

e. The Claimant had to wait an inordinate amount of time for his appeal to be dealt with;

f. The Claimant was not given the opportunity to cross-examine witnesses as part of his appeal;

g. Sarah Simpson did not ask all of the questions that the Claimant set out in his note of appeal;

h. The Claimant was not permitted to audio-record his appeal hearing;

i. Sarah Simpson attended the appeal hearing late and without any paperwork;

j. A year before the Claimant's dismissal, CB was assaulted by another colleague, Sean Miskimmon. The Respondent did not take action against Mr Miskimmon.

d. Did the Respondent follow a fair procedure?

i. Did the Respondent follow a fair procedure in relation to the termination of the Claimant's employment and comply with any relevant requirements of the ACAS Code of Practice on Disciplinary and Grievance Procedures?

e. Did the employer have sufficient regard to the employee's disciplinary record and length of service?

f. Has the employer been consistent in how it has dealt with genuinely similar cases in the past?

g. Were alternatives to dismissal considered?

h. Did the Respondent consider the career-threatening nature of the allegations when reaching that decision?

Turner v East Midlands Trains [2012]

i. If the tribunal finds that the dismissal was unfair (which is denied):

   i. Should the Claimant be re-instated under s114 of the Employment Rights Act 1996?

   ii. Is it just and equitable to reduce the basic award as a result of the Claimant's contributory conduct under s122(2) of the Employment Rights Act 1996?

   iii. Is it just and equitable to award compensation to the Claimant in accordance with section 123(1) of the Employment Rights Act 1996?

   iv. If the Tribunal considers that there was a flaw in the procedure, should any compensation be reduced to reflect the fact that the Claimant would have been dismissed in any event in accordance with *Polkey v AE Dayton Services Limited [1987] ICR 142*?

   v. Did the Claimant contribute to his dismissal by way of his conduct and should any compensatory award be reduced in accordance with s123(6) of the Employment Rights Act 1996?

   vi. Should any compensation awarded to the Claimant be reduced on the basis that he failed to take reasonable steps to mitigate his loss?

5. The Tribunal was referred to an agreed bundle of documents and additional documents presented by the parties, having considered the oral and written evidence and oral and written submissions presented by the parties (the Tribunal does not intend to repeat all of the oral submissions, but has attempted to incorporate the points made by the parties within the body of this judgment with reasons), it has made the following findings of the relevant facts.

Facts

6. The respondent is a company based in Singapore in the business of operating ferry services, and appointed Northern Marine Manning Services Limited ("NMMS") as its UK agents in staffing and HR matters. Sarah Simpson's uncontested evidence was that as the respondent was based in Singapore it did not have the administrative resources to deal with disciplinary matters and these were dealt with via agents. On or around September 2018 the respondent appointed Stena Line Manning Services Limited to replace Northern Marine. NMMS provide ship management services, including HR, to a number of companies in addition to the Stena group.

7. The respondent recognises the National Union of Rail, Maritime and Transport Workers ("the RMT") and a collective agreement was reached in or around 2014 incorporating a Code of Conduct ("Code of Conduct") for the Merchant Navy dated August 2013 that is incorporated in to the employment contracts of employees, including the claimant's contract and non-compliance can amount to a breach of contract. The Code was agreed to by Nautilus International, RMT, UK Chamber of Shipping and approved by the Maritime and Coastguard Agency.

The relevant sections of the Code

8. The following are relevant to this claim and has been taken into account by the Tribunal:

8.1 Seafaring imposes on seafarer's certain demands not found in land-based jobs. [The respondent's witnesses described the unusual demands of employees being constrained on a vessel and required to work closely "as a family" which the Tribunal accepted was the case.]

8.2 The Code sets out disciplinary rules reflecting the standards of behaviour generally expected. Paragraph 7 sets out examples of gross misconduct which may "if appropriate in the circumstances and established to the satisfaction of the master; lead to dismissal from the ship…and to dismissal from employment. This is separate from any other legal or disciplinary action which may be called for…" Assault including threatening behaviour is an act of gross misconduct.

8.3 Paragraph 8 deals with less serious misconduct providing "breaches of a lesser degree of seriousness may be dealt with by…(C) a written warning by a senior officer (d) a final written warning by a senior officer or a master." Examples of breaches listed include (a) "offences of the kind described at Paragraph 7, which are not considered to justify dismissal in the particular circumstances of the case and (b) **minor acts of**…neglect of duty, disobedience and **assault**" [the Tribunal's emphasis].

8.4 Under the Title 'Shipboard Disciplinary procedures' at paragraph 10 a seafarer may be suspended and "in such cases the Master may require for the seafarer to be disembarked and repatriated…**Shipboard procedures may not then apply. In such an event disciplinary action will be initiated ashore by a shore manager**" [the Tribunal's emphasis].

8.5 If formal action is being taken "an officer or the master will investigate the allegation. Written statements may be taken from material witnesses. The investigation should be completed without undue delay"- paragraph 15.

8.6 If a master concludes disciplinary action is called for: (a) if there is no current warning and the breach is one of a lesser degree…the Master will undertake a disciplinary hearing…paragraph 17.

8.7 At any hearing the seafarer will be invited to say if s/he admits the alleged breach of discipline. (a) **If s/he admits it, the hearing will move immediately to consideration of penalty**. (b) If s/he does not admit it, the hearing will consider relevant evidence including any presented by the seafarer. In exceptional circumstances, it may be appropriate to conduct the hearing ashore-paragraph 20 [the Tribunal's emphasis].

8.8 The penalties which may be imposed by a master include dismissal from ship, final warning, written warning, formal warning and informal warning – paragraph 21.

8.9 Under the heading "Shore disciplinary procedures" it was provided "Dismissal from the ship will not operate to terminate employment. An appropriate shore manager will be appointed to consider the seafarer's future employment in the light of their dismissal from ship" – paragraph 27.

8.10 The right to an appeal of a shore management decision was set out under paragraph 31 that provided "on appeal it will be for the seafarer to show that the outcome of the first shore hearing was inappropriate – paragraph 34.

8.11 Under exclusions, paragraph 36 sets out "This Code does not apply to procedures conducted ashore that may lead to termination of employment."

9. Under the RMT Collective Bargaining Agreement at paragraph 19 reference was made to revised disciplinary procedures being issued in due course. The information before the Tribunal was that none were issued and the Code of Conduct continued to apply to the claimant. The Collective Bargaining Agreement dealt with salary, holidays and so on, and formed part of the claimant's contract of employment.

The claimant's employment

10. The claimant was employed from 1 January 1995 until 10 May 2018, a continuous period of 23 years. He had an unblemished employment record and had been promoted on a number of occasions, the last promotion being to onboard services manager ("OSM"). He was responsible for a crew of 20 including the guest services receptionist referred to in these proceedings as CB. The claimant had recruited CB to that role, he mentored her and they had got on well until the incident on 29 March 2018. The claimant was aware CB was suffering from stress and approximately one year before he had witnessed CB being physically assaulted by her partner and fellow employee, which included grabbing CB by the throat. No action was taken against CB's partner. CB's duties included making announcements on the tannoy and booking customers in.

The incident

11. On 29 March 2018 the claimant and CB were working on the overnight 22.30 crossing from Liverpool to Belfast. It is important to note the claimant had been working from 8.00am with two breaks of half an hour, and CB had been working split shifts since 5.30am. Both were overtired, the claimant having worked approximately 14-hours under pressure; the ship was late and he had dealt with a number of drunken passengers on board who had to be removed from the vessel on health and safety grounds.

12. The ship shop was 15 minutes from closing and claimant instructed CB to announce this on the tannoy. CB refused despite the fact that she was not serving any passengers at the time, a passenger approached the desk part-way through the incident. In his witness statement the claimant describes how he was "angered" by her refusal and he leant over to switch off the computer entering into CB's personal space. CB pushed the claimant's hand away from the computer and he then

wheeled her towards the tannoy, CB still sitting in the chair. The claimant gave undisputed evidence that in the past he would often wheel CB towards the tannoy in jest. CB made the announcement but incorrectly, and the claimant believed she had done this on purpose to annoy him. CB refused to make the announcement again, refusing to obey a reasonable management command and the claimant pushed CB on the arm back towards the tannoy. CB told the claimant to go away, which he then did at the same time as indicating to CB that he would be taking up her behaviour later.

13. The Tribunal viewed the CCTV on a number of occasions taking time to freeze the picture and playback and the description set out in paragraph 13 above was reached taking into account the footage and the fact that no speech was recorded. It was clear from the footage that CB and the claimant were both confrontational and this arose initially out of CB's intransigence and refusal to make the tannoy announcement. At the end of the liability hearing the Tribunal attempted to get some agreement with the parties as to what the CCTV footage divulged, and it was agreed the claimant touched/pushed CB's arm on the one occasion, and was the principle physical incident, wheeling the chair with CB in it twice, the encroachment by CB into the claimant's personal space and her pushing away the claimant's hand and later pointing a finger at the claimant, which also appeared a confrontational act in the Tribunal's view.

14. In an email sent to NMMS on 30 March 2018 the claimant confirmed CB had left the ship "claiming to be sick…I suspect she left due to an incident last night when she was disobedient towards me and I would be speaking to her the next morning." The claimant was understood he should report any sickness absence to HR at NMMS.

15. It was the view of Ailish Jamieson, HR officer at NMMS as CB had been absent previously and had a target of zero absence she would not receive sick pay. In an email sent 12.42pm to the claimant and copied to others including the claimant, Ailish Jamieson indicated she would call up CB and arrange another absence review meeting "with regards the circumstances in which she left the vessel." It appears that this telephone conversation took place with Ailish Jamieson and CB who emailed NMMS at 15.59 with her statement. It is notable Ailish Jamieson conducted the second on-shore investigation having taken part in the earlier communications concerning the claimant and CB.

16. Captain Millar also had a telephone conversation with CB about the incident, and he requested that she came into work in order that an investigation took place. CB did not, instead she chose to provide a witness statement which Captain Millar took into account.

17. The statement of CB received by Ailish Jamieson is a key document as it sets out CB's description of the events that took place on the day before. She described how the claimant asked her to make a tannoy announcement that the shop would be closing in 15-minutes and at "this time I was busy checking passengers through the system and advised Mr Gorry I was not able to perform this task at this time, but would be happy to do so when the opportunity arose." The Tribunal noted that the CCTV evidence showed otherwise as CB was not checking in passengers when the

claimant instructed her to make the announcement, there were no passengers until later on in the incident, and it appears the claimant had intentionally refused to obey a management instruction. CB described how the claimant got "extremely angry", reached over her and turned off the computer. She does not state that she pushed the claimant's hand away when he was in her personal space as shown on the CCTV. She relates how the claimant shouted at her, pushed her chair towards the tannoy and "grabbed my right arm" whilst doing so alleging she felt "very threatened and scared" and had obtained a witness statement from the freight driver. She alleged the claimant had pushed her towards the tannoy three times in all and "in my years with Stena Line and all my years working with Mr Gorry, I have never witnessed him…. act in such an aggressive, threatening and unprofessional manner…and behaviour which made me feel intimidated and scared." CB attached an unsigned and undated hand-written statement allegedly taken from the freight driver. It is notable that his evidence does not reflect the starting point in the CCTV evidence, and supports CB's version of events. He also confirmed the claimant had "grabbed" CB which was not supported by the CCTV, and pushed her chair, which was supported by the CCTV evidence. He finished the statement by expressing his annoyance that "I've had to witness this sort of behaviour on board…towards a female member of staff and think that it was totally unacceptable."

