THE INDUSTRIAL TRIBUNALS

CASE REF: 24558/19

CLAIMANT: **Mariya Bozova**

RESPONDENT: **Kilmorey Arms Ltd**

JUDGMENT ON REMEDIES

The unanimous decision of the tribunal is that:

In respect of the claimant's unfair dismissal, the claimant is awarded:

(i) a basic award of **£1,215.76** calculated in accordance with Art 154(1A) of the Employment Rights (Northern Ireland) Order 1996; and

(ii) a compensatory award of **7,695.86** after all adjustments.

The claimant is awarded **£607.88** as she was not provided with a main statement of terms and conditions.

The claimant's claim for holiday pay is well founded and the tribunal awards the claimant the sum of **£1,208.68** for holiday pay.

The claimant's claim for failure to provide a written statement of reasons for dismissal is dismissed.

Constitution of Tribunal:

Employment Judge: **Employment Judge Gamble**

Members: **Mr A Kerr**
Mr I Rosbotham

Appearances:

The claimant appeared in person and represented herself.

The respondent was represented by Ms S Agnew, Barrister at Law, instructed by Michael F Curran Solicitors.

BACKGROUND

1. The claimant was employed by the respondent from 1 July 2018 until her dismissal on 2 September 2019. The claimant was called to a meeting with the directors of the Hotel (Mr Samuel Hamilton, Mrs Lenore Hamilton and Mr Andrew Annett) and Mrs Brenda Trimble (the Manager of the Hotel) on 2 September 2019, following an

incident on the evening of 1 September 2019. The claimant was informed that she was dismissed at that meeting and a short time after the meeting ended she was given a letter confirming her dismissal. The letter was dated 2 September 2019 and stated:

> *"To Whom It May Concern,*
> *Miss Mariya Bozova*
>
> *I am hereby dismissing you from your duties of Bar Person for misconduct on Sunday 1 September 2019.*
>
> *Regards,*
>
> *Directors and Management"*

The letter was signed by Mr Annett and Mr Hamilton.

2. The claimant presented an ET1 claim form on 13 November 2019 making a claim of unfair dismissal, a claim for failure to provide written reasons and a claim in respect of accrued but unpaid holiday pay against the respondent. Those claims were resisted by the respondent in its ET3 response presented on 8 January 2020. The respondent's response stated that on 1 September 2019, the claimant had been verbally abusive to a customer and that the claimant's aggressive behaviour was witnessed by two female customers in the bar area. It stated that when the doorman intervened to try and calm the claimant she made allegations that the doorman had pushed her. It stated that management became aware of the matter on 1 September 2019 as Lenore Hamilton could hear the claimant shouting at the doorman from the general office and that a review of CCTV footage did not support the claimant's view of how she had been allegedly "pushed" by the doorman. The response concluded that the claimant's conduct over a period of time had deteriorated to the extent that she had become hostile to customers and a danger to other staff members and that her ongoing conduct made her continued employment untenable and that she was dismissed for misconduct.

3. The proceedings were case managed on 2 October 2020, when the case was listed from 8 to 10 March 2021. Due to the closure of the tribunal building during the Covid-19 pandemic, the hearing was postponed. Following a further Case Management Preliminary Hearing conducted on 25 May 2021, the case was relisted from 5 to 7 July 2021.

4. On 24 May 2021, the respondent's representative made an admission that the dismissal was both procedurally and substantively unfair. The Record of Proceedings of the Preliminary Hearing conducted on 25 May 2021 recorded that:

> *"… the respondent had accepted that the statutory three step procedure had not been followed and that the respondent was, in relation to the unfair dismissal claim, proceeding on the basis of contributory conduct deduction and Polkey deduction"*

5. The case was not ready to proceed in July 2021, for the reasons recorded in the Record of Proceedings dated 5 July 2021, including that the claimant wished to

amend her claim. At that hearing, the claimant who is from Bulgaria, was offered an interpreter. She confirmed that she had been offered an interpreter at a previous Preliminary Hearing and had refused. She confirmed that she did not require an interpreter for the hearing, but if necessary would ask for clarification of unfamiliar words or concepts. The issue of whether any reasonable adjustments were required was also addressed in that hearing and the claimant was afforded regular breaks during the hearing. The tribunal listed a separate Preliminary Hearing to consider the claimant's application to amend her claim. Case Management Orders were given in respect of amendment application. In seeking to comply with the Case Management Orders, the claimant submitted a further claim form to the tribunal with amendments sought by her shown in red type to the tribunal on 5 August 2021. This was registered as a new claim, reference 38494/21.

6. At a Preliminary Hearing conducted on 18 November 2021, following discussion with the parties about how best to proceed, a Preliminary Hearing was listed to consider:

   (a) whether the claimant's existing claim, reference 24558/19, should be amended to include the further details as set out in claim reference 38493/21; and

   (b) whether claim 38493/21 should be struck out on the grounds that the tribunal has no jurisdiction to consider that claim because it was not brought within the requisite 3 months period of the acts complained off or whether it is just and equitable to extend time.

7. At a Preliminary Hearing conducted on 22 February 2022, the tribunal refused the claimant leave to amend her claim reference 24558/19 to include a claim of disability discrimination and struck out the claimant's claim reference 38494/21 because the tribunal had no jurisdiction to consider the claim. At that hearing, the tribunal relisted the Remedies Hearing from 28 to 30 March 2022 and made further Case Management Orders.

8. On 3 March 2022, the respondent informed the claimant that it was making an application to withdraw the admission that the dismissal was substantively unfair for the reasons set out in that email. The respondent did not seek to withdraw the admission that the statutory disciplinary and dismissal procedures had not been followed and that the dismissal was therefore automatically unfair by reason of Article 130A of the Employment Rights (Northern Ireland) Order 1996 (see paragraph 23 below). That application was opposed by the claimant by submission dated 15 March 2022 (at pages 47 to 49 of the Supplementary Bundle). The respondent withdrew its application to withdraw its prior admission on the first day of the hearing.

9. On 7 March 2022, the claimant made an application to exclude the evidence from Mr Samuel Hamilton (a director in the respondent) and Mr Christopher Kearney (the claimant's former bar manager). The tribunal considered that application on the first day of the hearing. That application was refused for oral reasons given at the hearing.

10. During the hearing, the respondent's representative agreed that the claimant was entitled to a Basic Award of four weeks' gross pay calculated in accordance with Article 154(1A) of the Employment Rights (Northern Ireland) Order 1996. The respondent's representative conceded that the claimant had not been provided with a written statement of terms and conditions and contended that the award made under Article 27 of the Employment (Northern Ireland) Order 2003 (see paragraph 23 below) in respect of this should be limited to two weeks' gross pay. The respondent's representative conceded that the claimant was owed monies in respect of holiday pay at the termination of her employment, although there was a dispute between the claimant and the respondent as to what was owed.

11. The claimant did not advance her claim of failure to provide a written statement of reasons for dismissal at the hearing and did not advance evidence that she had made a request for a statement, as required by Art 124(2) of the Employment Rights (Northern Ireland) Order 1996. Accordingly, that claim is dismissed.

SOURCES OF EVIDENCE

12. The claimant gave direct evidence by way of three witness statements (one dated 5 July 2021, and two served in the context of her amendment application) and was cross examined. She adopted her schedule of loss in evidence.

