EMPLOYMENT TRIBUNALS

Claimant: **Ms Anna Gut**

Respondent: **Community Foods Limited**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **27 and 28 October 2020; 14 December 2020**

Before: **Employment Judge Gardiner**

Representation

Claimant: In person

Respondent: Ms Amy Smith, counsel

Interpreter: Ms Broka (Polish language)

JUDGMENT

The judgment of the Tribunal is that:-

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

2. There is to be a reduction of 50% to both the basic and the compensatory awards under Sections 122(2) and 123(6) Employment Rights Act 1996 for the Claimant's contributory conduct.

3. There is to be a reduction of 60% to the compensatory award under the principle established in the case of *Polkey v AE Dayton Services Limited* for the chance that the Claimant would have been dismissed in any event even if a fair process had been followed.

4. The Claimant's claim to recover her entitlement to notice pay is well founded and succeeds.

5. The Respondent did not fail to follow the ACAS Code of Practice on Disciplinary Procedures and therefore there is to be no increase to any award on that basis.

6. A Remedy Hearing will be listed to determine the remedy to which the Claimant is entitled, with a time estimate of 1 day. The date of this Remedy Hearing will be fixed taking into account the parties' dates of non-availability and the need for evidence to be exchanged in advance of that Hearing on the issue of remedy.

REASONS

1. This is a claim for unfair dismissal and wrongful dismissal. It is brought by Ms Gut, the Claimant, who was employed by the Respondent as Goods In Goods Out Administrator until her summary dismissal on 14 October 2019. The Respondent disputes all the complaints. Its position is that the Claimant was fairly dismissed for gross misconduct, specifically for threatening and abusive behaviour towards a colleague. As a result, it was entitled to dismiss the Claimant without paying her for her contractual notice period. As originally formulated, there also appeared to be a claim for failure to provide a statement of employment particulars.

2. At the start of the second day of the hearing, Ms Gut confirmed she did not intend to continue such a claim. She accepted the Respondent had updated her original statement of employment particulars to reflect the changes that were made following her return from maternity leave.

3. Ms Gut is a Polish national and English is not her first language. As a result, she has given her evidence through an interpreter, Ms Broka. Ms Broka has also assisted by translating the evidence of other witnesses and most other aspects of the Final Hearing.

4. Witness evidence has been given by the following witnesses, who confirmed the truth of their witness statements and were cross examined:

(1) Colin Smyth, who conducted the disciplinary investigation;

(2) Trevor Shaul, the dismissing offer;

(3) David Gray, who heard the Claimant's appeal;

(4) Ms Gut, the Claimant

5. Marcin Rogalski had also prepared a witness statement in support of the Claimant's case. Ms Smith, counsel for the Respondent, indicated that she did not have any questions to ask. As a result, the evidence in his witness statement was introduced into evidence without its contents being specifically challenged. The Respondent does not admit the truth of what Mr Rogalski is saying in his witness statement.

6. The documents were contained in an agreed bundle of documents running to 184 pages. Further documents were added to that bundle towards the start of the hearing, again by agreement. At the end of the first day, the Tribunal was sent a further document

by the Respondent, which the Respondent wished to include. This was a record of an interview with Karol Serwatka. It appeared to the Tribunal that the document was potentially relevant to the issues to be decided. As a result, it was added to the Final Hearing bundle.

7. Evidence was heard over two days on 27 and 28 October 2020, but there was insufficient time for closing submissions within that listing. As a result, the case was listed for a further day on 14 December 2020 for that purpose, and to allow for time for deliberation and for delivery of the judgment. In advance of the scheduled day for the resumption of the Final Hearing, the parties exchanged written closing submissions. They amplified these written submissions orally as well as commenting on the points made by the other side and answering questions asked by the Tribunal. After the Reasons had been given orally, which were translated sentence by sentence, Respondent's counsel asked for Written Reasons.

Factual findings

8. Ms Gut started her work for the Respondent on 6 June 2016. Her job title changed over time but latterly was that of Goods In/Goods Out Administrator, although much of her duties were undertaken outdoors. She was on maternity leave from 1 June 2018 until 1 June 2019. Her line manager was Marcin Rogalski. Mr Rogalski was also her partner. Also working at the Respondent's production facility in Witham, Essex, was Karol Serwatka, whose role was that of forklift truck driver. He also reported to Mr Rogalski.

9. Before the incident which led to her dismissal, the Claimant had a clean disciplinary record. In a Performance Review in September 2017 she was rated as "High Added Value Performance", the level below "Outstanding". No concerns were recorded about her interpersonal skills.

10. On 27 September 2019, there was a heated discussion between Mr Rogalski and Mr Serwatka. The reason for the dispute was apparently the timing of a break taken by Mr Serwatka on that day. Mr Rogalski was unhappy that Mr Serwatka had chosen to take his break at the same time as another member of staff. Prompted by what was said in that discussion, Mr Serwatka went to the Human Resources offices to make a formal complaint about Mr Rogalski, which was received by Anna Roda.

11. Later on that morning, Ms Gut approached Mr Serwatka in the canteen, whilst he was on his break. Most of the discussion was conducted in Polish, although at the end of the conversation, Mr Serwatka told Ms Gut that he had recorded the conversation. This was said in English. A copy of the recording has been provided to the Tribunal.

12. Following the discussion, Mr Serwatka returned to the Respondent's HR department to provide them with the recording. He was asked to write down his version of events. He did this in a one-page statement to which he signed his name [145]. So far as is relevant to the circumstances of the Claimant's dismissal, the statement said as follows:

> "After I filed the complaint, I returned to the canteen to have my breakfast in peace. I was disturbed by Anna Gut, who is Marcin's, the Supervisor's girlfriend. Anna Gut is an Administration Assistant and has nothing to do with the position of

a Supervisor or a Line Leader, but because her boyfriend Marcin is a Supervisor, she often helps him, using foul language, to pressurise others to achieve any goal.