18. In accordance with procedure, Captain Miller met with the claimant and was provided with a copy of the CCTV evidence. Captain Millar emailed Martin Allen, superintendent at NMMS, further to earlier discussions that had taken place that day indicating that he had interviewed the claimant "in relation to the allegations made against him by [CB]. I am satisfied that whilst the whole incident could have, and should have been better handled by Tony, there is not in my opinion, sufficient evidence of significant wrongdoing to suspend him from duty pending investigation. I would hope that both parties can be encouraged to sit down and resolve this amicable."

19. In an email sent on 30 March 20.51 Martin Allen of NMMS responded "" I have a statement from Tony…**both parties seem to be at fault here**. CB refusing to follow instruction and departing the vessel without the Master's permission. TB shouting at and pushing a crew member. **Both had worked a very long day and were no doubt tired and stressed. I believe, given Tony's record on board that there is no reason for him not to remain on board**…." [the Tribunal's emphasis]. The Tribunal has not seen the claimant's initial statement, which unusually was not included in the documentation that formed the evidence in relation to the second investigation leading to the second set of disciplinary proceedings.

20. On 2 April 2018 Ailish Jamieson, NMMS HR confirmed to CB that her statements had been passed to Captain Miller when CB made contact for an update. Ailish Jamieson would have bene aware at this point of the process that Captain Miller (a) did not think there was sufficient evidence of significant wrongdoing to justify suspending the claimant, (b) Superintendent Martin Allen from NMMS agreed with Captain Millar, and also took the view there was no reason that the claimant could not remain on board ship. In the immediate aftermath of the incident both Captain Millar and Martin Allen expressed any concerns to the effect that the claimant was a danger to the public, and Ailish Jamieson had raised no such concerns. The Tribunal found there was no satisfactory evidence before it that

Lindsey Herrington and Sarah Simpson could have legitimately concluded the claimant posed a danger in the future to staff and the public; their belief was not genuine and nor was it reasonably based on any reasonable investigation but designed to justify further the claimant's dismissal.

21. CB never returned to work and the Tribunal understands (although it has not been referred to any medical evidence) that CB has been signed off with post-traumatic stress disorder ("PTSD") allegedly as a result of the incident.

22. It is clear from an email of 2 April 2018 sent by NMMS to a number of parties, including the claimant and the Captain Miller, that they were provided with copies of both witness statements and HR advice was given that an on-board investigation should take place, and if the claimant was disciplined Captain Millar could issue him with an appropriate sanction. HR advised "**given the seriousness of the allegations, a formal process should be followed. I also believe since a passenger allegedly witnessed this, resolving amicable without a formal process would not address this properly**…any allegations in relation to [CB] leaving the vessel should be treated as separate…after the process" [the Tribunal's emphasis]. It transpired CB was never dealt with. Ailish Jamieson was aware of the communications exchanged during this period and the advice given. It was clear that NMMS were aware the issue was serious and took the view it was appropriate Captain Millar should deal with it off-shore and the claimant should not be suspended, having considered much of the evidence including CB's statement and that allegedly of the passenger.

<u>The disciplinary hearing and written warning 3 April 2018</u>

23. The claimant was invited to a disciplinary hearing on 3 April 2018 during which he admitted to the offence of minor assault. Captain Miller viewed the CCTV evidence with the claimant twice. Having taken the advice of the superintendent at NMMS previously and in compliance with the agreed Code of Conduct, he issued the claimant with a formal warning recorded in a "Record of Formal Warning" which amounted to a final written warning and so the Tribunal finds.

24. The written Record of Formal Warning recorded "breach of disciplinary code M002 6.8.3.2 B & G You have been warned that any further breach of the disciplinary code may lead to further disciplinary action including dismissal from the Vessel and/or the Company's service." The parties were in agreement that the warning was not a final written warning, the Tribunal did not agree from the evidence before it that this was the case. Captain Millar had made it clear to the respondent that it was a final written warning and the Record of Formal Warning was clear in its effect.

25. In the report recorded within the body of the Record of Formal Warning reference was made to the claimant "following a disagreement with [CB] placed his hand on CB in the presence of a freight driver. **This is a minor act of assault**…deemed to bring the company into disrepute" [the Tribunal's emphasis]. The claimant's admission of the breach was confirmed and under the heading "Seafarers remarks" the claimant referred to CB repeatedly refusal to make the announcement, it had been witnessed by Clare Kawin, "following a long day and

being under some stress due to drunk passengers I lost my temper and reacted in a way that was out of character for me. I acknowledge that I should not have laid hands on CB." The record was signed by the clamant and Master Captain Millar.

26. As far as the claimant was concerned the matter had been concluded and on 3 April 2018 Captain Millar discussed the matter with CB stating he believed "both of us were at fault." CB produced a handwritten of the discussion in which she referred to the Captain having "reassured me that Tony had admitted he lost his temper and had seen red…he is very sorry…and had been given a one-year formal warning…we would all sit together when we returned to work and everything would go back to normal in no time. He also said Terry and I had worked a lot of hours but Terry had worked much a lot more than me and this may have led to stress."

CB's grievance 7 April 2018

27. CB was advised of the outcome and 4-days later she raised a grievance on 7 April 20198 alleging victimisation, bullying, harassment and assault". It is notable that all of the allegations were not set out in the earlier statement, in which she described the claimant's actions as aggressive and threatening, and to her feeling threatened and scared. It is also notable these allegations were made 7 days after the incident and CB had worked as normal the rest of her shift and not made any allegations at the time to Captain Millar or any other person. The difference between the statement and grievance, and why it had been lodged, were not matters picked up on during the second disciplinary procedure and CB was not asked for any explanation despite the grievance being the mechanism by which the respondent re-opened the disciplinary process for the second time ignoring the views expressed by Captain Millar and superintendent Martin Allen that should not be suspended and remain working on board the ship.

The claimant's suspension

28. Following on from the grievance the claimant was suspended on full pay by a letter dated 10 April 2018 allegedly written by Christopher Cher, director of the respondent, pending investigation into the "allegations of assault (including threatening behaviour) Code of Conduct for the Merchant Navy section 7.1…you must not communicate with any of our employees…unless authorised by NMMS." The earlier allegation put before the claimant on the same evidence did not include threatening behaviour, and the Tribunal took the view on the balance of probabilities that NMMS and the respondent were concerned with putting a stop to CB's grievance and in order to do so, wanted a "second bite of the cherry" in the words of Mr Mensah, in order that the claimant would be dismissed. The Tribunal, in arriving at this decision, took into account that prior to CB's grievance NMMS were satisfied with how the matter had been conducted by Captain Millar.

29. The claimant was informed in a telephone conversation with Ailish Jamieson on 10 April 2018 that the following CB's statement "on the back of last week's on-board investigation and then subsequent disciplinary…[NMMS} have decided to conduct an on-shore investigation." The note of the telephone records NMMN informing the claimant that "part of the process is…the first stage is for an on-board investigation and disciplinary to be conducted. This isn't a disciplinary Tony, this is

investigating it from an on-shore side of things…that will just involve myself producing a report of all the information that was conducted on the vessel, and **looking at that and seeing whether it needs to go to the next stage or not…if someone raises a complaint…that they don't feel satisfied for the outcome of the investigation on board, this is the next stage. It goes on-shore for any investigations…because [CB] has raised a further complaint then it comes on-shore**" [the Tribunal's emphasis]. Ailish Jamieson's advice to the claimant was incorrect; the Code of Practice did nto provide a process by which steps could be taken to overturn Captain Millar's decision on the basis that it did not meet the approval of CB, her union or the respondent and its agents.

30. It is notable, Ailish Jamieson had been involved in the earlier communications and advice, and she carried out the subsequent investigation including taking a statement from Captain Miller, the claimant and CB. She did not take a statement from Clair Kawin who had allegedly witnessed CB's behaviour as recorded by the claimant on the Record of Formal Warning.

The interview with Captain Miller

31. Captain Miller explained to Ailish Jamieson that he had viewed the CCTV placed in the official log, the claimant "was in the wrong, he should not have done it and held his hands up…. Tony was at the end of a 14-hour shift, and the Lagan [the ship] was sailing beyond comfortable capacity…the vessel was due to sail at 23000 and there were 7 drunk passengers…he felt Tony was under a huge amount of pressure and things may kick off with drunk passengers. [CB] works split shifts, so her rest period is short, so both were tired." Captain Miller's statement reflects his awareness of the mitigating circumstances lying behind the incident, and the Tribunal finds that he was the best placed person to objectively assess the incident in the light of the claimant's and CB's working relationship and the claimant's unblemished employment record against a background of working 14-hours in stressful circumstances. It must follow as a matter of logic Captain Millar is knowledgeable if not an expert in off-shore working and nautical matters.

32. The interview notes record Captain Millar stating that "**he was concerned when allegations of bullying and harassment came about as [CB] had never raised this issue…he had never witnessed any bullying or harassment behaviour from Tony towards [CB]…**he felt this was a minor assault…Tony losing his cool…it was unprofessional…he felt he had followed the Company Code of Conduct and kept in mind that he bought the company into disrepute…Tony is a good manager and knowing him and [CB] he did not feel it would grow arms and legs…**if he gave Tony a final written warning he would lose his job if something else happened…he wanted a stepping stone in-between as Tony had never been subject to a disciplinary procedure before…the sanction was proportionate between the two parties and he would not change the sanction**" [the Tribunal's emphasis]. Ailish Jamieson did not explore Captain Millar's evidence that he had never witnessed the claimant bullying or harassing CB, and this was an issue that remained unexplored throughout the entire disciplinary process from investigation to appeal stage.

33. It is undisputed Captain Miller did not speak with CB directly about the incident, however, it appears from the evidence CB refused to come into work despite invited to do so, he did have her statement and the alleged statement of the passenger in addition to other statements provided by the crew, the claimant's admission and the CCTV evidence.

34. As indicated earlier, there was an issue as to whether the formal warning was a final written warning or not. The Tribunal indicated to the parties that the evidence appeared to suggest it was a final written warning; both parties were of the view that it was not. Having considered the evidence of Captain Millar and the Record of Formal Warning the Tribunal concludes that it was a final written warning, the claimant having been put on notice that any further breach of the disciplinary code may lead to further disciplinary action including dismissal. The fact that the claimant had been issued with a final written warning was not information put before Christopher Cher and Sigvardsson Hakan. Lindsey Herrington and Sarah Simpson took the view a written warning had been given and they had not addressed their minds to whether it was a final written warning or not because of the pressure they were under from CB and SM to recommend dismissal, and their belief that the claimant should have been dealt with more severely than he was.

