THE EMPLOYMENT TRIBUNALS

BETWEEN

Ms Terri Paddock ***Claimant***

AND

Whatsonstage Limited ***Respondent***

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: London Central **ON:** 19, 22, 23, 24, 25 and 26 September 2014 and (in Chambers) 9, 10 and 11 December 2014

EMPLOYMENT JUDGE: Mr Paul Stewart **MEMBERS:** Ms Carol I Ihnatowicz and Dr Jim Moher

Appearances:

For Claimant: Mr D O'Dempsey of Counsel

For Respondent: Mr P Gorasia of Counsel

JUDGMENT

The complaints of direct sex discrimination, harassment and perceived disability discrimination are all dismissed. The complaint of unfair dismissal is upheld. No reduction in either the compensatory award or in the basic award is justified on the ground that it would be just and equitable so to do having regard to the Claimant's conduct or on the grounds outlined in Polkey v Dayton Services [1988] A.C. 344.

REASONS

1. The Claimant has made five claims: unfair dismissal, wrongful dismissal, harassment, direct sex discrimination and perceived disability discrimination.

2. Employment Judge Glennie, in making directions at a preliminary hearing on 6 June 2014, noted there to have been agreement on a list of issues. That list duly appears in our bundle at pages 45 to 47.

3. The Claimant's evidence was given at the outset but was interrupted on two occasions by the need to interpose witnesses whose personal commitments militated against them being able to await their turn. The first interruption allowed us to hear the evidence of Mr David Leatham and Mr Richard Howle for the Claimant. The second interruption allowed us to hear, by video link, the evidence Mr Jon Williams and Ms Victoria Lang for the Respondent and Ms Kimberly Kaye Lopez for the Claimant. After the Claimant had finished her evidence, we heard evidence from Mr James Seabright and Mr Richard Gresham, these being the final witnesses for the Claimant.

4. Thereafter, we heard evidence from Ms Gretchen Shugart, Mr Lee Simonson, Mr Joe Yurcik, Ms Leila Faiz and Ms Kate Koch for the Respondent.

FACTS

5. The Respondent's business in London started out as a website created by EMAP Online. The Claimant was hired in June 1997 to work part-time editing content on the site. She left in March 2000 to found a start-up company with her then husband, Mr David Dobson. The company she and her husband created, Bandwidth Communications Ltd, acquired EMAP's website known as WhatsOnStage.com and, in October of that year, the Claimant became an employee of Bandwidth Communications Ltd.

6. The Claimant held the position of Editorial Director and Mr Dobson the position of Managing Director. In December 2010, Mr Dobson stepped down from his executive role and the Claimant took over as both Managing and Editorial Director, which position she held until her dismissal on 16 December 2013.

7. From 2008 to 2013, there had been some changes in the ownership of the Bandwidth Communications Ltd. A company called TheaterMania based in New York was interested in purchasing WhatsOnStage in 2008 but, in the event, the Really Useful Group, created by Andrew Lloyd Webber, made a bid that was accepted by the shareholders. The Claimant and her husband retained their executive roles but became minority shareholders in the company. In 2011, the Claimant lobbied for TheaterMania to purchase WhatsOnStage believing the same to be a way to secure further funds to invest in the business. However, the Time Out Group made a bid which was accepted by the shareholders. At this change in ownership, Mr Dobson and the Claimant ceased to be shareholders.

8. It appears that the Time Out Group was not able to devote the time or the finance that might have been its intention on purchase or, at any rate, was the Claimant's hope. As a result, in 2012 the Claimant contacted Ms Gretchen Shugart of TheaterMania to see whether, for the third time, TheaterMania might be interested in purchasing WhatsOnStage. This time TheaterMania not only was interested but completed the purchase in December 2012.

9. There were some negotiations conducted ahead of the purchase between the Claimant and TheaterMania concerning the personal remuneration that the Claimant received. She had been entitled under her contract to certain bonuses which, if the entitlement was to be honoured, considerably reduced the attractiveness of the proposed purchase for TheaterMania. As a result, the Claimant appears to have reached an agreement with TheaterMania whereby she accepted a new contract of employment for the promise of shares, later varied to

being a promise of share options.

10. We did not explore this agreement which we understand may be the subject of proceedings in the High Court. We were told that the documentation for the agreement concerning share options was never forthcoming from the Respondent to the Claimant. We make no findings of fact concerning that agreement nor as to whether she was entitled to such options in the event of her dismissal from the company.

11. By the time that TheaterMania purchased the company owning the business WhatsOnStage.com in December 2012, the company name had changed to become WhatsOnStage Ltd. The Claimant signed a service agreement on 19 December 2012 which provided for her to be employed by the Respondent as the Managing and Editorial Director, such appointment to continue until terminated by either party giving to the other not less than six months' notice in writing.

12. Among the duties of the Claimant as set out in the service agreement was one at 3.4 requiring her to "promptly disclose to the Chief Executive [*Ms Shugart*] any misconduct or breach of duty on her part". There was a provision whereby the Respondent could terminate the service agreement without notice in certain situations which were set out at 11.4. Ten such situations are catered for in that provision but the two relevant ones for these purposes are those set out at 11.4.1 and 11.4.7. These are where the Claimant:

> "shall:
>
> "11.4.1 commit any act of serious misconduct: or ...
>
> "...
>
> "11.4.7 act in any way which may in the reasonable opinion of the Board bring the Company or any Group Company into disrepute or discredit, or prejudice the interests of the Company or any Group Company."