I have recorded the conversation in the canteen on my mobile. Clay was present and witnessed the conversation, which took place in the canteen on 27/09/2019 at 9.43am. I sent the recorded conversation to Anna Roda. I had been prepared for a confrontation with Anna Gut, because this was not the first time when she overstepped her competence. My phone had been prepared for recording."

13. The statement accused Mr Rogalski of having a very bad attitude and bullying him. In relation to the recorded conversation with Ms Gut in the canteen, it did not clearly state that he felt threatened by Ms Gut, nor that he thought she was about to attack him. In relation to the conduct of both Mr Rogalski and Ms Gut, he referred to being "stressed by mobbing" and said that as an operator of machinery this stress could lead to an accident in the yard or warehouse. The statement refers to the formal complaint he had already made against Mr Rogalski, and effectively extended the formal complaint to cover Ms Gut's conduct as well.

14. A transcript of the recording was prepared [146], with the translation done by Anna Roda. She worked in the HR Team. It was verified by another of the Respondent's employees.

15. The relevant passage of the transcript is as follows:

AG : Do you want me to punch (whack, hit) you? What do I have the licence for?
KS : You can punch (whack, hit) me, come on.
AG : You are fucked.
KS: I think you are fucked.
AG : No I don't think so
KS : I conclude from your screaming, that you are
AG: Don't fucking talk to me like that.
KS : No, you don't talk to me like that. I don't want you to scream on me.
AG: I don't give a shit what you want. If you don't like it then you know what to do.
KS : That's fine. I just have recorded this.
AG : Very good

16. Mr Colin Smyth, Head of Commercial Planning and Process, was asked to carry out an investigation into Mr Serwatka's complaint against both Mr Rogalski and Ms Gut. When he first spoke to Mr Serwatka he noted he was distraught and upset. He spoke to Mr Serwatka later the same day, although made no record of what he was told by Mr Serwatka. According to his evidence, that discussion lasted about 10 minutes.

17. On Monday 30 September 2019, Mr Rogalski made a complaint about Mr Serwatka in an email sent to HR. Mr Smyth was also asked to consider this complaint at the same time as the complaint from Mr Serwatka.

18. Mr Rogalski was suspended on 30 September 2019, and invited to attend an investigatory meeting on 2 October 2019 to discuss whether he had used verbal abuse and engaged in bullying towards a colleague. This was a day before any action was taken in relation to Ms Gut. I infer from this that, at the outset, Mr Smyth was primarily

concerned with the conduct of Mr Rogalski, rather than with the conduct of Ms Gut. This appeared to be the main focus of Mr Serwatka's complaint.

19. Ms Gut was suspended the following day, 1 October 2019 pending a disciplinary investigation. Confirmation of the terms of her suspension was given in writing in a letter of the same date [144]. She was told that the investigation would not prejudge the outcome but that the investigation might determine that an act of gross or lesser misconduct had occurred. If so, then she would be required to attend a disciplinary hearing. She was told she was not to contact any of the company's employees without the permission of her manager.

20. On 3 October 2019, Mr Rogalski was informed in a further meeting that his complaint against Mr Serwatka was rejected. Mr Serwatka, who had also been suspended following the incident, would be reinstated with effect from 4 October 2019. Mr Rogalski was told he would be facing disciplinary action in relation to his conduct. At the conclusion of the meeting, Mr Rogalski resigned [147], giving one month's notice. Mr Rogalski was asked to attend a disciplinary meeting on 7 October 2019. That was conducted by Colin Marshall. The conclusion of the disciplinary meeting, confirmed to him in writing on 7 October 2019, was that no further action would be taken against Mr Rogalski [160]. He was placed on garden leave until the end of his contract.

21. On 4 October 2019 Mr Smyth held an investigatory meeting with Ms Gut. Anna Roda attended the meeting as note taker. The typed notes of this meeting were referred to in a letter sent to Ms Gut on 7 October 2019 inviting her to a disciplinary hearing [155]. That letter purported to attach particular documents, including the notes of this investigatory meeting. Ms Gut claims that there were no attachments to this letter. She says she was not sent a copy of the notes of the investigatory meeting. I find it is likely she was sent the notes of this meeting as an attachment to that letter. This is because the letter stated that there were attachments, the Claimant has never previously commented on the lack of attachments before saying this for the first time in cross examination, and there is other evidence suggesting that she did receive another of the attachments referred to in the letter, namely a statement from Mr Clay Harris.

22. Ms Gut did not dispute the accuracy of these notes of the investigatory meeting at any point during the subsequent disciplinary process. I find that the notes are a reasonably accurate summary of what was discussed, even though they do not record every word that was said.

23. At the outset of the investigatory meeting on 4 October 2019, Ms Gut was asked if she would like to be accompanied by a work colleague, but chose not to have a representative. She did not ask for her boyfriend Marcin to be her representative at the meeting so he could assist her with translating particular words or phrases into Polish. She did not raise any difficulties with the investigatory meeting being conducted in English. During the meeting, Ms Gut was shown a copy of the transcript of the conversation that had been prepared by Ms Roda. She objected to the covert recording being used against her. She argued that it amounted to a breach of company policy and of data protection. Mr Smyth told her that the company considered that the recording was admissible, but this would be confirmed after the meeting had ended.

24. As recorded in the notes of the investigatory meeting, the following relevant matters were discussed:

a. Ms Gut accepted that she had used abusive language towards Karol, but claimed that Karol had used abusive language towards her. She disputed that she had threatened to punch Karol, explaining – although not in so many words - that the true significance of the language she used had been lost in translation;

b. Ms Gut accepted that she had behaved in an impulsive way and described herself as "dynamite". In evidence, she explained this choice of word as her tendency to explode in particular situations;

c. Ms Gut's explanation for why she had behaved in the way in which she did was that she had been provoked by Karol, by the way that he had been abusive towards her;

d. Ms Gut read through the transcript and confirmed she agreed with the translation that had been made. She did not say that there were relevant parts of the conversation that occurred before the point at which the transcript started;

e. At a later point during the investigatory meeting, Ms Gut asked Ms Roda to note that she didn't remember anything. I infer that this was a comment made in frustration at the transcript being used against her, rather than because she had no memory of the incident under investigation;

f. Ms Gut said that there was no point in her lodging a formal complaint against Mr Serwatka, because he was given special treatment by the Respondent. Notwithstanding that, Mr Smyth said that he would investigate her concerns by speaking to two other employees, named Clay and Ricky;

g. There is no record that Ms Gut offered any apology for the manner in which she spoke to Mr Serwatka at any point during the investigatory meeting.

