Case Number:1402326/2021

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Donna Griffiths	**v**	**N & C Leisure Limited**

Heard at: Bristol ET (by video) **On: 18 & 19 May 2022**

Before: Employment Judge Hogarth

Appearances

For the Claimant: Mr H Dyson Counsel, instructed by Spencers Solicitors, Chesterfield
For the Respondent: Mr P Saunders (co-owner of the respondent company)

RESERVED JUDGMENT

1. The claimant was unfairly dismissed by the respondent.

2. The claimant contributed to her dismissal to the extent of 100%, to be applied to both the basic and compensatory awards and therefore the claimant is awarded no compensation in respect of her dismissal.

3. The claim under section 38 of the Employment Act 2002 is upheld. The respondent must pay the claimant £1076.00 (two weeks' pay).

REASONS

Introduction

1. The claimant was employed by the respondent as manager of the Barrington Arms Hotel, Shrivenham ("the hotel"), part of which is a licensed pub ("the licensed premises"). She was dismissed with a month's notice on 30 December 2020 and claims for unfair dismissal under section 98 of the Employment Rights Act 1996 ("the ERA 96") and for compensation under section 38 of the Employment Act 2002 ("the EA 2002"). Both claims are contested.

Form of hearing and witnesses

2. The hearing was conducted by video (VHS). There were occasions when connection issues or other IT issues caused interruptions. These resulted in some lost time, but did not impact on the viability or fairness of the hearing.

3. The claimant, who was present throughout the hearing, gave sworn evidence. No other witnesses were called on her behalf. Mr Saunders, a co-owner of the respondent, represented the respondent company. He was at all times the directing mind of the company and his actions are attributable to it. He also was present throughout the hearing and gave sworn evidence. He called as witnesses Ms Naomi Cook an employee of the respondent and Mr Gareth Pinchin the current manager of the hotel, who both gave sworn evidence.

Procedure

4. I had before me an agreed 97-page Bundle, and an unsigned and undated 4-page witness statement from the claimant, which the claimant applied to be admitted as late evidence. The respondent did not object. I admitted the statement. I also agreed to applications (not objected to by the claimant) to treat Mr Saunders' statement in paragraph 6 of his ET3 form (referred to below as his "ET3 statement") as his witness statement and to give leave for Mr Pinchin to be called as a witness despite his not having given a written statement in advance. I considered it appropriate to make these decisions in the light of the overriding objective, so that the Tribunal had all the available evidence. There were no other procedural matters raised by either party.

5. Neither party requested any reasonable adjustments in response to my enquiry as to their possible needs.

6. The first hearing day and part of the second day was taken up with evidence and submissions on liability issues (including Polkey reduction and contributory fault). The rest of the second day was taken up with evidence and submissions on remedy. Judgment was reserved.

Mr Saunders' appearance in person

7. Mr Saunders appeared able to cope with the demands of the video hearing and was able to give evidence, ask questions of witnesses and make submissions. However, he was not familiar with the relevant law and procedure, and did not always appear to understand the potential significance of some of the questions put to him or other witnesses by Mr Dyson. On occasion I saw that he was confused by what was being said to him or others, or by the procedure. That was not helped by the fact he did not have a complete paginated bundle, which made it harder for him to locate specific documents.

8. All these things put Mr Saunders at a disadvantage. In order to enable him to participate on a more equal footing (and in the light of the overriding objective) I afforded him some latitude in the way he presented his case, gave evidence and asked questions. I gave explanations of legal or procedural matters and on occasion I helped him to formulate a question he wished to ask or to articulate the respondent's position on a matter. I also made some inferences as to aspects of the respondent's position from a combination of sources – Mr Saunders' oral evidence, statements and submissions, his ET3 statement and other documents in the bundle.

9. Mr Saunders was able to present his case as he wished. I do not consider that the claimant was prejudiced by any of the steps mentioned in paragraph 8 above, because (a) she was able to give her own evidence freely, (b) she was represented by experienced counsel, and (c) her counsel did not object to any of them and agreed, when invited by me to comment, with my explanations of legal and procedural matters. Mr Dyson addressed the respondent's case thoroughly, and was able to deal with all aspects of that case as set out below.

Claims and issues

10. The parties agree that the claimant was employed by the respondent as the manager of the hotel from 1 October 2017 until 29 January 2021, at the expiry of one month's notice of dismissal given on 30 December 2020.

11. I set out the issues for the Tribunal to decide at the start of the hearing and Mr Dyson agreed they were the correct ones. The issues are:

Issue 1 – was the claimant unfairly dismissed?
1.1 What was the principal reason for the claimant's dismissal and was it a potentially fair reason under sections 98(1) and (2) of the Employment Rights Act 1996?
1.2 Did the respondent genuinely believe that the claimant had committed the alleged misconduct?
1.3 If so, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? In particular the Tribunal must decide whether—

1.3.1 there were reasonable grounds for the respondent's belief;
1.3.2 when the belief was formed, the respondent had carried out a reasonable investigation;
1.3.3 the respondent had otherwise followed a reasonably fair procedure; and
1.3.4 dismissal was in the range of reasonable responses by an employer.

The respondent asserts that the principal reason for dismissal was gross misconduct through being under the influence of alcohol when on the licensed premises, that it had a genuine belief she committed that misconduct, and that it acted reasonably in treating it as a sufficient reason to dismiss. The claimant disputes the respondent's position on each issue, asserting that the real reason for dismissal was Mr Saunders' wish to make his brother-in-law Mr Pinchin the manager, there was no misconduct or reasonable belief in it, and that the respondent did not act reasonably in dismissing her. In particular she denies that there was a reasonable investigation and asserts that the procedure adopted by the respondent was unfair.

Issue 2 - breach of ACAS Code of Practice (if the dismissal was unfair)
2.1 Did the respondent unreasonably fail to comply with the ACAS Code on Disciplinary and Grievance Procedures?
2.2 If so, is it just and equitable to increase any compensatory award payable to the claimant? By what proportion, up to 25%?

The ACAS Code applied. The claimant seeks the maximum uplift of 25% for serious failures to comply with the Code in the investigation and in the procedure. I inferred that the respondent's position is to resist this claim and assert that there should be no uplift.

Issue 3 - Polkey reduction (if the dismissal was unfair)
3.1 Is there a chance the claimant would have been fairly dismissed anyway if a fair procedure had been followed?
3.2 If so, should the claimant's compensatory award be reduced in accordance with the principles in Polkey v AE Dayton Services Ltd [1987] UKHL 8 and subsequent cases? By what proportion, up to 100%?
The claimant's position is that the answer to Issue 3.1 is "no", or failing that the chances of a fair dismissal were at most "slim", so any reduction should be 0% or close to it. The respondent's position is that she would have been fairly dismissed, so a 100% reduction is appropriate.

Issue 4 – Reduction for contributory conduct (if the dismissal was unfair)
4.1 Did the claimant cause or contribute to her dismissal by blameworthy conduct before the notice of dismissal was given to her on 30 December 2020?
4.2 If so, would it be just and equitable to reduce the claimant's basic or compensatory awards? By what proportion, up to 100%?
The claimant says she did not cause or contribute to her dismissal by blameworthy conduct. I inferred that the respondent's position is that she was entirely to blame for her dismissal, so the reduction should be 100%.

Issue 5 - Compensation for unfair dismissal (if relevant)
5.1 What basic award is payable to the claimant (taking account of the decisions on issues 2 and 4)?
5.2 If there is a compensatory award, how much should it be (taking account of the decisions on issues 2, 3 and 4)? The Tribunal will decide—
5.1.1 What financial losses has the dismissal caused the claimant?
5.1.2 Has the claimant taken reasonable steps to mitigate her losses, including by replacing her lost earnings, for example by looking for or taking another job?
5.1.3 If not, for what period of loss should the claimant be compensated?
The claimant seeks a basic award based on 3 complete years' service and a compensatory award for loss of earnings (including her free accommodation at the premises) in accordance with the Schedule of Loss in the bundle.

Issue 6 - Failure to provide statutory particulars of employment contract
6.1 Did the respondent provide the claimant with written particulars of her employment contract as required by section 1(1) and 4(1) of the Employment Rights Act 1996?
6.2 If not, what award (if any) is the claimant entitled to under section 38 of the Employment Act 2002?
The respondent says that the claimant was given a written employment contract and signed a copy. The claimant denies she was ever given, or signed, the contract and seeks the maximum award of four weeks' pay (£2,152). Neither

party made detailed submissions as to whether the written contract gave all the particulars required by ERA 1996, so I must determine sub-issue 6.2 based on my own assessment of the documents and oral evidence.

Other issues raised by Mr Saunders

12. Mr Saunders raised two further matters which are not issues in this case.

Employer's right to dismiss under the employment contract

13. Mr. Saunders asserted several times that the employment contract entitled him to dismiss the claimant for gross misconduct, giving him a choice whether to dismiss with or without notice. This is a misconception - a contractual right to dismiss is not a defence to an unfair dismissal claim. The claimant had a statutory right not to be unfairly dismissed. The question whether a dismissal was fair or unfair is governed by ERA 1996 and not the contract, although a specific contract term can sometimes be relevant to a particular issue in a case, such as what counts as gross misconduct.

Respondent's financial position

14. Mr Saunders repeatedly referred to the respondent's weak financial position at the time of the dismissal and subsequently. He said that as a result of the pandemic the respondent's business was (like the hospitality sector generally) in serious financial difficulty and has only stayed afloat with financial support from himself, including a £12,000 director's loan in April 2021. The company had not ceased trading, but its financial difficulties continued to the date of the hearing. This meant, he said, that the respondent could not pay compensation to the claimant. I accept his evidence on the respondent's financial situation, which was not disputed. But its relevance to the issues in this case is limited. Section 98(4)(a) of ERA 1996 requires me to take account for certain purposes of "the size and administrative resources of the employer's undertaking". The respondent's means are of some relevance in assessing the size and administrative resources of its business. But its lack of means is no reason to deny the claimant a financial remedy to which she is otherwise entitled.

Findings of fact.

The respondent employer

15. The respondent company is a small hospitality business with approximately 8 employees in 2020. It appeared that only the claimant worked full time. An independent accountant dealt with payroll, holiday pay and similar matters. As set out in paragraph 14 above, the company's financial position in the second half of 2020 was weak, due to the pandemic.

16. The respondent is co-owned by Mr Saunders and his wife Claire, although it did not appear that at any material time she played an active role in managing the business. Nobody other than the claimant and Mr Saunders had a managerial role in the business between August 2020 and January 2021. Mr Saunders' evidence, which was not disputed and I accept, was that his active role in the business reduced considerably after March 2020 when the first national

lockdown started. He was unable to visit the premises because he was in the "vulnerable" category (he told me at the hearing that he was 82) and was isolating at home with his wife. They continued to isolate during the summer of 2020, even after the premises re-opened after the first national lockdown. However, after the events of 4 August 2020 described below he was forced to involve himself to a greater extent in the respondent's affairs, despite the practical difficulties resulting from the pandemic.

The claimant's contract of employment

17. Mr Saunders' oral evidence was that he prepared the contract in the bundle and gave a copy to the claimant just before 5 October 2017 (the date on the copy in the bundle). The claimant denied ever being given a copy of the contract when she started her employment and her case (as put forward by Mr Dyson) was that the wording was created by Mr Saunders after he saw the claims presented on 26 June 2021. Mr Saunders stated that the original of item (d) in paragraph 19 below (the signature page of the contract apparently signed by the claimant and Mr Saunders) was found in the claimant's tied flat after she vacated it in January 2021. The claimant's evidence was that she never signed a copy and did not leave anything behind in the flat.

18. The accounts put forward by each party about the contract documentation in the bundle cannot both be correct. Both parties' oral accounts appeared credible, so I must examine all the relevant oral and written evidence in order to determine which is correct.

19. The relevant written material in the bundle is--
(a) The "Details of Claim" of 26 June 2021, which include a bare claim for compensation for failure to provide written particulars of the employment contract, but does not say anything about the facts. The claimant's written statement is also silent as to those facts.
(b) A brief assertion by Mr Saunders in his ET3 statement received on 30 July 2021 that "on the 5th October we both duly signed her contract of employment", referring to an "enclosed" copy of the contract. There is no direct evidence as to what (if anything) was enclosed.
(c) A copy of an unsigned employment contract dated 5 October 2017 which purports to be made between Mr and Mrs Saunders and the claimant.
(d) A photocopy of the signature page of the same contract which purports to bear the signatures of the claimant and Mr Saunders.
(e) Two emails dated 14 January 2021. The first from Mr Saunders timed at 10.56 states he is "once again forwarding your employment contract" and refers to clause 8.3 on carrying over unused holiday. The claimant's brief response timed at 13.31 said she was not asking for carry over but just what she was owed for "this year". It then stated that "I have never signed a contract nor been issued one". This exchange happened while the claimant was still living in her

flat in the hotel, so was before the time when Mr Saunders claimed item (d) was found in the flat after she moved out.