13. "The Board" is defined in the agreement as being:

> "the board of directors of the Company from time to time" and "the Company" is the Respondent Company.

14. In the Staff Handbook which contained the company's policies, practices and procedures and which employees, by dint of their acceptance of employment with the company, were deemed to have undertaken to apply, there was provided a list of details of behaviour which the company viewed as gross misconduct which were stated as being likely to result in dismissal without notice. Two of the items on the long, but not exhaustive, list were:

- Bringing the Company into disrepute
- Unlawful discrimination, including acts of indecency or harassment.

15. The Handbook also contained the company's Harassment and Bullying Policy which defined harassment in the terms used in section 26 of the Equality Act 2010 as being:

> "Any unwanted physical, verbal or non-verbal conduct based on sex, sexual orientation, marital or civil partnership status, gender reassignment, religious belief, age, race or

> disability which affects the dignity of anyone at work or creates an intimidating, hostile, degrading humiliating or offensive environment."

The Handbook specified that a single incident of unwanted or offensive behaviour can amount to harassment with a number of examples given, one of which was:

> "Inappropriate personal contact, including intrusion by pestering or spying."

16. Within the Handbook is to be found the Disciplinary Policy and Procedure. The procedure set out therein provided for the company to have the right to suspend an employee pending further investigation or disciplinary action. An employee could be required to attend an Investigation Meeting. Depending on the outcome of the investigation, the company would decide whether or not to proceed with a Disciplinary Meeting. If the employee were to be required to attend a Disciplinary meeting, the company would inform him or her of this in writing. In the letter, the company would set out the issues to be considered, how seriously these were being viewed, the potential consequences and details of any intention to call witnesses. The timing of this meeting was to be fixed to allow the employee sufficient time to prepare his or her case. If, for any legitimate reason, the employee was unable to attend the meeting, then the meeting may then be delayed to facilitate the employee's attendance, if this was considered reasonable.

17. During 2013, there appear to have been concerns on the part of the new American owners of the Respondent over its performance. There were attempts on the part of Ms Shugart to identify reasons as to why the Respondent was not profitable and these attempts appear to have centred on the role that the Claimant performed. Ms Shugart perceived that changes were needed and envisaged the Claimant, whose enthusiasm and qualities she lauded, acting in more of an ambassadorial role rather than as a hands-on executive. Ms Shugart arrived at that conclusion after interaction with the Claimant that left the Claimant feeling bruised and undermined.

18. We do not intend to rehearse all the detail of events during that year which contributed to the Claimant feeling undermined and might, had she not been prepared to accept much of Ms Shugart's ideas on the management structure of the Respondent, have resulted in her resigning and claiming constructive dismissal. We should, however, mention the events surrounding a questionnaire distributed to London staff by Ms Shugart in October 2013. This questionnaire comprised questions formulated by Ms Shugart without input from the Claimant. They were read out to the Claimant once without a copy being provided to her. Staff were given the option of declaring whether or not they wanted their identity as the authors of their answers to be disclosed to the Claimant. The Claimant perceived the questions as active encouragement to her staff to complain about her.

19. A meeting was arranged for 24 October for Ms Shurgart to discuss with all staff the responses which the questionnaire had generated. Ahead of the meeting, Ms Shurgart told the Claimant that all staff were unhappy with her, that they were afraid of her, that they did not trust her and that they were all threatening to quit because of her. At the meeting, staff were encouraged to criticise her openly. When she questioned one complaint advanced by a member of staff by seeking further detail, Ms Shugart intervened and told the member of staff he need not

provide further detail and told the Claimant she was being defensive. The staff were told that they were the management team of the future and that the Claimant was not needed to make the company successful. She was to back away from management and simply be on hand as a 'resource' for the staff.

20. The perception of the Claimant was that, for the duration of the meeting, a period of two hours, she was made the subject of criticism to which she was not allowed the opportunity to respond properly. She felt humiliated.

21. As we have stated, despite her bruised feelings about the way in which Ms Shugart treated her, the Claimant did not resign. She went out of her way to accept the role that Ms Shugart was fashioning for her as was evident from a document she sent Ms Shugart on 15 November 2013 entitled "Overview – the Role and the Why Behind It" which was referred to as "Terri's role thoughts". Nonetheless, the Claimant was taken by surprise at an off-site all-staff meeting on 10 December 2013 by Ms Shugart producing an organisational chart encompassing both the TheaterMania [in New York] and the WhatsOnStage [in London] businesses. This chart had been prepared without input from the Claimant. The chart showed that all aspects of the business reported directly to Ms Shugart as did the Claimant and Darren Sussman, the founder of TheaterMania and a man fondly referred to by Ms Shugart as "goofy". However, no-one reported to either the Claimant or Mr Sussman. Both of them were shown in the organisational chart as having a downward input into two areas of the business which, in the Claimant's case, were into Marketing and into that part of Editorial which was handled by Mr Theo Bosanquet. This stark depiction of how the Claimant was being stripped of her managerial role upset the Claimant when she saw the chart unveiled by Ms Shugart at the 10 December 2013 meeting.

