EMPLOYMENT TRIBUNALS

Claimant: Mrs Lorraine Moynan

Respondents: (1) Mr Paul Jenkins & (2) Mr Simon Davis,
for and on behalf of the members of the
East Midlands Airport Taxi Association (an unincorporated association)

FINAL HEARING

Heard at: Nottingham **On:** 16 March 2017

Before: Employment Judge Camp (sitting alone)

Appearances
For the claimant: in person
For the respondents: Mr P Jenkins, respondent (1)

RESERVED JUDGMENT & ORDER

(1) By consent, the respondent is amended to [as above]: (1) Mr Paul Jenkins & (2) Mr Simon Davis, for and on behalf of the members of the East Midlands Airport Taxi Association (an unincorporated association).

(2) The claimant was unfairly dismissed.

(3) If the claimant is to be awarded compensation for unfair dismissal, the following adjustments will be made to her basic award and any compensatory award:

   a. a 25 percent reduction to both types of aware, pursuant to sections 122(2) and 123(6) of the Employment Rights Act 1996;

   b. a 10 percent increase to any compensatory aware, pursuant to section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992.

(4) The claimant was wrongfully dismissed, i.e. was dismissed without notice in breach of contract, and is entitled to damages.

(5) The parties must within 28 days of the date this is sent to them submit to the tribunal their proposals, agreed if at all possible, for case management orders to enable the tribunal to deal with remedy, including a realistic time estimate for a remedy hearing and any dates of unavailability.

REASONS

1. This is an unfair and wrongful dismissal case. The respondent is an unincorporated association that operates as a private hire taxi 'firm' based in Castle Donington. At the relevant time, it had nine or so "members", also sometimes called "shareholders", all self-employed drivers, and two employees, of whom the claimant, Lorraine Moynan, was one. She was a desk controller; in other words, she took and organised bookings. She was employed from 6 January 2014 until her summary dismissal on 15 July 2016. The letter of dismissal (dated 15 July 2016) gave the reasons for it as, "*gross misconduct (behaviour) and capability (job performance)*".

2. The respondent (which I shall also refer to as the "Association") is a collective and seems to take decisions collectively. Apparently this was the first time it had ever sacked anybody. It lacked anything like a dedicated HR function. It had and has 'officers' of a kind, but these are purely voluntary positions and the people occupying those positions claim no particular expertise in HR matters.

3. The respondent apparently took some advice before disciplining and dismissing the claimant and it is clear that they have had some advice in the past. For example: the respondent has and had a written disciplinary procedure; in December 2015, there was an informal meeting with the claimant about capability concerns, at the end of which the respondent's then Secretary, a Mr Brooke, wrote a letter to her in terms that were fairly obviously the product of advice. The respondent was not, then, a completely unsophisticated employer, entirely ignorant of how properly to conduct relationships with its employees and without access to sources of employment advice and assistance.

4. When it dismissed the claimant, I accept the respondent probably thought that it was doing the right thing and going about it in the right way. The respondent took advice and even got some information from ACAS in the form of what are described in the Response form as "*ACAS letter templates*". Unfortunately, if it was aware of the ACAS Code of Practice, it did not take it into account or begin to follow it. It didn't even stick to its own written disciplinary procedure properly.

5. The two main issues that nominally arise are:

   5.1 what was the principal reason for dismissal and was it a reason relating to the claimant's conduct?

   5.2 was the dismissal fair or unfair in all the circumstances, in accordance with equity and the substantial merits of the case, pursuant to section 98(4) of the Employment Rights Act 1996 ("ERA")?

6. Deciding those two main issues has involved me looking at the following subsidiary issues:

   6.1 did the respondent genuinely believe the claimant guilty of the misconduct alleged?

   6.2 did the respondent have reasonable grounds on which to sustain that belief?

6.3 had the respondent carried out as much investigation into the matter as was reasonable in the circumstances at the final stage at which it formed that belief?