25. Notwithstanding Mr Smyth's promise that he would speak to Clay Harris, he did not do so. His only interview with Mr Harris had already taken place on 1 October 2019. This was in the context of his investigation into Mr Rogalski's conduct, although the discussion had touched on the incident in the canteen involving Ms Gut. This is what the notes of that interview record on that matter [142]:

> "Clay explained that when Anna Gut came to the canteen, she "exploded". She has been using a polish, when she was shouted to Karol, however, he told her that he recorded the conversation."

26. Mr Smyth did not prepare a written report at the conclusion of his investigation. He made a verbal report to HR. It was decided in the light of the verbal report that a disciplinary hearing should be held. It is unclear who took that decision.

27. On 7 October 2019, Ms Gut was sent a letter inviting her to a disciplinary hearing to be held on 11 October 2019. The disciplinary allegation was framed as follows: "you approached [a work colleague] on Friday 27 September during his break time and you shouted, used abusive language and threatened to punch him" [155].

28. She was offered the opportunity to submit any documentation in advance of the hearing. She was not offered the opportunity to call any witnesses in her support. The letter warned her that if she was found guilty she could be issued with a disciplinary sanction and that this could include dismissal without notice or pay in lieu of notice.

29. As already stated, the letter purported to attach documents. These were "the attached statements from two employees who witnessed the altercation", the notes from the investigatory meeting on 4 October 2019, the Harassment and Bullying Policy, and the Disciplinary Procedure. I find that the attached statements were the statement prepared by Mr Serwatka on the day of the altercation and a statement taken from Mr Clay Harris during the course of the disciplinary investigation primarily into Mr Rogalski, following an interview on 1 October 2019. This is confirmed by Facebook messages sent from Ms Gut to Mr Harris, in which it is clear that Ms Gut had received a statement from Mr Harris [177]. She is likely to have received it as an attachment to the disciplinary invite letter.

30. However, Ms Gut was not sent the record of Mr Smyth's interview with Mr Serwatka. This document was not included in the Final Hearing bundle at the start of the Final Hearing, but was added at the start of the second day. It was a potentially relevant document for these proceedings because it contains more details from Mr Serwatka as to his exchange with Ms Gut in the canteen. It was worded as follows:

> "A couple of minutes later, Anna Gut (Marcin's partner) came to the canteen. She expressed very aggressive behaviour towards Karol and used very offensive language.
>
> Colin Smyth went through the minutes from the recorded conversation (attached).
>
> Colin Smyth asked Karol what in his opinion Anna meant by saying "If you don't like it then you know what to do"? Colin asked if it might have been an invitation for a fight?
>
> Karol answered that it was not the first time Anna behaved this way towards Karol. He also mentions that Marcin behave "different" when Anna is around, which in Karol's opinion might be a sort of "pressure" from Anna's side towards Marcin."

31. It is notable that Mr Serwatka did not answer the question about whether Ms Gut was inviting him to have a fight.

32. In addition, Ms Gut was not sent the audio recording, even though Mr Smyth had listened to the audio recording during the course of his investigation. No further documents were sent to Ms Gut in relation to the investigation or disciplinary process which had been followed in relation to Mr Rogalski.

33. The Respondent's Disciplinary Procedure contains the following wording:

> "After a full investigation and after being given an opportunity to state their case at a disciplinary hearing, an employee found to have committed gross misconduct will be dismissed with or without notice unless s/he can show substantial mitigating factors. Examples of what is considered to be gross misconduct can be found at Section A of the disciplinary rules document.
>
> …
>
> Section A
> If, after investigation, it is confirmed that an employee has committed an offence of the following nature (the list is not exhaustive), the normal consequence will be dismissal:
>
> 6. Threatening behaviour, or gross verbal abuse
>
> …
>
> Section B
> Offences which do not fall within section A will not normally result in dismissal without prior warning:
>
> 7. Behaviour not conducive to good order or working relationships"

34. The disciplinary hearing took place on 11 October 2019. It was conducted by Trevor Shaul, who was Operations Manager. Mr Marshall attended as note taker. The Claimant did not have a representative present at the meeting. The notes of the disciplinary hearing are at pages [162] – [164] of the bundle. Ms Gut does not accept that they are an accurate record of what was said during the course of that hearing, and challenged these notes in her appeal against dismissal. I have found that the notes were broadly accurate, although they were not a word for word record of everything that was said.

35. At the start of the meeting, Ms Gut was asked if she would like to have a representative present during the meeting. She confirmed that she was happy to continue by herself. In the course of her oral evidence at the Final Hearing, Ms Gut stated for the first time that she had been denied the opportunity to have Mr Rogalski present as her representative. I reject that contention. The disciplinary invite letter did not limit the identity of the colleagues who could be present at the disciplinary hearing. There is no evidence that she had asked to have Rogalski present and this was refused. The point was not put to Mr Shaul in cross-examination. It is at odds with the record in the notes of the disciplinary hearing, in which the Claimant accepted she was willing to continue the hearing without a representative.

36. During the disciplinary hearing, Mr Shaul read from the record of the interview with Mr Harris in which he described the Claimant as exploding. The Claimant admitted using abusive language and "exploding". She said that the reason for this was because of her partner's current situation. She asked if the transcript was admissible against her. Mr Marshall said that he had taken advice and the advice was that the transcript was admissible. She again confirmed that the contents of the transcript were accurate.