The interview of CB

35. CB, represented by SM, her RMT union representative was interviewed next. The claimant alleges that it was SM who had allegedly physically assaulted CB some 12 months earlier by grabbing her by the throat and pushing her up against side of the boat with no action being taken against him.

36. It is notable in her interview CB explained that she told the claimant she would make the announcement when she had finished checking in the passenger, contrary to the CCTV footage. The start of the CCTV evidence reflected there was no passenger being checked in when CB first refused to obey a management instruction. The notes taken do not refer to the CCTV footage being viewed, and as it was not considered at the claimant's interview, the Tribunal infers that it was not viewed at the interview of CB given SM's request for a copy, which the Tribunal finds surprising due the seriousness of the allegations raised by the claimant in her grievance. It is notable the allegations of victimisation, bullying and harassment were never investigated and CB was not asked about these allegations, despite Captain Millar having given evidence earlier that he had never witnessed bullying and harassment.

37. It is also notable that SM expressed "concerns over Captain Miller's handling of the incident…SM further explained CB had gone against the advice of the union and has not contacted the police yet, placing in the investigation process…her faith in AJ [Ailish Jamieson] …the unions ideal outcome would be for Tony to be moved or failing that dismissal." The matter was never reported to the police, despite the threat. The Tribunal took the view that a reasonable employer acting within the bands of reasonable responses would have (a) tested CB's evidence against the CCTV footage by viewing it in her presence, (b) ignored the union's threat of police involvement and demand for a dismissal and (c) investigated how CB maintains she was victimised, bullied and harassed by a one-off incident that had taken place with

the claimant against the off-shore background of this case. The evidence given by CB was in effect a repetition of that given the day after the incident with nothing more added and it took the respondent no further on the issue of whether victimisation, bullying or harassment had taken place and so the Tribunal found.

38. Having considered the oral and written evidence before it, the Tribunal took the view that the untested grievance allegations raised by CB who was unhappy with the written warning issued and wanted the claimant moved or dismissed, took priority as far as the respondent's HR advisors were concerned, they had lost sight of what it means to have a fair and balanced procedure compliant with the respondent's Code of Conduct and this lay the groundwork for the unfair process that subsequently transpired leading to the claimant's dismissal.

The interview of the claimant.

39. The claimant attended an investigation meeting with Ailish Jamieson. It is notable that the CCTV evidence was again not viewed when a reasonable employer acting with the bands of reasonable responses would have made a point of taking the claimant through the CCTV evidence, stopping, starting and freezing the frames a number of times, in order to fully comprehend the incident and Ailish Jamieson's failure to do so was a fundamental unfairness in the case. The claimant could not be expected to remember the minutia of the CCTV evidence, and should have been provided with a copy prior to the hearing at the very least in order that Ailish Jamieson could understand exactly what he was admitting to.

40. The claimant explained how he had worked a 14-hour shift starting at 8am and the incident took place at 11pm, the ship was two crew short and running late, he had received threats from drunken passengers, CB had refused to make the announcement and no crew had witnessed the incident. He described his relationship with CB as good, "he had never heard such subordination in his life, but admits that he did not handle it very well." There was no investigation in to CB's allegations of victimisation, bullying and harassment.

41. In a letter dated 27 April 2018 the claimant was invited to a disciplinary hearing the purpose of which was to "discuss allegations of assault (including threatening behaviour) …the outcome could include a disciplinary sanction up to and including dismissal. The Tribunal is satisfied, despite the claimant's allegation to the contrary, he was put on notice that he could be dismissed, even if he did not believe this would happen, and reference was made to the allegations he was facing both in the letter of invite and the investigation report attached to it.

Investigation report

42. It is notable the investigation report produced by Ailish Jamieson sets out a number of documents that do not include all of the earlier evidence gathered prior to Captain Millar issuing the written warning, including the Record of Formal Warning, which was a key document. The CCTV "screenshot" footage was cited together with a "full disk." The report confirmed "from the CCTV footage the passenger is present throughout" which was not found to be the case by the Tribunal on viewing the footage, as a passenger appeared (presumable the driver who allegedly provided

the unsigned, unnamed and undated statement) part way though the incident. Despite HR's earlier advice that resulted in the claimant being issued with a written warning (of which Ailish Jamieson had knowledge) the conclusion in the report was that the matter should proceed to a disciplinary hearing under the Code of Conduct. The report did not make it clear how Ailish Jamieson concluded that the Code of Conduct was applicable and being followed, given the fact the claimant had been dealt with under that procedure by Captain Millar and there was no facility under the Code to open the process to affect a dismissal for the same offence once a formal warning had been issued.

43. With reference to the screenshots provided, the Tribunal took the view that they are not particularly helpful and a reasonable employer acting within the band of reasonable response would have found it necessary to view all of the relevant CCTV footage, a number of times, to understand what transpired and the context of the claimant's actions. It is apparent from the disciplinary process taken as a whole the behaviour of CB was ignored despite it being one of the building blocks by which the incident could be understood and mitigation taken into account.

The disciplinary hearing 8 May 2018

44. The disciplinary hearing took place before Lindsey Herrington, who had worked for NMMS as a senior crewing consultant, a managerial position, having previously worked as a crew manager for another company. Lindsey Herrington was not HR qualified, she had overseen only 10 disciplinary hearings and made recommendations in respect of them in the past. Mr Haddon described her as an off-shore expert on whom the Tribunal should rely given its inexperience in an off-shore working environment. The Tribunal took her expertise into account when it arrived at its judgment.

45. Lindsey Herrington did not have sight of the Record of Formal Warning which she refers to as a written warning. She did not address her mind to whether it was a final written warning or not.

46. Inadequate notes of the hearing were taken, which the Tribunal has considered in full. They record the claimant expressing his confusion as to why he was required to attend disciplinary hearing when the matter had already been dealt with. It was confirmed CB had raised a grievance and investigation shoreside had led to the disciplinary.

47. Lindsey Herrington, who had viewed the CCTV evidence three times, but not with the claimant, stated the "footage does not look good." The claimant referred to Claire Kewin and Katherine Gallagher as being witnesses. Lindsey Herrington did not pick up on the fact that Ailish Jamieson had failed to take a statement from Claire Kewin despite her being named in the Record of Formal Warning as a witness and this resulted in a procedural and substantive unfairness as Claire Krewin may have been in a position to provide context and also deal with the harassment, victimisation and bullying allegations. This failure underlines the importance of ensuring that all of the relevant documents were available throughout the disciplinary process, and as indicated earlier, the Record of Formal Warning was a contemporaneous key document that had never been shown to Lindsey Herrington, Sarah Simpson,

Christopher Cher and Sigvardsson Hakan, despite the part Ailish Jamieson in the process that lead to its issue. A reasonable employer acting reasonably would have ensured key documents were available and witnesses listed interviewed in order that a reasonable investigation could be carried out given the fact that CB was looking for a dismissal, NMMS were concerned about the threats made by the union and the evidence may have assisted the claimant in establishing that it was not an act of assault more serious than minor and CB had been not been bullied. In order to access this the part played by CB into the incident needed to be explored and it was not.

48. During the disciplinary hearing the claimant correctly raised the point the CB had pushed his hand away, and not the other way around, and he incorrectly believed he had his arm on CB's chair rather than her arm (which the CCTV showed otherwise), and if so, it was the one time only (which the CCTV showed to be the case). The claimant referred to speaking with Katherine Gallagher, one of the witnesses who should have been interviewed and was not) regarding the investigation and Lindsey Herrington's response was that he should not have "contacted any employee during his suspension and this would be considered." This is relevant and became an issue at the liability hearing given the reference made by Lindsey Herrington in the dismissal letter to this, and her denial at the liability hearing that it was considered when she made her recommendation of dismissal, which the Tribunal did not accept as credible.

49. The claimant made it clear the process conducted on-board was correct, it was not a serious assault, bullying or harassment "but the actions of 2 tired people."

50. The claimant was not asked any questions about CB's allegations of bullying., harassment or victimisation and the evidence before Lindsey Herrington was similar if not identical to that before Captain Miller as far as the facts were concerned, the only difference being CB's grievance, the union's threat to report the matter to the police and the requirement expressed by the union that the claimant was moved or dismissed.

Disciplinary outcome

51. Following the disciplinary hearing Lindsey Herrington set out her recommendation of the claimant's dismissal in an email sent by Alastair Clarkson HR, to the respondent's Singapore HR, and an outcome letter was attached together with the meeting notes. The outcome letter dated 10 May 2018 was short and it referred to meeting the claimant, when Christopher Cher (the signatory to the letter) had never met him. The claimant was summarily dismissed for gross misconduct and reference was made to the allegations together with the following "It should be noted that during the hearing you admitted to breaking your suspension and contacting an employee with confidential details obtained from the investigation, also gross misconduct, this would be investigated separately if your employment was to continue". The Tribunal took the view, on the balance of probabilities, that Lindsey Herrington had taken this factor into account when arriving at her decision to recommend dismiss, otherwise there was no reasons to mention it given the fact the claimant had been dismissed and there was would not be any separate investigation. Lindsey Herrington did not consider the part played by CB in the incident and the

very strong mitigation, not least the fact that claimant had worked 14-hours with 2 breaks of 30 minutes in stressful working conditions, had been employed since the 1 January 1995 with an excellent record. She did not consider Captain Miller's views, the personal knowledge he had of the claimant and CB, the mitigating events and the fact that the final written warning had been correctly given following the Merchant Navy Code of Conduct that did not provide any process by which the disciplinary proceedings and outcome could be re-opened by Lindsey Herrington, who substituted Captain Miller's views and his expertise with her own as a result of CB's grievance and CB's demands made through her union official that the claimant be dismissed despite there being no evidence whatsoever of harassment, victimisation and bullying. Captain Miller, who possessed the relevant information, had been clear on this point during the investigation meeting and Lindsey Herrington completely ignored his view, despite Captain Millar's expertise in running a ship off-shore.

52. Lindsey Herrington concluded the claimant's actions had constituted assault under section 7(1) of the Code of Conduct, as had Captain Miller albeit he deemed it a minor assault, and there was no consideration or explanation given as to why a minor assault that resulted in a final written warning became an assault that merited summary dismissal. In her witness statement before this Tribunal she stated the claimant did not accept his actions amounted to an assault which cannot have been the case given the claimant admitted his guilt before Captain Miller that resulted in the final written warning. The evidence of Captain Millar made the position very clear, and if Lindsey Herrington had been in any doubts, the Record of Formal Warning set out the claimant's admission of the breach of the Code of Conduct.

53. It is notable Lindsey Herrington's recommendation was sent to Singapore HR on 11 May 2018, by 14 May 2018 the 10 May 2018 letter of dismissal signed by Christopher Cher (who had suspended the claimant earlier) was returned and sent to the claimant. There was no evidence Christopher Cher had read the documents and dismissal letter, discussed the matter with anybody, or queried how punishment of a final written warning can change to a dismissal under the Code of Conduct. On the balance of probabilities, the Tribunal concluded at its very highest Christopher Cher "rubber stamped" Lindsey Herrington's unamended letter of 10 May 2018 without any thought as to due process or fairness to the claimant.