20. Mr Dyson submitted that I should conclude that the contract documentation (items (c) and (d) in paragraph 19 above) was created by Mr Saunders in response to the making of the claims in this case on 26 June 2021. This submission accuses Mr Saunders of fraudulently fabricating the documentation, as there was no suggestion anyone else had done this. Mr Saunders denied this allegation, forcefully. The claimant's oral evidence was that she did not receive a copy of the contract in October 2017 and she denied signing a copy or leaving a signed copy in her flat when she moved out.

21. The claimant was asked by Mr Dyson in cross-examination whether she signed for things as manager and whether there were documents with her signature about in the hotel, and she said there were. I accept that Mr Saunders would have had access in 2021 to documents containing her signature. That is not surprising as she must have dealt with all manner of paperwork as manager of the hotel. It is not itself evidence of wrongdoing.

22. Mr Dyson relied on three main reasons to substantiate his submission (in addition to the claimant's oral evidence) as to when the documents were created, namely **(1)** Mr Saunders had taken an inappropriate contract template from somewhere and put the document in the bundle together, **(2)** there was no mention in the contract of accommodation, a matter which did not go without saying and should be there, and **(3)** the only one of the listed examples of gross misconduct that was in bold was "Serious incapacity at work through an excess of drink or drugs", which, he said, must have been added to assist the respondent's case.

    I understood Mr Dyson's' reason (2) to include an assertion that the written contract does not deal with pay. However, clause 6.1 specifies an annual salary of £25,000, which appears to me consistent with pay of £30,000 in 2019-20 according to the claimant's pay slip for March 2020.

23. The above reasons relate to the content of the contract rather than the claimant's purported signature on item (d) in paragraph 19, so I will consider when the contract wording was devised, before turning to the separate question whether a copy was given to and signed by the claimant in October 2017.

24. As for reason (1), it is clear on the face of the contract wording that it comes from a third-party source, adapted with limited success to the claimant's job situation. There is a copyright notice from "Abbey Legal Protection" at the bottom of page 8 of the contract. I note that the employer is referred to variously as "Peter and Claire Saunders", "the Partnership, to also be known as the Company", "the Partnership" and (in most places) "the Company". I expect that the original template related to a company, before the words were adapted.

25. I see no reason why the way the contract wording was created makes it more likely to have been faked after Mr Saunders had sight of the claims in this case, rather than made genuinely in early October 2017. I consider that he was as likely to have created the contract in that way in October 2017 as in 2021. If Mr Dyson was implying that in October 2017 Mr Saunders would have used a solicitor, there was no evidence of this and it was not a point he put to Mr Saunders in cross-examination. I can see no reason to infer that he would have used a solicitor in 2017. On the contrary, Mr Saunders has acted for himself in investigating and dismissing the claimant and in defending her claims, which suggests he prefers to do things himself to avoid legal costs. It is more likely than not, in my view, that he would have done the same in October 2017.

26. As for reason (2), the contract wording has gaps and errors in it. The absence of provision about the tied flat was a mistake (the claimant had a live-in position and free accommodation was part of her remuneration). That mistake is likely to have been caused by Mr Saunders' ignorance of the need to cover it, and I expect that there was no reference to accommodation in the template wording he used to create the document. In my view this mistake was likely to be made whenever the contract was created.

27. The employer is given in the contract as a partnership between Mr and Mrs Saunders and not N and C Leisure Ltd. That would be a surprising mistake to make after the unfair dismissal claim was made, since the claimant's ET1 form correctly names "N and C Leisure Ltd" as the respondent and her pay slips also name that company. I have no evidence whether her employer in October 2017 was N and C Leisure or not, but in my view it is more likely that a contract referring to Mr and Mrs Saunders would have been created in October 2017 than after June 2021. This is a point in favour of Mr Saunders' account as to when the wording was created.

28. Clauses 8.1 and 8.4 of the contract (dealing with holidays) have blank spaces for the leave year, the number of days holiday per year, the holiday accrual rate per month and the notice required for taking holiday. Again, I do not see why these omissions support Mr Dyson's submission that the contract was faked after June 2021. I consider it just as likely that the mistakes would have been made whenever the contract wording was created. The same goes for any other mistakes or omissions in the contract wording.

29. As for reason (3), the list of examples of gross misconduct in the contract has one entry in bold which refers to "serious incapacity at work through an excess of alcohol or drugs". Mr Saunders' explanation was that when he adapted the contract wording from the internet (before 5 October 2017) he added this entry because of his previous experience as an employer. He said he put it in bold because it was important. In any event, I do not accept the submission that the fact the words appear in bold show that the contract was faked after 27 June 2021. I accept that at that time it would have been possible for Mr Saunders to think that adding the wording to a fake contract would assist the respondent's defence to the claims (whether or not that was in fact the case). But equally, he

might also have thought in October 2017 that adding the highlighted example to the list would be a useful warning for a new manager (which was his explanation). I do not consider that the existence of the words in bold, in itself, supports the claimant's case as to when the contract wording was created.

30. In the light of paragraphs 23 to 29 above, I conclude that the reasons put forward by Mr Dyson do not show that the contract wording was created by Mr Saunders as a fake after the ET1 form was presented. So I must consider what other evidence or arguments are relevant to the question when it was created.

31. Both parties had potential motives for giving a false account. In the claimant's case failure by the respondent to give her the alleged contract wording in October 2017 would mean she was entitled to succeed on her section 38 claim, and if she could persuade me that Mr Saunders faked the contract and perjured himself in giving evidence, that could not fail to assist her unfair dismissal claim. She might also have thought that the contract wording supports the respondent's case on that claim (whether or not it in fact does so). In Mr Saunders' case, producing the contract wording after 26 June 2021 (as alleged by the claimant) might have been thought by him to assist the respondent's defence to both claims (again, whether or not the contract actually does so). But I have concluded that consideration of possible motives does not assist me in deciding which account is true or more likely to be true. The matter is too speculative for me to draw any reliable conclusions. Apart from anything else I have no direct evidence about the parties' knowledge of legal matters, such as weaknesses in their case or the relevance or otherwise to their case of the contract wording.

32. On the claimant's case, Mr Saunders is guilty of at least forgery and perjury as a result of faking the contract wording and the signature on item (e) in paragraph 19. There are serious potential criminal consequences for such acts (whether imprisonment or an unlimited fine) as well as the potential effect on his reputation. On its own, this might be relevant to the credibility of the claimant's account. But there are of course also potential criminal consequences for the claimant if she were found to have lied on oath in giving evidence, as that would also be perjury and would affect her reputation. I would expect both of them to have some awareness of the possible consequences of this sort of wrongdoing. But it is very difficult indeed (a) to assess the chances of either of them being found out, prosecuted or convicted for this sort of offence or (b) more specifically, to tell whether either of them would have been aware of the risks attaching to fraud or perjury (in Mr Saunders' case) or perjury (in the claimant's case). I conclude from that that consideration of the consequences of either account being false does not assist me in deciding whose account is true, or more likely to be true. As with possible consideration of motives for wrongdoing, the matter is far too speculative to be a reliable guide.

33. The email exchange on 14 January 2021 (item (e) in paragraph 19 above) is significant evidence in relation to the question when the contract wording was created. It shows that both Mr Saunders and the claimant referred on that day

to their respective positions as to the existence of an employment contract, more than 6 months before the claims in this case were presented. This is a point against the claimant's case that it was created after the claims were presented. There is no specific documentary evidence as to what contract document (if any) was "forwarded" as stated in Mr Saunders' email of 14 January. On Mr Saunders' account it cannot have been the signed document as this was not in his possession at the time. However, Mr Saunders asked the claimant in cross-examination, in reference to the time "when I sent the contract", if she remembered him sending it to her. Her response was that that was the first time she saw it. I understood this exchange to refer to what his email of 14 January said he was forwarding to her – a copy of the contract. In my view this answer undermines Mr Dyson's submission that the contract wording itself was created after the respondent saw her claims in June 2021.

34. I consider that on the basis of the evidence discussed so far, the balance of probabilities marginally favours Mr Saunders' account as to when the contract wording was created. In particular I have not identified anything (apart from the claimant's own oral denials) which suggests the claimant's case is correct. But the evidence discussed so far does not answer the question whether a copy of the contract was given to the claimant on or before 5 October 2017. On this point item (d) in paragraph 19 above – the signed signature page from that contract – is crucial. It is also highly relevant to the question when the contract wording was created. The existence of a genuine signed contract would be strong evidence the contract existed and that she received a copy on or before 5 October 2017. If it is not genuine, that would destroy the credibility of Mr Saunders' account and would push the balance of probabilities in favour of the claimant's case as to when the wording was produced.

35. Mr Saunders' written and oral evidence was that both parties signed a copy of the contract, and he relies on the copy of the signed page as proof. I did not have sight of the original during the hearing, which he said was found in the claimant's flat after she moved out. The claimant denied she received a copy when she started her job, and said that she did not sign any contract and did not leave any such document in the flat. On their face, both of their accounts relating to the signed page were credible.

36. The signed page itself is the most relevant document on this point. There is no example of the claimant's usual signature in the bundle, but if the signature on the signed page looked different I would expect her, or her counsel, to have raised the point - which they did not. The claimant agreed when asked that the signature on the document looked like hers. I conclude from this that the signature on the document is either genuine or a reproduction of a genuine signature. If the latter, a real signature must have been manipulated in some way to generate the document. There is no overt sign of this on the copy in the bundle, nor is there any other evidence of forgery beyond the claimant's denial that she signed it. While I have found that Mr Saunders had access in 2021 to documents with the claimant's signature on them, there was no evidence as to (a) what technology would be needed for him to be able to produce a

convincing fake, or (b) whether he had access to, or the ability to use, such technology.

37. In these circumstances I must consider the balance of probabilities. I am sure that Mr Saunders has access to a laptop or other device that he is able to use to send and receive emails or to download a document from the internet. But I consider he would have needed more than that to successfully fake the signed document. I have no evidence as to what access he had in 2021 to what technology, but whatever the true position on that, I consider it most unlikely that he would have been able to create a convincing document using a genuine signature from another document. Nothing in the evidence, or my experience of him during the hearing, suggests to me that Mr Saunders has more than a basic knowledge of, or any skill with, technology. In my view this tips the balance against the claimant's account. For that reason, I find on the balance of probabilities that that the signed page is genuine and was not faked by Mr Saunders as alleged. It follows from that (and I so find) that a copy of the contract must have been given to the claimant in order for her to have signed it. I infer that that happened on or before 5 October 2017, the date on the signed page. Accordingly, I accept Mr Saunders' account of when the contract was created and given to the claimant, and I reject Mr Dyson's submission that it was created after Mr Saunders had sight of the claims in this case.

The claimant's position as manager of the Barrington Arms Hotel

38. The claimant was employed by the respondent as manager of the hotel and was answerable to Mr Saunders. While employed as manager the claimant lived in a flat on the premises, provided rent free. After the hotel reopened after the first national lockdown starting in 2020, the claimant was in practice the only person involved in managing the hotel on a day-to-day basis. Mr Saunders was isolating at home with his wife.

39. I had no direct evidence as to the identity of the licensee of the licensed premises in the second half of 2020. A police report in the bundle states that the claimant told the police on 4 August that she was the licensee. However, Mr Saunders referred in his evidence to "our" licence, and he put a document from 2019 about a licensing issue in the bundle. Managers come and go, and he was the owner, so it would not be surprising if he was the licensee. But not much turns on the identity of the licensee because, if it was not the claimant, she must have been the person responsible on the ground for ensuring that the licence (and licensing law more generally) were complied with. There is nobody else who could have had that role.

40. The claimant had a clean disciplinary record before the incidents on 4 August 2020 described below. Mr Saunders mentioned some previous concerns, and complaints, in relation to noise, but there was no evidence of any disciplinary action having been taken against her.

41. The evidence as to the claimant's working hours was very limited, and the written employment contract gives no particulars of the claimant's contracted hours or her working pattern across the week. She did not work on Mondays, for which the standing arrangement was to leave another staff member, Naomi Cooke, in charge. That arrangement was known to Mr Saunders, who accepted it was an appropriate arrangement.

42. The claimant worked shifts behind the bar, but as manager of the hotel and pub she also had administrative and other duties to fulfil. It is highly improbable that she was expected to work whenever the hotel or the pub was open, six days a week. The written evidence relied on by Mr Saunders refers to periods when she was "not working" from which I infer that there were periods on days other than Monday when she was not working behind the bar. What is less clear is whether, when not working behind the bar, she was still carrying out any duties or activities as manager or was otherwise still "in charge" as manager. There is a reference in the statement of Leah Maclean to the claimant remaining very much in charge even when sitting and drinking with customers, and to her going behind the bar to serve herself or customers with drinks. That suggests that the line between the claimant being on and off duty was in practice blurred.