Mr Shaul asked her why she had gone to see Mr Serwatka in the canteen. Her answer was that "I wanted to fight with him". She was given an opportunity to add anything. She replied that she had told him everything.

37. Ms Gut disputes she said during the disciplinary hearing that she wanted to fight with Mr Serwatka. I find that, on balance, the words were used, although were not intended in a literal way. She did say these words, because this is what was recorded in the contemporaneous notes and the accuracy of the notes was confirmed by Mr Marshall to Mr Gray as part of the appeal process. In so using these words, she meant that she wanted to challenge him verbally, not physically. However, Mr Shaul was entitled to, and did, take this remark literally. Ms Gut's English was sufficiently good that she knew or ought to have known that, in English, the translation of the words she had used may well be understood literally.

38. During the disciplinary hearing Ms Gut did not say she wanted to call any witnesses to give evidence as to what took place during the incident. She did not ask for the recording so that she could listen to it for herself. She was told at the end of the disciplinary hearing that she would remain suspended on full pay until an outcome of the allegation had been reached. In evidence, I asked Ms Gut whether it would have made any difference if she had been offered the opportunity to call witnesses. She said she would have chosen to call Mr Rogalski. I asked her why she would have wanted to have Mr Rogalski as a witness. She said she wanted to have him there to support her and to provide a translation if she was struggling to understand or be understood. She did not indicate that he could provide useful evidence as to what took place during the course of the disputed altercation.

39. Mr Shaul's decision was that the Claimant was guilty of gross misconduct. The appropriate sanction was dismissal. In the dismissal letter [165], which was written by Mr Marshall, the following was written:

> "The reason for your dismissal is that having completed the Disciplinary Process it was decided that you had displayed both threatening behaviour and verbally abused a fellow Employee within Community Foods Canteen area on the 27th of September."

40. By way of further explanation for his decision, as set out in his witness statement at paragraph 33, Mr Shaul said:

> "I considered whether a final written warning was an appropriate alternative to dismissal. I concluded that it was not because I believed that there was a chance this type of behaviour could happen again and this was unacceptable behaviour which exposed another member of staff to a threat of violence. I was also mindful of the wider example of standards of behaviour we need to set at the Company."

41. I asked Mr Shaul whether his view that "there was a chance that this type of behaviour could happen again" was based on the incident alone or was influenced by his view as to what may have happened on other occasions. He said that it was based on the incident alone. I will return to that evidence when setting out my conclusions below. He stated that whilst he did not regard the words spoken during the transcript as "gross verbal

abuse" he did regard it as threatening behaviour, and it was for this reason that he had decided to dismiss.

42. The dismissal letter offered Ms Gut the right to appeal. Her appeal was set out in an email dated 17 October 2019 [168]. So far as potentially relevant to her Employment Tribunal case, the appeal stated:

> "TS didn't include in that statement the whole process of the conversation made, what's more, he choose the sentences taken out of the context. I can't agree to the situation that somebody is putting words on my mouth which I never said, for example:
>
> TS : but why?
> AG : I wanted to fight with him! Really Trevor?????
> TS: Did K tell you, that he had made a recording?
> AG : Yes
>
> All of the above answers are fabricated and I never said it"

43. That passage is a quote from the notes of the disciplinary hearing. As a result, the Claimant must have been provided with a copy of those notes some point before 17 October 2019.

44. The appeal email went on to challenge whether the record of the disciplinary hearing was a full record of what was discussed. Ms Gut wrote "TS didn't include my explanation about that whole situation, nothing has been mentioned in the statement which he signed and sent to me". She also stated, in relation to the recording "it was translated by the person that has no qualification to interpretation and highly connected with the company, so mu conclusion is that it might be incomplete/false and unbelievable. I demand the release of the original recording as a proof. I'm not interested of written form (original or translated). If you can't or won't do this, I will take as intentional hiding of evidence in very important matter for me".

45. This was the first occasion on which she had specifically asked for the original recording to be provided to her. In her evidence to the Tribunal, in answer to a question to why the original recording was important, Ms Gut said that she could have checked whether the transcript was a true transcript and whether it was only part of a longer conversation. The relevance of the audio recording to her employment tribunal case, in her opinion, is that it shows that her tone of voice is the same throughout the conversation, which is relevant to whether she exploded. She also considers that it might help in deciding whether she had an intention to assault Mr Serwatka. She did not explain that with this level of detail during the disciplinary process or subsequent appeal.

46. David Gray, Finance Director, was appointed to conduct the appeal. He told the Tribunal that he saw his role as to listen to Ms Gut's concerns to identify if there was anything that needed to be reversed. Other than a letter dated 21 October 2019 inviting Ms Gut to an appeal meeting on 24 October 2019, there was no further communication from Mr Gray to her before the meeting took place. In particular, there was no response to her request for the audio recording of the conversation made in her appeal email. In his

witness statement, Mr Gray said (at paragraph 16) that “she had already agreed the contents of the recording on two occasions but he would listen to her reason for requesting this at the Appeal Hearing”.

47. The appeal hearing took place on 24 October 2019 as scheduled. Ms Roda was again present as note taker. It started at 9am and ended at 9.10am, as recorded in the minutes of the appeal meeting. Therefore, it only lasted 10 minutes in total. Mr Gray started by explaining that the purpose of the meeting was to discuss the grounds of appeal set out in Ms Gut’s email of 17 October 2019. Ms Gut’s response was that she felt that her complaints had been ignored, so she had decided to say no more. She wanted to hear Mr Gray’s response to the matters raised in her email of 17 October 2019. She said she no longer trusted the company. Mr Gray said that there had been four different people who had been present during the investigatory and disciplinary proceedings and he did not see how these employees could have made mistakes during the meetings. Ms Gut reiterated that she had a different opinion and the minutes from the disciplinary hearing includes phrases she had never said.

48. During the meeting, Mr Gray did not specifically address the contents of the email of 17 October 2019 despite saying that the purpose of the meeting was to discuss this email, and Ms Gut specifically asking him to do so. In particular, he did not ask Ms Gut to provide further details as to the particular passages in the disciplinary hearing notes that she disputed. In addition, he did not discuss with her whether it would be appropriate for her to hear the recording of the conversation or ask her to explain why this was important.