Appeal

54. The claimant appealed in a letter dated 22 May 2018 that ran to 18-pages written by Andrew McCabe, who assisted him. In that letter it was confirmed the claimant accepted he had touched CB's arm, had admitted the allegation and as a result received the written warning that was to remain on his file for 12 months. He questioned why CB had been advised of the outcome, breaking his confidentiality, and why she had not been disciplined for the part she had played. The fact that Ailish Jamieson was appointed to be his point of contact, had heard CB's grievance hearing and had also carried out the disciplinary investigation was raised as an issue on the basis that she was "clearly not an impartial person." The Tribunal agreed with this assessment. It found Ms Jamieson lacked any objectivity, she had been involved in the allegation form the outset, and this resulted in an inadequate investigation and unfair investigation report whose contents did not fall within the band of reasonableness.

55. Other procedural issues were raised including "according to company policy Captain Millar was the correct person to deal with the matter so why would the company want to hold a second disciplinary allegation for the same allegations…Mr Gorry admitted to the allegation and so no further investigation was required to be undertaken by Captain Millar. This is contained in the Code at paragraph 20. Captain Millar believed this to be a minor infringement and the Code states at paragraph 9(b) *minor acts of negligence…and assault* warrant a formal warning, which he gave to Mr Gorry." The issue of mitigation was raised, such as length of the claimant's shift "being in breach of the Working Time Regulations" and why no witness statement was obtained from Claire Kewin. The doctrine of res judicata was relied upon. It is accepted by the parties that the legal doctrine of res judicata does not apply to disciplinary proceedings and is applicable only to Court and Tribunal proceedings.

Appeal investigation

56. The claimant appealed to Sarah Simpson, Lindsey Herrington's line manager but nothing hangs on this contrary to submissions made on behalf of the claimant. The Tribunal accepted she was independent, having no previous dealings with the claimant or incident. Sarah Simpson was a fleet personnel manager employed by NMMS and then Stena Line Manning Services Limited following a TUPE transfer in or around 1 September 2018. Mr Haddon repeated his submissions concerning the expertise Sarah Simpson had in off-shore matters, warning the Tribunal that it should not substitute its view for that of the appeal officer.

57. In a letter dated 18 June 2018 Sarah Simpson confirmed the relevant procedure was the Code of conduct for the Merchant Nay August 2013 and the claimant, who wanted to cross-examine CB, could not cross-examine witnesses.

Sarah Simpson interviewed Ailish Jamieson

58. Sarah Simpson interviewed Ailish Jamieson on 2 July 2018 who confirmed CB had made a statement about the incident on 3 April 2018 "to the Master." She confirmed no CCTV footage was shown to the claimant during the investigation meeting because "the company cannot show this footage as there are other people present who have not consented to us sharing this footage for this purpose." Ailish Jamieson did not explain who the other people were, and whether an attempt had been made to obtain their consent, and she was not asked about this. The Tribunal took the view that the relevant footage of the CCTV evidence showed the claimant, CB, the claimant's work colleague who was working in the shop and the passenger who had allegedly provided a statement. It seemed illogical that the footage could not be shared, and as indicated above, the respondent's failure amounted to a fundamental procedural and substantive unfairness bearing in mind the Passenger in question had already provided a statement to CB which she had forwarded on.

59. Ailish Jamieson confirmed Captain Millar had authority to deal with the matter "however, upon full investigation it was felt policy wasn't adhered to as Captain Millar did not complete a full investigation." It was not at all clear either at appeal or during this liability hearing how the Policy was not adhered to by Captain Millar, whom the Tribunal found complied with the Code of Conduct, unlike the respondent, who did

not. Ailish Jamieson did not explain how the investigation was not a full one, and nor was she asked. Ailish Jamieson confirmed her investigation was "purely into the allegation of assault" and Sarah Simpson did not explore with her the differences between that investigation and the one carried out by Captain Millar also into the allegation of assault, which the claimant admitted. Sarah Simpson did not ask Ailish Jamieson why she had failed to investigate the allegations of victimisation, bullying and harassment given the stated objective, which was to have carried out a full investigation.

Sarah Simpson interviewed Lindsey Herrington

60. Sarah Simpson interviewed Lindsey Herrington on 3 July 2018 who also confirmed the claimant had not been shown CCTV footage at the disciplinary hearing relying on the fact that he had seen it previously. Sarah Simpson did not explore with her the impact of time passing and memory, the claimant having viewed the CCTV footage in or around 30 March 2018 for the first and last time (the disciplinary having taken place on 8 May 2018 without the claimant being provided with a cop), followed by the appeal hearing on 23 July 2018, almost 4-months after the incident and her failure gave rise to a procedural and substantive unfairness within the appeal process.

Sarah Simpson interviewed Captain Millar

61. Captain Millar was interviewed on 9 July 2018 and he confirmed a number of matters as correct as follows; he had contacted CB and asked her to return to work and get her version of what had happened during his call with CB immediately following the incident, he had gathered evidence, "including statements form several crew members and had seen the CCTV footage and that the situation could be resolved on board when CB joined again in two weeks…he had advised CB that they should follow established on-board process first." He had taken the view not to call CB to a disciplinary hearing as "it would not achieve anything useful" believing she was guilty of insubordination. He "advised he felt the situation was quite clear cut, as CB had provided a written statement." The claimant had "freely admitted he lost his temper and put his hands-on CB…there was no historical issue between TG [the claimant] and CB and they were two people under stress…it was a minor assault under the Merchant Navy Code of Conduct…TG was honest about what happened, and seemed embarrassed" and he had watched the CCTV with the claimant twice. There was no suggestion before the Tribunal that Captain Millar's evidence was disputed in any way, and the Tribunal took the view that an appeal officer, acting reasonably, would have given it a considerable amount of weight given his expertise, knowledge of the ship, its personnel and the circumstances leading up to the incident. An appeal officer, acting reasonably, would also have obtained copies of the statements taken from several crew members, which appeared not to have been requested at any stage of the second disciplinary process.

Appeal hearing

62. The appeal hearing took place on 23 July 2018. A full minute of the meeting was taken. Sarah Simpson confirmed that once CB's the grievance came in there was a need "to conduct a formal investigation to get everyone's version of events."

She believed her role to be whether the "later sanction" was appropriate. When she asked if he would do anything differently the claimant responded "he didn't think mitigation had been taken into account enough…he had lost his Mum at Christmas and hadn't taken nearly enough time to get over it…he had lost his cool that day, not just because of his Mum but because of the situation on ship that day…had he been at 100% though he would definitely wouldn't' have lost his cool" and he "and CB had had a close relationship before all this and had been friends…He said he would never do the same again in a million years and he thought that Stephen Millar's sanction had been spot on…he admitted that he had been unprofessional."

63. Sarah Simpson's response was described as follows "she was aware that Tony had a full ship and drunk passengers and everything to deal with that night…although Tony and [CB] had been coming to the end of a long shift, nobody's hours had been excessive" and sought the claimant's reassurance for the future. The claimant responded, "he had learnt a lesson…and if it ever happened again he would take a step back…and would put one of his managers in-between him and the situation…he would have got another manager to help CB." He explained that CB's refusal to make the announcement and her telling him to go away caused him to "lose his cool. He said he would never do it again…. he'd never needed coping mechanisms as that had never happened before."

64. In direct contrast to the CCTV evidence Sarah Simpson referred to the claimant touching CB's arm more than once, and it is clear from the notes taken that she believed this to have been the case when it was not. If follows that the decision made was based on incorrect evidence; a reasonable employer acting within the bands of reasonable responses would have ensured that the appeal officer knew precisely how many times the alleged assault had taken place to establish whether it was indeed a minor assault as found by Captain Millar who had viewed the CCTV evidence twice. The CCTV evidence was not viewed at the appeal hearing, had it been Sarah Simpson may not have made such a fundamental error.

65. The claimant was asked how he would address a similar situation of he was working with CB again, to which the response was that "he would put in a grievance about CB's conduct, walking off ship because she was going to be spoken to about the incident that night in the morning" and it would be "unfair" of the respondent to put him back in that position.

66. With reference to the process adopted Sarah Simpson, who was not HR qualified, she incorrectly took the view that despite the claimant's admission made to Captain Millar "a full investigation was always taken under the Code of Conduct…the Code says there is a need to investigate when there might have been gross misconduct." An appeal officer acting reasonable with reference to a correct interpretation of the Code of Conduct would not have reached this view, and the Tribunal on the balance of probabilities, found Sarah Simpson was attempting to justify a situation where an initial investigation supported by HR advice had taken place, but as a result of CB's grievance allegations (which were not subsequently investigated in full) and pressure from the union, the appropriate sanction was not a final written warning but dismissal.

67. The appeal notes were agreed with the claimant, and on 7 August 2018 Sarah Simpson emailed Sigvardsson Hakan, providing him with the investigation report, disciplinary notes, outcome letter, claimant's appeal, appeal meeting notes, interview records and draft outcome letter. Reference was made to the CCTV footage as follows "I would like you to view the CCTV footage, this is problematic but can be done." There was an attempt by Mr Mensah to question the lack of evidence concerning whether Sigvardsson Hakan had viewed the CCTV evidence or not. The Tribunal accepted, on the balance of probabilities that he had viewed it once only, and the letter drafted by Sarah Simpson was accepted wholescale with no amendments or any suggestion that its contents had bene discussed or explored in any way. There was no way of knowing if Sigvardsson Hakan had read any of the other supporting documents given there were no communications from him concerning them, and it appears if he did read them nothing was questioned. The Tribunal took the view from the evidence before it that Mr Hakan had "rubber-stamped" Sarah Simpson's outcome letter.

Appeal outcome letter

68. Turning to the letter sent to the claimant dated 17 August 2018, in relation to the allegation of a procedural unfairness Sarah Simpson had written "the second disciplinary process was undertaken…having taken into account the severity of the incident, the fact your colleague went on to raise a formal grievance…(which hadn't been raised at the time the incident was dealt with on board) and also the importance of us ensuring the health, safety and well-being of colleagues under your management, I am satisfied that the approach taken was appropriate and reasonable…"

69. The fact that CB's initial statement provided to Captain Millar did not refer to all the allegations set out in the grievance, and how those allegations came about i.e. after the claimant was issued with a final written warning to remain on his final for 12-months when CB wanted him removed or dismissed, was not explored or considered. The fact that Ailish Jamieson had not questioned CB why it had taken her 9-days to lodge the grievance was found not be relevant as the claimant had not asked the question during the investigation. The Tribunal found the question was a reasonable one any investigator carrying out an investigation within the bands of reasonable responses would have asked. Sarah Simpson did not consider objectivity whether Ailish Jamieson was sufficiently independent to have carried out a reasonable investigation given the part she had played when Captain Millar had investigated and arrived at an outcome, overseen by the superintendent of NNMS. It was as if these events had never taken place, and for the investigation, disciplinary hearing and appeal hearing to have fallen within the ban of reasonable responses, the full history leading to Captain Millar's decision-making process should have been made available, when it was not. For example, the fact Captain Millar had invited CB to give her version of events face-to-face and she chose to send in a written statement, which was considered by him. It is notable CB's original statement and the Record of Formal Warning appeared not to have been provided, and if they were, not considered during the second disciplinary process. This was a fundamental substantive unfairness, given Captain Millar's specific knowledge of the ship and its personnel and the fact he, unlike anybody else, properly considered all

the circumstances and mitigation, not least the claimant's lengthy employment record and the circumstances surrounding the incident.