43. When not working on shift behind the bar the undisputed evidence (which I accept) was that the claimant often spent time sitting and drinking with customers in the bar. She said in her oral evidence (and I accept) that she rarely left the licensed premises during opening hours. The claimant did not seriously dispute (and I accept) the evidence that she was drunk or under the influence of drink when in the licensed premises on 4 August and on other occasions. Her position was that on such occasions she was "off duty", so that her drinking was her own business and her time sitting in the bar area was her own. That is a matter that falls to be considered in reaching my conclusions on the reasonableness or otherwise of Mr Saunders' decision to dismiss the claimant for misconduct.

44. The claimant's duties as manager included making arrangements for the day-to-day staffing of the bar and the rest of the hotel. In her oral evidence the claimant said Mr Saunders had encouraged her to hire casual bar staff and pay them on a self-employed basis. I understood this to mean that casual staff were paid in cash without any paperwork, with his express or tacit agreement. Mr Saunders denied strongly that he had ever agreed to this and said that, as an experienced employer, he would never permit what he said was illegal behaviour. I was unconvinced by the claimant's evidence on this and believed Mr Saunders' evidence, which I accept. There was no evidence to support the claimant's oral assertions that Mr Saunders had any knowledge of her previous reliance on casual bar staff. Accordingly, I find on a balance of probabilities that her use of casual bar staff was not known to or authorised or encouraged by Mr Saunders.

Incidents on 4 August 2020

45. On 4 August 2020 the claimant took an "afternoon off" (as she put it in her details of claim and written statement) and went to another pub in Shrivenham with Stuart Carter, the chef at the hotel. In her oral evidence she referred to taking the day off, and she answered questions from Mr Saunders by asserting that she was entitled to take a day off in addition to her regular Mondays off. I find that she did take the whole day off. It is unlikely she would have spent the afternoon drinking if she was planning to return to work in the evening. She said (and I accept) that she wanted the day off because it was the anniversary of the death of a close friend, and that she expected her mother to take charge of the licensed premises for the evening shift from about 6 pm. That was not disputed by Mr Saunders.

46. The claimant said that her day off was not contractual "holiday", but a non-working day allowed under the arrangements governing her working hours under her contract of employment. There was no clear evidence as to whether or not she was supposed to be working on 4 August or exactly when she decided to take the day (or the rest of the day) off. The claimant's evidence was that she was entitled to take a day off (in addition to the Monday) because she was not meant to work a full 6-day week. She said she occasionally took an extra day off in addition to Mondays. Mr Saunders' evidence was that the claimant's regular day off was Monday and that she had made no arrangements through the accountant to take 4 August as holiday. He said he believed she should have been working and he denied telling her that she could have two non-working days a week, saying that the previous manager worked on 6 days, because of the difficulty of finding someone suitable to be in charge of the hotel for a whole day. The difficulty from his point of view is that the claimant's duties in relation to staffing must have included the ability to arrange her own shifts and working hours.

47. However, it is not necessary for me to make a finding as to whether her absence was or was not authorised, because Mr Saunders has not relied on the absence itself as misconduct that he took into account in deciding to dismiss her. He was more concerned about the claimant's drinking. Nor do I consider it necessary to make a finding as to exactly when the claimant decided to take the day off, because Mr Saunders' case did not rely on this matter either. But I infer from the fact that she did not arrange for Naomi Cooke or another experienced staff member to be in charge in her absence that the decision was probably made either on the day (4 August) or the previous day.

48. What is clear is that instead of doing that, she left the hotel in the sole charge of a friend, Sharla Curtis, who was working behind the bar that afternoon. The claimant said that Ms Curtis did not expect to be paid, although later she said that casual staff were paid out of the till. I consider it most unlikely that Ms Curtis was working for free. There is no reference to her working unpaid in the "Details of Claim" (which refer to Sharla "working behind the bar") or in her

written statement (which refers in paragraph 3 to Sharla having "agreed to cover the bar for me" and in paragraph 4 to Sharla's "shift"). I prefer her written evidence on this point, and I find that she had arranged for Ms Curtis to work a shift that afternoon on a paid basis. When she left the premises Ms Curtis was left in charge because there was nobody else there to take on that role.

49. Mr Saunders said that he had no idea who "Sharla" was and that she was not a member of staff on the payroll. The claimant accepted that Ms Curtis was not a member of staff on the payroll, but asserted in her written statement that Sharla Curtis had done some shifts before and that Mr Saunders was aware of this. There was no other evidence to corroborate that assertion, which Mr Saunders denied. I prefer his evidence (that he was not previously aware of Ms Curtis' acting as a casual worker), because I found the claimant's account on this point wholly unconvincing. There was nothing in the evidence to suggest that Mr Saunders had any prior knowledge that Ms Curtis would be working behind the bar on 4 August 2020 or that she would be left in charge.

50. Mr Saunders asked the claimant whether Ms Curtis had the necessary training, and especially health and safety training, to be left in charge of licensed premises. Her response (which did not answer the question) was that Ms Curtis had worked in hospitality before. Mr Saunders referred to Mr Pinchin's oral evidence that he had given Ms Curtis a shift behind the bar after taking over as manager in 2021 and that he had found her to be irresponsible and incapable. Her response was that that was his opinion. I found her answers about Ms Curtis' training evasive and unconvincing. I find that she did not know whether or not Sharla Curtis was appropriately trained. There was no evidence to suggest she did know, and she did not claim to have asked her. In all the circumstances it seems unlikely that Ms Curtis had any training.

51. As manager of the licensed premises, the claimant was responsible for setting a rota of shifts for herself and the staff members who worked behind the bar. Mr Saunders accepted in his evidence that this was part of her job. She was clearly responsible for ensuring the bar was properly staffed during opening hours. In my view this responsibility included (and the claimant must have known it included) ensuring that an appropriate person was left in charge of the licensed premises when she was absent. On Mondays Naomi Cooke was left in charge. There was no direct evidence as to who (if anyone) was left in charge on other days at times when the claimant was absent or not working.

52. Ms Curtis was not on any view an appropriate person to be left in charge. There was no evidence to suggest either that she was an appropriate person or that the claimant had any reason to think that she was an appropriate person. However, despite the concern about this expressed by Mr Saunders during the hearing, I note that he did not rely on this as misconduct justifying the claimant's dismissal.

53. The claimant said that she told Ms Curtis that if there were any problems, she should call the claimant's mother, who was another member of staff. If true, that

instruction supports my view that Ms Curtis was an inappropriate person to be left in charge. However, I did not believe her evidence on this point, which I found wholly unconvincing. There was no corroborating evidence from the claimant's mother and, as it turned out, it was the claimant who Ms Curtis called when unable to cope with two difficult customers, even though she must have known the claimant had gone drinking with Mr Carter. Ms Curtis had the claimant's mobile number and was likely to regard the claimant as her first port of call in an emergency.

54. On the claimant's own account she was drinking during the afternoon. Her written statement refers to going out to "have a few drinks and relax". There was no serious dispute that she was drinking sufficiently to have become drunk by the time Ms Curtis called her on her mobile phone to tell her that there were two customers in the bar causing trouble. She and Stuart Carter returned to the premises to sort out the problem, and the claimant eventually persuaded the customers to leave. After asking them to leave, the claimant's evidence was that one of them grabbed her arm and she pushed him away. There was no dispute that at this time she was drunk. Shortly after this (between 5.30 and 6.00 pm), as the claimant put it in her statement, "the Police arrived at the hotel where I was arrested along with Stuart for suspected assault". She accepted that during the arrest "I may have raised my voice" but denied assault.

55. Mr Saunders was at home at this time and unaware of the events unfolding at the hotel. At some stage after the arrests were made he was called and went to the hotel. This was the first time he had gone there since the start of the first lockdown in March 2020. He found a confused situation. He spoke to those present and viewed the CCTV footage in the hotel. He did not at this point think there had been any assault, and he asked the police to release the claimant and Mr Carter on the basis that they had been doing their job in dealing with a difficult situation. His evidence (which I accept) was that Mr Carter was released the same evening but the claimant was not released until the following morning. The claimant did not dispute this.

Mr Saunders' complaint to the police after the arrests on 4 August 2020

56. Shortly after 4 August Mr Saunders complained to the police about the arrests, saying they were unjustified and had caused problems and losses to the respondent's business. At this point he was clearly supporting the claimant. He said (and I accept) that this was because at the time he did not think the claimant had done anything wrong. Mr Saunders' complaint led to an internal police investigation by an Inspector.

Mr Saunders' written warning of October.

57. On 17 October 2021 at 3.28, Mr Saunders sent the claimant the following email warning her about the potential consequences of being drunk at work:
"Donna
I have had a telephone call from a PC Mark Burton who was one of the officers concerned with the fracas at the BA. He has informed me that the CPS are still deliberating as to whether or not you should be charged with assault on a police officer when you arrived at the police station.

I tried to persuade him to make arrangements to drop the charges if we took no further action to sue for wrongful arrest.
I am still bewildered as to why you and Stuart chose to abandon the hotel on a work day at a time of unprecedented crisis to go on a drinking spree at another pub.
It indicates to me that your drinking is totally out of control.
People who suffer from alcohol dependency tend to be in denial about their condition and your recent behaviour seems to confirm this.
I have also had reports of your aggressive behaviour to some of our customers when you are under the influence of alcohol.
I must warn you of the fact that if you are caught in the act of being drunk in charge of the hotel, you will be subject to instant dismissal for gross misconduct.
If you feel you cannot abide by this rule you may consider resigning by giving due notice …".
The copy in the bundle is missing one or two letters on each line on the left margin, but it is reasonably clear what the missing letters are.
.

58. The email shows that by 17 October Mr Saunders was no longer of the view that the claimant's behaviour on returning to the hotel on 4 August was blameless. This email was not the product of a disciplinary process but appears on its face to be a warning, putting the claimant on notice that he had serious concerns about her drinking that day and he would take a very serious view of her being found to have been "drunk in charge" of the hotel, which he considered to be gross misconduct.

59. The claimant said in her oral evidence that Mr Saunders told her shortly after it was sent that the warning email was withdrawn. Mr Saunders denied this. The point was not mentioned in her Details of Claim, but her written statement said the following:
"*12. Given Mr Saunders was continuing to pursue a complaint against the Police for wrongful arrest, including demanding compensation, the email came as a complete surprise. He had never commented on my conduct previously and I was under the impression he did not think I had done anything wrong on 4th August as,if he did,he would not be pursuing a complaint with the Police.*
13. Following the email, I called Mr Saunders to discuss it with him as I was concerned about the implications and Mr Saunders told me that he had jumped the gun and did not need to discuss the matter further. Mr Saunders confirmed that no further action would be taken and that the "warning" would not be held on file."

60. Mr Saunders ET3 statement refers to his giving a warning to the claimant, following the phone call with PC Burton, and goes on to say "I then had to make the decision as to whether the police or Donna were lying". There is no mention of a further conversation about the warning. I consider that it is more probable than not that the claimant would have discussed the warning with Mr Saunders and I find that this happened. However, I do not accept the claimant's oral evidence that Mr Saunders withdrew the warning and told her not to worry about it. This is not how the matter was put in the above extract from the Details of Claim and is uncorroborated by any other evidence. No record was kept of what was said. But whatever was said it is quite possible that her perception of what he meant and his were different. If anything like the words described in the extract was said, Mr Saunders was probably referring to the email as having

been sent prematurely (because he had not seen the police report) and to there being no more to discuss at that time (because he was waiting for that report, before deciding his next steps). I do not accept that those words would mean he was "withdrawing" the warning. It is most improbable that Mr Saunders would have withdrawn the warning before he had seen the police report, having just been told by PC Burton about some of what the police were looking at, at a time when he was considering whether to investigate further. Moreover, the warning did not purport to be a disciplinary warning so it is not clear to me what withdrawing it would achieve. It simply asserted something that was the case anyway – that being "drunk in charge" of the hotel was gross misconduct. I also consider it improbable that Mr Saunders would have said that "no further action would be taken", for the same reasons. I find, on the balance of probabilities, that the warning was not withdrawn by him and that he did not tell the claimant he would take no further action.

Police report responding to Mr Saunders' complaint

61. Mr Saunders received a letter dated 4 November from Thames Valley Police responding to his complaint. Following an investigation by, and a report from, Inspector 2845 Lamboll, the letter concluded that the relevant police officers' actions on 4 August on the licensed premises (including the arrests) and subsequently at the police station were lawful, proportionate and necessary given "the behaviour of your employees" at the time. The report describes Mr Saunders' complaint as being that "... *Donna and Stuart did the right thing by evicting troublemakers. The complaint is that the police arrested without taking any steps to verify the allegations*". It goes on to say that "*the complainant requests the immediate release of Donna Griffiths and Stuart Carter as well as seeking compensation for wrongful arrest because his hotel was left understaffed and guests cancelled their bookings*".