13. Mr Michael Grant (the doorman), Mr Chris Kearney (the former bar manager), Mrs Brenda Trimble (the Manager) and Mr Samuel Hamilton (a Director in the respondent) gave direct evidence on behalf of the respondent by way of witness statements and were cross examined. Mrs Trimble provided three witness statements. The respondent's solicitor informed the tribunal that he had inadvertently included an incomplete draft of Mrs Trimble's witness statement in the bundle for the determination of the amendment application. Mr Hamilton also provided three witness statements which were admitted in evidence. Mr Grant and Mrs Trimble were re-examined.

14. The witness statement bundle included an email which was sent by LC to the respondent dated 25 May 2021 and sent at 01:52 am. This email was sent on her own behalf and purportedly on behalf of another female patron of the respondent. Neither of these ladies attended the hearing to tender a statement nor to be cross examined. This email could not have been before or taken into account by the respondent when it made its decision to dismiss the claimant on 2 September 2019. In these circumstances no weight was attached to the email from LC.

15. The tribunal was also provided with an agreed bundle of documents and a supplementary bundle.

ASSESSMENT OF CREDIBILITY

16. The tribunal found the claimant to be a consistent and reliable witness, who readily acknowledged where there had been fault on her part in the incident involving KS. The tribunal found Mr Grant to be a witness who was doing his best to remember and give an honest account to the tribunal. The tribunal accepts his evidence on cross examination that Mrs Trimble was not with him when he approached the claimant on the 1 September 2019. Notwithstanding this, the tribunal was troubled

by the timeline in his witness statement. He accepted in cross examination that the claimant's shift did not start until 5pm and the church evening service took place at 7pm. In cross examination, he accepted that when he came over to the table with customer X, the claimant was not arguing with the customer or with Mr Grant. This is important as his actions to "defuse" the "situation" must be viewed in the context of this concession. Whilst the tribunal found Mr Kearney to be a helpful witness, it was unable to resolve the conflicts between his evidence and Mrs Trimble's evidence as to the timing, nature and identity of the person who gave the warning to the claimant in respect of the MM incident. Mr Kearney said it was a written warning given by Mrs Trimble. Mrs Trimble said it was a verbal warning given by Mr Kearney and that she had sat in on this. Mr Hamilton's evidence was that "it should have led to a written warning". The tribunal found Mr Hamilton to be a straightforward witness, who accepted that he had formed his conclusions from speaking to Mrs Trimble and watching CCTV after the incident. However, it preferred the claimant's account of what happened when she was dismissed. The tribunal did not find Mrs Trimble's evidence to be reliable. Her witness statement about being present with Mr Grant, when he interacted with the claimant and customer X, was contradicted by Mr Grant. She tried to give the impression that there was no need for her to carry out any investigation, because she had witnessed events first hand. During cross examination, this position changed to that she had watched the CCTV images, which she conceded did not have audio. During cross examination, the tribunal noted that she made exaggerated claims, which she resiled from, to the effect that the claimant had assaulted a customer. The tribunal accepted her evidence only where it was not challenged or was supported by the evidence of another witness. Where there was a conflict between the claimant's evidence and Mrs Trimble's evidence, the tribunal preferred the claimant's evidence.

ISSUES

17. The issues for determination by the tribunal are as follows:

(i) what compensatory award is the claimant entitled to?;

(ii) whether the claimant has mitigated her loss?;

(iii) whether there should be an uplift to the compensatory award pursuant to Art 17 of the Employment (Northern Ireland) Order 2003 because the statutory dismissal procedures were not followed?;

(iv) whether the dismissal was to any extent caused or contributed to by any action of the complainant?;

(v) if so, whether it is just and equitable for the claimant's compensation to be reduced?;

(vi) what sum is the claimant owed monies in respect of accrued holiday leave which was untaken at her dismissal?

ALLEGED CONTRIBUTORY CONDUCT/POLKEY REDUCTION

18. The respondent's representative sought a 100% reduction to the claimant's compensation on the basis of the claimant's contributory conduct and on the basis of **Polkey**.

19. During the hearing, the respondent's representative referred the tribunal to the matters set out at paragraphs 4 to 10 of Mrs Trimble's first statement as comprising the matters relied on by way of contributory conduct, as well as the incident with MM referred to in Mrs Trimble's later statement. These were:

> *"4. Pat (night porter) and Maria had altercation over cleaning of toilets and sanitary bins.*
>
> *5. Calton and Maria had words over staffing meals and asking about menus.*
>
> *6. Maria Dessie and Matthew had to be spoken to about behaviour on Sunday 17 Feb about shouting behind bar at one another which was Maria doing the shouting.*
>
> *7. 1st verbal warning given to Maria by Chris for turning in late for shift and saying it was because she had taken too many sleeping tablets. Chris covered her shift for 1½ hrs Wed 13th March 19.*
>
> *8. Linzi and Maria had words over toilets Chris spoke to both of them 14 April 19.*
>
> *9. Maria was spoken to about leaving stores open and not locking beer and stock doors at night at end of shift. June 28 19.*
>
> *10. Altercation between Maria and [KS] 12th July 19. Spoken to about this on Monday 15th July, both [KS] and Maria and written warning handed and accepted by both which is all in a statement separate from this. All in my 2019 diary."* (Tribunal's emphasis.)

20. Mrs Trimble's statement served on 5 January 2022 (but not her first statement or the version included in the bundle for the amendment application) included the following:

> *"In or around May or June 2019 there was a serious incident involving Mariya where she held another member of staff (MM) against a wall and put a knife or some kind of implement to his throat … this incident ought to have been dealt with more seriously at the time, however it was dealt with informally and Maria (sic) was given a verbal warning."*

21. The respondent also relied on the final incident of 1 September 2019 which is recorded at paragraph 11 of Mrs Trimble's first statement in the following terms:

> *"5pm I was leaving for the evening and on walking through bar I came across Maria and a gentleman shouting quite loudly at one another I stood and listened for a moment before intervening as it got very heated. I told Maria to go into the hallway of kitchen I will speak to her there. She shouted at me for saying this so I said Maria go to hallway now or you are going home so she*

went into hallway I spoke briefly to gentleman and said Sir plz go back to your company and I'll speak to Maria he said thank you and walked away I spoke to Maria in hallway told her to stay away and let Paul serve the gentleman for the rest of evening. Full documents in my diary 2019 and doorman's book."

The doorman's book was not included in the hearing bundle before the tribunal.

22. In her later statement, Mrs Trimble gave an amplified account of this incident:

"The account of the incident on 1st September 2019 given by Mariya as inaccurate. Immediately following the incident on 1st September 2019 I began to write down an account of the incident in my diary. The second part of the report was completed the following day after the second part of the incident occurred. A copy of the diary entry has been exhibited in the bundle of exhibits.

The entry reads:

"Approx 5pm Sunday"

"as I was leaving work I was walking through the front bar to leave work and came across an altercation between Mariya and a gentleman. I stood back and listened to what was going on before I intervened and told Maria (sic) to go to the hallway as I wanted to speak to her as the conversation between the two was getting quite heated. I told the gentleman to go back to his seat with the people he was with and that I didn't want to hear any more out of either of them. I went to the hallway then and told Mariya she was not to go back near the gentleman and I would speak to her on Monday when she had calmed down. She shouted in my face "I am calm. It was him who was shouting." I told her to stop shouting at me as I will speak to her tomorrow. I said to go and get a quick smoke and get back behind the bar and do not go anywhere near the man. I told her to let Paul serve him and that was all. I went back behind the bar and told Paul to serve the man and not let Mariya go anywhere near him.

… back into office to write a quick report.