70. A reasonable appeal officer acting within the band of reasonable responses would have queried why the claimant was not shown the CCTV footage at the investigation and disciplinary hearing. Sarah Simpson referred to the claimant being shown footage twice by Captain Millar, ignoring the fact that he had made it clear during the process that (a) he had no recollection of touching CB on the arm until the CCTV footage had been viewed, and (b) had requested access to it during the second disciplinary process and it had been refused for no good reason. The respondent's omission has resulted in a further substantive and procedural unfairness taking place; a reasonable employer would have allowed the claimant to view the footage during the investigation and disciplinary hearings. The Tribunal, who acknowledges it does not possess a knowledge of what working as a "family" on a vessel entails, unlike Captain Millar who does and to a lesser extent, Lindsey Herrington and Sarah Simpson, does not accept that the special relationship between seafarers nullifies the requirement to act within the band of reasonable responses when conducting a disciplinary process, including an appeal when the CCTV footage was unavailable to the claimant.

71. Sarah Simpson refers to the mitigation relied upon by the claimant, and unlike Captain Millar, discounted it on the basis that it did not justify the claimant's actions and the respondent "expected that a manager will deal with alleged subordination without responding physically." Captain Millar, who possessed a greater understanding than Sarah Simpson of the claimant's situation, accepted that there was mitigating circumstances, not least the situation on the ship and the claimant coming to the end of a 14-hour shift. In oral evidence the claimant explained he had taken two half hour breaks during the 14-hour shift; this had not been factored in at the appeal, the impression being given to the Tribunal that there was an expectation for the claimant, on occasion, to work these hours. The problem for Sarah Simpson lies in the evidence of Captain Millar who confirmed there had never been an issue with the claimant before, and the claimant had got on well with CB. These are strong mitigating factors, coupled with the claimant's mother's death and CB's own evidence confirming the claimant had never acted in this way before. In addition, the claimant made it very clear that there would not be a repeat, and the Tribunal on the balance of probabilities, came to a view that a reasonable employer acting reasonably given the specific circumstances of this case, would not have dismissed the claimant and it would have issued him with a final written warning, as had Captain Millar who had acted in accordance with the Code of Conduct, unlike the respondent who acted outside it and in this regard was in breach of contract as the Code had contractual effect.

72. It is accepted by the respondent not all the points raised in the claimant's appeal were dealt with.

73. The effective date of termination was 10 May 2018.

Law

74. Section 94(1) of the Employment Rights Act 1996 ("the 1996 Act") provides that an employee has the right not to be unfairly dismissed by her employer. Section

98(1) of the 1996 Act provides that in determining whether the dismissal is fair or unfair, it is for the employer to show the reasons for the dismissal, and that it is a reason falling within section 98 (2) of the 1996 Act. Section 98(2) includes conduct of the employee as being a potentially fair reason for dismissal.

75. Section 98(4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal if fair or unfair (having regard to the reasons shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the respondent's undertaking) the employer acted unreasonable or reasonably in treating it as a sufficient reason, and this shall be determined in accordance with equity and the substantial merits of the case.

76. Where the reason for dismissal is based upon the employee's conduct, the employer must show that this conduct was the reason for dismissal. For a dismissal to be procedurally fair in a case where the alleged reason for dismissal is misconduct, Lord Bridge in Polkey –v- A E Dayton Services Limited [1981] ICR (142) HL said that the procedural steps necessary in the great majority of cases of misconduct is a full investigation of the conduct and a fair hearing to hear what the employee must say in explanation or mitigation. It is the employer who must show that misconduct was the reason for the dismissal, and must establish a genuine belief based upon reasonable grounds after a reasonable investigation that the employee was guilty of misconduct – British Home Stores Ltd v Birchell [1980] CA affirmed in Post Office v Foley [2000] ICR 1283 and J Sainsbury v Hitt [2003] C111. In short, the Tribunal is required to conduct an objective assessment of the entire dismissal process, including the investigation, without substituting itself for the employer.

77. The Court of Appeal in British Leyland (UK) Ltd v Swift [1981] IRLR 91 set out the correct approach: "If no reasonable employer would have dismissed him then the dismissal was fair. But is a reasonable employer might reasonably have dismissed him, then the dismissal was fair…in all these cases there is a band of reasonableness, within which one employer might reasonably take one view and another reasonably take a different view. In between extreme cases of misconduct there will be cases where there is room for reasonable disagreement amongst reasonable employers as to whether dismissal for the misconduct is a reasonable or unreasonable response: LJ Mummery in HSBC Bank Plc v Madden [2000] ICT 1283.

78. The question for the Tribunal is the reasonableness of the decision to dismiss in the circumstances of the case, having regard to equity and the substantial merits of the case. The Tribunal will not substitute its own view for that of the respondent. In order for the dismissal to be fair, all that is required is that it falls within the band of reasonable responses open to employer. It is necessary to apply the objective standards of the reasonable employer – the "band of reasonable responses" test – to all aspects of the question of whether the employee had been fairly dismissed, including whether the dismissal of an employee was reasonable in all the circumstances of the case.

Conclusion; applying the law to the facts
Unfair Dismissal

79. With reference to the first issue, the Tribunal finds the claimant was dismissed on the grounds of conduct contrary to section 7.1 of the Merchant Navy Code of Conduct. In the agreed issues it was accepted by the parties that the reason for the claimant's dismissal was assault. The Code of Conduct did not provide for the respondent to re-open the disciplinary proceedings after Captain Millar had issued the claimant with a final written warning that was the lie on his file for a period of 12-months, and the decision to dismiss was both substantially and procedurally unfair motivated by CB's grievance and her union representative's threat to involve the police if the claimant was not dismissed.

The doctrine of res judicata

80. The Tribunal was referred to Christou & Anor v London Borough of Haringey [2013] EWCA Civ 178 in which the Court of Appeal held that the principles of res judicata and abuse of process do not apply to the exercise of disciplinary power by employers. In that case the claimants prayed in aid the doctrine of res judicata in contending that their dismissals following the instigation of a second set of disciplinary proceedings for the same misconduct were unfair. C and W were initially disciplined under the Council's 'simplified' disciplinary procedure — which was usually invoked for relatively minor misconduct — and given a written warning for the way in which they had dealt with the case of Baby P, who had died as a result of parental neglect and abuse. A new Director of Children's Services for the Council, concluded that the previous disciplinary procedures against the claimants were 'blatantly unsafe, unsound and inadequate'. Fresh disciplinary proceedings resulted in their summary dismissal for gross misconduct and they brought unfair dismissal claims on the basis that it was unfair to reopen the earlier determinations. A majority of the tribunal rejected the claims, deciding that the misconduct justified dismissal and that the new management was entitled to take a different view of the material facts and instigate a second set of disciplinary proceedings.

81. The Court of Appeal held the doctrine of res judicata applies to adjudication procedures which involve establishing the existence of a legal right or 'determining a dispute'. The purpose of employment disciplinary procedures is not to allow a body independent of the parties to determine a dispute between them but to enable the employer to determine whether the employee has acted in breach of contract. The fact that procedures may be contractual or provide safeguards that typically apply to adjudicative bodies does not alter their basic function or purpose. Even if res judicata did apply, the Court continued, a dismissal in breach of the doctrine would not necessarily be unfair — S.98 ERA would still require a consideration of whether the employer had acted reasonably in all the circumstances.

82. The Court also rejected the claimants' related argument that the second disciplinary procedure was an abuse of process, holding that this doctrine, too, only applies to adjudications. In any event, tribunals considering whether a dismissal in circumstances such as those in the instant case is fair must ask whether it was fair to institute the second proceedings at all. The Court concluded that the majority of the tribunal had been entitled to find that, since the allegations of misconduct against the claimants were very serious and involved risk to the public, the Council's new

management had been justified in taking a different view of the gravity of the conduct. In relation to Mr Gorry, it was suggested by the respondent his behaviour was very serious and involved a risk to the public. Objectively assessed, it is difficult to perceive how pushing an employee on the arm and pushing her in the chair towards a tannoy is comparable to the behaviour of the claimants in Baby P, which was an exceptional case involving the death of a child and there was risk to the public. The same cannot be said for the case of Mr Gorry. Captain Millar, with his expertise in running a ship, deemed him not be a risk meriting suspension, and guilty of a minor offence having taken advice from the HR agents. The circumstances that gave rise to the second set of proceedings in Christou were unusual grave, and in contrast, the respondent's reason for dismissing Mr Gorry was motivated by CB's grievance raising a series of serious allegations and her union representative's demands and threats, and the Tribunal found this was the reason behind dismissing the claimant for misconduct conduct which previously appeared to warrant a lesser sanction by a decision maker experience in the maritime sector.

83. Turning to Mr Haddon's submission that the respondent had a responsibility to ensure the safety of those under the respondent's management (also relevant to the band of reasonable responses test referred to below) reference was made to Sarah Simpson's evidence that she was not convinced the claimant would not repeat his behaviour in the future, and it was common for employees to be tired and vessels to be at capacity with boisterous passengers. Sarah Simpson's analysis was not in accordance with that of Captain Millar and the claimant's undisputed evidence given throughout the disciplinary process related to the drunken (not "boisterous" as minimised by the respondent) passengers) whom the claimant evicted from the ship which caused a delay in it sailing for Ireland, his 14 hour shift, the death of his mother, his clean employment record with no suggestion of any misbehaviour in the past, his good relationship with CB, his admission of misconduct at the outset when he clearly took responsibility for what had happened and contrite behaviour with promises that it would never happen again during the disciplinary process. There was no objective evidence to support any legitimate concern the respondent may have of the claimant was faced with a similar situation, and this was the view of Captain Millar who decided early on there was no need for suspension pending an investigation.

Re-opening the disciplinary proceedings

84. With reference to the issue was it unfair to re-open the proceedings, the Tribunal found that it was, but its finding was not the only reason for the unfair dismissal. The Tribunal accepted that there is no burden of proof on either party and the issue of whether the dismissal was reasonable is a neutral one; in the claimant's case decided in is favour the Tribunal having analysed the test of fairness to the reason for the claimant's dismissal, namely assault and bullying. The Tribunal took the view that all of the circumstances surrounding this case needed to be taken into consideration, including Captain Millar's earlier investigation and outcome.