62. The report states that Inspector Lamboll obtained accounts from two attending officers and reviewed contemporaneous records, namely CCTV, officers' Body Worn Video, the Command and Control log and Niche Investigation reports. The evidence from the two officers was summarised as follows:
"1/Summary of discussion with PC Roberts. He confirmed he was dispatched to the Barrington Arms following allegations of assaults.
Prior to attendance at scene he confirmed that the persons who called the police were debriefed and allegations were made.
He confirmed that police attended and CCTV of an assault was viewed and recorded on officers BWV.
He confirmed that he attempted (with other officers) to deal with alleged suspects of the alleged offence who claimed to be the licensee and Chef of the premise.
He confirmed that they were both drunk and obstructive and were arrested for the prompt and effective investigation of the offences alleged.
PC Burton also confirmed account of PC Roberts and added that further offences were committed by a person while under arrest. I found no inconsistency with the officers accounts which were supported by Body Worn Video (BWV). I have not felt it necessary to interview further officers that attended in a support role."

63. Inspector Lamboll's findings are recorded as follows:

"2./I have reviewed BWV footage of officer attendance and can confirm that the CCTV of an assault has been down loaded and corroborates the initial allegation of assault. The footage shows arrested persons clearly argumentative with officers and appearing drunk.
My view is that the officers actions were lawful, necessary and proportionate to the offences alleged and the behaviour of suspects necessitated arrest to allow prompt and effective investigation.
I have requested that the Licensing Authorities are informed of incident.
The complainant has provided further witness statements that have been included with the investigation file that relates to the initial assault and is in the process of determination (case decision) by an Evidential Review Officer and potentially CPS. …"

64. Mr Saunders' evidence (which I accept) was that he took this report as evidence that the claimant was drunk when she and Mr Carter returned to the Barrington Arms and when she was taken to the police station, that she assaulted at least one of the customers she was trying to remove and that she also assaulted a police officer at the police station. He already knew that she had been kept in custody overnight on 4 August. He considered that he had been wrong in the immediate aftermath of the events of 4 August to think that the claimant's conduct was blameless and appropriate for the purpose of evicting two troublemakers.

65. The claimant denied she assaulted anybody and asserted that she was not at work when she returned to the premises to assist Ms Curtis by dealing with the two "troublemakers". She disputed whether it was reasonable for him to reach the conclusions he did about the events on 4 August. I address that point in my conclusions below on Issue 1.2.

66. No further action was taken by the police or the Crown Prosecution Service in respect of the events on 4 August. There was no evidence as to whether the local licensing authority were informed of those events or that any action was taken by them as a result.

Mr Saunders investigation of the claimant's behaviour as manager

67. At some point in November 2020, Mr Saunders' attention was drawn by his daughter to two reviews of the hotel on Tripadvisor which referred to the claimant in very critical terms. One was dated 10 November and posted by "jonmunch2020". It was headed "*Manager is indescribable*" and said (among other things) *"I have never witnessed a manager being so vulgar and quite frankly hideous! The alcohol consumption this lady … had clearly consumed … had an impact on her speech, (however abusive swear words weren't an issue) the tone and manner in which staff were spoken to was disgraceful…"*. The other review was headed "*Inappropriate management*" and included the following "*We saw a few people being quite loud having some drinks, one lady was the manager/landlady as she was constantly reminding her staff that "she was the boss". We tried to ignore how she was but as the night went on she got louder and more rude, then all of a sudden she yelling at one of the guys she was sat with, don't know if it was her mate, boyfriend or just a customer she was drinking with.*

The staff apologised and we asked if she's often like this, they said no .. but it isn't exactly believable. We started to feel quite uncomfortable by her behaviour and decided to leave.
The staff themselves were great … but the manager was rude and thought she was entitled to get pissed in front of customers ..."

68. Mr Saunders' evidence, which I accept, was that he was not that computer literate and would not have been aware of the reviews unless someone had shown them to him.

69. In the bundle there was also a short review from "Barry, Shrivenham" which says "written 12 December 2019" and refers to "Oct 2019". It reads: *"Absolutely vile the manager was drunk and screaming at staff in the middle of dinner Service. Will never be back …".* There were also two other critical reviews that refer to the manager but do not specifically refer to her drinking or being drunk. One, from "David" dated July 2020 referred to "*a disgusting display of anger and aggression"* and said "*we saw her screaming obscenities at another woman in language that can only be described as disgraceful*". The other, from "Kevin B" dated August 2020 is headed "*Avoid … like shameless without the intellect*" and referred to the fact the pub is no longer "*a destination of choice by many of the locals and visitors … alas no more … it is either empty (surprise surprise) or has what can only be described as loud vulgar and foul mouthed patrons led by no less than the landlady herself*".

70. The bundle includes eight other reviews dated from 19 February 2018 to 1 August 2020 which were positive. These were put forward on behalf of the claimant' and are short and mostly in general terms about the bar or the hotel. One from May 2019 headed "*Donna is amazing*" says ""... *the first night I already become friends with the manager!. She made me feel like I am home here in the town … The atmosphere is good …"*. Mr Saunders agreed, when asked, that he had not looked for other, potentially positive, reviews when his daughter showed him the two negative reviews described above.

71. Mr Saunders' evidence, which I accept, was that he was concerned by the negative reviews, on top of the events of 4 August and the police report, and so he decided to investigate the claimant's behaviour as manager. He did not inform the claimant that he was doing that, although she knew from the warning email set out above that he had concerns about her drinking and being "drunk in charge" of the hotel.

72. Mr Saunders said in his oral evidence, in line with his ET3 statement, that he spoke to a number of members of staff and former members of staff and collected written statements from some of them, which were included in the bundle. These were not dated. There are no notes in the bundle of his conversations with the people he spoke to. His ET3 statement says:
"I then started to investigate the various allegations relating to Donna's drinking habits and behaviour while on duty and I discovered both verbal and written statements that her constant drinking habits were putting the business in danger of closing down and the business license being revoked.

1) ... . According to Naomi Cook's statement, Naomi normally covered for Donna when she had her day off and Tuesday was not her day off.
2) I took signed statements from other members of staff, Leah Maclean, Jane Stopp and Felicity Draper all confirming that Donna was often drunk in charge. I then looked at Trip Advisor and the most recent reviews (copies enclosed) were appalling particularly with regard to Donna's behaviour.
3.) There were also a number of people who told me of various incidents relating to Donna's drunken behaviour but who were reluctant to put their signatures on a statement. A girl called Tina who sourced accommodation for the Defence Academy, told my daughter in law that 6 visitors to the academy arrived to sign in to the hotel, but Donna was so drunk that she could not admit them and Tina found them accommodation elsewhere. Unfortunately Tina no longer works there.
4) my biggest fear was that we would lose our licence …
5) …
At the time of my investigation the hotel was in lockdown and all the staff were furloughed … . It was not until December 2020 that I managed to make contact with all the main witnesses to Donna's drunken behaviour when in charge of the hotel".

Paragraph 5) refers to a different allegation against the claimant, but this was not pursued as a disciplinary matter or relied on as a ground of dismissal.

73. In his oral evidence Mr Saunders repeated that he could not get anyone to come forward to give evidence about certain "illegal activities" (as he described them) by or involving the claimant, and so was unable to prove them. I have no reason to doubt what he said on this, but as he did not seek to rely on any such activities as part of his justification for dismissing the claimant I make no finding on them.

74. He also repeated the account he had had from his daughter-in-law about the incident referred to in paragraph 3) of the extract in paragraph 72 above. He said that "Tina" (who booked accommodation for visitors to the Defence Academy) had left and so he had not been able to obtain a statement. I accept his evidence on this. He appeared to be under the impression that his daughter-in-law's account was not evidence, and that he could not place any reliance on it at the hearing.

75. Mr Saunders said that (a) he had statements from 4 members of staff as to what they had seen or experienced in terms of the claimant's drinking, and (b) he did not have any reason to think they were all lying or were wrong in what they said. The statements he relied on were as follows, although as discussed below there is a problem with the fourth one.

76. There is a one-page statement from Naomi Cooke who has worked at the Barrington Arms since April 2019. It states she was left in charge on Mondays when the claimant would be "upstairs chilling" but she did not need to cover for her on Tuesdays because this was not her day off. As to the claimant's

behaviour, the statement says: "*There were many occasions when I would have to pour Donna a soft drink and send her upstairs because she was too drunk to be in charge*. … *When she was drunk in the evenings, she would start to get funny with the customers and if they came in later she would scream "NO" at them even if we were open*."

77. There is a short one-page statement from Leah Maclean which states that she worked at the Barrington Arms on and off in 2019 when the claimant was manager. The material parts of the statement are as follows "*Donna was not present for numerous reasons. She was often drunk and having to go to bed or sitting with customers drinking while in charge of the pub.*
She often went out to other pubs on days when she should have been working. Nobody was ever told that they were in charge. Donna was always in charge no one else was given authority to be in charge. She would come behind the bar to serve customers and help herself to drinks. Donna would ask for a larger top up regularly. As she got more drunk we would add more lemonade to slow her down and stop her getting too intoxicated.
…
The only time I saw Donna when she was sober was when she took part in "Sober October" and even then she sat on the other side of the bar drinking Heineken 0% with customers, She returned to her normal drinking habits afterwards.".

78. There is a short 8-line statement from Felicity Draper referring to a shift she worked behind the bar in April 2019. It says: "*She was in the kitchen at the time and she came out to the bar on a number of occasions to ask for a glass of "Medicine", (Thatchers Haze).*
She was meant to be working behind the bar that night.
When I finished my shift at 6 pm she had been sat at a table for some time drinking with her regular customers. She was clearly drunk at the time."

79. Finally, there is in the bundle a half-page email from Jane Stopp sent from her mobile phone to Mr Saunders. It states that she had worked for about 18 months at the Barrington Arms for the claimant, and continues "*... on numerous occasions Donna was unable to work through alcohol which is affected her position as a bar manager there was always a lot of complaints in the morning about Donna drinking too much getting too loud we lost a lot of customers John and myself had a lot of complaints in the morning that we had to deal with there are other members of staff that I will pass the details on to youThere is Charlotte He left because of Donna's drink in there is Harly Who left because of Donna's drinking and had a big tad eden he could not handle Donna when she was drunk on a Sunday session there was over £3000 worth of tabs that had not been paid by customers and by members of staff Donna got herself into a situation that she wanted to be everybody's friend and a drink flowed with the friends, It became the Sunday session I left as I could not stand the drama anymore."*

80. This email is dated 17 July 2021 at 5.08 pm, more than 6 months after the claimant was dismissed. In his final submissions Mr Dyson relied on the date as being inconsistent with Mr Saunders' written and oral assertion that the

statements were made and signed before the claimant was dismissed on 30 December 2021. However, he did not put this specific point to Mr Saunders in cross-examination (he asked instead a general question about when Mr Saunders had the signed statements), and so did not did not specifically ask for an explanation from Mr Saunders about the Jane Stopp email. I do not know what Mr Saunders' explanation would have been, as it is very clearly and obviously not a "signed statement".

81. Mr Saunders' ET3 statement (received on 30 July 2020) refers to his taking "a signed statement" from Jane Stopp. The email is not signed, unlike the others described above and is dated some 8 or 9 months after his investigations in 2020. It cannot be the "signed statement" his ET3 statement mentions. In the absence of any direct evidence on the point, I consider it more probable than not that Mr Saunders had such a statement in his possession before he decided to dismiss the claimant; and I find that he did. It is not possible to tell how far the garbled communication set out above reproduces what the statement said, but I consider the statement would have contained similar information about the claimant's drinking. However, the email in the bundle is of limited probative value as to the details of what the statement said.

82. Mr Dyson disputed whether Mr Saunders had any of the above statements in his possession before the decision to dismiss was taken on 30 December. Mr Saunders asserted that he did, consistently with the brief account he gave in his ET3 statement in July 2021. Mr Dyson relied on the three signed statements being undated, in addition to his submission relating to the date of the email from Jane Stopp which I have addressed above. It would have been preferable for the statements to be dated, and the same goes for the claimant's own witness statement. But I do not accept Mr Dyson's submission that the fact they were unsigned shows that they were not made before the decision to dismiss was made. It would be consistent with his ignorance of other aspects of the law for Mr Saunders to be simply unaware of the desirability of their being dated. His evidence (which I accept) was that in November and December 2020 he was acting without legal advice. He claimed that during the lockdown in operation at the time he had no solicitor available for advice. This was not disputed, but I consider it questionable whether he would have sought legal advice if it had been available. He did not do so when compiling the employment contract, responding to the claimant's ET1 form or subsequently in defending the claims she made and representing the respondent at the hearing.

83. Mr Dyson also relied on Ms Cooke's answers to his questions in cross-examination as to when he made her signed statement. Ms Cooke agreed, when asked by Mr Dyson if she typed it herself, that she had. She then gave a succession of different answers as to when she did that, as Mr Dyson developed his line of questioning. Her first answer (when asked if she could be certain when she signed it) was that she could not be sure but thought it was

November/December time (in 2020). She apologised for having a poor memory. Then, when asked if there was any possibility it was after January 2021, her reply was that she was not sure and couldn't remember but she thought it was the end of 2020 or the start of 2021. Mr Dyson commented that that was "last year" and asked if it was later than January 2021, perhaps in the Summer. The answer given was that it was "7 to 9 months ago" (which would refer to August to October 2021). At the end of her oral evidence, she told me that she could not remember "the date of the writing".