6.4 did the respondent in deciding that dismissal was the appropriate sanction and in relation to all other matters, including the procedure followed, act as a reasonable employer might have done, i.e. within the so-called 'band of reasonable responses'?

7. It was agreed at the start of the hearing that if I took the view that the claimant was unfairly dismissed, I would decide the following issues at the same time as deciding liability for unfair dismissal:

7.1 if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed (the "Polkey" issue – see Polkey v AE Dayton Services Ltd [1987] UKHL 8; see also paragraph 54 of the EAT's decision in Software 2000 Ltd v Andrews [2007] ICR 825)?

7.2 if compensation is awarded, would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?

7.3 did the claimant, by blameworthy or culpable actions, cause or contribute to his dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

7.4 if the respondent unreasonably failed to comply with ACAS Code of Practice 1 in relation to the claimant's dismissal, would it be just and equitable in all the circumstances to increase any compensatory award and if so, by what percentage, up to a maximum of 25 percent, pursuant to section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 ("section 207A")?

8. The relevant law appears substantially in the issues as set out above and in the legislation referred to above. My starting point has been the wording of ERA section 98 itself. I have also had in mind the well-known 'Burchell test', originally expounded in British Home Stores Limited v Burchell [1978] IRLR 379. I note that the burden of proving 'general reasonableness' under ERA section 98(4) is not on the employer as it was when Burchell was decided; the burden of proving a potentially fair reason under subsection (1) is [on the employer], but the burden is neutral under subsection (4).

9. In relation to ERA section 98(4), I have considered the whole of the well-known passage from the judgment of the EAT in Iceland Frozen Foods v Jones [1982] IRLR 439 at paragraph 24, which includes a reference to the "*band of reasonable responses*" test. That test, which I shall also call the "*band of reasonableness*" test, applies in all circumstances, to both procedural and

substantive questions: see Sainsbury's Supermarkets Ltd v Hitt [2002] EWCA Civ 1588.

10. Hand in hand with the fact that the band of reasonableness test applies is the fact that I may not substitute my view of what should have been done for that of the reasonable employer. I have to guard myself against slipping "*into the substitution mindset*" (London Ambulance Service NHS Trust v Small [2009] IRLR 563 at paragraph 43) and remind myself that only if the respondent acted as no reasonable employer could have done is the dismissal unfair. Nevertheless (see Newbound v Thames Water Utilities Ltd [2015] EWCA Civ 677): the 'band of reasonable responses' test is not infinitely wide; it is important not to overlook ERA section 98(4)(b); Parliament did not intend the tribunal's consideration of a case of this kind simply to be a matter of procedural box-ticking.

11. In relation to the issue of fairness under ERA section 98(4), I have also taken into account the ACAS Code of Practice on Disciplinary and Grievance procedures. Compliance or non-compliance with the Code is not, of course, determinative of that issue.

12. In relation to ERA sections 122(2) and 123(6), I have sought to apply the law as set out in paragraphs 8 to 12 of the decision of the EAT (HH Judge Eady QC) in Jinadu v Docklands Buses Ltd [2016] UKEAT 0166_16_3110.

13. I used the word "*nominally*" before setting out the issues (above) because, at least in terms of liability for unfair dismissal, there can be absolutely no doubt at all that this was an unfair dismissal.

14. As mentioned above, two reasons were cited in the letter of dismissal: conduct and capability. However, in his oral evidence, the person supposedly making the decision to dismiss – Mr Paul Jenkins, who was then a member of the Association but has since become its Secretary, in place of Mr Brooke – told me that misconduct was the only reason for dismissal; and that although the respondent did have concerns about the claimant's performance, they would not have resulted in dismissal. The claimant's appeal against dismissal was decided by Mr Simon Davis (respondent (2); the respondent's "Chairman") and a colleague. Mr Davis told me that although, unlike Mr Jenkins, he did take capability concerns into account in rejecting the claimant's appeal, the reason – certainly the principal reason – for the appeal decision was one relating to the claimant's conduct, not to her capability. Further, only conduct was relied on by the respondent in relation to the remedy issues referred to in paragraph 7 above.