22. Four days previously, the Claimant had acted as the emcee in the Respondent's Awards ceremony, an event whereby the votes of theatregoers, as collected by the Respondent, determine awards to performances in the previous year. The event generates considerable publicity for the Respondent and was regarded by the Claimant as highly important. She saw the event as indicative of the Respondent acting as a champion for the theatre as an art form, a role for the Respondent which, when articulated by the Claimant at the meeting on 10 December, was specifically rejected by Ms Shugart.

23. The Awards ceremony itself appears to have been very successful. Mr Joe Yurcik, the Chief Financial Officer of the joint businesses whose base was in New York, attended and complimented the Claimant on having done a good job acting as emcee. He had not only attended the ceremony but also, for a short time, an after-party which was held where the ceremony had been. Some stories of the Claimant's behaviour at this party reached his ears in subsequent days: it was said she had been drunk. Mr Yurcik heard this allegation at breakfast the following day from Ms Kate Koch, another New York employee who was in London and who shared an apartment with Ms Shugart. Ms Shugart was present at that breakfast. Some days later, he heard an allegation that the Claimant had changed her outer clothes in a room where there had been other staff present, including one male employee who happened to be gay and whose sexual orientation she had alluded to when asserting it was all right for her as a female to change in front of him. Additionally, he learned of an allegation that she had been

rude to a male member of staff who had resisted her entreaty to have a hug. However, although Mr Yurcik had the ear of Ms Shugart and had heard and discussed the allegation of drunkenness in her company, no action was taken.

24. On 10 December 2013, the off-site all-staff meeting was followed by a staff Christmas lunch which was held in Brown's Restaurant in St Martin's Lane. There, Mr Yorcik witnessed an incident that was to be categorised as gross misconduct and was the one incident of gross misconduct relied on by the Respondent for their dismissal of the Claimant. Putting it shortly, he witnessed the Claimant touching with her right hand the outer clothing covering the left breast of Ms Laura Norman, an employee of the company and more junior than the Claimant. Mr Yorcik made a manuscript note of what he witnessed sometime later. He recorded:

> "Terri reaches across the table and puts her hand on Laura Norman's breast and comments on them ...
>
> "[Terri said, "Laura has wonderful breasts; aren't they wonderful?"]
>
> "And JY [*Mr Yurcik*] says to TP [*the Claimant*] You cannot do that.
>
> "TP responds saying it is okay because I have big breasts too.
>
> "JY states that is not a reason that would make it ok.
>
> "Laura Norman states in a light-hearted voice Yes, that means you can't.
>
> "TP adds that it's ok; Peter likes her breasts [referring to her own]. Joe, confused, thought TP was referring to her boyfriend, gave Terri a look that may have suggested confusion and said "Your boyfriend?"
>
> "TP said Peter Gibbons [*an* employee] and Peter Jones [*her boyfriend*] likes them too.
>
> "JY said to TP This is too much information.
>
> "TP continued by stating "Doen't Laura have a great body? I think she has a great body."
>
> "All present, seeing the downward spiral, re-directed their attention elsewhere and physically moved where possible."

25. It is of note that this happened at the end of a large table where some 15 or 16 people had had lunch of whom some 5 had departed. Ms Shugart was at one end of the table talking to a Mr Jonathan Gilpin, a man she described as being a "vendor", who was sitting on her left at the end of the table. On Ms Shugart's right, there was Ms Norman and, beyond Ms Norman, was Ms Leila Faiz. On the left of Mr Gilpin was Mr Yurcik. Beside Mr Yurcik on his left was the Claimant. We know the positioning of the individuals at the table because we were provided with CCTV footage that had been recorded by Brown's Restaurant and made available at a later date to the Claimant.

26. It is worth recording, at this point, what the Claimant says happened. Her account, made in her witness statement, was not prepared contemporaneously but she was assisted in her recollection by being able to view footage of the CCTV video recordings that Brown's Restaurant had made, part of their security system. The Claimant said this:

> "A little later on towards the end of the meal I saw Laura Norman, who was sitting diagonally opposite me, jiggle her breasts and I laughed. Joe looked at me when I laughed

> as I think he hadn't seen Laura doing this. I asked Laura to do it again. We both explained to Joe, and Leila who was also laughing, that this was a long running joke. Laura often jiggled her breasts on social occasions and it always made me laugh. I briefly touched my own breasts to demonstrate. Then Laura said something like "Terri's jealous of my breasts" and invited me to touch her. She leaned forwards over the table towards me. I stood, leaned over and lightly touched the top of her chest. This lasted at most one second.
>
> "Joe said "you can't do that in the United States". Laura responded and gestured towards Joe saying something like "I wouldn't recommend you do it because you are a man but Terri can because she is another large breasted woman and I asked her to" and everyone laughed, including Joe and Leila. By way of further explanation, I told Joe that the breast joke had been fuelled at a staff Christmas party two years earlier when an extremely drunk Peter Gibbons had jokingly compared mine and Laura's breasts and repeated grabbed both of us throughout the evening. Joe asked whether I was talking about my partner, Peter Jones, and I said "No, Peter Gibbons". Laura confirmed what I was saying, Joe said in a joking tone "OK, too much information" or words to that effect. Everyone laughed. At that point, people just carried on talking about other things."