84. I do not accept that Ms Cooke's oral evidence, taken as a whole, supports Dyson's submission that her statement did not exist before the decision to dismiss was made. Her first answer was consistent with Mr Saunders' account of his investigations, but although she gave two different answers subsequently to that answer, she did say that she was not sure and that she had a poor memory, an answer Mr Dyson acknowledged in his closing submissions. My assessment of her as a witness is that she got a little muddled in trying to recall events from 2020 and early 2021 and was a little too ready to agree with whatever specific questions she was being asked. Her three answers were inconsistent with each other and, taken together, do not take us very far. I cannot place much weight on her oral answers on this point. They certainly do not establish that her statement was produced after December 2020.

85. I find, on the balance of probabilities, that Ms Cooke was questioned by Mr Saunders, and gave him a written statement, before the decision to dismiss was taken. It is inconceivable that he would not have questioned her, as she was the nearest the hotel had to a deputy manager, worked nearly full-time, and was the person usually left in charge when the claimant was not working. There is nothing in her evidence, or the other evidence in this case, to suggest that she was somehow working in collusion with Mr Saunders to fabricate written evidence to help him construct a fraudulent case. On the contrary, Mr Dyson in his closing submissions invited me to accept her oral evidence on another matter (that she had not seen the claimant drunk when working a shift behind the bar and that the claimant had observed "Sober October"), which appeared to be inconsistent with some of her written statement. Her oral evidence on those matters was not helpful to the respondent's case.

86. I consider that it is more probable than not that Mr Saunders was also telling the truth about the other investigations he carried out, both in his ET3 statement and in his oral evidence in response to Mr Dyson's cross examination. Apart from the exchanges between Mr Dyson and Ms Cooke described above, I could identify no evidence that indicated his account was untrue. I found his oral evidence on these matters convincing, and I find that he did carry out the investigations and did have the statements he referred to before 30 December 2020, with one qualification. This is that the email from Jane Stopp discussed

above is not, in my view, a reliable guide as to the details of what was in the signed statement I have found Mr Saunders obtained from her.

87. Mr Saunders's evidence did not specifically mention anything he had been told by Mr Pinchin, his brother-in-law. Mr Pinchin came to live in Mr Saunders' house extension during 2020 to work from home as an accountant in order to reduce his risk of catching COVID. I accept his evidence on this point which was confirmed by Mr Saunders' evidence. Mr Pinchin was asked a question by Mr Saunders about how he was greeted when first entering the Barrington Arms. Mr Pinchin's answer was that he saw a local he knew with a lady on his lap who greeted him with the words "Who the fuck are you?", to which he responded in kind he said. He also said that she was extremely drunk at the time. The lady referred to was the claimant. He said he "told Pete and Claire" (Mr and Mrs Saunders) about this. In cross examination Mr Dyson asked when this incident occurred and the reply was that he first "bubbled" with Pete and Claire in July 2020 so that it would have been in August 2020. He was not asked other questions about the incident. There was no suggestion that he was not telling the truth and I accept his evidence about it and find that Mr Saunders was made aware of the incident at some time in August 2020, before he sent the warning email described in paragraph 57 above. I consider that Mr Pinchin's story must have been one of the "reports" (of aggressive behaviour when under the influence) that email refers to.

Disciplinary meeting on 30 December

88. A meeting took place on 30 December 2020 at the end of which the claimant was given notice of dismissal.

89. Mr Saunders' account of his thinking in setting up the meeting came across as a little muddled, but can be summarised as follows. After obtaining the statements and other evidence described above, he considered that (a) he had enough to ask the claimant for "an explanation" in a disciplinary meeting and (b) that the evidence he had of wrongdoing through drink was sufficient to potentially justify dismissal in the absence of a decent explanation. In his oral evidence he said he intended to put to her the results of his investigations and invite her to explain herself. He thought, he said, that in a case of gross misconduct he could simply sack her under the terms of the employment contract. I accept his evidence as to his thinking at the time, I have not identified any evidence that seriously calls into question his account of what his thinking was in the run up to the meeting. I also accept Mr Saunders evidence as showing that he did not definitely decide to dismiss the claimant in advance of the meeting, even though he clearly had it in mind as a possible or even likely outcome.

90. In his ET3 statement Mr Saunders refers to phoning the claimant to tell her she was to attend a disciplinary meeting. But when asked if he had told the claimant

the meeting on 30 December was a disciplinary one, he said no, he wanted to hear her story having carried out his investigation after seeing the police report. His answer was not consistent with his ET3 statement. The claimant's oral evidence was that he simply sent her a text message inviting her to a meeting on 30 December.

91. I preferred her evidence on this point, because her account is supported by the text messages in the bundle. The key message is timed at 11.29 (there is no date, but it must have been sent a few days before 30 December) and reads: "*Hi Donna, I need to talk to you and Stuart on Wednesday. What time would suit you both? Peter*". There are six further texts in the chain which led to the meeting being fixed for 11 am on Wednesday 30 December. None of them mentions the purpose of the meeting. Nor do any of them hint there had been a previous discussion about a disciplinary meeting. I would expect to see some sort of reference to that if it had taken place, and the texts were simply setting a date and time for a meeting already discussed.

92. There is nothing in the evidence (apart from the statement by Mr Saunders about a discussion in advance of those texts, which I have already dealt with) to suggest the claimant was informed of the purpose of the meeting before it took place. Nor is there anything to suggest she was given any information about Mr Saunders' investigations or concerns arising from them. On being asked if he told the claimant in advance of the meeting that her job was at risk, Mr Saunders' answer was "no".

93. In the light of the matters set out in paragraphs 91 and 92, I accept the claimant's evidence about what she was or was not told in advance of the meeting. I find (a) that there was no prior discussion about holding a disciplinary hearing, (b) that she was never informed in advance what the purpose of the meeting was or that her job was at risk, and (c) that she was not given any information in advance about Mr Saunders' concerns or the evidence he had obtained. I also find that she was never offered the chance to bring someone with her for support or informed of her right to do so. Mr Saunders did not claim to have done that. I note that Mr Carter was present at the meeting but that was in his own capacity.

94. Mr Saunders' account of what took place at the meeting was as follows. He put the matters he had found to the claimant, asked her for an explanation, and received a simple denial of any wrongdoing. He did not consider what she said in reply to be a satisfactory explanation, so he decided to dismiss her and handed her a dismissal letter that he prepared in advance in case of need. He considered her guilty of gross misconduct, but he decided to give her a month's notice, despite his belief that under the employment contract this was unnecessary.

95. The claimant's account was that there was no discussion and she was simply handed a notice of dismissal.

96. Mr Saunders' account was consistent with his account of how he came to set up the meeting and what he expected to happen. I found his account more credible, and more probable, than the claimant's and prefer his evidence as to what happened. I find that he did do the things described in paragraph 94. Apart from anything else, I would expect him to be aware that a disciplinary meeting was usual before dismissal. And there was little or no point in setting up a meeting if all he was going to do was hand over a written dismissal notice.

97. However, even on Mr Saunders' own evidence (which I accept) what he did at the meeting was very limited. He did not claim to have shown the claimant the written statements he had gathered or to have taken her through the allegations and evidence in any detail. I find that he did not do so. He said he asked the claimant to explain what had happened (i.e. the incidents and the drinking that he had discovered) because he "knew it was gross misconduct" and he referred to his right to dismiss for gross misconduct under the employment contract. This all suggests he had, before the meeting, made up his mind about the claimant's behaviour as amounting to misconduct, so that at the meeting he simply have told her about his conclusions on matters he thought were established by investigations. That view is supported by answers he gave in cross examination. When asked if he accepted that he should have given the claimant notice he was applying disciplinary procedures, he said he did so verbally (a statement I do not accept: see paragraphs 92 and 93 above) but also said that the claimant was "guilty according to the contract". When asked whether the claimant should have had fair notice of things in order to make a response, Mr Saunders said not if it was gross misconduct.

98. In the light of his own evidence, it is clear (and I so find) that Mr Saunders regarded the meeting as one at which he would decide whether to sack the claimant for the gross misconduct he had already identified in his own mind.

99. Mr Saunders agreed, when asked, that he did not recall looking at the respondent's disciplinary procedure in advance of the meeting. I understood that to refer to the procedure set out in the contract of employment. It is questionable how far that procedure was ever suitable or practicable for a small business with just one person able to act, but it was revealing that he admitted not looking at it. His evidence as a whole made it clear, in my view, that he did not realise that a fair procedure should have been followed before and during the meeting, with a readiness on his part to approach what was said by the employee in response to allegations and evidence with an open mind. He did not see it as his role to do that before making a fair decision as to the facts and what misconduct (if any) they disclosed and then moving on to decide on an appropriate sanction. He thought the contract entitled him to sack the claimant

on the spot for gross misconduct, and that he was acting perfectly reasonably in giving her a chance to explain herself (as he put it) before deciding whether or not to dismiss. It is not clear what sort of "explanation" he might have found to be satisfactory.

The dismissal

100. A dismissal letter dated 29 December was handed to the claimant at the meeting on 30 December 2020. It was in the following terms:
"*Following the incident on 4th of August in which both you and Stuart Carter were arrested by the police for being drunk and disorderly, I have made several enquiries in which I have discovered that you have been under the influence of alcohol on a number of occasions when on the premises.*
This is contrary to our licensing conditions and also constitutes an offence of gross misconduct under your contract of employment.
I am therefore giving you one month's notice of dismissal of your employment as manager of the Barrington Arms as of today."
The reference to "today" (in "as of today") must refer to 30 December.

101. Mr Saunders explained his decision to dismiss as in part due to his fear that the claimant's misconduct (as he saw it) put his premises licence at risk. Mr Saunders was questioned at length by Mr Dyson as to whether or not he really did believe there was a risk to the premises licence. I do not view the answers given as in any way undermining Mr Saunders' evidence that he had a real concern that the licence was at risk if the local authority became aware of misconduct of the kind in question. I accept that he did have such a concern, but note that he was not relying on it as a reason to dismiss but rather as part of his explanation as to why he considered the misconduct to be a serious matter.

102. The claimant was paid until 29 January 2021 when her employment terminated. She did not work after she was given notice, although she was asked to do a hand-over meeting with Mr Pinchin in mid-January. She left her flat at some point in the second half of January 2021.

Mr Pinchin's appointment as manager in place of the claimant

103. Mr Pinchin's evidence was that during December 2020 he became aware of Mr Saunders' concerns about the claimant and the worries it was causing him. He had been an accountant for 20 years but relocated in 2020 to live in the Saunders' annex where he was able to work from home. He thought he could offer to help run the hotel on a temporary basis, if Mr Saunders ended up sacking the claimant. He had some experience in hospitality previously. The change would involve a pay cut, as he was a contract professional who had no difficulty getting work, but he had enjoyed seeing more of his family and being in the country (rather than London) and was prepared to make a life decision to help his family. This evidence was not disputed and I accept it.

104. When asked when discussions took place about the possibility of taking over the pub, Mr Pinchin said it was in December and that he knew Mr Saunders was stressed about the situation with the claimant, but he did not want to mention anything until as he put it "at the last minute" he offered to help out if it turned out that Mr Saunders needed someone to step in. He said the first conversation happened before Christmas Day 2020, and came as a surprise to Mr Saunders, who wanted to think about it. They had a number of meetings about it, resulting he said, in Mr Saunders appearing relieved that he might have an option other than closing the pub if the claimant was dismissed. Mr Pinchin was getting quite excited about the possibility of changing his job, and they were speaking daily. This evidence was not disputed and I accept it.

105. Mr Pinchin, on being asked when he "was told the job was his", initially said it might be a week after beginning to talk about it, and then he said it might be after Christmas, but to his best knowledge it was before 30 December.

106. On re-examination by Mr Saunders (who said his recollection was that it was not until January because he could not have afforded to pay another salary in lockdown) Mr Pinchin said categorically that he was not appointed until January and he started on 1 February. I believed that answer and find that Mr Pinchin was appointed in January with effect from 1 February. Quite when that took place is not clear, but it did not happen before the meeting on 30 December.

107. However, the question Mr Dyson had asked was not about a formal appointment as such, but something looser – when did Mr Pinchin know that he would get the job. Mr Pinchin was adamant in the rest of his evidence that the claimant was not sacked to make way for him to take over, and that his offer to step in was not even a consideration for Mr Saunders until he had decided to sack her. He said he did not encourage Mr Saunders to oust the claimant from her job and simply made the offer in case it fitted with Mr Saunders' plans. I accept Mr Pinchin's evidence as an accurate account of his perception of these matters. But his answer to Mr Dyson's question did appear to conflict with other statements he made, and Mr Saunders' evidence, to the effect that no decision was made about him taking over until after the claimant was dismissed.