15. Quite a lot of evidence relating to capability was put before me. In the above circumstances, however, I take the view that it is largely irrelevant to the issues I have to decide. In these Reasons I am therefore concentrating on the conduct issue.

16. There were two incidents of alleged misconduct relied on by the respondent in relation to the claimant's dismissal. The first occurred on or about 11 March 2016. There was a verbal altercation between the claimant and Mr Davis,

following which it is alleged the claimant threw a medium sized pad of post-it notes and a biro at him. Although there was at most one witness to this incident, other than the claimant and Mr Davis, and no witnesses from the respondent, it was apparently the subject of discussion / gossip amongst all the members of the Association within a few days. At this time, Mr Davis gave his version of events to, amongst others, Mr Jenkins.

17. The second incident took place on or about 19 May 2016. Various different dates have been given for this incident. The date of 19 May is taken from letters dated 18 November 2016 written for the purposes of these proceedings and signed by the two people (other than the claimant) involved in this incident: Mr John Wilson and Mr Jenkins.

18. The basic allegation in relation to this second incident is that the claimant called Mr Wilson, one of the respondent's members, a "*twat*" to his face and in the presence of Mr Jenkins.

19. For reasons that are unclear to me and which no one from the respondent was able to assist me with, it took the respondent a month or so from the incident in May to do anything about it; and three months or so from the incident in March to do anything about that. The respondent holds regular business development meetings, which are the respondent's equivalent of company board meetings. All or almost all members attended at a relevant meeting sometime in June. I assume it was in late June because it led directly to disciplinary action, and that didn't happen until July.

20. One of the matters that was discussed at this particular meeting, apparently as an item on the agenda, was potentially taking disciplinary action against the claimant. The above-mentioned two incidents, amongst other things, were discussed. Mr Davis gave his version of events of the March incident, which anyway had been discussed between the members a number of times previously; Mr Jenkins (and presumably Mr Wilson) discussed the May incident too.

21. In his oral evidence, Mr Jenkins told me very clearly – I asked him to repeat himself several times because I found this part of his evidence so surprising – that at this meeting in June (i.e. before even the possibility of disciplinary action about these two incidents had been mentioned to the claimant and without her having been spoken to about them at all) a collective decision was taken by the members of the respondent that the claimant had committed acts of gross misconduct.

22. I also find that the understanding of the respondent's members, including Mr Jenkins, at the time of the meeting was that if the claimant was guilty of gross misconduct then she should be dismissed.

23. Mr Jenkins's oral evidence about whether a decision to dismiss had been taken shifted. When I first asked him about it, he told me in unambiguous terms that the members decided in their June meeting that the claimant should be dismissed. That evidence fits with other parts of the respondent's evidence. For example, in the minutes of the disciplinary hearing, which took place on 15 July

and which I shall come to in a moment, appears the following: "*Paul Jenkins reiterated that the Violent Conduct and Abusive language constituted Gross Misconduct, Lorraine clearly unhappy rose from her seat to say "Am I being dismissed" and turned to leave the office as Paul Jenkins said "yes"*." It also fits with the fact that when I specifically asked Mr Jenkins, during his oral evidence, whether consideration had been given to the possibility of not dismissing the claimant even if she was guilty of gross misconduct, the gist of his reply was that he did not understand the question.

24. When I asked Mr Jenkins to confirm the evidence he had given about the Association having decided to dismiss at the June business development meeting, however, he said something along these lines: "*We decided that we had grounds to undertake a disciplinary hearing to discuss gross misconduct*". Quite what he meant by this if it was not that the respondent had decided the claimant was guilty of gross misconduct and that a disciplinary hearing should be convened to dismiss her was unclear. At no stage during his evidence, and nowhere in the documentary evidence, was it suggested by the respondent or on its behalf that any outcome other than dismissal was considered; and I find that it was not.