27. Following the lunch, Mr Yurcik reported what he had seen to Ms Shugart in the presence of Ms Koch. Ms Koch contributed certain observations of another matter that had been reported to her by Messrs Peter Gibbons and Kevin Quilty and Ms Leila Faiz. One of the attendees at the lunch party was a Mr Richard Gresham, a Sales Consultant formerly employed by the Respondent who was actively in discussions with Ms Shugart concerning his possible re-joining of the company and had been present at the earlier all-staff meeting. The Claimant had conducted a conversation with Mr Gresham over lunch. The report that Ms Koch had received from her informants led her to describe this conversation as "not business appropriate". The mischief of the conversation in her eyes was Mr Gresham's indication that, in the event he re-joined the Respondent and became head of the sales team, those within the team who did not pull their weight would be fired, a matter which apparently had caused some concern to Mr Quilty, a member of the sales team, who was at the table and able to overhear Mr Gresham's remarks. A further mischief in Ms Koch's eyes was the report of the Claimant and Mr Gresham discussing the US / UK split of the business and using the phrase "scratch your back if you'll scratch mine."

28. As a result of what Mr Yurcik had observed and reported and of what Ms Koch reported, Ms Shugart and Mr Yurcik spoke to several members of staff on 11 December. The staff they spoke to were Ms Faiz, Mr Gibbons, Mr Jon Kearnes, Ms Norman and Mr Quilty. Mr Yurcik reported these people as having:

> "confirmed that they had overhead the conversations between Terri and Richard and / or had seen Terri touching Laura and / or heard Terri's comments and / or my reactions to Terri's actions."

29. We note that Mr Yurcik did not choose to include in his report whether Ms Norman regarded the touching of her breast as unwanted physical contact.

30. Mr Yurcik and Ms Shugart decided they should meet with the Claimant the following day, 12 December. Ahead of the meeting, they discussed the Claimant's conduct and "consulted extensively" with UK employment solicitors. Mr Yurcik told us:

> "we were both very clear in our minds that Terri's conduct constituted gross misconduct under her employment contract and we, therefore, felt we had sufficient grounds to terminate her employment in accordance with clause 11.4 of the contract.

> "My personal view was that we should terminate Terri's employment immediately. Terri was the most senior UK based employee and should have been setting an example for the other staff members. In my eyes, Terri's inappropriate touching of Laura in a public restaurant and her inappropriate comments regarding Laura's body in a public restaurant were enough on their own to justify dismissal on the grounds of gross misconduct. I find it almost incomprehensible that a person would continue to pursue their poor actions and judgments after it being overtly made clear to them that they cannot 'do that'. Further, I saw this as an abuse of seniority in that Laura was junior to Terri. Still further, the restaurant was busy and we were at a work event where our company's name was posted in a public section in the front of the restaurant. We were therefore representing WOS and TheaterMania. I thought that Terri's actions had put the WOS and TheaterMania's reputations at risk."

31. Ms Shugart wrote up, in or around New Year's Eve 2013 which she spent in Cape Town, a note to help her remember events which had occurred both on 6 and 10 December. That part of her note regarding the breast touching incident reads as follows:

> "Also, Joe then reported to me that Terri had touched Laura Norman's breast at the end of the lunch for an extended period of time (he said she held her hand there for 30 seconds) and, when Joe told her she couldn't do that, she said it was okay because she had big breasts too and commented on Laura's figure. I was told this was witnessed by others. The next day, Laura Norman confirmed that this happened, as did Leila Faiz."

32. On 12 December, the Claimant was called to meet with Mr Yurcik and Ms Shugart. The meeting lasted some 37 minutes, a fact we know because the Claimant, having some apprehension that the meeting was not going to be a good event for her, recorded the event and thus we have a complete transcript of what was said.

33. Ms Shugart introduced the subject of the meeting in this manner:

> "As you know, over the course of the last year, there have been issues and we've talked about them a lot. Concerns about your management style, concerns about insubordination and things like that. It's always been our hope, and we've been working with you, to try and address those things.
>
> "Frankly, as time has gone on, it has felt like we might not be able to get there with you. However, we were still invested and showed up at the beginning of this visit, fully hoping to continue the process, put you in the position that you said you wanted in the company; all of those kinds of things. But now, in the last five days, really inappropriate behaviour on your part has come to our attention."

34. The Claimant asked what had she done. Ms Shugart continued:

> "The things that really disturb us are getting drunk, and drunken behaviour at the nominations event, at the party. Disrobing in front of employees.
>
> "...
>
> "Changing clothes with employees in the room. At the luncheon at Brown's, having inappropriate conversations with Richard Gresham about scratching each other's back. About "if you hear anything from New York, will you let me know?"

35. The Claimant said "I didn't say that, I don't know what you're talking about." And Ms Shugart continued:

> "You will have a chance to address these charges because we are calling a disciplinary investigation, if you want to take it there. And another thing, Terri, which is very, very serious: putting your hand on the breasts of an employee, in a public space, at a company event. They happened, these things happened. We can prove them, people saw them."

36. Ms Shugart told her that they had a letter inviting her to a meeting the following day. She said counsel had advised that disciplinary action could be taken and such disciplinary action might include termination of employment without notice. Once they had had the meeting, "we'll make a decision about what the appropriate course of action is".

37. The Claimant addressed Mr Yurcik:

> "You were there, and you know. She was jiggling her breasts, and it's a joke that we have. She made a joke about it and then said: "Oh yeah, you can touch them." That's how it was..."