49. Mr Gray spoke to Mr Marshall about the accuracy of the notes of the disciplinary hearing. He was the minute taker for the disciplinary hearing. Mr Marshall confirmed that the notes were accurate. The fact that he had taken this step was not relayed to Ms Gut, nor was his conclusion that the notes of the disciplinary hearing were accurate.

50. Mr Gray ’s appeal outcome was contained in a letter dated 28 October 2019 [173], which was signed by Mr Marshall, although it was written from Mr Gray. Mr Gray dismissed the appeal, writing as follows:

> “That the decision made at the original Disciplinary Hearing to dismiss you by way of Gross Misconduct was appropriate and so I do not uphold your appeal. This decision has been taken because you failed at the meeting to provide further evidence/specific reasons as to why your Appeal should be upheld.”

51. His appeal outcome letter did not address any of the grounds of appeal which had been raised in the Claimant’s email of 17 October 2019. Therefore, no specific reasons were given as to why the grounds of appeal had been rejected.

52. In his witness statement, he referred to Ms Gut’s reference to Clay Harris in her appeal email. He said (at paragraph 17) that whilst he appreciated that Mr Harris may not have known precisely what was said by Ms Gut, Mr Harris could still give helpful evidence about the tone and the degree of menace in the conversation. He therefore felt able to rely on Mr Harris’s evidence.

Issues in dispute

53. By the conclusion of the Final Hearing, the issues had narrowed. The Claimant was no longer suggesting that her conduct was not the principal reason for her dismissal. She now accepted that her conduct was the main reason for her dismissal. However, her complaint was about the extent of the investigation which was conducted, whether dismissal was within the range of reasonable sanctions given the extent of her misconduct, and whether a fair procedure had been followed. She accepted that a sanction might be appropriate, but it should be a sanction short of dismissal. She said in cross examination that a final written warning might have been appropriate.

54. By way of explaining the language she used during the conversation that whilst she had asked Mr Serwatka if he wanted her to punch him, she said that this is a phrase which is used in the Polish language quite regularly but there was no intention of punching him. She said that when saying “You are fucked” she was using a Polish phrase which meant that he was ‘fucked up in his head’, he was a fool or an idiot.

55. By way of explaining why she was angry she said that Mr Serwatka was not performing the duties that he was supposed to be doing and as a result, her partner, Mr Rogalski had to do the duties himself and doing this was risking his health as a result of recent surgery.

Legal principles

A. Unfair dismissal

56. Section 98(1) Employment Rights Act 1996 provides as follows:

> “(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –
>
> (a) the reason … for the dismissal …”

57. Section 98(4) provides:

> “(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.”

58. It is for the Tribunal to determine, on the balance of probabilities, the reason or the principal reason for the dismissal. Conduct is a potentially fair reason for dismissal. It has

long been established that it is not the Tribunal's role in an unfair dismissal case to decide for itself whether dismissal was the appropriate sanction, given the evidence presented before the Tribunal. Rather, the Tribunal has to decide whether the dismissal of this Claimant was a reasonable decision and whether it was taken after a reasonable procedure was followed. Where the reason for dismissal is alleged to be conduct, the correct approach was stated in the case of *British Home Stores Ltd v Burchell* [1978] IRLR 379. This requires the Tribunal to consider the following issues:

a. Did the dismissing officer genuinely believe that the Claimant was guilty of the disciplinary charge alleged?

b. Was that a reasonable belief in all the circumstances?

c. Had the Claimant carried out a reasonable investigation before the dismissal decision was taken?

59. To be a reasonable investigation, the investigation has to be the type of investigation a reasonable employer would conduct, even if other reasonable employers might choose to undertake a more or less detailed investigation. In other words, it has to be within the band of reasonable investigations, given this particular employer's resources and the nature of the alleged misconduct (*J Sainsbury plc v Hitt* [2003] ICR 111 at paragraph 30). The amount of the investigation required to be a sufficient investigation will vary depending on the evidence:

> "At one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation, including questioning of the employee, which may be required is likely to increase." (*ILEA v Gravett* [1988] IRLR 497; para 15)

60. A reasonable employer has to consider potential lines of defence identified by the employee but, depending on the facts, does not have to investigate each exhaustively. "As part of the process of investigation, the employer must consider any defences advanced by the employee, but whether and to what extent it is necessary to carry out specific enquiry into them in order to meet the *Burchell* teste will depend on the circumstances as a whole" (*Shrestha v Genesis Housing Association Limited* [2015] IRLR 399 at para 23).

61. To be a fair dismissal by reason of conduct, dismissal has to be within the range of reasonable sanctions, given the dismissing officer's belief about the gravity of the Claimant's conduct, in the context of the Claimant's length of service and previous disciplinary record, and the Respondent's own policies ranking the comparative gravity of different disciplinary offences. A dismissal for a first offence (without warnings) may or may not be unfair, depending on a consideration of all the facts and the application of the range of reasonable responses test (Harvey on Industrial Relations, DII 1553.01). An employer will find it easier to justify a dismissal for a particular single act of misconduct where a rule explicitly states that breach will or may lead to a dismissal (Harvey at DII 1568). If a reasonable employer with the dismissing officer's belief could have fairly

dismissed for that misconduct, then it will be a fair dismissal, even if other reasonable employers with the same belief may have chosen to impose a lesser sanction.

62. Even if the dismissal decision falls within the band of reasonable responses, it may still be an unfair dismissal if the Respondent has not followed a fair procedure. The requirements of a fair procedure are set out in the ACAS Code of Conduct on Disciplinary Procedures, and considered in previous caselaw. The Tribunal must evaluate the significance of the procedural failing, because "it will almost inevitably be the case that in any alleged unfair dismissal a Claimant will be able to identify a flaw, small or large, in the employer's process": *Sharkey v Lloyds Bank Plc* UKEATS/0005/15/JW at paragraph 26.