25. The claimant's fate was sealed at the business development meeting in June. The disciplinary process that followed was purely going through the motions to reach a predetermined end.

26. This brings me to the first issue in the case, which is: what was the reason – or principal reason – for dismissal and was it a genuine belief in the claimant's guilt of misconduct?

27. Mr Jenkins was nominally the principal decision-maker at the disciplinary meeting in July. What was in his mind was purely the two incidents of alleged misconduct. But the problem with this from the respondent's perspective is that, as I have just found, the decision to dismiss was not taken at that meeting; it was taken at the business development meeting in June.

28. The decision to dismiss was a collective decision of up to nine people. They might well all have had their own different reasons for thinking it was appropriate to dismiss the claimant. It is not in dispute that there were at the relevant time concerns about the claimant's capability. This brings me to the unanswered question: why, if this alleged misconduct was so serious that it merited summary dismissal, was nothing done about it until June/July?

29. My strong suspicion in this case is that the main reason, in at least some of the decision-makers' minds (the decision makers being the members present at the business development meeting) was their concerns – legitimate or otherwise – about the claimant's performance. I also suspect that having taken advice, it was appreciated that the claimant could not be dismissed for poor performance there and then but would have to be put through a capability process; and that conduct was thought to be a better 'hook' to hang the claimant's dismissal on. The allegation that this was the case was not, however, put to either of the respondent's witnesses – Mr Davis and Mr Jenkins. I am therefore bound to accept their evidence that from their point of view, the principal reason for

dismissal was the claimant's alleged misconduct. They did not, though, give any evidence as to what was in anyone else's mind.

30. In short, the respondent as a whole – the Association – has not persuaded me on the balance of probabilities that the principal reason for dismissal was a reason relating to the claimant's conduct. I am nevertheless persuaded that that the principal reason was either one relating to her conduct or one relating to her capability. This was therefore a potentially fair dismissal in accordance with ERA section 98.

31. On 13 July 2016, out of the blue from the claimant's point of view, the claimant was provided with a letter from Mr Jenkins telling her about a disciplinary meeting / hearing. It is worth quoting the body of that letter in full:

> *... I am writing to tell you that you are required to attend a disciplinary meeting on Friday 15th July 2016 at 13.00 pm* [sic] *which is to be held in The Silk Room.*
>
> *At this meeting the question of disciplinary action against you, in accordance with the Company Disciplinary Procedure, will be considered with regard to your work performance and behaviour.*
>
> *You are entitled, if you wish, to be accompanied by another work college.*

32. Pausing there, the claimant had no way of knowing from that letter what she was accused of. She could not reasonably have been expected to guess that it was about the incidents of May and March; and certainly would not know this was a meeting about allegations of gross misconduct for which she could potentially face summary dismissal there and then. The letter was not accompanied by any documentary evidence and, indeed, there was no documentary evidence. Mr Jenkins confirmed that what he was relying on: in relation to the March incident was what he had been told by Mr Davis; in relation to the May incident, was nothing more than his own recollection of what had occurred. Neither he, Mr Davis, Mr Wilson, nor an alleged witness to the March incident (a woman who worked for the respondent's landlord called Caroline Lowe) had made a written record of either incident at this stage. So far as I am aware, none of them did so until November 2016, some four months after the claimant's dismissal – except to the very limited extent Mr Davis did in a letter of 26 July 2016, which I shall come to in a moment.

33. The disciplinary meeting took place on 15 July 2016. Present were Mr Jenkins, the claimant and a member called Peter Ballard. At the outset of the meeting, the claimant was told that it was to "*discuss gross misconduct regarding* [a] *violent incident with Simon Davis, verbal abuse with John Wilson and ongoing work areas which pose a serious commercial threat*"[1] to the respondent. This was the first the claimant knew her job might be at risk. That statement was also misleading, or at least confusing, in referring to "*work areas*" in that – on Mr Jenkins's own evidence – the only things being considered as a disciplinary matter were the two incidents of May and March. This confusion was

[1] Quotation taken from the respondent's minutes of the meeting.

compounded by, according to the minutes, a significant part of the meeting being taken up discussing capability matters.