As I was leaving for a second time I met Michael the doorman and stopped to tell him to keep an eye on the situation. As I was talking to Michael we could hear raised voices so I went back in with Michael to see Mariya down at the gentleman's table and the two of them were raising their voices again. I then told Mariya to go back behind the bar as she was told not to go anywhere near the man. But she insisted she was doing her job cleaning glasses. The ladies that were sitting with a man had also told to go away at this stage. Michael the doorman tried to turn Mariya around but she then started shouting "get your hands off me. I'll have you for assault." At this stage I said "Mariya you are going home now", as she had completely lost all control of herself. On her way out through the door she shouted "I'll

have you for putting your hands on me. I am going to get the police on you. After she left I went home.

Later that evening I got a phone call from … I then got a phone call from police to say that they were calling as a Mariya Bozova had put in a complaint to say the doorman had assaulted her."

RELEVANT LAW

23. **Employment Rights (Northern Ireland) Order 1996**

Procedural fairness

130A.—(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—

(a) one of the procedures set out in Part I of Schedule 1 to the Employment (Northern Ireland) Order 2003 (dismissal and disciplinary procedures) applies in relation to the dismissal,

(b) the procedure has not been completed, and

(c) the non-completion of the procedure is wholly or mainly attributable to failure by the employer to comply with its requirements.

…

General

152.—(1) Where a tribunal makes an award of compensation for unfair dismissal under Article 146(4) or 151(3)(a) the award shall consist of—

(a) a basic award (calculated in accordance with Articles 153 to 156,160 and 161), and

(b) a compensatory award (calculated in accordance with Articles 157, 158, 158A, 160 and 161.

Basic award

153.—(1) Subject to the provisions of this Article, Articles 154 to 156 and Articles 160 and 161, the amount of the basic award shall be calculated by—

…

Basic award: minimum in certain cases

154 …

(1A) Where—

(a) an employee is regarded as unfairly dismissed by virtue of Article 130A(1) (whether or not his dismissal is unfair or regarded as unfair for any other reason),

(b) an award of compensation falls to be made under Article 146(4), and

(c) the amount of the award under Article 152(1)(a), before any reduction under Article 156(3A) or (4), is less than the amount of four weeks' pay, the industrial tribunal shall, subject to paragraph (1B), increase the award under Article 152(1)(a) to the amount of four weeks' pay.

(1B) An industrial tribunal shall not be required by paragraph (1A) to increase the amount of an award if it considers that the increase would result in injustice to the employer.

…

Basic award: reductions

156

…

(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 that amount accordingly.

…

Compensatory award

157.—(1) Subject to the provisions of this Article and Articles 158, 158A, 160 and 161, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer. (Tribunal's emphasis.)

…

(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.

Adjustments under the Employment (Northern Ireland) Order 2003

158A. Where an award of compensation for unfair dismissal falls to be—

(a) reduced or increased under Article 17 of the Employment (Northern Ireland) Order 2003 (non-completion of statutory procedures); or

(b) increased under Article 27 of that Order (failure to give statement of employment particulars),

the adjustment shall be in the amount awarded under Article152(1)(b) and shall be applied immediately before any reduction under Article 157(6) or (7).

Employment (Northern Ireland) Order 2003

Non completion of statutory procedures

17 …

(3) If, in the case of proceedings to which this Article applies, it appears to the industrial tribunal

that—

(a) the claim to which the proceedings relate concerns a matter to which one of the statutory procedures applies,

(b) the statutory procedure was not completed before the proceedings were begun, and

(c) the non-completion of the statutory procedure was wholly or mainly attributable to failure by the employer to comply with a requirement of the procedure,

it shall, subject to paragraph (4), increase any award which it makes to the employee by 10 per cent and may, if it considers it just and equitable in all the circumstances to do so, increase it by a further amount, but not so as to make a total increase of more than 50 per cent.

(4) The duty under paragraph (2) or (3) to make a reduction or increase of 10 per cent does not apply if there are exceptional circumstances which would make a reduction or increase of that percentage unjust or inequitable, in which case the tribunal may make no reduction or increase or a reduction or increase of such lesser percentage as it considers just and equitable in all the circumstances.

Schedule One

The statutory procedure

STANDARD PROCEDURE

Step 1: statement of grounds for action and invitation to meeting

1. (1) The employer must set out in writing the employee's alleged conduct or characteristics, or other circumstances, which lead him to contemplate dismissing or taking disciplinary action against the employee.

(2) The employer must send the statement or a copy of it to the employee and invite the employee to attend a meeting to discuss the matter.

Step 2: meeting

2. (1) The meeting must take place before action is taken, except in the case where the disciplinary action consists of suspension.

(2) The meeting must not take place unless—

(a) the employer has informed the employee what the basis was for including in the statement under paragraph 1(1) the ground or grounds given in it, and

(b) the employee has had a reasonable opportunity to consider his response to that information.

(3) The employee must take all reasonable steps to attend the meeting.

(4) After the meeting, the employer must inform the employee of his decision and notify him of the right to appeal against the decision if he is not satisfied with it.

Step 3: appeal

3. (1) If the employee does wish to appeal, he must inform the employer.

(2) If the employee informs the employer of his wish to appeal, the employer must invite him to attend a further meeting.

(3) The employee must take all reasonable steps to attend the meeting.

(4) The appeal meeting need not take place before the dismissal or disciplinary action takes effect.

(5) After the appeal meeting, the employer must inform the employee of his final decision.

Failure to give statement of employment particulars, etc.: industrial tribunals

27.— (1) This Article applies to proceedings before an industrial tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule 4.

(2) If in the case of proceedings to which this Article applies—

(a) the industrial tribunal finds in favour of the employee, …., and

(b) when the proceedings were begun the employer was in breach of his duty to the employee under Article 33(1) or 36(1) of the Employment Rights Order (duty to give a written statement of initial employment particulars or of particulars of change), the tribunal shall, subject to paragraph (5), make an award of the minimum amount to be paid by the employer to the employee and may, if it considers it just and equitable in all the circumstances, award the higher amount instead.

…

(4) In paragraphs (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 paragraph (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that paragraph unjust or inequitable.

Case Law

24. The respondent's representative, in her submissions, referred the tribunal to the following authorities:

Nelson v BBC [1979] IRLR 346
Parker Foundry v Slack [1992] ICR 302
Friend v Civil Award [2001] EWCA Civ 1204
Polkey v AE Dayton Services Ltd [1987] UKHL 8
Whitehead v Robertson Partnership [2004] UKEAT/0378/03
Software 2000 Ltd v Andrews and others UKEAT/0533/06
O'Donoghue v Redcar [2001] EWCA Civ 701
Flanagan v BMC [2016] NIIT 01085/15IT
Digital equipment Co Ltd v Clements [1998] I.C.R. 258
Rao Civil Aviation Authority [1994] IRLR 240

Assessing Compensation

25. In **Flanagan v Belfast Metropolitan College 1085/15,** the Vice President, as he then was, stated:

*"The NIRC [in **Norton** Tool] when considering the correct manner for assessing compensation in relation to the loss of employment did not say that the first element in such compensation should be the loss of wages up to the date of the hearing; whether that hearing is by an employment tribunal or by some other judicial body. The date of any such hearing is subject to considerable variation and is impacted upon by a range of matters such as*

the availability of parties, the availability of counsel, the availability of witnesses and the availability of listing time. In real terms there can on occasion be significant delays and equally cases can move exceptionally quickly on occasion. In the tribunal's view, it is highly unlikely that the NIRC, or anyone else, ever intended that a significant element of compensation should be determined by such a random event. The statutory basis for assessing compensation is to assess actual loss. It is not appropriate to assess a significant portion of actual loss by fixing that proportion to the listing dates given to that case."