63. The procedural issues should be considered together with the reason for the dismissal. This is because the two interact with each other. The Tribunal's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason as a sufficient reason to dismiss. Where the misconduct is serious, notwithstanding some procedural imperfections, an employment tribunal might well decide (after considering equity and the substantial merits of the case) that the employer acted reasonably in treating the reason as a sufficient reason to dismiss the employee. When considering whether the employer acted reasonably the Tribunal has to look at the question in the round and without regard to a lawyer's technicalities (*Taylor v OCS Group Limited* [2006] ICR 1602 at paragraph 48, approving of dicta from Donaldson LJ in *Union of Construction, Allied Trades and Technicians v Brain* [1981] ICR 542 at 550). This need for a holistic approach has been reiterated in later cases, notably *Sharkey v Lloyds Bank Plc* UKEATS/0005/15/JW and *NHS 24 v Pillar* UKEATS/005/16/JW.

64. Looking at the matter as a whole includes looking at the impact of the appeal process on any earlier deficiencies in the Respondent's procedure. The Tribunal should consider the fairness of the whole of the disciplinary process. Where there has been a defect at an earlier stage, the Tribunal "will want to examine any subsequent proceeding with particular care" (*Taylor* at para 47). A defect in the handling of the appeal is in principle capable of rendering the dismissal unfair (*West Midlands Co-operative Society Limited v Tipton* [1986] 1 All ER 513).

B. Polkey reduction

65. If procedural unfairness is the basis for a finding of unfair dismissal, in order to determine the appropriate remedy the Tribunal must go on to assess what would have happened had a fair procedure been followed. This requires a degree of speculation and requires the Tribunal to determine in percentage terms the likelihood that the result would have been the same. That percentage is then relevant in determining the appropriate compensatory award. This is referred to as making a *Polkey* deduction, after the House of Lords case in which this issue was considered, that of *Polkey v AE Dayton Services Limited*.

C. Contributory fault/Just and Equitable reduction

66. In addition, in appropriate cases, the Tribunal should consider whether the Claimant has contributed to his dismissal by reason of his conduct as a basis for reducing the amount of the Claimant's award. This issue is required by the wording of Section 123(6) Employment Rights Act 1996 in relation to the unfair dismissal compensatory award, and by Section 122(2) of the same Act in relation to the basic award. In order to be potentially capable of being contributory conduct, a causal link between the employee's conduct and the dismissal must be shown. This means that the conduct must have taken place before the dismissal; the employer must have been aware of the conduct; and the employer must then have dismissed the employee at least partly in consequence of that conduct.

67. The Tribunal must decide whether the conduct is morally culpable. If so, then a percentage adjustment can be made to both the basic and the compensatory awards to reflect the extent of the Claimant's moral culpability as a contributory factor in his dismissal. The extent of the reduction will be the amount the Tribunal considers just and equitable. In some cases, it will be appropriate to make a 100% reduction, such as where the Tribunal considers that the employee's misconduct was such that dismissal was wholly justified but nonetheless feels compelled to find dismissal unfair because of procedural flaws in the dismissal procedure.

68. An assessment of contributory conduct requires a different analysis to the determination of whether the dismissal was an unfair dismissal. It requires the Tribunal to assess whether, on the balance of probabilities, the Claimant was guilty of the misconduct for which he was dismissed, or morally culpable in other respects that contributed to the sanction of dismissal (see *Steen v ASP Packaging* [2014] ICR 56 at paragraphs 12-14).

69. In *London Ambulance Service v Small* [2009] IRLR 563 the Court of Appeal suggested that Tribunals should structure their reasons in such a way as to make it clear that the contributory conduct analysis is undertaken separately from the different analysis as to whether the dismissal was unfair. I have attempted to do that in these reasons.

D. Wrongful dismissal

70. The issue in a wrongful dismissal claim is whether the Claimant committed a fundamental breach of his employment contract, entitling the Respondent to dismiss without notice. In *Laws v London Chronicle (Indicator Newspapers) Limited* [1959] 1 WLR 698, Lord Evershed MR stated at 700: "Since a contract of service is but an example of contracts in general, so that the general law of contract will be applicable, it follows that the question must be – if summary dismissal is claimed to be justifiable – whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service … one act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract, or one of its essential conditions".

71. The burden here is on the Respondent to establish on the balance of probabilities that the Claimant's conduct amounted to a fundamental breach of contract. Unlike the claim for unfair dismissal, this requires me to reach my own conclusions as to what occurred in the altercation with Mr Serwatka, and then evaluate the gravity of that conduct by reference to the Claimant's employment contract in deciding whether it amounted to a breach of contract, and if so whether it was a fundamental breach of contract.

Conclusions

Unfair dismissal

72. It is clear from the evidence that the reason for Ms Gut's dismissal was misconduct. Mr Shaul genuinely believed Ms Gut was guilty of misconduct, and this was a reasonable belief on the evidence before him. Ms Gut had accepted that the transcript was an accurate statement of what she had said. When asked why she had chosen to confront Mr Serwatka she said she wanted to fight with him. Based on the language recorded in the transcript and on Ms Gut's own explanations during the course of the disciplinary hearing, it was reasonable for Mr Shaul to believe that Ms Gut had displayed both threatening behaviour and verbally abused a fellow employee. In addition, there was evidence from Mr Harris that Ms Gut had "exploded" as she confronted Mr Serwatka.

73. I consider that Mr Shaul's belief was reached after there had been a reasonable investigation. He had spoken to Mr Serwatka and to Mr Harris as to what was said during the incident, and how it was said. He had had regard to the transcript of the conversation, which the Claimant had accepted as accurate. He had taken into account the wider context, which was that it was the Claimant who had approached Mr Serwatka in the canteen as he was on his break. The provocation for her doing so had been the earlier incident between Mr Rogalski and Mr Serwatka. This was not any concern of hers, given the different role she was performing and the fact that she did not have any supervisory responsibility for Mr Serwatka.