34. I am not satisfied that precisely what the respondent was alleging against the claimant in relation to the March incident was ever made clear to the claimant. The minutes simply record this: "*With regard to the violent incident with Simon Davis at first reluctant to accept Airport Cars interpretation of events, Lorraine said "He made me do it!!".*"

35. The allegation now being made is, as already explained, that the claimant threw a pen and a pad of post-it notes. In his oral evidence, Mr Jenkins told me that had it just been the pad, it would not have been a serious matter, but that for him a pen is "*a weapon*". However, in Mr Davis's letter of 26 July 2016 he refers to this incident in the following terms: "...*A few weeks ago, you threw a pad of paper at the Chairman's* [i.e. Mr Davis's] *head ...*". If it was throwing the pen that was the issue, the failure to mention it in the letter would be surprising.

36. In the ET3, what was allegedly thrown was "*a note book and pen*". It was clear from her evidence before me that the claimant believed it was being alleged that she had thrown something like an A4 pad of paper.

37. Similarly, I am not satisfied that the respondent made clear to the claimant what was being alleged about *how* the pad of post-it notes and pen were thrown.

38. The claimant accepts she threw a pad of post-it notes towards Mr Davis. Mr Davis's evidence before me, though – evidence that only emerged from specific questioning on the point – was that the pen and pack of post-it notes had not just been thrown in the direction of his head but that they had actually bounced off the side of his head by his ear. He said the claimant had "*turned into a raging mad woman*". In his letter of 18 November 2016 (referred to in paragraph 17 above) he said: "*she threw a pen and pad straight at me*". The alleged witness to the incident, Caroline Lowe, in her letter of 18 November 2016 stated: "*... I saw* [the claimant] *throw a pen and pad at*" Mr Davis.

39. A number of different versions of events have, then, been given by and on behalf of the respondent at various different times. The core allegation that the claimant threw something at Mr Davis – a pad of some kind at least – has remained the same, but the details do matter. Mr Jenkins tacitly acknowledged this by a comment during his oral evidence that "w*e probably would not be here*" if only a pad of post-it notes had been thrown.

40. It appears to me that the Association was not clear in its own collective mind what the precise allegation against the claimant was in relation to the March 2016 incident; and consequently it is improbable a clear allegation was put to the claimant at the disciplinary meeting on 15 July 2016.

41. So far as the second incident is concerned, the discussion at the disciplinary meeting seems to have been limited to the claimant saying that she used the word "twit" and not the word "twat"; and Mr Jenkins telling her that he knew that that was not true because he had been there.

42. The claimant was dismissed at the meeting itself. I have already mentioned the dismissal letter. It does not really give reasons for dismissal and it misleadingly suggests that capability was an important factor from Mr Jenkins's point of view.

43. The claimant appealed against dismissal by a letter dated 21 July 2016. For reasons he was unable to explain to me (not satisfactorily, anyway) Mr Davis replied substantively to the letter of appeal. He did so in the letter of 26 July 2016 mentioned above. In her letter of the 21st, the claimant had raised a number of specific grounds of appeal and what Mr Davis did in his letter, amongst other things, was to deal with each of them and effectively dismiss them. There was no appeal meeting or anything like that between 21 and 26 July.

44. In the second half of his letter of the 26th, Mr Davis set out what he described as "*the reasons for dismissal discussed at the meeting on 15 July 2016*". Most of what is then mentioned relates to performance. This was an odd thing to do if in fact those performance issues formed no part of the reason for dismissal. The relevant section of the letter concludes with the words, *"This is simply unacceptable*...". There is then a short paragraph consisting of two sentences dealing with the March and May incidents. The final paragraph of the body of the letter is: "*I remind you that these incidents constitute gross misconduct, hence the reason for your dismissal*".