Mr Yurcik:	"I didn't hear anything. I didn't see Laura jiggling her breasts or moving in any way other than her sitting there or standing up at any other point in time. I definitely saw, as you point out, and as I said to you, you can't do that. And you said, "Oh, it's okay." And I said "No, you can't do that," and you went on to say, "Its okay, because I have large breasts too.""
The Claimant:	"No, she said that. She said it was okay because ..."
Mr Yurcik:	"No you said that."
The Claimant:	"Has Laura complained about this?"
Mr Yurcik:	"And ... there were other people there and as Gretchen pointed out ..."
Ms Shugart:	"In a public place."

38. The meeting continued with the Claimant expressing astonishment at the allegation of changing clothes, something that was done every year at that event.

Ms Shugart:	"Okay we can talk about this tomorrow. Let me go through this ... We think this looks very bad for you. "It's not our desire to dismiss you for gross misconduct. And, um, we can have an off the record conversation, if you wish, about another course of action. And off the record means that anything said, offered, in the off the record conversation cannot be referred to in the future. Does this make sense to you?"

39. The Claimant was distressed and crying at this point and pointed out that:

> "All I wanted was this. This is what I've been trying to make happen for years. And I've sacrificed a lot personally to make this happen."

40. Ms Shugart went on in the meeting to make clear that the alternative was an offer which "doesn't stay on the table past this meeting". This offer, if accepted, would avoid the potential consequence of the proposed disciplinary investigation which was of being summarily dismissed for gross misconduct, as to which possibility, Mr Yurcik observed:

> "based on what we know, that's a, that's a, that's a high likelihood. And, if we do that, and under the contract, you would be out of the company immediately and you would not receive any compensation of any type."

41. The Claimant sought some time to consider the offer and Ms Shugart relented from her stated position that the time available for consideration of the offer was only until the end of the meeting to 24 hours being available. The offer under consideration was of a termination with the Claimant receiving money in lieu of notice.

42. In the course of the conversation, the Claimant made the point that she had given up more that £100,000 [a reference to the bonus she asserts she was entitled to under the contract which pertained before TheaterMania's purchase from Time Out]. Ms Shugart responded with: "It's not working, is it?"

43. The meeting drew to a close with Claimant being presented with a letter already prepared which called her for what was described as a disciplinary investigation meeting the following day at 2 p.m. The offer of six months' salary in lieu of notice would stand until that meeting. Ms Shugart left the room first. The Claimant was in some distress at this point. Mr Yurcik told her:

> "I think there's a way to go about it and to explain to the marketplace so that you can leave with your head held high. And people move on and it's something that, at the moment, in the moment, moving on is a hard thing to think about. That's probably what you are experiencing.
>
> "I'll be around. Gretchen will be around to help. You can reach out to us."

44. The Claimant was told before the end of the meeting that she was suspended from duty pending the outcome of the disciplinary investigation. After the meeting, she consulted solicitors who wrote to Ms Shugart the same day announcing that the Claimant was unwell and would be consulting a doctor later in the day.

45. The solicitor later provided a medical certificate dated 13 December attesting that the Claimant was diagnosed with reactive stress and anxiety, insomnia and elevated blood pressure and was thus unable to attend work from 13 December to 20 December and hence would be unable to attend the disciplinary meeting on 13 December.

46. Ms Shugart and Mr Yurcik conferred and sought guidance from two other members of the TheaterMania Board of Directors. The conclusion they reached was that they should dismiss the Claimant forthwith. In consequence, Ms Shugart wrote a letter dated 16 December [*the termination letter*] stating:

> "Joe Yurcik and I met with you on Thursday 12 December 2013 to discuss certain allegations of gross misconduct. At that meeting you explain that although the acts alleged had taken place, it was your view that such conduct did not amount to gross misconduct. After careful consideration of these issues and reflections on your comments, I remain extremely disappointed in your behaviour, even more so as you do not accept your conduct was wrong.
>
> "My view remains that your conduct on Friday 6 December 2013 at the WhatsOnStage Awards Nomination event and on Tuesday 10 December 2013 at the team lunch at Browns was extremely inappropriate and, given your seniority within the Company, amounts to gross misconduct in breach of your employment contract, Unfortunately your recent conduct has destroyed all trust and confidence that the Company had in you and a working relationship with you is no longer sustainable."

47. The Claimant was dismissed summarily. Ms Shugart in her evidence said that the Respondent did not rely on the alleged drunkenness of the Claimant at the party which followed the awards ceremony. She specified that the gross misconduct for which the Claimant had been dismissed was:

> "Terri leaning across the table and touching Laura's breast."

48. Ms Shugart had, by the time she gave evidence, seen the video footage which the Claimant had obtained from Brown's restaurant. She therefore should have

realised that the incident she was referring to did not involve the Claimant leaning across the table but rather standing up and reaching her right hand out and putting it momentarily on the clothing covering Ms Norman's left breast. Furthermore, she would have realised that the report made to her by Mr Yurcik of the Claimant holding her hand on Ms Norman's breast for an extended period of time, asserted (she noted) by Mr Yurcik to have been for 30 seconds, was quite simply a gross exaggeration. Notwithstanding the fact that the decision to dismiss must have been based on an apprehension that the Claimant held her hand on Ms Norman's breast for 30 seconds, Ms Shugart stated clearly that the gross misconduct for which the Claimant was dismissed summarily was this momentary touching. She went on in her evidence to refer to the discussion that the Claimant was alleged to have had with Mr Gresham which Ms Koch had reported as being "not business appropriate". She stated that such a conversation was not a reason for dismissal but rather a reason for her not being able to hire Mr Gresham (the overtures which had been made to him by the Respondent about him re-joining the Respondent were taken no further after the Christmas luncheon party). She also dealt with the allegation that the Claimant was drunk in the party held after the Awards Ceremony by saying:

> "She did not lose her job because of drinking."