85. Mr Haddon referred the Tribunal to the Code of Conduct and submitted that it "specifically envisages the possibility of separate proceedings onboard a ship and a second set of off-shore disciplinary proceedings". The Tribunal did not agree with this proposition on a common sense reading of the Code. It is not the case that Captain Millar only had the power to conduct on-board disciplinary hearings with a

view to addressing the operation of the ship in the immediate term, and offshore proceedings were specifically required to consider the future relationship between the parties and dismissal as submitted on behalf of the respondent.

86. Both parties referred the Tribunal to the Court of Appeal judgment in Sarkar v West London Mental Health Trust [2010] EWCA Civ 289. Mr Haddon argued the effect of the Code of NHS conduct can be differentiated because it expressly states that the off-shore procedure is separate from any other disciplinary action, and also refers to exceptional circumstances which may mean the process is brought offshore. Reference was also made to the unique marine environment to which Sarkar was not comparable. The Tribunal did not agree that a marine environment precluded the application of Sarkar. Section 98(4)(b) ERA requires Tribunals to determine the reasonableness of a dismissal 'in accordance with equity and the substantial merits of the case' and Mr Gorry's case is analogous to that of Sarkar, where the Court of Appeal upheld a Tribunal's decision that the Trust had unfairly dismissed S for gross misconduct under its formal disciplinary procedure, when it had initially taken the view that the misconduct could be dealt with under its 'Fair Blame Policy' (FBP) — a dispute resolution procedure designed to deal with less serious matters. The Tribunal was entitled to regard the initial use of the FBP as an indication of the Trust's view that the misconduct was relatively minor and that it was prepared to deal with it under a procedure that could not result in S's dismissal. The tribunal did not err in law in concluding that it was inconsistent of the Trust to then charge S with gross misconduct based on the same matters. Mr Gorry's case cannot be differentiated; Lindsey Herrington recommended dismissal to Christopher Cher under paragraphs 7 and 10 of the Code of Conduct, Captain Millar had found the claimant guilty of less serious conduct under paragraphs 8, 17 and 20. Under paragraph 20 of the Code of Conduct the claimant admitted the conduct and Captain Millar immediately considered penalty. The respondent could only conduct a hearing offshore if the conduct was not admitted coupled with "exceptional circumstances." Captain Millar had taken the view, having taken written statements from material witnesses, and acting with the benefit of HR advice, that the conduct was less serious/relatively minor and could be dealt with under a procedure that would not have resulted in the claimant's dismissal from the ship. Had Captain Millar taken the decision to dismiss the claimant from the ship, in those circumstances, it would have been entirely appropriate for Lindsey Herrington, Sarah Simpson, Christopher Cher and Sigvardsson Hakan to have considered disciplinary action.

87. In short, the Code of Conduct did not provide the facility by which an on-shore agency company could re-open the disciplinary process (including an investigation) once it had taken place off-shore, the employee admitted to the offence and a decision made by the Captain as to the appropriate disciplinary penalty, and so the Tribunal found. The circumstances in which an on-shore disciplinary process could take place was limited to where the captain (master) dismisses an employee from the ship, suspension, disembarkation and repatriation and if the alleged breach of discipline is not admitted to "in exceptional circumstances." None of these provisions applied to the claimant who had admitted to the offence of a minor act of assault following an investigation conducted by Captain Millar, aware of the "unique marine environment" issued him with a final written warning that was to remain on his file for 12 months in accordance with the Code of Conduct. It was unfair for the respondent to overturn Captain Millar's decision in breach of a Code of Conduct that had been collectively agreed by Nautilus International, RMT, UK Chamber of Shipping and

approved by the Maritime and Coastguard Agency, which the claimant was entitled to rely upon, the concept of equity having come into play where the respondent via its reliance on the Code of Conduct had led the claimant to believe he would not be dismissed for certain conduct, and that included an act of minor assault. Section 98(4)(b) requires Tribunals to determine the reasonableness of a dismissal 'in accordance with equity and the substantial merits of the case, and it found the respondent had acted inequitably when it came to dismiss the claimant for an offence he had previously been punished by way of a final written warning. In the alternative, if the Tribunal is wrong in its analysis, for the reasons set out above, it found the dismissal to have been procedurally and substantively unfair in any event by the disciplinary process that had been carried out, setting aside the legal arguments on the effect of Sarkar and delegation to NMMW.

Delegation to NMMW

88. Mr Mensah submitted that the evidence of the decision makers was essential in a claim for unfair dismissal, that evidence was not before the Tribunal and for determining the fairness or otherwise of the dismissal the Tribunal is required to examine the mental processes of the dismissing and appeal officers, not Lindsey Herrington and Sarah Simpson who made recommendations and did not make the final decision to dismiss or reject the appeal.

89. Mr Mensah also contended the respondent's procedures were unfair due to the significant involvement of HR who investigated, made the recommendation for further disciplinary action, made the recommendation of dismissal and to dismiss the appeal. He argued HR were inextricably linked to the decisions that were reached, and the Tribunal accepted on the evidence before it that this was indeed the case. It did not accept Mr Haddon's proposition that Lindsey Herrington and Sarah Simpson were not HR qualified and did not act in the capacity of HR, but were experts on the very particular requirements of off-shore working and therefore did not come within the law concerning the involvement of HR in disciplinary proceedings as set out in Ramphal v Department for Transport UKEAT/0352/14/DA in which the EAT gave guidance on the limits that should be placed in respect of HR involvement.

90. In Ramphal the EAT dealt with the situation where the disciplinary investigation had been influenced by a third party i.e. HR who had changed a draft report that included comments favourable to the employee, to critical ones and the view of culpability changed from misconduct to gross negligence. Reference was made to the Supreme Court's decision in Chhabra v West London Mental Health NHS Trust 2014 ICR 194, SC. Mr Mensah correctly pointed out that Lindsey Herrington and Sarah Simpson had no decision-making powers and yet both wrote the outcome letters that were adopted ostensibly by Christopher Cher and Sigvardsson Hakan who gave the appearance that they had made the decision, written the letters, and in Christopher Cher's case, attended the disciplinary hearing where he met the claimant in person when this was not the case. Mr Mensah is correct, Lindsey Herrington and Sarah Simpson had strayed into the area of culpability and had not merely provided detached neutral advice. The Tribunal took the view that both were unhappy with the outcome from Captain Millar's disciplinary proceedings, and in the case of Sarah Simpson, she referred in the dismissal letter to the claimant allegedly breaching his suspension conditions, showing the claimant in a bad light in order to shore up the dismissal.

91. Having considered the evidence before it, the Tribunal accepted Mr Mensah's submission that Ailish Jameson, Lindsey Herrington and Sarah Simpson, acting as agents for the respondent, had conducted the process in their capacity of outsourced HR professions (even if they did not possess HR qualifications), they determined the process and that process was rubber stamped by either HR in Singapore, Christopher Cher and Sigvardsson Hakan. The Tribunal will never know as Christopher Cher and Sigvardsson Hakan did not give evidence, and there was no contemporaneous documentation evidencing either of them querying or exploring the decision-making process of Lindsey Herrington and Sarah Simpson. It is marked that neither appeared to question why one of the ship captains employed by the respondent had come to an entirely different decision following the earlier advice given by the agent NMMW in respect of an employee with lengthy continuity of employment and a good record throughout. There was no evidence that this was even properly considered by Lindsey Herrington and Sarah Simpson, let alone Christopher Cher and Sigvardsson Hakan.

92. Despite the Tribunal having accepted on the balance of probabilities that Sigvardsson Hakan had viewed the CCTV footage, Mr Mensah correctly pointed out that we will never know what aspect of the CCTV caused concern and tipped this case from minor assault to assault with threatening behaviour. It is undisputed CB got on with her job as normal after the incident and did not complain to Captain Millar or raise an issue. It was captain Millar who made the first contact which resulted in a witness statement being provided by CB against a background of her pay being stopped due to her poor attendance record and the possibility of a disciplinary investigation for leaving the ship without authority.

93. The Tribunal agreed with Mr Mensah, mindful of the fact that it cannot substitute its view for that of the respondent, that there was a disparity between CB's witness statements including the initial statement provided to Captain Millar, her grievance and her later statement taken weeks after the incident and the actual CCTV footage, where CB appears to be argumentative and it is undisputed by both parties, told the claimant to go away, which he did. The CCTV footage was vital evidence; it brought into question CB's version of events and as indicated earlier, the Tribunal found it was a procedural and substantive unfairness for the claimant not to have been provided with a copy, and even more importantly, for the respondent (apart from Captain Millar) not to have sought an explanation from the claimant at the same time as the CCTV evidence was viewed, at least more than once due to the speed in which the incident took place, and the contradictions in CB's statement. For example, she described how she was too busy serving a customer when the claimant first asked her to make the announcement when the CCTV footage clearly shows otherwise, CB pointed her finger at the claimant, pushing his hand away from the computer and appeared aggressive from her body posture, telling him to go away at the end. Captain Millar concluded that both were to blame for the incident after watching the CCTV with the claimant twice; had the respondent followed suite and disregarded CB's threat made via her union, the outcome of this case would more likely than not, have been different and more on the lines of the final written warning issued by Captain Millar, who properly considered the employment history of the individuals in addition to the strong mitigating circumstances. In contrast, the reference to the claimant breaking suspension and being disciplined for it was an irrelevance introduced by Lindsey Herrington to ensure by the claimant was dismissed as it brought him in further disrepute. Without the evidence of Mr Cher,

there is no way of knowing what weight he gave it, particularly given the brevity of the dismissal letter, which heightened more the reference to the claimant's failings that had not been investigated and were not the subject of any disciplinary allegations

94. Mr Haddon submitted the delegation to NMMW was transparent, the claimant was aware from the outset that a recommendation would be made to managers in Singapore. The Tribunal agreed, but with some reservation as the dismissal outcome letter gave the impression Christopher Cher had been at the disciplinary hearing when he had not.

95. Mr Haddon referred the Tribunal to the EAT decision in GM Packaging (UK) Ltd v Mr S Haslem UKEAT/0259/13/LA in which the disciplinary process was delegated to external HR consultants. It is notable that Stena, unlike GM Packaging is not a small employer, and as it does not have a UK base delegates to NMMW, a model common in the maritime industry and the Tribunal accepted Mr Haddon's submission that the process undertaken was a genuine proper procedure and transparent process. It also accepted that it is necessary for the Tribunal to consider the reason for dismissal from the perspective of Lindsey Herrington and Sarah Simpson as set out in the findings of facts above. In short, their recommendations leading to a dismissal and appeal decision taken by Christopher Cher and Sigvardsson Hakan did not fall within the band of reasonable responses for all of the reasons set out above and the dismissal and decision on appeal, however it came about i.e. via Christopher Cher and Sigvardsson Hakan, were both procedurally and substantively unfair.

Burchell test – did the respondent have in its mind reasonable grounds on which to sustain the belief that the claimant was guilty of gross misconduct in that he had committed more than a minor assault and bullied CB.