26. In **Norton Tool Co Ltd v Tewson [1972] EW Misc 1**, the NIRC held:

"The Court or tribunal is enjoined to assess compensation in an amount which is just and equitable in all the circumstances, and there is neither justice nor equity in a failure to act in accordance with principle. The principles to be adopted emerge from the section. First, the object is to compensate, and compensate fully, but not to award a bonus, save possibly in the special case of a refusal by an employer to make an offer of employment in accordance with the recommendation of the Court or a tribunal. Second, the amount to be awarded is that which just and equitable in all the circumstances having regard to the loss sustained by the complainant. "Loss," in the context of the section, does not include injury to pride or feelings. In its natural meaning the word is to be so construed, and that this meaning is intended seems to us to be clear from the elaboration contained in subsection (2). The discretionary element is introduced by the words "having regard to the loss". This does not mean that the Court or tribunal can have regard to other matters, but rather that the amount of the compensation is not precisely and arithmetically related to the proved loss. Such a provision will be seen to be natural and possibly essential, when it is remembered that the claims with which the Court and tribunals are concerned are more often than not presented by claimants in person and in conditions of informality. It is not therefore to be expected that precise and detailed proof of every item of loss will be presented, although, after making due allowance for the skills of the persons presenting the claims, the statutory requirement for informality of procedure and the undesirability of burdening the parties with the expense of adducing evidence of an elaboration which is disproportionate to the sums in issue, the burden of proof lies squarely upon the complainant."

27. **Harvey** at paragraph 2569 notes:

"In practice tribunals will determine loss down to the date of the hearing itself, which can be calculated with a reasonable degree of precision, and then assess future loss, which is inevitably considerably more speculative. An award for loss of bonus may be made upon a 'loss of chance' basis."

Polkey reduction

28. In **Polkey,** the House of Lords held that the employer showing that the claimant ex-employee would have been dismissed anyway (even if a fair procedure had been adopted) did not make fair an otherwise unfair dismissal (i.e. there was no 'it made

no difference' defence to liability). However, such evidence (if accepted by the tribunal) *may* be taken into account when assessing compensation and could have a severely limiting effect on the compensatory award. A **Polkey** reduction is only made to the Compensatory Award and not to the Basic Award.

29. If the evidence shows that the employee *may* have been dismissed properly in any event, if a proper procedure had been carried out, the tribunal should normally make a *percentage assessment* of the likelihood and apply that when assessing the compensation.

30. However, there may be cases where it is more logical for the tribunal to fix a *date* by which it is confident on a balance of probabilities that the employee would have been dismissed anyway and to limit compensation to the period up to that date. Where a claimant was on an inevitable course towards dismissal it was legitimate to avoid the complicated process of some sliding scale percentage estimate of her chances of dismissal as time progressed. (**O'Donoghue v Redcar and Cleveland Borough Council [2001] EWCA Civ 701, [2001] IRLR 615.**)

31. In **Whitehead v Robertson Partnership [2004] UKEAT/0378/03,** the EAT held that the question for the tribunal when considering **Polkey** deductions in the context of misconduct allegations, where no disciplinary hearing had been conducted, is:

> "whether if there had been a fair disciplinary hearing the result would still have been a dismissal."

32. In Elias J in **Software 2000 Ltd v Andrews [2007] UKEAT/0533/06** gave the following guidance:-

> *"(1) In assessing compensation the task of the tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.*
>
> *(2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future).*
>
> *(3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.*
>
> *(4) Whether that is the position is a matter of impression and judgment for the tribunal. … it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence."*

Contributory Conduct

33. The respondent's representative also referred to **Harvey on Industrial Relations and Employment Law** at paragraphs **2710** and **2710.03** on contributory conduct**.**

> *"2710 [ERA 1996 s 123(6)] provides that if the tribunal finds that the employee has, by any action, caused or contributed to his dismissal, it shall reduce the amount as it considers just and equitable. … In sum, if the employee is guilty of some kind of misconduct which does not warrant dismissal, but which resulted in or contributed to the dismissal, then a reduction may be made.*
>
> *The misconduct need not be gross in character to warrant a reduction. In Jagex Ltd v McCambridge [2020] IRLR 187, … The correct test is to consider if the conduct was culpable, blameworthy, foolish or similar which includes conduct that falls short of gross misconduct and need not necessarily amount to a breach of contract Nelson v British Broadcasting Corporation (No. 2) [1979] IRLR 346, [1980] ICR 110, CA.*
>
> *The deduction for contributory fault under s 123(6) can be made only in respect of conduct that persisted during the employment and which caused or contributed to the employer's decision to dismiss. It follows that the employee's conduct must be known to the employer prior to the dismissal.*
>
> *…*
>
> *In order to make a reduction for contributory fault, the tribunal must make findings of fact about the employee's conduct and that the conduct was culpable or blameworthy in some way. Only the employee's conduct is relevant to the inquiry about conduct. Once the tribunal is satisfied that there is culpable or blameworthy conduct then it is bound to consider making a reduction by such amount as it considers to be just and equitable.*
>
> [2710.01] I*t is well-established that questions of the employee's conduct alone are relevant to the issue reduction on account of contributory conduct.*
>
> *…*
>
> [2710.02]
>
> *However, the tribunal is entitled to take into account the conduct or actions of others insofar as they are relevant to the assessment of the culpability of the claimant's conduct: Havering Primary Care Trust v Bidwell UKEAT/0479/07, [2008] All ER (D) 297 (Apr) (Underhill J presiding). In Bidwell, the EAT said the tribunal was entitled to take account into account the fact that other nurses had second jobs and that the Trust did nothing to regulate the practice. These factors were 'obviously relevant in an assessment of the degree of [the claimant nurse's] fault.*
>
> [2710.03]

Upon the question of the actions of others (such as the employer) impacting upon the degree of culpability of the employee, see Hollier v Plysu [1983] IRLR 260. The employee had disregarded her employer's warning to have no dealings with a fellow employee lorry driver (who was known to be something of a rogue) by purchasing from him several toy pandas and a clock which were items of dubious provenance. The Court of Appeal approved the EAT's suggestion of four broad categories of reduction:

Employee wholly to blame 100%
Employee mainly to blame 75%
Employer and employee equally to blame 50%
Employee slightly to blame 25%

(The employee in Hollier was unfairly dismissed on procedural grounds as the employer did not give her a fair opportunity to explain her conduct.)

However, there is no reason a tribunal has to follow these guidelines, and in reality, they are simply a matter of common sense. The more serious and obviously 'wrong' an employee's conduct, the higher the deduction is likely to be. Apportionment of responsibility for a dismissal is very much a matter of common sense and impression.

On occasions, modest reductions may be made by tribunals: see Phoenix House Ltd v Stockman [2019] IRLR 960, EAT. The employee was unfairly dismissed for having made a covert recording of a meeting with the employer's human resources department. On the facts, the ET reduced the compensatory award for this conduct by only 10% as the employee made only one recording about her own case and the meeting did not concern confidential business information. This reduction was upheld by the EAT. (A further 20% reduction was made for other conduct which was not the subject of appeal.)

34. In **Maris v Rotherham Corpn [1974] 2 All ER 776, [1974] IRLR 147** Sir Hugh Griffiths made comments, in the context of a predecessor to the present provision, which apply equally to Article 156(2) of the 1996 Order.

"[The section] brings into consideration all the circumstances surrounding the dismissal, requiring the tribunal to take a broad common sense view of the situation and to decide what, if any, part the [claimant's] own conduct played in contributing to his dismissal and then in the light of that finding decide what, if any, reduction should be made in the assessment of this loss".