108. Having considered carefully the totality of Mr Pinchin's evidence, and that from Mr Saunders about his intentions for the meeting on 30 December, I have concluded, on the balance of probabilities, that he was not told before the meeting on 30 December that the job was definitely his. Mr Saunders may well have told, or hinted to, Mr Pinchin that if she was sacked, the job would be his, but I do not accept Mr Dyson's submission that Mr Pinchin was told the job was definitely his before the meeting. My view on that issue is consistent with my finding that the decision to dismiss was not made before the meeting. In my view it is more probable that in the run up to the meeting Mr Saunders was

relieved by the offer Mr Pinchin had made, as it gave him an option other than closure if he dismissed the claimant.

Relevant law

(a) Unfair dismissal

109. Section 94 of the Employment Rights Act 1996 gives employees with two years' or more service the right not to be unfairly dismissed. The material provisions of section 98 (dealing with the fairness of dismissals) are:

"98 General.

(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 (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

…

(b) relates to the conduct of the employee,

. . . .

(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.

…"

110. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the respondent does that the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted reasonably or unreasonably in dismissing for that reason. In misconduct dismissals, the decisions in *Burchell* 1978 IRLR 379 and *Post Office v Foley* 2000 IRLR 827 give well-established guidance on the correct approach when considering fairness within section 98(4). The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation and following a fair procedure.

111. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (*Iceland Frozen Foods Limited v Jones* 1982 IRLR 439, *Sainsbury's*

Supermarkets Limited v Hitt 2003 IRLR 23, and *London Ambulance Service NHS Trust v Small* 2009 IRLR 563).

(b) Unreasonable breach of ACAS Code

112. Section 207A(2) of the Employment Rights Act 1996 is as follows:

"(2) If in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%."

The ACAS Code of Practice on Grievance and Disciplinary Procedures is "a relevant Code of Practice" under the definition given by section 207A(4).

(c) Polkey reduction

113. The leading case of *Polkey v AE Dayton Services Ltd [1987] UKHL 8* and subsequent decisions establish that a compensatory award for future loss in an unfair dismissal case may be reduced to reflect the chance that an employee would have been dismissed fairly in any event had a fair process been followed. This involves an assessment of what the employer in question (rather than a hypothetical reasonable employer) would have done.

(d) Contributory fault

114. Issue 4 is governed by the following provisions of the Employment Rights Act 1996:

"122(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce the amount accordingly."

"123(6) 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."

Case law establishes that to fall within those provisions the conduct involved must be culpable or blameworthy. In the circumstances of this case the differences between the wording of the two provisions above are not material.

(e) Failure by employer to provide written particulars of employment contract

115. Section 1 of the Employment Rights Act 1996 lists various matters to be addressed in written particulars given by the employer to an employee when employment begins. If there are any changes later, section 4 requires the employer to give the employee written particulars of the change. The consequences of a failure to comply are dealt with in section 38 of the Employment Act 2002 which provides, so far as material, as follows:

"38 **Failure to give statement of employment particulars etc**
(1) …
(2) If in the case of proceedings to which this section applies—
(a) the employment tribunal finds in favour of the worker, but makes no award to him in respect of the claim to which the proceedings relate, and
(b) when the proceedings were begun, the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996 …
the tribunal must, subject to subsection (5), make an award of the minimum amount to be paid by the employer to the worker and may, if it considers it just and equitable in all the circumstances, award the higher amount instead.
…
(4) In subsections (2) and (3)--
(a) references to the minimum amount are to an amount equal to two weeks' pay, and
(b) references to the higher amount are to an amount equal to four weeks' pay.
(5) The duty under subsection (2) ... does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable.
(6) The amount of a week's pay of a worker shall—
(a) be calculated for the purposes of this section in accordance with Chapter 2 of Part 14 of the Employment Rights Act 1996, and
(b) not exceed the amount for the time being specified in section 227 of that Act (maximum amount of week's pay).
…"
Section 38 only applies if the claimant is found to have been unfairly dismissed. Subsection (2) applies if no compensation is awarded. Subsection (3) makes corresponding provision for the case where there is compensation.

Conclusions on the claim for unfair dismissal

Issue 1.1

116. The reason for dismissal given by the respondent in this case was what Mr Saunders' described in the dismissal letter as gross misconduct by the claimant being "under the influence of alcohol on a number of occasions when on the premises". The words "the premises" must refer to the hotel, and in particular the licensed premises, but not the claimant's flat. This was also the reason given in Mr Saunders' ET3 statement and in his oral evidence. There was some variation in the words used, but I do not view the variation as significant. It was clear, and the claimant was made aware, why she was being dismissed. Mr Saunders used the phrase "drunk in charge" on more than one occasion to describe the misconduct as he saw it.

117. Mr Saunders case was that he decided to dismiss on the basis of evidence acquired after 4 August 2020, that he believed that evidence demonstrated the misconduct described in the dismissal letter and that he dismissed the claimant on the basis of his belief in that misconduct.

118. Before deciding whether the reason or principal reason for dismissal was as stated in the dismissal letter, I must consider other possible reasons that were referred to during the hearing.

119. It is clear from the dismissal letter, his ET3 statement and his oral evidence that concerns about the possible consequences of the claimant's misconduct (as he saw it) for the premises licence played a part in Mr Saunders' decision to dismiss. But this was not in my view a separate reason for dismissal – it was something that in Mr Saunders' view added to the seriousness of the misconduct in terms of its effect on the business. In any event, I do not regard these concerns as indicating that the reason or principal reason for dismissal was not as stated in the dismissal letter.

120. Mr Dyson's submitted that I should conclude that the real reason or principal reason for dismissal was Mr Saunders' wish to replace the claimant with Mr Pinchin. However, I have found that Mr Pinchin was not appointed as manager, or told the job was definitely his, before the meeting on 30 December 2020 and that Mr Saunders did not decide to dismiss the claimant before that meeting. Nor have I identified any evidence (apart from Mr Pinchin's answers to Mr Dyson's questioning about when he "was told the job was his", which I have already addressed) that suggests the reason or principal reason for dismissal at that meeting was a wish to replace the claimant with Mr Pinchin. I am sure that Mr Pinchin's offer to take over as manager on a temporary basis gave Mr Saunders confidence that he could sack the claimant without closing the business (as it would have been difficult to recruit a replacement in early 2021), but that does not in my view bear out Mr Dyson's submission. I conclude, therefore, that a wish to replace the claimant with Mr Pinchin was not a reason for the dismissal, let alone the reason or principal reason.

121. I am sure the events of 4 August will have been in Mr Saunders' mind when he made the decision to dismiss. The claimant's undisputed drunken state when on the premises and interacting with customers and the police was doubtless one of the "occasions" referred to in the dismissal letter. However, Mr Saunders did not seek to justify dismissal on the basis of (as he saw it) any other wrongful actions on 4 August, such as leaving work during opening hours, leaving the premises in the charge of Ms Curtis or assaulting a customer and a police officer. It is certainly possible that all or any of those things were in his mind when he decided to dismiss, but I see no basis for concluding that this means the reason or principal reason for dismissal was not as described in the dismissal letter.

122. Finally, there were references in the written and oral evidence to other behaviour that might have been misconduct, including the claimant's use of casual staff, what Mr Saunders referred to as "illegal activity" or complaints by neighbours about late night drinking and noise. There was no evidence these matters played any part in the decision to dismiss.

123. For all the reasons given above, I am satisfied that the reason or principal reason for the dismissal was the reason stated in the dismissal letter. That is clearly a reason related to the claimant's conduct and so is a potentially fair reason under section 98(1) and (2) of the Employment Rights Act 1996.

Issue 1.2

124. Did Mr Saunders genuinely believe that the claimant committed the misconduct alleged? This was disputed, but I have not identified any evidence which tends to show that his written and oral evidence to the effect that he did have that belief is untrue. Indeed, I have already found that he concluded, in advance of the disciplinary meeting, that she was guilty of gross misconduct. My other findings indicate that once he became aware from PC Burton of the likely views of the police as to the events on 4 August 2020, he had increasing concerns about the claimant's behaviour. That is why he sent the warning email to the claimant on 17 October 2020 and started gathering evidence, which he clearly thought sufficient to prove the misconduct referred to in the dismissal letter.

125. The claimant made much in her evidence of the fact that Mr Saunders had initially supported her, after viewing the CCTV recording of the incident at the hotel on 4 August 2020, and had complained to the police about her treatment. This was true, but does not mean he could not have changed his mind. He found a chaotic situation when he went to the hotel that evening and it must have been a stressful and alarming experience after isolating at home for about 5 months. By 17 October (when he sent the warning email to the claimant) he had clearly changed his view as to what had happened, in the light of what PC Burton told him. His worries about her behaviour under the influence of alcohol were confirmed (as he saw it) by the police report and then the evidence he gathered in advance of the meeting on 30 December.

126. The claimant disputed the allegations of assault, but the issue (if there is one) is whether he relied on the assaults in relation to the dismissal and, if so, whether he did so on reasonable grounds. In my view the police report did provide him with reasonable grounds for thinking they had occurred. However, this is a side issue because Mr Saunders did not seek to rely on them in justifying his decision to dismiss, and there was no evidence that they played any significant part in the decision to dismiss.

127. I conclude that Mr Saunders genuinely believed, at the time he decided to dismiss the claimant, that she had committed the misconduct described in the dismissal letter.

Issue 1.3

128. Before reaching a conclusion on Issue 1.3, I must consider sub-issues 1.3.1 to 1.3.4. In all aspects of Issue 1.3 my task is to decide whether what Mr Saunders decided, and did, was in all the circumstances reasonable (i.e. within the band of reasonable responses). I must not substitute my own view as to what was the reasonable, or most reasonable, thing to decide or to do. In

reaching my conclusions I have taken into account the statutory consideration in section 98(4)(a) of the Employment Rights Act 1996 – the very small size of the respondent's business and the very limited administrative resources available to it. Mr Saunders was on his own in carrying out investigations, devising the procedure he followed and in reaching his decision to dismiss. In these circumstances the standards expected of the respondent (acting through Mr Saunders) are less rigorous and demanding as those that would apply to a larger or better resourced undertaking.

129. A further relevant circumstance is that Mr Saunders' freedom of action during the period from August to December 2020 was constrained by the effects of the pandemic on him and on others. This made "in person" interactions difficult, if possible at all. This matter is part of "the circumstances" to be considered in assessing the reasonableness of his actions. But it is not as significant a matter as the statutory consideration in section 98(4)(a).

Sub-issue 1.3.1

130. Did Mr Saunders have reasonable grounds for his belief that the claimant had committed the misconduct in question. In my view he did, given he had all the material set out below at the time of the dismissal on 30 December 2020. I leave on one side questions as to the fairness of the investigation and procedure leading to dismissal, as those are distinct issues in the case.

131. *Police report about the events on 4 August* This concluded that the claimant was drunk when she returned to the pub and later when taken to the police station. This report provides reasonable grounds for him to take the view that she was guilty of misconduct by returning to the hotel in a drunken state to take charge (as manager) and that she was, as she put it in her own written statement "only doing my job by asking two customers to leave, which as manager of the hotel I was fully entitled to do". It is a reasonable interpretation of the report and the other evidence about the events on 4 August, taken as a whole, that she was acting in her capacity as manager. Even if that was not the case, the events described in the report would still, in my view, provide grounds for concluding she committed misconduct: drunken behaviour in public on the premises is in my view capable of constituting misconduct by the manager given the likely effect on the business and its reputation.

132. *Mr Pinchin's oral account of first meeting the claimant in August 2020* This was not disputed. It was reasonable for Mr Saunders to take this account as evidence of misconduct on the part of the claimant in greeting Mr Pinchin (a visitor to the hotel she had not met before) in a drunken state and with foul language. It was also a reasonable inference for him to draw that she was in charge or acting as manager at the time. But even if she was not "on duty" at the time I consider that Mr Pinchin's account also provided Mr Saunders with reasonable grounds for the view that her conduct was still misconduct: it was wholly inappropriate and unacceptable behaviour that could only reflect badly on the respondent's business and reputation.

133. *The written statements obtained in late 2020* The claimant's position on these was that for various different reasons each author, other than Naomi Cooke, had reasons to want to get back at her and that, whatever they all said, she was never drunk when "on shift" behind the bar. Mr Saunders was not aware of her detailed objections until after the unfair dismissal claim was made. I consider it unlikely that his decision would have been different if he had been aware of them at the time of her dismissal because, on their face, the statements disclose behaviour that, in my view, provide reasonable grounds for the considering it as misconduct of the kind referred to in the dismissal letter.

134. Leah Maclean's statement can reasonably be taken as evidence that even when not working behind the bar, the claimant was still very much in charge as manager, and would do things (such as serving drinks to herself and others) that were not consistent with her acting wholly in a private capacity on the premises when not on duty behind the bar. Felicity Draper's statement refers to an occasion when the claimant was drinking in the bar with customers, and drunk, when she was supposed to be working. Naomi Cooke's statement, on its face, indicates that she witnessed occasions when the claimant was drunk when in the bar area and in charge of the premises. As with Leah Maclean's statement, Ms Cooke's statement can on its face be read reasonably as suggesting that the claimant remained in charge of the premises when in the bar area even if not working a shift behind the bar. And the last paragraph of her statement describes behaviour (screaming at customers when drunk) that can reasonably be seen as misconduct for the manager of licensed premises, whether or not she was formally on duty. Finally, there was Jane Stopp's statement, which I consider will have contained similar information to that in the email in the bundle, discussed in paragraphs 79 to 81 above.