96. Mr Haddon submitted that in applying the Burchell test, the Tribunal must not substitute its decision as to what was the right course to adopt for that of the Respondent: Post Office v Foley. It must ask itself whether what occurred fell within the range of reasonable responses of a reasonable employer given the respondent's genuine belief that the Claimant had engaged in threatening behaviour and assaulted a colleague. The Tribunal had this test in mind throughout. It was also referred to Neary and Neary v Dean of Westminister [1999] IRLR 288 and Mr Haddon submitted what will amount to gross misconduct can and will vary according to the employment concerned with reference to employees working and living within proximity with one another on board a ship.

97. Mr Haddon further submitted the question to be determined by the Tribunal is whether the employer believed that the employee was guilty and were entitled so to believe, having regard to the investigation carried out relying on Scottish Midland Co-operative Society Ltd v Cullion [1991] IRLR 261. He referred to Lindsey Herrington not accepting the claimant's version of events having viewed the CCTV evidence. The Tribunal found a disciplinary officer, acting reasonably, would have viewed the CCTV evidence with the claimant to understand the footage, and he or she would have ensured the claimant had been provided with a copy. The fact the claimant was forced to rely on is memory at the disciplinary hearing amounted to a procedural and substantive unfairness. The claimant had agreed an act of minor assault had taken

place, and it was incumbent on Lindsey Herrington to view the evidence objectively, with a view to properly coming to a decision as to whether the claimant's act could be described as minor assault or a more serious assault. Lindsey Herrington did not address her mind to this, blinded by the grievance raised by CB and threats made by her union representative to involve the police if the matter was not resolved to their satisfaction i.e. no written warning, removal or dismissal.

98. The Tribunal did not find respondent held a genuine belief the claimant was guilty of the misconduct alleged; the claimant (who did not admit an assault that was not minor and threatening behaviour) had admitted minor assault from the outset during the disciplinary hearing conducted by Captain Millar and the CCTV evidence had confirmed the position as far as Captain Millar's investigation was concerned. A reasonable investigation was carried out by Captain Millar, who gave CB the opportunity to come into work and provide a witness statement in person, which she did not take up preferring to submit a written statement that was before Captain Millar, who took HR advice on the disciplinary process.

99. It is notable that if CB had not raised the grievance, Captain Millar's decision would not have been overturned. A reasonable investigation into the allegation the claimant was found guilty of was not conducted by Ailish Jamieson because she refused to provide the claimant with a copy of the CCTV footage which she did not view with the claimant at the time, and there was no attempt by her to investigate the complaints made by CB in her grievance. The complaints of harassment, bullying and victimisation were not considered during the disciplinary process; no new evidence was thrown up by Ailish Jamieson's investigation CB essentially repeating what she had said in her written statement that was before Captain Millar, with no evidence given of the harassment and victimisation allegations. Given the evidence before it, the Tribunal finds CB's strongly-worded grievance were made with a view to the respondent overturning the final written warning and either moving or dismissing the claimant, CB and the union dissatisfied with the original outcome. The Tribunal accepts Mr Mensah's submission that there was no material change in the issues that had been identified and decided upon by Captain Millar, it is most unusual for a second set or proceedings to follow a first set on the same facts, and could give rise to a fair dismissal only in the most exceptional of circumstances assessed in the light of the employer's reason for doing so.

100. Mr Mensah reminded the Tribunal that the respondent accepted the situation was unusual, and the Tribunal found there existed no serious or cogent reasons for going behind Captain Millar's original sanction, which he deemed to be appropriate and proportionate, considering mitigation including the claimant's completely unblemished record over many years.

101. The Tribunal on the balance of probabilities found the investigation, dismissal and appeal outcome were guided by what CB's representative wanted as an outcome to the investigation; Ailish Jamieson did not take CB's actions (when Captain Millar, who did act within the band of reasonable responses, considered all the relevant background) into account during the investigation. Ailish Jamieson did not interview Clare Kewin or Kathryn Gallacher who may have been able to throw some light on CB's conduct that day, she failed to watch the CCTV footage with the Claimant during the investigation, and this resulted in fundamental substantive and procedural unfairness given the passage of time between when the claimant had last

viewed the CCTV with Captain Millar. The issues in CB's grievance were not put to the claimant at any stage during the disciplinary process and this reflects the true intention behind the second set of disciplinary proceedings, which arose as a result of pressure from CB and her union representative, and the Stena Line Manning Services Limited taking a different view of (a) Captain Millar's punishment which they believed to be a written warning when it was in fact a final written warning as confirmed by Captain Millar and as suggested in the Record of Formal written Warning, although the position was not made entirely clear when it should have been. Ailish Jamieson did not advise the Claimant what constituted an 'assault' more serious than a minor assault. The claimant was aware from his hearing with Captain Millar what the allegation was, and had admitted to it being a minor assault. As put by Mr Mensah, any objective assessment of the CCTV would conclude that the incident was minor borne out of frustration and both parties could have acted better than they did. The notes of the disciplinary hearing did not assist in clarifying the position any further, they were lacking in detail and it is difficult to see how Mr Cher could have taken an objective and considered view of the evidence, especially considering the brief outcome letter which he appeared to "rubber-stamp".

Did the decision to dismiss the claimant fall within the band of reasonable responses which a reasonable employer might adopt.

102. Mr Haddon submitted that in applying the Burchell test, the Tribunal must not substitute its decision as to what was the right course to adopt for that of the Respondent: Post Office v Foley. It must ask itself whether what occurred fell within the range of reasonable responses of a reasonable employer given the respondent's genuine belief that the Claimant had engaged in threatening behaviour and assaulted a colleague. The Tribunal had this test in mind throughout. Mr Haddon further submitted there exists an area of discretion within which management may decide on a range of disciplinary sanctions and it was not for the Tribunal to ask whether a lesser sanction would have been more reasonable. The Tribunla was referred to Boys & Girls Welfare Society v McDonald [1997] ICR 693.

103. Mindful of the requirement not to substitute its decision for that of the respondent, the sanction imposed on the Claimant did not fall within the band of reasonable responses of a reasonable employer for the following reasons:

a. The Respondent commenced an on-shore investigation and disciplinary process, when the Claimant's behaviour had already been the subject of an on-board investigation and disciplinary process;

b. The respondent did not take the strong mitigating factors into account, unlike Captain Millar who was best placed to assess the pressures experienced by staff on the ship the night of the incident, including the long stressful hours of work.

c. The claimant's long length of service and excellent employment record.

d. With reference to the alleged assault of CB by SM, the Tribunal did not find this was raised at the disciplinary of appeal hearing and therefore, could not have been matter that could have been taken into account.

104. With reference to the other matters relied upon by the claimant the Tribunal found letter inviting the Claimant to the disciplinary hearing, coupled with the investigation report attached, did contain sufficient detail of the allegation and consequences, including dismissal. It was not an unfairness for Alistair Clarkson to act as notetaker, and the Tribunal did not find he was involved in the decision-making process. The notes of the disciplinary hearing lacked detail and this has given rise to an unfairness in the circumstances of the case on the basis that insufficient information was put before Christopher Cher. The Claimant did not have to wait an inordinate amount of time for his appeal to be dealt with, it was dealt with within a reasonable time given availability issues and the fact authority for the outcome had to come from Singapore.

105. The Claimant was not given the opportunity to cross-examine witnesses as part of his appeal; and the Tribunal took the view that given CB's allegations and alleged medical condition, it would not have been appropriate for her to have been cross-examined by the claimant. The Claimant was not permitted to audio-record his appeal hearing but nothing hangs on this as the minutes taken at the appeal hearing properly recorded it as accepted by the claimant in cross-examination. There was no satisfactory evidence that Sarah Simpson attended the appeal hearing late and without any paperwork, and even had she done so it would have made no difference to the fairness of the appeal hearing. Sarah Simpson did not ask all the questions that the Claimant set out in his note of appeal, and at no stage during the disciplinary process did the respondent attempt to define and differentiate between a minor assault (as accepted by the claimant) and a serious assault. Had the claimant been found guilty of victimisation, harassment and bullying in addition to assault the issue would have undeniably been more serious, but the Tribunal was unclear, having viewed the CCTV evidence numerous times, how the claimant's actions constituted more than a minor assault, and this has never been satisfactory explained by the respondent, despite a number of requests previously made including the grounds set out in the claimant's appeal raising this as an issue.

Fair procedure

106. With reference to the next issue, namely, did the Respondent follow a fair procedure, the Tribunal found that it had not. The Code of Conduct did not provide a procedure enabling the respondent to go behind a final written warning issued by the Captain of a ship following off-shore proceedings. There was a breach of the ACAS Code of Practice on Disciplinary and Grievance Procedures. Sufficient regard was not given to the claimant's disciplinary record and length of service. There was no satisfactory evidence that the respondent had not been consistent in how it dealt with genuinely similar cases in the past, and it was accepted by the Tribunal that the dismissing officer and appeal officer were unaware of the allegations concerning the earlier serious assault on CB by SM, preferring the evidence give by the dismissing officer to that of the claimant that it had not been raised as an issue during the disciplinary hearing. The minutes of the appeal hearing contain no reference to the very serious allegations of SM's assault on CB, and there was no mention in the appeal letter or during the appeal hearing itself, and as a consequence the respondent cannot be criticised for failing to take it into account, even if there was any truth to the allegation.

107. Mr Haddon referred the Tribunal to Whitbread v Hall [2001] ICR 699 a Court of Appeal decision in which it was held that the fact that an employee who is dismissed owing to misconduct has admitted the misconduct does not mean that an employer is relieved of the duty to follow a fair dismissal procedure. The test of reasonableness in s.98(4) of the ERA 1996 should be applied to both the substantive and procedural elements of the employer's decision to dismiss. The Tribunal noted in that case the Court of Appeal did comment that there could be some cases of misconduct so heinous that a reasonable employer following good employment practice could conclude that no explanation or mitigation would make any difference to the decision to dismiss. The Tribunal did not find Mr Gorry fell into that category, following both investigations.

108. The Tribunal was satisfied alternatives to dismissal were not considered, and nor were any of the mitigating factors including the claimant's early admission, his promise that the behaviour would not be repeated in the future (the reference to the death of his Mother was given on appeal only) and the general circumstances that lay behind the incident. The claimant at no stage indicated there was any career-threatening nature of the allegations when reaching the decision to dismiss, and this was not an issue put forward during the disciplinary process. As matters transpired, it was not career threatening and the claimant has obtained alternative employment. The Tribunal was referred to Turner v East Midlands Trains [2012]by Mr Mensah, but it preferred the more cogent submissions put forward by Mr Haddon on this issue, namely, that the claimant's career has not ended because he found alternative employment and therefore it is not analogous to Mr Turner. The Tribunal accepted that the band of reasonable response test applies, the nature of the allegation in the second set of disciplinary action was serious and additional care was required. The Tribunal concluded there was no additional care taken, evidenced by the findings of fact above, the investigation and disciplinary process was substantially and procedurally unfair to such an extent that it was impossible to envisage a scenario by which a fair dismissal could have taken place either at the time or in the future.