35. In **Nelson v BBC (No.2) [1979] IRLR 346** the Court of Appeal in England and Wales held that in determining whether to make a reduction for contributory conduct, an Industrial Tribunal must make three findings. Firstly, there must be a finding that there was conduct on the part of the employee in connection with his unfair dismissal which was culpable or blameworthy. It could never be just or equitable to reduce an award of compensation unless the conduct on the claimant's part relied upon as contributory was culpable or blameworthy. Brandon LJ held:

"It is necessary, however, to consider what is included in the concept of culpability or blameworthiness in this connection. The concept does not, in my view, necessarily involve any conduct of the complainant amounting to a breach of contract or a tort. It includes, no doubt, conduct of that kind. But it also includes conduct which, while not amounting to a breach of contract or a tort, is nevertheless perverse or foolish, or, if I may use the colloquialism, bloody-minded. It may also include action which, though not meriting any of those more pejorative epithets, is nevertheless unreasonable in all the circumstances. I should not, however, go as far as to say that all unreasonable conduct is necessarily culpable or blameworthy; it must depend on the degree of unreasonableness involved'."

Secondly, there must be a finding that the matters to which the complaint relates were caused or contributed to some extent by action that was culpable or blameworthy. In this context, the expression "matters to which the complaint relates" means the unfair dismissal itself and the word "action" comprehends not only behaviour or conduct which consists of doing something but also behaviour or conduct which consists of doing nothing or in declining or being unwilling to do something.

Thirdly, there must be a finding that it is just and equitable to reduce the assessment of the complainant's loss to a specified extent.

36. In **Gibson v British Transport Docks Board [1982] IRLR 228** Browne-Wilkinson J put it clearly and succinctly as follows:

"What has to be shown is that the conduct of the [claimant] contributed to the dismissal. If the applicant has been guilty of improper conduct which gave rise to a situation in which he was dismissed and that conduct was blameworthy, then it is open to the tribunal to find that the conduct contributed to the dismissal. That is how the section has been uniformly applied"

37. At the hearing, the respondent's representative did not seek any reduction to the minimum Basic Award. In **G McFall & Co Ltd v Curran [1981] IRLR 455** the Northern Ireland Court of Appeal held that the reduction in the two awards must be treated consistently. This decision was made before the introduction of the minimum Basic Award in Art 154(1A).

38. In **Ingram v Bristol Street Parts UKEAT/0586/06** the EAT considered whether a minimum Basic Award under the equivalent provisions to Art 154(1A) should be subject to a reduction for contributory fault:

"36. … The calculation under s120(1A) requires that the ultimate award payable under s118(1)(a) must be increased to four weeks' pay save to the extent that there may be reduction by reason of ss122(3A) or (4). Had the intention been to provide that a reduction under s122(2) [for any conduct of the complainant before the dismissal] could be also be made after any uplift to four weeks, then in our view that would have been stated in terms. This is precisely what Parliament has said with respect to s120(1) which provides for a higher minimum in certain circumstances. That is subject to any reduction

under s122; but the permissible reduction under s120(1A) is more tightly drawn."

The tribunal is satisfied that **Ingram** should be followed in relation to the treatment of a minimum Basic Award calculated under Art 154(1A).

Order of deductions and uplifts

39. **Digital Equipment Company Ltd v Clements [1998] IRLR 134** establishes the order of deductions. In the circumstances of the claimant's case, this will require sums earned in mitigation to be set off, then the **Polkey** reduction. The **Polkey** reduction is part of the process of establishing the quantum of the claimant's loss before adjustment or deduction for contributory fault. Next, any statutory uplift should be considered before any deduction for contributory fault (see Art 158A at paragraph 23 above).

RELEVANT FINDINGS OF FACT AND CONCLUSIONS

40. The respondent business is a hotel business. The tribunal accepts the evidence of Mrs Trimble that it employs between 45 and 50 people. The tribunal finds, on the basis of the evidence of Mr Kearney, Mrs Trimble and Mr Hamilton, that the claimant was generally a hardworking member of staff with a good work ethic, although she could be volatile on occasions.

41. During the hearing, the parties agreed that the claimant's gross weekly pay at dismissal was £303.94 and her net weekly pay was £274.68.

42. The tribunal finds that at the time of her dismissal the claimant had one live warning – a written warning issued to her on 15 July 2019. This warning was included in the agreed hearing bundle and the claimant accepted that she had received it. In light of the inconsistent and at times contradictory nature of the evidence of the respondent's witnesses and the failure of the respondent to provide copies of any other warnings, whether verbal warnings or written warnings, the tribunal is not satisfied that any other warning, other than the warning dated 15 July 2019, had been given before the claimant's dismissal.

43. The tribunal finds that the warning received by the claimant on 15 July 2019 in respect of the altercation with KS was a "written warning" and not a "final written warning" as asserted by the respondent in pleadings and in closing submissions. The tribunal finds that the claimant received a written warning because the warning required to be subject to deletion to show whether it was a written warning or final written warning. In the absence of this deletion, the tribunal construes the issue against the respondent. If the warning was intended to be a final written warning, the onus was on the respondent to amend the document to reflect this. Notwithstanding this, the warning did place the claimant on notice of the risk of dismissal:

*"This warning will be placed in your personal file but will be disregarded for disciplinary purposes after a period of 6 months, provided your conduct improves/performance reaches a satisfactory level**.*

a) *The nature of the unsatisfactory conduct was: VERBAL AND ABUSIVE BEHAVE IN FRONT OF CUSTOMERS.* (Sic.)

b) *The conduct or performance improvement expected is: TEAM AND EQUAL WORKING RELATIONSHIP WITH ALL COLLEAGUES.*

c) *The timescale for improvement is: 6 MONTHS.*

d) *The likely consequence of further misconduct or insufficient improvement is dismissal."*

Further, Mrs Trimble's own evidence set out at paragraph 19 above describes this warning as a "written warning".

44. The claimant candidly accepted that she was at fault over this incident. The tribunal accepts the claimant's account of this incident in her witness statement at page 24 and in her oral evidence, that KS's behaviour was provocative to the claimant and that KS used foul and abusive language towards her, and that she reacted in an unacceptable way, by grabbing KS. Both the claimant and KS were sanctioned, because they were both at fault.

45. In respect of the incident of 1 September 2019, which gave rise to the claimant's dismissal, the tribunal accepts the claimant's uncontroverted evidence that customer X attended the respondent's premises on 28 August 2019, several days before the final incident when he had been drunken, aggressive and violent, and when there was no doorman in attendance on the premises. The claimant sought advice from Mrs Hamilton, one of the directors of the respondent. The claimant, pursuant to that advice, phoned the PSNI from her mobile phone in customer X's presence, following which he left the premises. Customer X was in attendance on 1 September 2019, when the tribunal finds, having accepted the claimant's evidence, that customer X behaved inappropriately towards the claimant, threatening the claimant, saying that he was going to get her sacked and that he knew where she lived. Although no other witness to this exchange gave evidence, the claimant's account of customer X behaving in a provocative manner towards her is supported by Mr Grant's evidence in chief, when he recounted that in his presence one of the other patrons who was with customer X had told the claimant "Please Mariya just walk away and forget it". The tribunal concludes that customer X had clearly said something offensive to the claimant, otherwise there would have been nothing for the claimant to "forget" about.