49. Later, she dealt with the allegation regarding the Claimant changing her outer clothing down "to her knickers" and she said that she had not dismissed the Claimant for this incident. And it was in the context of being cross-examined about the various incidents that were alleged to have taken place and which were mentioned in the meeting on 12 December that Ms Shugart stated, for the second time, that:

> "Laura Norman is the reason for summary dismissal."

50. Ms Shugart brushed aside the difference in the reported length of time that the Claimant had her hand on Ms Norman's breast:

> "I did not care whether it was 1 second or 30 seconds."

51. She admitted that she had not checked whether, ahead of the incident, Ms Norman had herself drawn attention to her breasts by moving them up and down with her hands, an action described as "jiggling" her breasts. For her, the incident was not trivial and she asserted that Mr Yurcik was visibly shaken by observing the Claimant's action:

> "To this day, he is spooked by this, haunted by this. I don't think this is trivial at all.
>
> "I think Laura was part of the culture of the company – used to Terri and was putting up with her boss – there is a culture of oppression in the office – prior to the incident.
>
> "Laura never said she was offended, I was offended and Joe was offended. She got angry after the fact because she was seeing the way it was seen."

52. As to the nature of the incident, Ms Shugart in answer to a question from the Tribunal, said:

> "I did think this was a sexual act."

53. It should be mentioned that Ms Shugart can be seen in the video recording talking to the person on her left during the time that the breast touching incident took

place. With her head leaning forward and turned to her left, her hair falls down on her right forming a curtain that would have obscured her vision to the right. And her evidence was that she has bad vision in her right eye in any event. Hence she did not see any part of the incident notwithstanding that Ms Norman was sat immediately on her right.

54. Mr Yurcik was cross-examined about the breast touching incident. He asserted that the whole incident happened over half a minute during which time comments were made about Ms Norman's body. He denied having told Ms Shugart that the Claimant's hand was on the breast for 30 seconds in this manner:

> "I do not believe I told Gretchen that Terri held her hand on Laura's breast for 30 seconds. I had no idea that Terri taped covertly the conversation on 12 December. I don't believe I said she held her hand there.
>
> "Totally unacceptable – I have not changed my story. Your suggestion is wrong. I was not trying [to mislead] – it was a very serious piece of sexual harassment."

55. There was an appeal launched by the Claimant. Mr Lee Simonson, a member of the TheaterMania's board, heard her appeal over a video link. We were not impressed with Mr Simonson's evidence. It appeared to us that he neither had a clear recollection of the documents he had read ahead of the appeal nor had he a proper understanding of the independent role he was required to exercise on the appeal - he had been briefed by both Mr Yurcik and Ms Shugart along with legal counsel ahead of conducting the appeal hearing. Indeed, he appeared to have some difficulty in identifying what the reason for the dismissal had been, saying eventually that the reason was inappropriate behaviour at the after-party.

56. Mr Simonson stated in evidence that his:

> "Charge was to listen to [the Claimant] and give her a chance to defend herself."

He said he had been told:

> "My job was to listen and ask questions of Terri and then to affirm or quash the action".

He couldn't remember the package of information he had been given, he was not sure whether he had seen the dismissal letter although later in his evidence he said:

> "I had no other documents other than the letter of dismissal and the appeal letter."

57. He did not take notes of his conversations with the Claimant and other witnesses because he did not think he needed to take notes. The Claimant played to him on a screen held up to the video camera providing the link from London to New York the CCTV footage she had obtained from Brown's Restaurant and he said:

> "She [The Claimant] touched her [Ms Norman's] breast for some 5 to 10 seconds.
>
> "What I saw was that she touched her breast long enough to see it clearly. It might have been 5 seconds, it might have been 7 seconds but enough to see it clearly."

58. We pause to observe that, had Mr Simonson received the same information as had Ms Shugart about the allegation being made concerning the Laura Norman incident, he would have understood that the Respondent, when taking the decision to dismiss, was doing so on the basis that the Claimant had kept her hand on Ms Norman's breast for 30 seconds. What he would have seen on the

video, even when observing the video recording that the Claimant played to him over the video link and certainly later if, indeed, he availed himself of the opportunity to view the video clip that the Claimant emailed to him after the appeal hearing, was a momentary contact of the Claimant's right hand on the garments covering Ms Norman's left breast which lasted, at best, 1 second. We found Mr Simonson's readiness to describe the period of contact as being 5 seconds, perhaps as long as 7 seconds, difficult to understand. If he had been told the contact lasted for 30 seconds, he could not have failed to observe a whooping discrepancy between that information and the evidence on the video. For him to ignore the discrepancy and substitute another estimate of the period of contact between hand and breast suggested to us that he was not acting as an independent and disinterested adjudicator on the Claimant's appeal.