135. Close questioning of Ms Cooke by Mr Dyson produced answers indicating that the behaviour described in her statement did not occur when the claimant was working on shift behind the bar. Ms Cooke also confirmed that the claimant had observed "Sober October" and she did not see her drinking during that month. But her written evidence that the claimant was on occasion drunk when in the bar area was not challenged. Mr Saunders did not have the benefit of the answers given by Ms Cooke at the disciplinary hearing. It would in my view be unreasonable to expect him to have elicited those answers himself. In any event. Ms Cooke's written statement can reasonably be read as suggesting more in terms of misconduct on the part of the claimant than did her oral answers in the hearing before me. I consider it reasonable for Mr Saunders to take the statement at face value.

136. I do not consider that the statement I have found he had from Jane Stopp should be disregarded. I am sure it disclosed some misconduct through drink. To that limited extent the statement was part of the evidence, and could reasonably be regarded as supporting his belief that she had committed misconduct.

137. I consider that these statements, taken together with the police report and the account from Mr Pinchin, provided reasonable grounds for Mr Saunders' belief in the claimant's misconduct through drink on the licensed premises on more than one occasion. There is no evidence to show he had any reason at the time of dismissal to think that the makers were biased against the claimant and were fabricating or exaggerating the facts recorded in their statements. On the face of this evidence, it was reasonable for Mr Saunders to conclude that there had been (a) occasions when the claimant was drunk on the licensed premises when working; (b) occasions when the claimant was drunk when sitting in the bar with customers, where the lines between being on and off duty were blurred, so that she remained in charge even if not on shift behind the bar; and (c) behaviour when drunk that constituted misconduct for a manager of the hotel on the premises, whether or not she was on duty or in charge at the time.

138. *Negative Trip Advisor reviews* Mr Dyson put a lot of questions to Mr Saunders about these reviews, suggesting that he should not have placed any reliance on anonymous reviews in taking disciplinary action and, ultimately, dismissing the claimant. He said Mr Saunders should have considered whether they might have been bogus and malicious and he also submitted that Mr Saunders had not looked for or taken account of positive reviews and that the positive reviews were also significant. Mr Saunders agreed that he had only looked at the negative reviews and had not thought about the possibility they were malicious, but I do not find that surprising as I believed his answers in cross-examination that he was not familiar with online feedback sites and was reliant on what he was shown or told by others. I do not accept Mr Dyson's suggestion that in this case, which turns on allegations of serious misconduct, positive reviews somehow cancel out negative reviews (unless, perhaps, they relate to the same occasion). There were three very negative reviews as far as the claimant was concerned referring to drink, amounting to around 25% of the total number of reviews identified over a period of 2 or 3 years.

139. Despite their being anonymous, I consider it would have been reasonable for Mr Saunders to consider them part of the evidence of misconduct. But it was not established that they did in fact play much part in forming his belief in the claimant's misconduct. He stated (and I accept) that their main relevance, for him, was that they led him to conclude that he needed to investigate further. He sought to justify dismissal on the basis of the other evidence.

140. *Oral evidence of the incident described in paragraph 74 above* I also consider this was also part of the evidence Mr Saunders could reasonably rely on as disclosing misconduct through drink. Mr Saunders said in his evidence that because he had not been able to speak to "Tina" from the Defence Academy he could not prove what happened. But the question is not whether he could prove at the hearing that the incident happened but, rather, whether he could reasonably consider, in forming his belief in the misconduct, that he had evidence of another incident of misconduct through drink. It was clear to me

from his oral evidence that he did believe what he had been told, but he thought he could not rely on it without direct proof. However, as with the Tripadvisor reviews, there was no evidence to suggest that it played more than a minor part in his assessment of the evidence.

141. I conclude that the material described above did provide Mr Saunders with reasonable grounds for his belief when he dismissed the claimant that she had committed misconduct through drink on several occasions, despite her denials at the meeting on 30 December.

Sub-issue 1.3.2.

142. In my view Mr Saunders carried out a reasonable investigation in all the circumstances, taking account of all the circumstances at the time including in particular the statutory consideration in section 98(4)(a) of the ERA 1996.

143. His decision to investigate himself was, in my view, reasonable. It was not practicable for anyone else to do this, given the small size of the respondent's business and the absence of any other director or manager in a position to do so. The respondent was in a poor financial state.

144. He approached a number of members of staff and former members of staff and obtained what information he could, as best as he could. He obtained written statements from those prepared to do so. His evidence (which I accept) was that not all of the information suggestive of misconduct he was given orally ended up in written statements. But he ended up with evidence of misconduct on 4 August 2020 and on other occasions.

145. Mr Saunders did not interview the claimant as part of the investigation. While he could have done so, this is not a requirement: paragraph 5 of the ACAS Code suggests that it is not necessarily unfair to investigate without an investigatory meeting with the employee. In my view the decision not to interview the claimant as part of the investigation was a reasonable one for him to take. He wanted to discover the totality of the evidence he could find before deciding what action to take and then approaching the claimant for an explanation.

146. While it would have been better if Mr Saunders had kept contemporaneous records of all the conversations he had with potential witnesses, I do not consider that his failure to do so renders the investigation unreasonable. Indeed, this may have worked to the claimant's advantage by limiting the material on which he relied to justify dismissal, as he appeared to think that he could only rely on the written evidence in his possession.

147. Mr Saunders judged that his investigations that produced sufficient evidence (in addition to the other evidence already in his possession) to show that on a number of occasions the manager of the hotel had committed misconduct on the premises through drink. I do not consider there was any need in the circumstances to do more, in order for the investigation to be seen

as a reasonable investigation. The investigation was in my view within the band of reasonable responses.

Sub-issue 1.3.3

148. The procedure adopted in this case by Mr Saunders before and at the disciplinary meeting was not a reasonable procedure. It was outside the range of reasonable responses. His own evidence in answering questions from Mr Dyson, taken with other findings I have made, provide ample justification for my conclusion on this sub-issue.

149. I consider that it was reasonable for Mr Saunders to conduct the investigation and the disciplinary meeting as well as making the disciplinary decisions at the meeting. There was nobody else in the business able to do those things. But in combining the investigation role and the decision-maker role he needed to take care to carry out both roles fairly.

150. Mr Saunders' position was that the material he had before the meeting on 30 December demonstrating gross misconduct entitled him (under the employment contract) to dismiss the claimant. In the absence of a satisfactory explanation (as he put it) at the meeting he expected to dismiss her. He said in his evidence that he was unaware of the content of the ACAS Code or of any of the basic requirements for procedural fairness. I have no reason to doubt that evidence, but ignorance of those matters is no excuse for failing to act fairly. He also admitted not considering the disciplinary procedure set out in the employment contract. In these circumstances it is not surprising that the result was an unfair procedure.

151. The claimant's position was that the procedure adopted fell well short of being a reasonable or fair procedure. She was not informed that the meeting on 30 December was a disciplinary meeting, she was not informed of her right to be accompanied, she was not informed in any detail of the allegations or evidence against her in advance of the meeting or at the meeting. In the light of my findings as to what happened before, and at, the meeting I conclude that all these criticisms are well-founded. Mr Saunders should have done all those things.

152. Mr Dyson submitted that Mr Saunders had made up his mind to dismiss before the meeting and that he had sought to ambush the claimant at the meeting by asserting, without any prior notice, that he had evidence of serious misconduct and then giving her written notice of dismissal.

153. In the light of my findings on what happened before the meeting I accept Mr Dyson's submission that Mr Saunders ambushed the claimant at the meeting, giving her no practical chance to defend herself against serious allegations. Employees are entitled to a reasonable chance to engage with the case against them, including by producing evidence or making submissions on

questions of fact (or law) and, where relevant, on the appropriate disciplinary response to any misconduct found. But the prerequisite to being able to do that is sufficient notice of the case against them, including statements from witnesses and other evidence, in enough detail to prepare a considered response. The claimant was not given any of that, a failure that in my view fatally tainted the procedure adopted.

154. I have found that Mr Saunders did not decide to dismiss in advance of the meeting and that at the meeting he did give the claimant some idea of what he thought the evidence established and what was alleged against her. But those things do not begin to make the procedure fair overall.

155. I have also found that Mr Saunders concluded before the meeting the claimant was guilty of gross misconduct. That is another serious defect in the procedure, because he should have been prepared to allow the claimant to challenge the factual evidence if she wished, before reaching a fair decision on the facts in the light of all the evidence.

156. I believed Mr Saunders when he said he thought he had acted fairly in gathering evidence before concluding the claimant was guilty of gross misconduct and then giving her the chance to give an explanation. But his belief in that is not the issue. The issue is whether the procedure he adopted was a reasonable one to adopt. It was not, for the reasons set out above.

Sub-issue 1.3.4

157. My conclusion on sub-issue 1.3.3 leads more or less inexorably to the conclusion that dismissal was not within the range of reasonable responses in this case. The claimant never had the chance to engage with the case against her, and there were many other serious defects in the procedure. The failures were so fundamental that that a decision to dismiss was not (and could never be) a reasonable response. This is not a case where the facts were so clear that only one outcome was possible.

Issue 1.3: general

158. It follows from my conclusions on sub-issues 1.3.1 to 1.3.4 that Mr Saunders did not act reasonably in all the circumstances in treating his belief in the misconduct in question as a sufficient reason to dismiss the claimant. The decision was procedurally unfair and so dismissal was not within the range of reasonable responses.

159. Mr Dyson submitted that, even taking the case against the claimant at its highest, none of the allegations against her amounted to gross misconduct and under the respondent's own disciplinary policy a written warning or final warning would be the only reasonable response. I do not agree with that submission, although it becomes academic in the light of my conclusions on sub-issues 1.3.3 and 1.3.4. The misconduct in question could in my view be reasonably seen by an employer as a serious breach of discipline that constituted misconduct justifying dismissal or gross misconduct justifying summary

dismissal. Mr Dyson also invited me to conclude that, even if I considered any conduct by the claimant could reasonably be regarded by Mr Saunders as misconduct (which I do), I should nonetheless conclude that it was too minor or trivial to justify dismissal. Again, my conclusion that the dismissal was procedurally unfair renders the point academic. But I do not accept the submission. The misconduct identified by Mr Saunders was not necessarily "minor or trivial" but something he could reasonably take as something justifying dismissal.

160. My conclusion on Issue 1.3 means that the claimant was unfairly dismissed. This entitles her in principle to compensation comprising a basic award and a compensatory award, but subject to any uplift relating to the ACAS Code (Issue 2), any reduction in the compensatory award under the Polkey principle (Issue 3) or any reduction for contributory fault (Issue 4).

Issue 2 (unreasonable failure to comply with ACAS Code)

161. In the light of my conclusion on contributory fault, I do not need to determine Issue 2, but my conclusions would have been as follows.

162. The ACAS Code of Practice on Disciplinary and Grievance Procedures applied in this case. It contains provisions about investigations in disciplinary matters and the procedures to be followed before taking disciplinary decisions. I do not consider that the investigation in this case (which I have concluded was a reasonable investigation: sub-issue 1.3.2), failed to comply with paragraphs 5 to 8 of the ACAS Code. However, the procedural defects identified in my conclusions on the fairness of the procedure adopted in this case do involve a number of failures to comply with other provisions of the Code.

163. The key paragraphs of the Code are as follows:

"9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.

10. The notifications should also give details of the time and venue of the disciplinary meeting and advise the employees of their right to be accompanied at the meeting. Hold a meeting with the employee to discuss the problem.

11. The meeting should be held without delay whilst allowing the employee reasonable time to prepare their case.

12. Employers and employees (and their companions) should make every effort to attend the meeting. At the meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses. Where an employer or employee intends to call relevant witnesses they should give advance notice that they intend to do this.

...

23. Some acts, termed gross misconduct, are so serious in themselves or have such serious consequences that they may call for dismissal without notice for a first offence. But a fair disciplinary process should always be followed, before dismissing for gross misconduct."

164. None of the requirements in paragraph 9 of the Code were complied with. The claimant was not notified that there was a disciplinary case for her to answer and nor was she given information about the alleged misconduct and its possible consequences (which clearly included dismissal) or copies of the written evidence. I see no reason for Mr Saunders to have thought disclosing the evidence to her was in any way inappropriate. As a result of these failures, she had no chance to answer the case against her.

165. There was a failure to comply with paragraph 10 of the Code, because the claimant was not informed of her right to be accompanied at the meeting. In view of all the other procedural failures, the question under paragraph 11 of the Code whether she was allowed enough time to prepare her case is somewhat academic. But she was only given a few days' notice of a meeting to be held on 30 December 2020 in the Christmas holiday period during a Government-ordered lockdown. If she had had the information she was entitled to, she plainly did not have a reasonable chance to prepare a case. That might have included seeking legal advice or communicating with possible witnesses. In my view this amounts to a failure to comply with paragraph 11.