46. There was a dispute between the claimant and Mrs Trimble as to precisely what Mrs Trimble had said to the claimant when she intervened, whether it was "do not serve" customer X and "stay behind the bar" (and by implication away from the vicinity of the table at which customer X and his party were seated) or to "stay away" and "not to go anywhere near" the man. The tribunal finds, having considered the evidence of both Mrs Trimble and the claimant, that Mrs Trimble had called the claimant away from customer X and had given an instruction to the claimant to the intent that she should not serve customer X and should avoid him during her shift. The purpose of this instruction was to avoid the potential for confrontation between the claimant and customer X. The tribunal finds that there was a further interaction between the claimant and customer X after this instruction had been issued and that

the claimant, though she sought to portray her behaviour towards customer X at the time when Mr Grant came over as passive, acted foolishly in allowing herself to be and remain at customer X's table. The tribunal accepts Mr Grant's evidence given in cross examination that Mrs Trimble was not with him when he approached the claimant (and as a consequence rejects in its entirety Mrs Trimble's account contained in her later statement from "*As I was leaving for a second time…"* as set out at paragraph 22 above*)*. The tribunal also accepts Mr Grant's evidence in cross examination that the claimant was silently standing at Customer X's table when he arrived, and refused to move away when he asked her to do so.

47. The tribunal finds that Mr Grant did not attempt to investigate further what had happened or to involve a manager, but instead, on the basis of Mr Grant's own evidence, committed a battery upon the claimant, when he placed his fingertips on the claimant's shoulders and on Mrs Trimble's evidence that he attempted to turn the claimant around. The tribunal finds that the claimant followed Mr Grant outside and challenged his actions in robust terms and that the claimant became upset and agitated. Mr Grant described his actions as seeking to defuse the situation, but there was no violence/threat of violence directed by the claimant (a member of staff, not a patron) against either customer X or Mr Grant. The tribunal was unable to understand Mr Grant's actions in touching the claimant or attempting to turn the claimant around, in these circumstances.

48. The tribunal finds that there was a complete failure by the respondent to commence or complete the statutory disciplinary and dismissal procedures. There was no stage 1 letter inviting the claimant to a meeting to discuss her contemplated dismissal or the reason for it and there was no offer of an appeal against dismissal. Whilst the tribunal finds that the claimant attended a meeting on 2 September 2019, the tribunal finds that this meeting did not meet the requirements of the statutory procedure because when that meeting took place the respondent had not informed the claimant of her alleged conduct or characteristics, or other circumstances, which led the respondent to contemplate dismissing or taking disciplinary action against her, and the claimant had not been given a reasonable opportunity to consider her response to that information. The claimant was contacted at 17:02 by WhatsApp for a meeting which was arranged to take place at 17:30. She was given no forewarning of the disciplinary nature of that meeting (page 83 of the hearing bundle). Mr Hamilton's "amended statement" purports to offer an explanation at paragraph 6 for the failure to follow the statutory disciplinary and dismissal procedures. However no satisfactory explanation for the failure can be discerned from what follows in his statement. Mr Hamilton merely states *"Given the claimant's previous behavioural issues and the written warning, it seemed apparent that some action would have to be taken against the claimant. When the claimant was offered the opportunity to say something about the incident on 1st September 2019 she made no reply and I felt that I had no other option but to dismiss her…"* The tribunal prefers the claimant's account of the meeting contained in her witness statement at pages 15 and 16 of the witness statement folder to that of Mr Hamilton. Accordingly, the tribunal finds that the claimant was told that this would be her last day working for the respondent and then (having in effect been dismissed) was asked whether she had anything to say. The claimant did not say anything in these circumstances. Mrs Trimble's later statement accepts that at that meeting *"the events of the night before were not discussed in great detail but Mariya's behaviour was discussed and Mr Hamilton explained to her that her behaviour had become unacceptable".* Mrs

Trimble's witness statement also addresses the failure to comply with the minimum statutory disciplinary and dismissal procedures by stating that the meeting was *"hastily arranged…"*

49. The tribunal's detailed findings in respect of contributory conduct are set out at paragraph 62 below.

Period of Compensation for Unfair Dismissal

50. The tribunal finds that it is just and equitable to award the claimant loss up to the date when the matter was first listed for hearing on 8 March 2021 (a period of approximately 18 months after her dismissal).

51. The tribunal does not find that it is just and equitable to award loss beyond that date as the tribunal is satisfied that after that date the claimant's loss is not attributable to the actions of the respondent.

52. The tribunal is not persuaded by the respondent's submission that the claimant would have been dismissed in any event before the warning dated 15 July 2019 had expired because she was on an inevitable course towards dismissal, finding that the exercise of seeking to reconstruct what might have happened after 1 September 2019 during the tenure of the written warning so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.

Mitigation of loss

53. The tribunal accepts that the claimant obtained and resigned from employment with Kilkeel Sea Foods Ltd after only three days on 28 October 2019. The tribunal accepts the claimant's evidence that this role was unsuitable for her in light of medical problems as detailed at paragraph 2 of her witness statement dated 5 July 2021 and during cross examination. The tribunal is satisfied in light of the unsuitability of this role that the claimant continued to sustain loss as a result of her dismissal.

54. The respondent raised issues in respect of mitigation of loss by the claimant, in particular that she had been working in a competitor bar (Harley's Bar) after dismissal and this was not reflected in her schedule of loss. The claimant accepted that she worked in Harley's bar from the end of November/beginning of December 2019 until the first national lockdown in March 2020. The tribunal accepts the claimant's evidence was that she worked one to two shifts per week, which she did as a favour to friends who were employed there. She stated that she did not receive any payment for this work and this was the reason it was not accounted for in her schedule of loss. The tribunal finds, in light of the claimant's evidence that her work went against the cost of repairs to her vehicle that the claimant was paid in kind and the tribunal has therefore taken into account a monetary sum in respect of this work in calculating the claimant's loss. The tribunal takes judicial notice of the terms of the furlough scheme and concludes that the claimant, in the circumstances outlined above, would not have been eligible for furlough with Harley's Bar, which according to the claimant's evidence (accepted by the tribunal), closed for good in October 2020.

55. The tribunal also finds on the balance of probabilities that if the claimant had remained in employment with the respondent she would have been placed on furlough by the respondent after the first national lockdown.

56. The tribunal is satisfied that the claimant made appropriate efforts to mitigate her losses. The tribunal notes that the claimant's health was detrimentally affected by her dismissal, as confirmed by her counsellor at page 107 of the hearing bundle, and has taken this into account in considering her efforts to mitigate her loss.

57. The tribunal has not taken into account sums received by the claimant by way of Personal Independence Payment (PIP) as mitigation of the claimant's loss. The claimant referred the tribunal to the NI direct website at page 40 of the supplementary bundle:

> *"You can get PIP even if you're working, have savings or are getting most other benefits.*
> *…*
>
> *PIP is not affected by income or savings, it is not taxable and you can get it whether you are in work or not."*

The respondent's representative did not make any contrary submission.

Polkey deduction

58. The tribunal makes a reduction of 50% in the claimant's compensatory award on the basis that the claimant already had a written warning that was less than 2 months old, when the incident of 1 September 2019 occurred. That warning placed the claimant on notice that she was at risk of dismissal in the event of further misconduct. The tribunal does not take into account other incidents when the claimant had been "spoken to" as the tribunal was not satisfied that this amounted to a disciplinary sanction, rather than management advice.

59. The tribunal is satisfied that there was misconduct on the part of the claimant on 1 September 2019 in placing herself and continuing to be in close proximity to customer X despite the earlier instruction by Mrs Trimble. Taking the existence of the written warning of 15 July 2019 and the misconduct on 1 September 2019 in the round, the tribunal acting as an industrial jury, finds that it was as likely as not that if a proper process had been followed in respect of the incident of 1 September 2019, that the disciplinary sanction would have been dismissal. The tribunal is not persuaded that dismissal was the inevitable outcome. The claimant had one live written warning. The respondent, on the basis of its own evidence had a history of dealing with matters, even very serious allegations of misconduct, in an informal way or at a low level of disciplinary sanction. Following careful consideration, the tribunal is satisfied that a 50% reduction is on the basis of **Polkey** is appropriate.