59. Mr Simonson did not check what information the Claimant had been given ahead of the appeal hearing. He himself had no other documents than the letter of dismissal and the appeal letter. The Claimant read out to him statements she had obtained from witnesses: he regarded as being:

> "glowing citations on her standing in the London Theatre Community"

60. He accepted, however, that some of the statements she read out went to the events in question but he did not put those statements (the Claimant had provided copies to him as well as reading them out) to the people he talked to after the appeal hearing because he did not perceive himself to be an investigator: he was hearing the appeal as a board member. Notwithstanding his perception that he was not an investigator, he took the trouble to speak to Ms Norman, Ms Koch and Mr Peter Gibbons as well as Mr Yurcik and Ms Shugart and reviewed a statement from Ms Faiz.

61. He did not perceive the procedure adopted by the Respondent leading up to the dismissal to have been unfair. He did not regard his role as encompassing that of making sure that the Claimant knew the charges against her. He did not know whether he knew at the time whether the Claimant had received statements of witnesses to the alleged events. He did not give the Claimant the opportunity of asking questions of such people.

62. He told us that he considered the points the Claimant made very carefully but could not come to any other view than that her behaviour was sufficiently inappropriate to warrant summary dismissal. He said:

> "I could not see any circumstances where it would be acceptable for a very senior employee to get drunk at a work function, verbally assault an employee in front of others and then touch another employee's breast in a public restaurant.
>
> " ...
>
> "In relation to the process followed, I did think it was quick. However, after speaking with Gretchen and Joe, I could see why they made the decision as they had. Joe and Gretchen had spoken with a number of people who had all confirmed the accuracy of the reports about Terri's conduct. It was clear they were convinced she had done what she was accused of and, in fact, to a material extent, Terri admitted it to them. It was very apparent that Terri's failure to take responsibility and acknowledge wrongdoing was also a significant factor for Gretchen and a longer process would not have affected the decision. I felt that the process that was followed was justified."

63. Again, we pause to observe that it is strange that Mr Simonson was unable to see any circumstances where it would be acceptable for a very senior employee to get drunk at a work function and verbally assault an employee in front of others, these being two incidents which he appear to have understood as being relied upon by the Respondent to justify, along with the breast incident, summary dismissal. Ms Shugart at this hearing made it clear she did not rely on such incidents as justifying summary dismissal. Nonetheless, the view Mr Simonson formed of those incidents contributed to his dismissal of the Claimant's appeal against dismissal. We can only speculate that Ms Shugart has reached her decision not to rely on those incidents because of some perceived flaw either in the evidence or the argument that such incidents justify summary dismissal. That Mr Simonson was not able to perceive such flaw or flaws contributes to our view that he was not acting as a disinterested party in the conduct of the Claimant's appeal.

THE LAW

64. In respect of the claim for unfair dismissal, we remind ourselves of section 98 of the Employment Rights Act 1996. Where dismissal is admitted, it is for the employer, per section 98(1):

> to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

65. Section 98(4) provides that

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

66. In respect of the claim of sex discrimination, we remind ourselves of the relevant provisions of the Equality Act 2010. Section 13(1) provides:

> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

67. And in respect of the claim of harassment, we remind ourselves of section 26 of the Equality Act 2010:

> (1) A person (A) harasses another (B) if—
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of—
>
> (i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if—

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are—

age;

disability;

gender reassignment;

race;

religion or belief;

sex;

sexual orientation.

68. Additionally, we have been referred to statutory material and to cases in lengthy written submissions that counsel for both parties provided to us – and for which we are much indebted. We do not propose to set out all the material and cases to which we were referred: suffice to say that we considered both in our deliberations.

DISCUSSION

69. We considered very carefully the evidence that the Claimant relies on to show that Ms Shugart treated her less favourably than she would have treated a man. We acknowledge that the evidence shows Ms Shugart to have been inconsistent in the way she sought to manage the Claimant, criticising her at one point for being too motherly towards her staff and at another point for behaving in a way which caused the staff to be frightened of her. We accept that the use of the term "motherly" can, on occasion, be pejorative. We also acknowledge that Ms Shugart's decision to provide a questionnaire to members of staff who had reported to the Claimant amounted to a permission to those staff to criticise their manager. And there was much not to admire in her determination that the

Claimant should listen, but not respond, to the staff's responses to the issues raised in the questionnaire that Ms Shugart had written. Further, we could understand how the Claimant could have become upset at the unveiling at the off-site all-staff meeting of an organisational chart which indicated to staff that the Claimant no longer received direct reports from anyone and merely had downward input into two areas of the business. In short, we had a great deal of sympathy with many of the complaints made by the Claimant of Ms Shugart's management of her. However, we did not believe that Ms Shugart would have treated a hypothetical man more favourably. We note that Ms Shugart was instrumental in recruiting a female COO, Sita Mcintosh, after the Claimant's dismissal. We believe Ms Shugart would have been as uncompromisingly difficult a manager to a man as she was to the Claimant. We were not persuaded that the dismissal of the Claimant, which we will discuss later in this judgment, was evidence of direct discrimination on the grounds of sex.

70. Turning to harassment, we accept that Ms Shugart engaged in unwanted conduct which either had the purpose or the effect of creating adverse environment for the Claimant. However, we were not satisfied such conduct was related to the protected characteristic of sex.

71. Moving on to the complaint of unfair dismissal, the Respondent has not satisfied us that the reason for the Claimant's dismissal was related to the Claimant's conduct. It is true that there was a number of complaints raised with the Claimant at the meeting held on 12 December that all related to conduct. However, the one instance of conduct which the Respondent stigmatised as gross misconduct and has relied on in these proceedings as justifying summary dismissal was the Laura Norman incident.