45. Even if it were not the case that Mr Davis was the complainant in relation to one of the two incidents and was therefore an unsuitable person to conduct an appeal against the claimant's dismissal, he would have disqualified himself from sitting in judgment on the appeal by that letter. On the face of that letter, he had already made up his mind that there was nothing to the specific grounds of appeal raised by the claimant and that she was guilty of gross misconduct and deserved to be dismissed.

46. To conclude the chronological narrative of relevant events, an appeal meeting took place on 3 August 2016. Again, no documents were provided to the claimant in advance of the appeal meeting. Again, it is common ground that there were still no documents, witness statements or anything of that kind about the two incidents of alleged misconduct. The claimant was not provided with, or shown, the minutes of the disciplinary meeting, although Mr Davis and the colleague of his who was dealing with the appeal together with him (Geoff Cresswell) had seen those minutes and took them into account. Once again, the meeting seems to have been mainly about capability issues. One of the strange things about that meeting is that there does not seem to have been any discussion of the claimant's appeal at all. The minutes, such as they are, set out 18 things that were supposedly discussed, none of which were the claimant's grounds of appeal or letter of appeal. Presumably, the reason these were not discussed is that Mr Davis had already made up his mind about them, in accordance with his letter of 26 July.

47. With that factual background in mind, I turn to the rest of the issues relevant to liability for unfair dismissal.

48. Did the respondent have reasonable grounds to sustain a belief in the claimant's guilt? No, the respondent did not. The reason the respondent did not have reasonable grounds is that there was no investigation worthy of the name. As a bare minimum, someone (preferably someone different from the person conducting the disciplinary) needed to take a statement from Mr Davis about the March incident and from Mr Wilson and/or Mr Jenkins about the May incident. The claimant should also have been given an opportunity to give her version of events in response to the respondent's version of events. An alternative to taking statements would have been for the individuals concerned to give oral evidence at a disciplinary hearing.

49. At the time the respondent made its collective decision to dismiss (which, as above, was at the June business development meeting), the claimant had not been spoken to at all. The decision to dismiss, in connection with the March incident at least, seems to have been taken on the basis of informal discussions over a period of months, discussions the claimant knew nothing about and was told nothing about.

50. In terms of procedural unfairness, it is difficult to know where to begin. The problems include:

    50.1 taking a decision to dismiss before holding a disciplinary meeting or even speaking to the claimant;

    50.2 having as decision makers individuals who were themselves witnesses to, or directly involved in, the incidents of alleged misconduct. I should make clear this was not one of those situations where having witnesses as decision makers was unavoidable. As I understand it, there were nine members or so at the time, three of whom were witnesses or involved in the incidents. That left six people that could have done the job. There is no good reason, for example, why Mr Ballard could not have conducted the disciplinary meeting by himself or why Mr Cresswell could not have conducted the appeal by himself. When I asked Mr Davis why he needed to be involved – why Mr Cresswell could not just have dealt with it by himself – Mr Davis said Mr Cresswell needed a witness. This was not a good point to make. Any number of people, including Mr Davis himself, could, if necessary, have sat in the disciplinary meeting as a witness and note taker, without them needing to be decision-makers;

    50.3 taking a decision about the claimant's fate as a collective and discussing it as a collective, meaning that no one could then conduct a disciplinary or appeal hearing from an even vaguely neutral perspective;

    50.4 failing to tell the claimant in advance of the hearing what it was she was being accused of;

    50.5 failing to tell her in advance of the hearing that it was a final disciplinary hearing into allegations of gross misconduct for which she could be dismissed;

    50.6 failing to conduct a meaningful appeal.

51. So far as concerns whether dismissal was a sanction that a reasonable employer could impose in all the circumstances, I do not think it was. I accept that getting into a rage and throwing a pen and paper at one's boss's head potentially are very serious matters indeed, but I do not think it really happened quite like that, nor that the respondent believed it happened quite like that, nor that the respondent considered it at the time a very serious incident, because if the respondent had, it would surely have done something about it before June / July. Having done nothing about it for that length of time, I do not think it was within the band of reasonableness to treat it as a dismissal offence.