Statutory Uplift

60. The tribunal is satisfied that an uplift should be made to the claimant's award pursuant to Art 17 of the Employment (Northern Ireland) Order 2003 (see paragraph 23 above) in relation to the failure to follow the statutory disciplinary and dismissal

procedures. The tribunal finds that the failure by the respondent consisted of a complete and culpable failure. Given the size of the respondent's undertaking, the respondent ought to have followed carefully the statutory minimum procedures. Having regard to the lack of a satisfactory explanation by the respondent, the tribunal is satisfied that a greater uplift than the mandatory 10% uplift should be made and that an uplift of 30% is appropriate. The tribunal declines to make a greater uplift on the award than 30% because it does not view the failure by the respondent as a deliberate and calculated failure to follow the procedures.

61. The tribunal is satisfied that the claimant is also entitled to receive an award under Article 27 of the Employment (Northern Ireland) Order 2003 because it has been accepted on behalf of the respondent that she was not given a main statement of terms and conditions before she commenced her claim.

Contributory Conduct

62. The tribunal notes the matters relied on by the respondent in respect of contributory conduct at paragraphs 19 to 22 above. The tribunal makes the following findings in respect of Contributory Conduct in relation to those matters:

(i) **Pat (night porter) and Maria had altercation over cleaning of toilets and sanitary bins.**

(ii) **Calton and Maria had words over staffing meals and asking about menus.**

(iii) **Maria Dessie and Matthew had to be spoken to about behaviour on Sunday 17 Feb about shouting behind bar at one another which was Maria doing the shouting.**

(iv) **1st verbal warning given to Maria by Chris for turning in late for shift and saying it was because she had taken too many sleeping tablets. Chris covered her shift for 1½ hrs Wed 13th March 19.**

(v) **Linzi and Maria had words over toilets Chris spoke to both of them 14 April 19.**

(vi) **Maria was spoken to about leaving stores open and not locking beer and stock doors at night at end of shift. June 28 19.**

The tribunal finds that these matters did not cause or contribute to the dismissal in any way, for the following reasons:

(a) the letter of dismissal did not refer to any consideration of these matters and expressly stated that the cause for the dismissal was "*misconduct on Sunday 1 September 2019".* The tribunal finds it improbable that a long established

business of the size of the respondent would not have included all relevant considerations on their part in the dismissal letter;

(b) the claimant was not the subject of any disciplinary action in respect of the matters listed at (i), (ii), (iii), (v) and (vi). If the conduct had been blameworthy or considered a disciplinary breach, it is improbable that formal disciplinary action would not have been taken by the respondent;

(c) the tribunal finds that the claimant was not in receipt of a first verbal warning for the incident listed at (iv) above. The tribunal prefers the evidence of the claimant, which was that she was late on 11 March 2019 as evidenced by the message exchange (at page 195 of the bundle) and that she did not receive any disciplinary action in respect of this. Mr Kearney responded to the claimant's message that she would be late with "Okay that's dead on see u then". Mr Kearney did not reference this incident in his witness statement. The tribunal rejects the evidence of Mrs Trimble that the claimant received a warning for this because no written confirmation of a formal verbal warning having been issued to the claimant was produced. Mrs Trimble, when giving oral evidence, seemed to conflate "speaking to" an employee with formal disciplinary action – when asked whether such "speaking to" staff was disciplinary or advisory, she stated that she was "being human to them and treating staff with respect"; and

(d) the matters referred to above do not meet the test in **Nelson** in that these matters were not blameworthy in the sense of being "perverse" or "foolish" or "bloody minded". Rather, they appear to be day to day management issues.

Even if the tribunal has erred in relation to the finding above, it would have declined to reduce the claimant's compensation on the just and equitable ground in regard to these matters in the particular circumstances of this claim.

(vii) Altercation between Maria and [KS] 12th July 19. Spoken to about this on Monday 15th July, both [KS] and Maria and written warning handed and accepted by both which is all in a statement separate from this. All in my 2019 diary.

The tribunal finds that this incident did not cause or contribute to the claimant's dismissal because the letter of dismissal did not refer to any consideration of these matters and expressly stated that the cause for the dismissal was "*misconduct on Sunday 1 September 2019".* The tribunal finds it improbable that the respondent would not have included the reliance on an extant written warning on their part in the dismissal letter. However, this incident has been considered in the context of a **Polkey** deduction (see paragraphs 58 and 59 above).

(viii) In or around May or June 2019 there was a serious incident involving Mariya where she held another member of staff (MM) against a wall and put a knife or some kind of implement to his throat … this incident ought to have been dealt with more seriously at the time, however it was dealt with informally and Maria (sic) was given a verbal warning.

The tribunal was satisfied in light of the evidence of Mrs Trimble, Mr Kearney and Mr Hamilton on the balance of probabilities that this incident occurred but not that the claimant received any warning for it. Mr Kearney's evidence was that Mrs Trimble gave the claimant a written warning for this incident. No written warning was produced. Mrs Trimble's evidence contradicted Mr Kearney's evidence in that she said that a verbal warning was given by Mr Kearney to the claimant, but that she had not been present. No record of any verbal warning was presented to the tribunal. Mr Hamilton's oral evidence, which was given to qualify and correct his witness statement, was that the claimant ought to have received a written warning for this incident. There was no record whatsoever of this incident in Mrs Trimble's diary, which she described as her "bible". The tribunal finds it beyond the bounds of credibility that an incident which was so serious could have resulted in a disciplinary sanction without some record of the disciplinary process or sanction existing.

Even if the tribunal has erred in relation to this finding, it would still have found that this incident did not cause or contribute to the claimant's dismissal because the letter of dismissal did not refer to any consideration of this matter and expressly stated that the cause for the dismissal was "*misconduct on Sunday 1 September 2019".* The tribunal finds it improbable that the respondent would have omitted to refer to consideration of this incident on their part in the dismissal letter had this been a material consideration in the decision to dismiss.

(ix) The incident of 1 September 2019

The tribunal finds that there was blameworthy conduct on the part of the claimant in respect of the incident on 1 September 2019 which caused or contributed to her dismissal. The tribunal finds that in the circumstances a reduction for contributory conduct is appropriate. The claimant's conduct was foolish and obstinate. There was something "bloody minded" in her remaining stood at customer X's table, as this action was likely to provoke and further escalate the situation with customer X. The claimant could have and should have moved away, seeking assistance from the doorman or from a director who was present on the premises. The tribunal also finds that this behaviour did ultimately contribute to her dismissal and that it is just and equitable to reduce her compensatory award in amount of **35%.** As noted in **Harvey,** set out at paragraph 33 above, "*the tribunal is entitled to take into account the conduct or actions of others insofar as they are relevant to the assessment of the culpability of the claimant's conduct."* In this context, the tribunal criticises the conduct of Mr Grant. It is clear from the evidence of the claimant, Mr Grant and Mrs Trimble, that Mr Grant, without any investigation of the circumstances giving rise to the claimant silently standing at customer X's table, and in the absence of any clear legal basis, committed a battery against the claimant. The actions which followed immediately upon this battery, that is the claimant following Mr Grant outside, warning him not to touch her again and calling the PSNI on him, were a consequence of Mr Grant's conduct. The tribunal does not find that the claimant's actions following Mr Grant's interaction were "blameworthy" in these circumstances.