109. In conclusion, the respondent had not acted reasonably in dismissing the claimant under the three-stage Burchell test. Immediate dismissal can be justified for the most serious offences that constitute gross misconduct which can include assault. The more serious the allegations, the more thorough the investigation ought to be and the Tribunal found the respondent had not carried out a reasonable investigation that was thorough, fair, objective and even-handed to the claimant. There was no unjustified delay in carrying out appeal and the claimant was not prejudiced in any way. The claimant was prejudiced by the respondent's attitude to CB and the part she had played in the incident, in that it failed to look at the whole picture and this coupled with its failure to obtain all the relevant documents relating to Captain Millar's investigation (including witness statements and the warning) rendered the dismissal unfair. One questions how the respondent was in a position to criticise Captain Mellor's investigation when it failed to access the evidence relied upon by Captain Millar. The claimant was particularly prejudiced by the passing of time and the respondent's refusal to show him the CCTV footage weeks after he had viewed it for the first time with Captain Millar, and the claimant's fading memory was not considered. The respondent misinterpreted the CCTV footage, and did not give the claimant's admission made to Captain Millar any credence, and nor did it give the claimant any credit. The appeal hearing did not cure the procedural defects and substantive unfairness resulting from the disciplinary hearing and outcome of

dismissal. The requirement of reasonableness under the Employment Rights Act 1996 relates not only to the outcome, in terms of the penalty imposed at the disciplinary hearing or appeal, but also to the procedure by which the employer arrives at the decision to dismiss. Taking into account the entire factual matrix related above, and without substituting its opinion for that of the respondent, the Tribunal found the second set of procedures were not fair and not reasonable, and the decision to dismiss the claimant for gross misconduct did not fall within the "band of reasonable responses" open to a reasonable employer.

Polkey 'no difference' rule.

110. There were flaws in respondent's the procedure. Compensation should not be reduced to reflect the fact that the claimant would have been dismissed in any event in accordance with Polkey v AE Dayton Services Limited [1987] ICR 142 as the Tribunal took the view he would not, and had a fair procedure been followed the original punishment would have remained, namely a final written warning on the claimant's file for 12-month period.

111. Mr Haddon submitted the Tribunal should apply a percentage chance approach and a 100 percent reduction should be made to reflect the fact of the claimant's conduct towards CB. Mr Haddon further submitted that it was not appropriate for the Tribunal to consider the sanction issued by CB because he did not put the perspective of CB to the claimant, or carry out a full investigation and therefore was not in a position to reach a conclusion on the facts that would have been available had he done so. Mr Haddon referred the Tribunal to Grantchester Construction (Eastern) Limited v Attrill [UKEAT/0327/12/LA in which the EAT held the the ET were wrong in their approach to Polkey: they should not have asked themselves what the chance would be of a hypothetical reasonable employer dismissing the claimant – instead they should have ascertained the chance of this employer in this case dismissing the claimant if a fair procedure had been followed. Dealing with Mr Haddon's submissions there was no evidence before the Tribunal as to whether Captain Millar put CB's statement to the claimant at the disciplinary hearing because he was not asked the question. Clearly, he could not have put the CB's grievance to the claimant because that came after the disciplinary outcome as a result of CB being aggrieved that the claimant was not dismissed. It is clear from Captain Millar's responses to question put to him during the investigation meetings that he considered CB's statement, which he had prior to the disciplinary hearing before formulating his belief that the claimant was guilty of misconduct and not gross misconduct. It is notable that neither Lindsey Herrington, Sarah Simpson, Christopher Cher, Sigvardsson Hakan or Ailish Jamieson put to the claimant the perspective of CB and all of the serious allegations she had included in her grievance that had not been duplicated in their entirely in her earlier statement.

112. In the alternative, were the Tribunal to disregard the part played by Captain Millar as suggested by Mr Haddon, (which accords with how the respondent itself disregarded Captain Millar's process and decision), it would still have found the respondent's procedural and substantive unfairness has gone 'to the heart of the matter', and it was difficult to envisage a hypothetical dismissal taking place on the facts of this case due to the seriously flawed dismissal procedures. There

exists no satisfactory evidence to suggest the claimant might have been fairly dismissed, either when the unfair dismissal occurred or at some later date on the basis that the process adopted was so fundamentally flawed that it was impossible to assess the percentage chance of the claimant still being dismissed had a fair procedure been followed.

Contributory conduct

113. On the issue of contribution, the Tribunal was reminded by Mr Haddon that it wears two hats, and it must be wary of substituting its own view for that of the employer in respect of the unfair dismissal taking into account the fact that many employees do not work on ships, and thus the perspective of the dismissing and appeal officers should be given credence as they are "experts in the marine world." Mr Mensah argued it was not just and equitable to make any contribution and referred the Tribunal to Brown v Baxter (t/a Careham Hall) UKEAT/0354/09 in which the EAT set out three questions to be asked by the Tribunal when considering an award of compensation under Section 123 ERA, which the Tribunal has done concluding there was the loss occasioned by the claimant as a result of the dismissal, attributable to the conduct of the respondent and it was just and equitable to award compensation.

114. Mr Haddon submitted that the Tribunal must only consider the conduct of the claimant and not the conduct of CB or the respondent, and to do so would be an error of law.

115. Mr Mensah referred the Tribunal to Hollier v Plysu [1983] IRLR 260 and Morrish v Henlys (Folkstone) Ltd [1973] IRLR 61. The respondent is seeking a 100% reduction, the claimant any sum between 10-25%.

116. With reference to the issue whether it was just and equitable to reduce the basic award as a result of the Claimant's contributory conduct under s122(2) of the Employment Rights Act 1996, the Tribunal found it was by 25%. By Mr Haddon it was referred to Steen v ASP Packaging Ltd 2014 ICR 56, EAT, the EAT, summarising the correct approach under S.122(2), held that it is for the Tribunal to:

117. Identify the conduct which is said to give rise to possible contributory fault – In this case it is the claimant's behaviour towards CB on 29 March.

118. Decide whether that conduct is culpable or blameworthy- Mr Haddon submitted that the claimant had acted in a threatening and aggressive manner towards CB and pushed her. At the appeal hearing he admitted to having "lost his cool," would "never do the same again in a million years" and his behaviour was unprofessional. The Tribunal also noted from the factual matrix found above, the claimant accepted the final written warning was an appropriate sanction. Mr Haddon submitted the claimant's behaviour constituted gross misconduct under the Code of Conduct, the Tribunal was not convinced given Captain Millar's finding, on the evidence before him, that it was not. As indicated above, the Tribunal considered the CCTV evidence numerous times, freezing and playing back at the same time as hearing evidence from the claimant and respondent's witnesses. It is entitled to consider the footage, which it viewed objectively,

together with the claimant's explanation of it, which it found to be credible concluding that the claimant was culpable and blameworthy in his actions towards CB, which as a manager let him and the respondent down and could not be condoned by the Tribunal. He held a managerial position, he had power of CB as her manager and he should have set the tone and acted as an example. It was totally unacceptable for the claimant to have pushed CB towards the tannoy whilst she was still sitting in her chair, infringe her personal space by accessing the computer and pushing her by the arm.

119. Decide whether it is just and equitable to reduce the amount of the basic award to any extent. A reduction must be made from the basic award on the ground of the employee's conduct where 'the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent' — S.122(2). The test is different to that in respect of reducing compensatory awards for contributory conduct.

120. Mr Haddon submitted that the claimant's mitigation, namely that he was stressed and reacting to CB's insubordination, does not justify his conduct. The Tribunal agreed, but it did go some way to explaining why and how the events took the course they did. The Tribunal took the view that Mr Haddon and the respondent downplayed (if not ignored as was the case of Lindsey Herrington and Christopher Cher) the mitigation. The Tribunal does not intend to repeat the events of that evening, these have been set out in detail above. The picture was of a man at the end of his tether, made worse by the death of his Mother and CB's actions (that would have merited disciplinary action being taken against her) set against a long history of employment, a clean record and no hint of the claimant having difficulties with CB (or any other employees) in the past. When assessing contribution, it would not be just and equitable to ignore the very serious impact of mitigation in the claimant's case and the fact that he had not been dealt with fairly as a long-standing employee.

121. With reference to the issue should any compensatory award be reduced in accordance with s123(6) of the Employment Rights Act 1996, for the reasons set out below gleaned from the factual matrix in this case, the Tribunal found sufficient evidence of misconduct such as to warrant a reduction of twenty-five percent from the basic award. For conduct to be the basis for a finding of contributory fault under S.123(6) ERA, it has to have the characteristic of culpability or blameworthiness: the Court of Appeal in Nelson v BBC (No.2) 1980 ICR 110, CA, where the Court said that it could also include conduct that was 'perverse or foolish', 'bloody-minded' or merely 'unreasonable in all the circumstances'.

122. Once the element of contributory fault has been established, the amount of any reduction is a matter of fact and degree for the tribunal's discretion- S.123(6) ERA: 'Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award *by such proportion as it considers just and equitable* having regard to that finding.' In the claimant's specific case, the Tribunal did not find he had contributed 100 per cent to the dismissal as suggested by the respondent. A

finding of 100% contribution is rare, and for a 100 per cent contribution finding to be just and equitable the claimant's conduct must be found to be the sole reason for the dismissal. The Tribunal found it was not; conduct was a factor however it was the grievance raised by CB, the threats made to involve the police and demand for the claimant's dismissal by CB's union representative that was also the reason for dismissal. Taking into account the factual matrix including mitigation the Tribunal found it was just and equitable to reduce the basic and compensatory award by 25%.

123. In conclusion, the claimant was unfairly dismissed and his claim for unfair dismissal is well-founded and adjourned to a remedy hearing. The issue of reinstatement/re-engagement and mitigation will be dealt with at the remedy hearing.

CASE MANAGEMENT ORDERS

To assist the parties, prepare for a remedy hearing the following case management orders are made:

(1) The parties will provide dated of availability for a remedy hearing with an estimated length of 3-hours, it will be set down on the next available date and the parties advised in due course.

(2) The parties will exchange documents relating to mitigation, reinstatement/re-engagement no later than 22 March 2019 including up-dating the schedule of loss if relevant. The respondent will prepare an up-to-date counter-schedule of loss if relevant 7 days thereafter.

(3) The claimant will prepare an agreed bundle dealing with remedy which he will send to the respondent no later than 5 April 2019. 4 copies will be lodged with the Tribunal on the day of the hearing by 9.30am together with all other documents.

(4) Witness statements dealing with all aspects of remedy will be simultaneously exchanged no later than 22 April 2019, dealing with if relevant, the impact of the final written warning on the claimant's application for reinstatement/re-engagement.

(5) If the parties intend to use skeleton arguments they will be exchanged 7-days before the remedy hearing.

7.3.19

Employment Judge Shotter

JUDGMENT & REASONS SENT TO THE PARTIES ON

13 March 2019

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FOR THE SECRETARY OF THE TRIBUNALS