166. My findings as to what took place at the disciplinary meeting show that there was only very limited compliance with some of paragraph 12 of the Code. Mr Saunders did not "go through the evidence" and give her a proper opportunity to "answer any allegations made", to "ask questions, present evidence and call relevant witnesses" or to "raise points about any information provided by witnesses". These were all failures to comply with paragraph 12.

167. The failure to follow a fair disciplinary process is a breach of paragraph 23 of the Code. But as that failure depends on exactly the same matters as the breaches of paragraphs 9 to 12 described above it cannot, in my view, be fairly treated as a further breach of the Code.

168. The failures to comply with paragraphs 9 to 12 of the Code were serious and fundamental and are plainly "unreasonable" in the sense used in section 207A(2) of the ERA 1996. Mr Saunders misunderstood the law of unfair dismissal and was ignorant of the ACAS Code and the minimum requirements for a fair disciplinary procedure, but that is no excuse for the failures that occurred.

169. I would have considered it just and equitable to increase any award payable to the claimant by 20%. The breaches were significant and fundamental as the procedure was unfair. But I would give the respondent some credit for carrying out an investigation and obtaining evidence of misconduct, and holding a disciplinary meeting, before dismissing the claimant.

Issue 3 (Polkey reduction)

170. In the light of my conclusion on contributory fault, I do not need to determine Issue 3 either, but my conclusions would have been as follows.

171. Mr Dyson invited me to conclude that there was no chance (or at most no more than a slim chance) of the respondent fairly dismissing the claimant had a fair procedure been followed. In this context a fair procedure would have been one without the defects identified in my conclusions on issue 1.3. However, I have concluded that there is a high chance that dismissal would have been the result of a fair proceeding. This is because the material that Mr Saunders relied on was, in my view, ample to justify a finding of serious misconduct on more than one occasion, and I consider it very likely that he would have made that finding and then reached the same decision to dismiss, even if the claimant had been able to put her case forward properly at the disciplinary meeting.

172. If a fair procedure had been followed the claimant would have been able to explain why she thought three of the witnesses Mr Saunders spoke to had reason to be hostile to her, she could have made points about the TripAdvisor reviews and the evidence that Mr Saunders relied on in deciding to dismiss, and she would have explained her case that she was never drunk when working behind the bar and that some at least of the "occasions" referred to in her dismissal letter were (as she saw it) in her own time when she was not acting as manager.

173. Even under a fair procedure the claimant would not have had the chance to cross-examine witnesses and, in any event, she would not have had Mr Dyson's forensic skill. So while Mr Dyson's cross-examination of Ms Cooke elicited answers inconsistent with her written statement, so far as it states she had seen the claimant drunk when working on shift behind the bar, it is in my view unlikely that at the disciplinary meeting the claimant would have been in a position to challenge the details of Ms Cooke's statement in the same way. But even if she had done so and Mr Saunders believed her assertion that she was not drunk on duty behind the bar, Ms Cooke's statement discloses behaviour when drunk that I consider Mr Saunders would be very likely to regard, reasonably, as serious misconduct by his manager that would justify dismissal.

174. I consider that there would only be a modest chance of Mr Saunders being persuaded to completely disregard the written evidence he had from Naomi Cooke, Leah Maclean, Felicity Draper and Jane Stopp. It is more likely that he would still have concluded that the written evidence disclosed behaviour when in charge of the premises that he would have reasonably regarded as misconduct for the manager of licensed premises that justified dismissal. There was evidence that when the claimant was in the bar area drinking, she was still in practice in charge, and seen as in charge. I also consider that he would probably have concluded, reasonably, that it was serious misconduct on her part as manager to behave drunkenly in the bar area even if not formally on duty or otherwise in charge. That is because he would probably have concluded

that that sort of behaviour reflected badly on the respondent and would damage its business (by putting off some potential customers and reducing takings).

175. The claimant would have been able to assert that she was acting in a private capacity on 4 August, that she was not required to be at work on that day and that she did not assault anyone, so that her drunken state (which was not disputed) did not constitute misconduct. However, I am sure that Mr Saunders would still have taken the police report as the prime evidence of what happened, and concluded that her behaviour on that day constituted serious misbehaviour when acting as manager.

176. While I consider it highly likely that the outcome in terms of dismissal for gross misconduct would have been the same, had a fair procedure had been followed, I accept that there must be a chance that the outcome might have been different. But I consider that to be a modest chance, and doing the best I can on the material before me I assess that chance at 15%. Accordingly, the chance of a fair dismissal was 85%. This percentage reduction would have applied to reduce any compensatory award had the claimant been entitled to one.

Issue 4 (contributory fault)

177. Did the claimant cause or contribute to her dismissal by blameworthy conduct before notice of dismissal was given to her on 30 December 2020? I have concluded that the answer to this question is “yes” for the following reasons.

178. On 4 August 2020 the claimant gave herself the day off but did not make proper arrangements for leaving the premises in the charge of an appropriate person, which was her responsibility as manager of the hotel. She relied instead on her friend Ms Curtis, who was not on the hotel payroll and was not an appropriate person. There was no evidence to suggest that the claimant had any reason to think she was an appropriate person. It was in my view completely irresponsible to allow the licensed premises to remain open in those circumstances. This failure breached her duties as manager and was blameworthy conduct that was a cause of her dismissal. An appropriate person left in charge would not have needed to call her for assistance in dealing with two troublesome customers.

179. The claimant’s conduct in going drinking in another pub in Shrivenham that afternoon was not in itself blameworthy conduct. But she took a massive risk in drinking heavily in the vicinity of the hotel, having left it in charge of someone inexperienced who might need support and was likely to call her in the event of trouble, as she did. Her actions in returning to take charge of things and interacting with customers and the police when drunk were blameworthy conduct which was another cause of her dismissal. It was open to her instead to call the police or a more experienced member of staff, such as her mother who she claimed was available.

180. The incident involving Mr Pinchin when he first visited the hotel in August 2020 was a case of boorish behaviour when drunk on the premises. Whether or not she was on duty or acting as manager or a person in charge at the time, this was unacceptable and blameworthy conduct on the part of the manager of a hotel and pub. The manager of a hotel should not be greeting members of the public when drunk and swearing at them. This conduct contributed to her dismissal.

181. As described above, Mr Saunders had other evidence that the claimant had been drunk (and behaving badly when drunk) on the licensed premises on a number of other occasions, both when on duty behind the bar and at other times. This was blameworthy conduct that caused or contributed to her dismissal. Even though Ms Cooke in her oral evidence agreed that she had not seen the claimant drunk when on duty, there was other evidence of this. But even if I disregard the evidence that she was sometimes drunk on duty (as Mr Dyson invited me to do) there was no dispute that there had been occasions when she had been drunk (and behaving badly when drunk) on the licensed premises, and my view that this was blameworthy conduct is not affected. There was cogent evidence that she still expected to be treated as "the boss" and behaved as someone in charge when sitting drinking with customers, doing things like pouring herself or customers drinks. But even if in some of the situations described in the evidence she was not acting as manager or as someone in charge, I would still regard drunkenness in public on the premises as blameworthy conduct. That is because she was still the manager (and the person responsible for compliance with the premises licence) and would be known by locals as such, and her behaviour was very likely to adversely affect the business and its reputation. It is in my view disingenuous for Mr Dyson to submit that on such occasions she was there solely in a private capacity and that her behaviour was her own business and nobody else's.

182. So I conclude, in relation to Issue 4.1, that blameworthy conduct of the claimant did cause or contribute to the dismissal. I turn next to Issue 4.2: would it be just and equitable to reduce the claimant's basic and compensatory awards and, if so, by what proportion (up to 100%). The actions I have concluded constitute blameworthy conduct are each of a serious nature, but the answer to the question posed by Issue 4.2 falls to be determined by judging them collectively. In my view her blameworthy conduct, taken as a whole, was such that it is just and equitable in all the circumstances to reduce the basic and compensatory awards by 100%. The claimant had only herself to blame for providing ample grounds for her dismissal.

Issue 5 (remedy)

183. In view of my conclusions on Issue 4 (contributory fault), the claimant is not entitled to any basic or compensatory award for unfair dismissal. Accordingly, I make no findings or decisions on the matters covered by Issue 5.1 (compensatory award) or 5.2 (basic award).

Issue 6 (failure to give written particulars of the employment contract)

184. As I have concluded that the claimant was unfairly dismissed but have not made an award, section 38(2) of the EA 2002 applies. The only document relied on by the respondent to show compliance with sections 1 and 4 of the ERA 1996 is the written contract in the bundle. There was no evidence of anything else being notified to her in any other document.

185. The respondent did not provide the claimant with all the required particulars of her employment contract. The written contract is defective in terms of providing all those particulars. I have identified the following failures (the words in square brackets indicate the particular provision of the ERA 1996 that contains the relevant requirement):
(a) *Name of employer* [section 1(3)(a)]: this is given as a partnership between Mr Saunders and his wife. The claimant's pay slips in the bundle, the first from January 2020, all refer to the respondent as the employer. It is not clear if the employer was the respondent when the claimant was appointed but even if the clause was correct in October 2017, it had become incorrect by the end of 2019 at the latest, and should have been corrected. It is important for employees to be in no doubt as to who their employer is.
(b) *Salary* [section 1(4)(a)]: the claimant's annual salary at the time of her dismissal was in the region of £30,000, rather than the "£25,000" stated in the contract. This should have been updated after any pay rise, although in practice her pay slips would have indicated to her what her salary was at any time.
(c) *Terms and conditions relating to hours of work* [section 1(4)(c)]: the written contract says "the company's normal hours of work are to be worked as needed but not to exceed 48 hours per week unless …". There are no details of what the "normal hours of work" are or her expected working pattern over the week, including any day or days off in lieu of weekend or bank holiday working. Doubtless flexibility was needed on both sides, but the absence of any detail on these matters is my view a serious failure to comply with the duties in section 1 and 4 of the Employment Rights Act 1996. Much more detail was needed to give a clear summary of whatever the contract required of her. Some of the factual disputes at the hearing arose due to the fact the arrangements on these matters were unclear. Whether, for example, she was entitled to a regular day off only, or more than one, could and should have been recorded in writing.
(d) *Holidays and holiday pay etc* [section 1(4)(b)]: The written contract included provision on these matters but the gaps left for figures to be added in were not filled. The omissions included the respondent's leave year (key to the operation of the provisions as a whole), the number of days holiday she was entitled to per year and the accrual rate per month.
(e) *Accommodation* [section 1(4)(da)]. The claimant's job was a live-in one, and free accommodation was an important part of her remuneration package. The written contract did not mention the accommodation or the terms on which it was offered or occupied.

186. Mr Saunders' took what he thought was a respectable form of contract off the internet and tried to adapt it to cover the claimant's contract. He appeared to be unaware of the statutory requirements, and claimed that what

he did was a reasonable thing for a small employer to do. But that is not the issue. Sections 1 and 4 of the Employment Rights Act impose mandatory duties on all employers, and ignorance of the law or lack of administrative means is no excuse for failure to comply.

187. As I have concluded that the written contract did not give all the necessary particulars, I must turn to Issue 6.2 and decide what award (if any) to make to the claimant. I have not identified anything that might constitute "exceptional circumstances" justifying a decision to make no award. Under section 38 of the EA 2002 I must therefore award the claimant two weeks' pay, unless I consider it just and equitable to award the higher amount of four weeks' pay. In determining whether to award the higher amount, I must take account of the extent and nature of the breaches and their impact on the claimant.

188. This is not a case where there was no statement of particulars at all, as the written contract gave many of the required particulars. In terms of impact on the claimant and significance it is not clear to me that all of the items in the list had significant practical impact on the claimant. She appeared to know who her employer was (as the claims in this case were made against it), her pay slips and annual P60 forms would reveal her current salary, and she had been in post for over three years when dismissed and appeared to have taken holiday and occupied the flat without any difficulties. Item (c) in paragraph 185 above is more important in terms of practical impact as lack of clarity on expectations and obligations around working hours and patterns of working can obviously lead to problems. For example, there was plainly a difference of opinion between her and Mr Saunders as to whether or not she could have other days than Monday as a "non-working day", which surfaced as a result of these proceedings.

189. I conclude in these circumstances that it is not just and equitable to award the higher amount, so I award the minimum amount of two weeks' pay to the claimant. She asserted in her Schedule of Loss that a week's pay for her under the relevant statutory provisions was £538 (the maximum permissible amount when her employment ended), because her weekly salary exceeded that amount. This was not disputed, so I accept that that sum is a weeks' pay for her. The respondent must pay the claimant £1076.

Employment Judge Hogarth
Dated: 27 November 2022

Sent to the parties on:
06 December 2022
By Mr J McCormick

For the Tribunal Office