HOLIDAY PAY

63. The tribunal finds that the claimant is entitled to recover in full payment for the accrued but untaken holidays claimed by her. The respondent accepted the claimant was owed holiday pay, but sought to limit recovery to 6.5 days on the basis that further leave had not been carried over and had been lost. The respondent relied on the provisions of a handbook included in the trial handbook which prevented carry over of unused holidays to the next leave period, which commenced on 1 April in each year. The claimant denied ever having been given this handbook. The respondent's witnesses did not give evidence about when or how this handbook had been given to the claimant. In these circumstances, the tribunal concludes that the claimant's right to carry over was not restricted and awards 22 days' holiday pay which was accrued and untaken at dismissal (being 28 days less 6 days taken).

Remedies for Unfair Dismissal

Basic Award

64. The tribunal awards four weeks' gross pay as a Basic Award in light of the respondent's failure to follow the statutory dismissal procedure. The respondent's representative has not made any suggestion that the making of this award would cause injustice to the respondent.

Basic Award = Gross weekly pay - £303.94 x 4 **= £1,215.76**

Compensatory Award

65. The tribunal declines to award the claimant counselling costs, which were not vouched, on the basis that she had been attending counselling through the NHS before she was dismissed. Accordingly, the tribunal is not satisfied that this loss should be attributed to the respondent. The tribunal declines to award a sum in respect of an underpayment of tax, on the basis that having regard to the documentation supplied by the claimant in respect of this, it arose in respect of a period for which she was not working for the respondent. It is open to her to liaise with HMRC if she believes that the calculation which has led to the request for payment is incorrect. The tribunal calculates the compensatory award up to 8 March 2021 as follows:

Loss until 8 March 2021

Loss of statutory rights	- £350.00
29 weeks at net weekly pay - £274.68 =	£7,965.72
50 weeks at net weekly pay (furlough at 80%) - £219.74 =	£10,987.00
Loss of pension contributions at 3% =	£720.00
Total loss before mitigation and adjustment	**= £20,022.72**

Less sums in Mitigation

Kilkeel Sea Foods (2 shifts) (£159.66)

Less 20 weeks payment in kind from Harley's Bar:

20 weeks at £82.40 (being **30%** of a week's pay based on 1-2 shifts per week at minimum wage rate) = (£1,648.00)

Total received in mitigation **(£1,807.66)**

£20,022.72 - £1,807.66 **= £18215.06**

Less Polkey reduction

£18215.06 less 50% (£9,107.53)

£18215.06 – (£9,107.53) **= £9,107.53**

Plus Statutory uplift

Failure to follow Statutory Dismissal Procedures – **30%** uplift = £2,732.26

Total compensatory loss award before contributory conduct deduction

= £11,839.79

Contributory Conduct deduction

Less **35%** of £11,839.79 = (£4,143.93)

£11,839.79- 4,143.93 = £7,695.86

Final Compensatory Award after all adjustments **= £7,695.86**

Failure to provide main statement of terms and conditions

– 2 weeks' gross pay **= £607.88**

Remedy for Holiday Pay claim

66. The tribunal finds that the claimant's claim for unpaid holiday pay is well founded and awards the sum of:

£274.68/5 = £54.94 net daily rate x 22 **= £1,208.68**

67. The claimant was in receipt of Universal Credit, which is a recoupable benefit from 25 September 2019.

68. This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1990.

Employment Judge:

Date and place of hearing: 28-30 March 2022, Belfast

Date decision recorded in register and issued to parties:

INTEREST NOTICE

INDUSTRIAL TRIBUNALS
INTEREST ON AWARDS IN NON DISCRIMINATION CASES

The Industrial Tribunals (Interest) Order (Northern Ireland) 1990 provides that interest shall accrue on a sum of money payable as a result of a decision of an industrial tribunal not being an award to which any of the following apply:

i. The Industrial Tribunals (Interest on Awards in Sex and Disability Discrimination Cases) Regulations (Northern Ireland) 1996

ii. The Race Relations (Interest on Awards) Order (Northern Ireland) 1997

iii. The Industrial Tribunals (Interest on Awards in Age Discrimination) Regulations (Northern Ireland) 2006

iv. The Industrial Tribunals (Interest on Awards in Sexual Orientation Discrimination Cases) Regulations (Northern Ireland) 2003

where that sum remains unpaid in whole or part 42 days after the day the decision of the tribunal was issued to the parties. 'Decision day' in this context means the day the decision of the tribunal was issued to the parties and 'calculation day' means the day immediately after the expiry of the period of 42 days from (and including) the decision day.

The 'stipulated rate of interest' is the rate of interest in force on amounts awarded by decree in the county court on the decision day. Interest does not accrue on costs or expenses awarded by the tribunal.

In this claim, please note that –

1. the decision day is [insert] being the day the decision was sent to the parties;

2. the calculation day is [insert] being the day immediately after the expiry of the period of 42 days from and including the decision day; and

3. the stipulated rate of interest is 8% being the rate of interest in force on amounts awarded by decree in the county court on the decision day.

B. Gamble

_____

Employment Judge

CASE REF: 24558/19

CLAIMANT: **Mariya Bozova**

RESPONDENT: **Kilmorey Arms Ltd**

ANNEX TO THE DECISION OF THE TRIBUNAL

STATEMENT RELATING TO THE RECOUPMENT OF JOBSEEKER'S ALLOWANCE, INCOME RELATED EMPLOYMENT AND SUPPORT ALLOWANCE, UNIVERSAL CREDIT OR INCOME SUPPORT

1. The following particulars are given pursuant to the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations (Northern Ireland) 1996; The Social Security (Miscellaneous Amendments No.6) (Northern Ireland) 2010; and The Universal Credit (Consequential Supplementary, Incidental and Miscellaneous Provisions) Regulations (Northern Ireland) 2016.

(a) Monetary award of **£10,728.18**
(b) Prescribed element of **£5,002.31** (proportionately reduced as per Regulation 4(2))
(c) Period to which (b) relates: 2 September 2019 – 8 March 2021
(d) Excess of (a) over (b) **£5,725.87**

The claimant may not be entitled to the whole monetary award. Only (d) is payable forthwith; (b) is the amount awarded for loss of earnings during the period under (c) without any allowance for Jobseeker's Allowance, Universal Credit, Income-related Employment and Support Allowance or Income Support received by the claimant in respect of that period; (b) is not payable until the Department for Communities has served a notice (called a recoupment notice) on the respondent to pay the whole or a part of (b) to the Department (which it may do in order to obtain repayment of Jobseeker's Allowance, Income-related Employment and Support Allowance, Universal Credit or Income Support paid to the claimant in respect of that period) or informs the respondent in writing that no such notice, which will not exceed (b), will be payable to the Department. The balance of (b), or the whole of it if notice is given that no recoupment notice will be served, is then payable to the claimant.

2. The Recoupment Notice must be served within the period of 21 days after the conclusion of the hearing or 9 days after the decision is sent to the parties (whichever is the later), or as soon as practicable thereafter, when the decision is given orally at the hearing. When the decision is reserved the notice must be sent within a period of 21 days after the date on which the decision is sent to the parties, or as soon as practicable thereafter.

3. The claimant will receive a copy of the recoupment notice and should inform the Department for Communities in writing within 21 days if the amount claimed is disputed. The tribunal cannot decide that question and the respondent, after paying the amount under (d) and the balance (if any) under (b), will have no further liability to the claimant, but the sum claimed in a recoupment notice is due from the respondent as a debt to the Department whatever may have been paid to the claimant and regardless of any dispute between the claimant and the Department.