74. Some employers may have gone further and made specific findings as to where Ms Gut and Mr Serwatka were standing in relation to each other, and as to the body language displayed by each, in order to decide whether Mr Serwatka did feel threatened by the Claimant's behaviour. However, there was evidence that Mr Serwatka had felt sufficiently upset at both Mr Rogalski and Ms Gut that he had chosen to bring a formal complaint to Human Resources. In order for the extent of the investigation to be reasonable – in other words, within the band of reasonable investigations – Mr Shaul did not specifically have to make these further investigations, given what had already been admitted.

75. Further, I find that Mr Shaul's decision to dismiss for this misconduct was a reasonable decision in that it was within the band of reasonable responses. I remind myself that it is not my role in an unfair dismissal case to stand in the shoes of the employer and decide whether in my view the Claimant's conduct amounted to gross misconduct. Rather it is to ask whether the decision to dismiss was a decision that a reasonable employer could have come to, given the extent of the misconduct and any mitigating circumstances. In the present case, Mr Shaul considered the Claimant had

spoken in a threatening and abusive way, without any justification or personal provocation. She had not apologised for her conduct, but had sought at least in part to blame Mr Serwatka for being abusive towards her. Although the Claimant had a clean disciplinary record this did not take Mr Shaul's dismissal decision for this incident outside the band of reasonable responses. The Respondent's disciplinary policy says that the normal consequence of threatening behaviour is dismissal.

76. Ms Gut herself accepts that her conduct merited a disciplinary sanction, but argued it should have been a warning rather than a dismissal. Again, some reasonable employers may have chosen to regard her conduct as the Section B less serious misconduct labelled as "behaviour not conducive to good order or working relationships". However, it was reasonably open to Mr Shaul to regard this as a more serious Section A matter constituting gross misconduct. It was not necessary for him to find that Mr Serwatka to have felt threatened, so long as he regarded the Claimant's behaviour as amounting to threatening behaviour.

77. Ms Gut argues that it was unfair for the Respondent to dismiss her in circumstances where this was not the action which was being taken for other employees. When pressed to identify the other employees, she refers to the fact that Mr Serwatka was already on a warning and was not dismissed in relation to this incident. However, as Ms Smith points out, Mr Serwatka's first written warning had been for health-related absences.

78. However, I do consider that the procedure that was followed was procedurally unfair in several respects. In so finding, I have borne in mind the need to take a holistic approach to the procedure as a whole, and the caselaw set out at paragraphs 63 and 64 above. The respects are as follows:

a. Firstly, the Claimant ought to have been provided with a copy of the notes of Mr Serwatka's disciplinary interview in advance of her disciplinary hearing. This was the evidence given in the course of the disciplinary investigation by the key individual, the person who was bringing the complaint against Ms Gut which had instigated the disciplinary process. For that reason, this was a highly relevant document. The Claimant ought to have had the opportunity to comment on what Mr Serwatka said during that interview. In particular, Mr Serwatka had said that this was not the first time that Ms Gut has behaved in this way towards him, suggesting that it was part of a pattern, and raising the risk by implication that it may happen again. This is something on which the Claimant ought to have been given the opportunity to comment, particularly if this would be taken into account in deciding the disciplinary penalty. It was not provided at any point during the disciplinary process and therefore this failure is not cured on appeal.

b. Secondly, the Claimant ought to have been provided with a copy of the audio recording of the conversation at the point at which she was invited to the disciplinary hearing. The Respondent is not excused from this obligation by the Claimant's failure to ask for it. The disciplinary charge in the invitation letter referred to the Claimant shouting at Mr Serwatka. The tone of voice

used during the audio recording was highly relevant to the issue of whether what was said amounted to shouting. Further, the Respondent was taking into account evidence from Mr Harris on this very point. He described the way in which the Claimant spoke to Mr Serwatka as "exploding". The tone with which the Claimant had spoken to Mr Serwatka was something that Mr Harris was remarking on in his evidence and potentially relevant. It was therefore potentially relevant to allow the Claimant the opportunity to listen to the audio recording in order to comment on the tone she had used during the exchange, as well as the sense in which particular words were intended. The failure to provide this audio recording was compounded when Ms Gut requested it as part of her grounds of appeal and it was not immediately forthcoming, as it should have been.

c. Thirdly, I find that Mr Shaul went beyond the disciplinary charge in concluding that there was a chance that the Claimant's behaviour might be repeated. He stated that this was his view at paragraph 33 of his witness statement. I find that Mr Shaul reached this view not on the basis of the incident itself, but because he was taking into account the undisclosed evidence of Mr Serwatka in his disciplinary interview that this was not the first time that the Claimant had behaved in this way. Yet Ms Gut was not being disciplined for any earlier incidents apart from events on 27 September 2019 and it was procedurally unfair to have regard to these earlier matters, which had not been investigated.

d. Finally, when disposing of the appeal, Mr Gray should have provided reasons in relation to each of the Claimant's grounds of appeal, even though the Claimant had chosen not to amplify her arguments during the appeal hearing. She had not withdrawn them and they ought to have been dealt with on their merits.

79. So far as the other potential procedural irregularities are concerned, I do not accept that the dismissal was procedurally unfair because the Claimant was not specifically offered the right to call witnesses to attend the disciplinary hearing. She had not asked for the opportunity to bring a witness to the incident under investigation. Furthermore, it was not necessarily unfair to withhold the name of the anonymous witness who was giving evidence, given that the contents of that witness statement were not centrally relevant to the focus of the disciplinary charge. Finally, despite the Claimant's objections, the Respondent acted reasonably in relying on the covert recording which had been made by Mr Serwatka. The Claimant had admitted that the transcript was accurate. There was nothing in the Respondent's procedures that prevented such evidence being admissible in internal disciplinary proceedings.