52. So far as the May incident is concerned, it seems to me that a reasonable employer could consider such language directed at a superior as misconduct justifying the imposition of a warning of some kind. Again, though, the length of time between this incident and disciplinary action being taken: first, suggests that the respondent did not consider it as serious as all that; and, secondly, means no reasonable employer would have taken the view that it should be dealt with as gross misconduct, even in combination with the March incident.

53. This was, then, an unfair dismissal. Although there is no 'bright-line' distinction between purely procedurally unfair dismissals and substantively unfair dismissals, this is a case falling very clearly within the substantively unfair group of cases. As above, I am not even satisfied that the majority view of the Association's members was that the claimant should be dismissed for misconduct as opposed to capability; and in any event, the chance of a fair dismissal disappeared as soon as a meeting was held of all members at which it was decided that she was guilty of gross misconduct without anyone having even spoken to her about the allegations. The Polkey issue therefore does not arise; the respondent could not have fairly dismissed the claimant at the time it did or subsequently, however immaculate the procedure it followed. It is conceivable that the claimant could have been fairly dismissed had the March incident been acted on earlier, but that is not relevant to whether the claimant was unfairly dismissed in July.

54. The next issue I have to decide is contribution / fault under ERA sections 122(2) and 123(6) ERA. To make my decision about this, I have to make findings as to what actually happened in the two incidents of May and March 2016.

55. In relation to the March incident, the claimant admits that she did throw her post-it pad towards Mr Davis. In her oral evidence: she could not remember whether it actually hit him or not; she agreed she threw it over-arm; she agreed she was cross, but she did not think she threw it towards his head, but more towards his torso.

56. On balance, I think the respondent's broad version of events is more likely to be accurate than the claimant's. Although I think there is an element of hyperbole to Mr Davis's evidence, the clear impression I get, even taking into account the claimant's oral evidence before me, is that at the time of this incident she was very cross indeed and was not thinking straight. I do not think she would have noticed whether what she threw towards Mr Davis was just a

pad of post-it notes or included a pen; I think she would just have thrown whatever was in her hand. I also do not think she took very much notice of where she was throwing it. I think she threw it at him. What I do not accept is that it actually hit him on the side of the head, as he described in his oral evidence before me. If that had happened, it would surely have been mentioned by the respondent before this final hearing.

57. The main reason why I prefer the gist of the respondent's evidence to the claimant's is that it is supported by the letter of 18 November 2016 from Caroline Lowe, the authenticity of which was not challenged. So far as I am aware, Caroline Lowe has no axe to grind against the claimant. When I asked the claimant about this, the claimant could not come up with any reason why Caroline Lowe would not accurately tell the truth.

58. Turning to the May incident, here I also prefer the respondent's version of events. The claimant was cross and upset at the time of this incident. She conceded in her oral evidence (and it seems to be common ground) that 'earthy' language was habitually used at the respondent's work place. Given this, it seems to me inherently unlikely that if the claimant was going to call Mr Wilson something, it would be the mild word "twit".

59. Although the suggestion was not made by the claimant during these proceedings, I did consider the possibility that Mr Wilson and Mr Jenkins had simply misheard what she had said, but given their description of the incident, this does not seem at all likely.

60. There are in relation to this two people making the same allegation. Although it is of course possible that Mr Wilson and Mr Jenkins conspired together to frame the claimant, there is no evidence suggesting a motivation for doing so.

61. I accept that both of these incidents involved blameworthy conduct on the part of the claimant; and that both of them to some extent contributed to the claimant being dismissed. I also take into account my findings that this was a substantively unfair dismissal and that no reasonable employer would have dismissed when the respondent did because of these incidents; and my finding that if the respondent had thought at the time that these were really as serious as all that, it would not have waited before taking action. In all the circumstances, if compensation is awarded I think it would be appropriate to reduce each of the basic award and any compensatory award by 25 percent.

62. The final issue I have to deal with at this stage of the proceedings is whether any compensatory award should be increased pursuant to section 207A.

63. There were multiple breaches of the ACAS Code of a more than technical kind. The breaches of the ACAS Code were not reasonable. The respondent was not, for example, a tiny employer that was reasonably ignorant of its legal duties and that, in all innocence, and understandably, did something that breached the Code.

64. I have mentioned the fact that the respondent did not even follow its own disciplinary rules and procedures. Paragraph 3 of those procedures is

"*Employees will be informed in writing of what is alleged*". The claimant was not informed in writing of what was alleged. It would have been the easiest thing in the world for the respondent to have told the claimant that she was being subjected to disciplinary proceedings because of the incidents in March and May and for the respondent to tell her that potentially she faced dismissal. The respondent did not need to read the ACAS Code or its own procedures, but simply show a little bit of empathy, in order to realise that that would have been a fair and reasonable thing to do.

65. The respondent also did not need to read the ACAS Code in order to appreciate that the person accusing the claimant of misconduct should not be the person deciding whether or not she was guilty and should be dismissed for that misconduct.

66. In any event, the respondent had clearly heard of ACAS; they had gone to the ACAS website. Why they did not look at and follow the ACAS Code is a mystery.

67. The final subsidiary issue is: would it be just and equitable for me to increase the claimant's compensation pursuant to section 207A and if so by what percentage?

68. Even though the respondent is a small employer without a dedicated HR function and had never disciplinary or dismissed someone before, I do feel that the breaches of the ACAS Code here was so bad and that there was no reasonable excuse for them, or even any substantial mitigation for them. Taking into account in addition the fact that this dismissal was unfair because of the very things that constituted breaches of the ACAS Code, this is a case where it would be just and equitable to increase the claimant's compensation.

69. I do not think this is a 25 or even a 20 percent case, however. The respondent did at least try to follow some kind of procedure and, as I have mentioned a number of times, the respondent is a small organisation and lacked any experience of considering the dismissal of an employee.

70. Taking everything into account, I think any compensatory award should be increased by 10 percent, pursuant to section 207A.

71. The final matter I need to deal with at this stage of the proceedings is whether or not the claimant was wrongfully dismissed.

72. The respondent has not satisfied me that the claimant committed a fundamental breach of her contract of employment. Further, in so far as the claimant did commit a fundamental breach of her contract of employment in March, by the time of the disciplinary proceedings the respondent had affirmed her contract. It did this by continuing unconditionally to treat her as its employee and to pay her and expect her to work as normal. By July, even taking the May incident into account, the claimant's conduct as I have found it to be was not so serious that it breached the trust and confidence term in the contract of employment or otherwise repudiate the contract. It did not go to the root of the contract, evincing an intention on the part of the claimant no longer

to be bound by the contract's terms[2]. To repeat myself: if what happened, particularly in relation to the March incident, was really as bad as has been painted by the respondent, the respondent would surely have done something about it sooner.

73. Accordingly, the claimant's wrongful dismissal claim succeeds and she is entitled to damages for breach of contract that put her in the position that she would have been in had she been given notice of dismissal.

74. By way of postscript, I have, above, ordered the parties to put forward proposals for case management orders to enable the tribunal to deal with remedy. The hope and expectation is that they won't actually need to do so – that they will be able to reach an agreement about remedy in light of my above decision. To that end, I urge the respondent to take independent, expert legal advice at the earliest opportunity. Although good quality legal advice is not cheap, it will almost certainly be money well spent.

Employment Judge Camp
02 May 2017

SENT TO THE PARTIES ON

08 May 2017

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FOR THE TRIBUNAL OFFICE

[2] Here I am echoing language used in some of the cases concerning fundamental breaches of contracts.