80. As a result, I find that the Claimant's dismissal was an unfair dismissal for procedural reasons.

Polkey

81. I next need to consider the percentage chance that the outcome would have been different had a fair procedure been followed in these respects – the *Polkey* issue. I consider that the likelihood is that the outcome would have been the same. However, there was a 40% chance that with a fair procedure, a sanction short of dismissal would have been imposed. My reasons are as follows:

a. As I have found, Mr Shaul wrongly placed reliance on the risk that the incident could be repeated. Apart from the lack of apology and the lack of remorse shown by the Claimant, there was no direct evidence in relation to the circumstances of the disciplinary charge itself which indicated that it might potentially be repeated, even if the Claimant had been punished for this incident with a final written warning. Further, insofar as the reason for her conduct was her willingness to stand up for her boyfriend, Mr Rogalski, this reason was unlikely to recur. Mr Rogalski had already resigned and would no longer be an employee in less than a month. Furthermore, the Claimant and Mr Serwatka were not engaged in the same activities and there was no evidence that they would inevitably have to deal with each other on a regular basis in the normal course of their duties.

b. Therefore, had the Respondent acted fairly and considered this incident alone, there was a real prospect that an employer, acting reasonably, would have regarded it as a unique event. The Claimant had had a clean disciplinary record throughout her employment to that point.

c. Viewed as a one-off event, and without evidence from the complainant that he had felt threatened, it was open to a reasonable employer to categorise this as behaviour "not conducive to good order or working relationships", which would normally result in a sanction short of dismissal under the Claimant's disciplinary procedures.

d. Further, if the Claimant had provided with all relevant evidence in advance of the disciplinary hearing, it is likely that even if she had been dismissed she would not have lost all trust in the Respondent when pursuing her appeal. As a result, it is likely she would have fully engaged in the appeal process, expanding on her grounds of appeal at the appeal hearing, which would have given her a reasonable prospect of overturning the dismissal on appeal.

Findings of fact relevant contributory conduct and wrongful dismissal

82. As to what actually happened in the incident, I have heard direct evidence from Ms Gut both as to what was said during the incident and also as to what she meant in saying what she did. I have not heard evidence from Mr Serwatka or from Mr Harris in relation to the incident. I have read the translated transcript of what was said during the altercation.

83. Based on this evidence, I find that the Claimant was upset when she discovered that Mr Serwatka had decided to complain to Human Resources about the way that Mr Rogalski had spoken to him when he discovered that Mr Serwatka was taking his break at the same time as Mr Harris. This was because Mr Rogalski was her boyfriend and, given her affection for him, she wanted to stand up for him.

84. As a result, she decided to confront Mr Serwatka when he was on a break in the Respondent's canteen. She did not have any work related reason to speak to Mr Serwatka about his complaint to Human Resources. She was angry and did raise her voice when speaking to Mr Serwatka. She did swear at him during what was a short conversation, lasting less than a minute. It was an explosive outburst, which had been provoked by Mr Serwatka's decision to complain about her boyfriend.

85. Mr Serwatka knew that the conversation was being recorded and knew that he would be submitting the recording of the conversation to Human Resources to support the complaint he had already instigated. In swearing in his responses to Ms Gut, Mr Serwatka would have known that his responses would be heard by Human Resources. I infer from this that swearing in the workplace was not, in itself, a matter that Mr Serwatka was unduly concerned might lead him to be punished.

86. Ms Gut did not hit Mr Serwatka, nor would a reasonable person in Mr Serwatka's position consider that she was about to hit him, or was in reality threatening to do so. As is revealed by the absence of any reference to 'feeling threatened' in the wording of his written letter of complaint to Human Resources, Mr Serwatka did not in fact feel threatened. That is relevant in assessing the gravity of the incident.

87. At no point during the subsequent investigation and disciplinary procedure did the Claimant apologise for her outburst.

Conclusion – contributory conduct

88. I find there has been contributory conduct. I find that the Claimant was at fault for behaving as set out in my findings in the previous section of these Reasons. I consider that the appropriate reduction to reflect this is 50%. This reflects the extent of the fault on her part in relation to the incident, but also the extent of the culpability on behalf the Respondent in relation to the procedural breaches.

Conclusion - Wrongful dismissal/notice pay

89. Faced with the Claimant's unchallenged evidence as to what took place, and my findings of fact as set out above, I do not find that the incident amounted to a fundamental breach of contract for the following reasons:

a. Firstly, I accept that this was an isolated incident. I do not accept that there had been previous incidents between Mr Serwatka and the Claimant;

b. Secondly, I do not consider that there was a real risk that this incident would have been repeated;

c. Thirdly, the transcript shows that Mr Serwatka responded to the Claimant's coarse language with coarse language of his own. There is no evidence that the Claimant's language in and of itself was a fundamental breach of contract, or regarded as wholly unacceptable in the culture of the Respondent's workplace;

d. Finally, I accept the evidence of Ms Gut that the words she used should not have been taken literally; and that they were not in fact taken literally by Mr Serwatka. Ms Gut has not mentioned this for the first time in these proceedings. It was a point she made in the first investigatory meeting. Given the overall context, I think it unlikely that Mr Serwatka would have interpreted references to having a fight as a threat of immediate physical violence. When he made his complaint to Human Resources, the main focus was on Marcin's conduct, rather than on Ms Gut's conduct, and he did not say he felt physically threatened by Ms Gut's behaviour.

90. For these reasons, in my view it was not behaviour that amounted to threatening behaviour. It was behaviour that was wrong and inappropriate, as the Claimant has accepted during these proceedings. However, it was not conduct which was sufficiently grave to amount to a fundamental breach of the Claimant's employment contract.

91. The Claimant is therefore entitled to be paid the notice pay to which she would have been entitled had she been dismissed on notice. Although this is a matter which may need to be determined at a remedy hearing, it appears that the Claimant may be entitled to four weeks' notice pay in accordance with clause 17.2 of her employment contract [103].

Compliance with ACAS Code of Practice

92. I do not find that there has been any failure to comply with the ACAS Code of Practice and therefore there will be no adjustment to any award on that basis.

Employment Judge Gardiner
Date: 15 December 2020