72. As to which, it has presented us with particular difficulty. We have been in the unusual position of being able to view the luncheon party at which the alleged gross misconduct occurred. Admittedly, we did not have the benefit of being able to hear the conversation which occurred before and after the Claimant stood up and reached out her hand to Ms Norman's chest. But we were able to see that, very shortly before the Claimant stood up, Ms Norman was cupping her own breasts and moving them up and down. We were also able to see that, when the Claimant stood up, Ms Norman leaned her chest towards the Claimant.

73. Mr Yurcik was in a position at the table to observe all of this and listen to the conversation between the Claimant and Ms Norman because the Claimant was seated immediately to his left, and Laura Norman, seated more or less opposite him. The memo he wrote to himself after the meal sets out conversation which occurred after the breast touching incident but not before. Either his attention was distracted from what was happening in front of him or he chose to edit out both Ms Norman's movement of her own breasts and the conversation that accompanied such movement. In the course of the conversation that he recorded, and which is corroborated by the Claimant, he made a comment on what he had heard to the effect that it was "too much information", which we observe is a phrase that has gained currency of late and is generally used by someone humorously drawing attention to the proper impact of what has just been said. His comment was perceived, as we would have expected, by the Claimant as jokey.

74. That Mr Yurcik might have been minded to contribute in such manner to the conversation that followed the breast touching incident is difficult to reconcile with his rejection in the course of cross-examination that the incident was not trivial but was "a very serious piece of sexual harassment". Indeed, the jokey nature of his contribution is difficult to reconcile with Ms Shugart's assertion, made while countering the same contention that the incident was trivial, that "To this day, [Mr Yurcik] is spooked by this, haunted by this."

75. Mr Yurcik's assertion that this incident was sexual harassment is also very difficult to reconcile with the absence of any direct evidence from Ms Norman that the Claimant's touching of her breast was "unwanted". It is clear from the video that Ms Norman was a willing participant in conversation that appeared to centre on breasts, first, with her cupping her own breasts and moving them – presumably thereby giving a demonstration of how she could "jiggle" her breasts – and then with her moving her upper body towards the advancing Claimant the better so that the Claimant could touch her breast.

76. In this connection, we were singularly unimpressed with the evidence of Ms Leila Faiz who asserted several times that one of the reasons she was giving evidence was so that she could be "a voice for my friend", referring thereby to Ms Norman, and that her attendance at the Tribunal to give evidence represented her "giving people a voice if they don't want to voice their concerns themselves". In her witness statement, she asserted herself to have been speaking to Ms Norman who, as already indicated, was seated immediately to Ms Faiz's left:

> "I cannot recall what we were discussing but Terri also began speaking with us. Terri then reached across the table and placed her and on Laura's breast. At that point, Joe Yurcik said something to Terri which I didn't hear but her response was along the lines of "It's ok, I have large breasts too". I felt extremely awkward during this time and it looked like Laura did too. I was shocked about how inappropriate Terri's behaviour was and it was clear that everyone involved was too as we all tried to change the subject very quickly."

77. Ms Faiz asserted in cross-examination that Ms Norman was shocked by the incident: she said of Ms Norman:

> "I know what bothers her, she is my friend."

78. Later, when challenged as to why there was a discrepancy between her assertion the incident had caused Ms Norman to become upset and the absence of mention in her statement that such was the case, she claimed that detail was not her finest point in writing. We agree.

79. We have been reminded of the threefold test set out in the well-known case British Home Stores v Burchell [1978] IRLR 379 and to the judgment of Arnold J regularly cited in these tribunals:

80. "What the Tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief.

And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case."

81. Ms Shugart was person who took the decision to dismiss. The question as to what belief she actually held at the time of dismissal is made difficult by the fact that, while now she relies solely on the Laura Norman incident as being the misconduct which justified dismissal, there were a number of other allegations of misconduct which were being ventilated. Furthermore, the letter of dismissal does not make clear the exact gross misconduct being relied upon, instead citing "certain allegations of gross misconduct" which occurred both on 6 December at the Awards Nomination event and on 10 December at the team lunch at Browns.

82. As Arnold J indicated, the misconduct he had in mind was usually, though not necessarily, dishonest conduct. The misconduct as it was understood by Ms Shugart comprised the Claimant putting her hand on Ms Norman's breast and holding it there for 30 seconds (that being what she noted Mr Yurcik as having reported to her in her note made on or about the end of the year in South Africa).

83. We think Ms Shugart, in those circumstances, probably did honestly believe that the Claimant was guilty of holding her hand to Ms Norman's breast for that length of time. We do not think, however, that Ms Shugart had in her mind reasonable grounds upon which to sustain that belief. Given that Mr Yurcik denies (in terms that he does not believe) that he told Ms Shugart that the Claimant held her hand on Laura's breast for 30 seconds, we have come to the conclusion that there was some misunderstanding on Ms Shugart's part: it is likely that she interpreted Mr Yurcik's estimate of the half minute that the whole incident took, that is the touching and the conversation that followed, as being the length of time the touching was sustained for. In other words, she believed the hand was held against the breast for 30 seconds. The other explanations that would explain her recording that Mr Yurcik specified the hand being held there for 30 seconds would either be that Mr Yurcik actually did specify 30 seconds - but, having seen the video and heard Mr Yurcik give evidence, we do not accept that Mr Yurcik would knowingly manufacture such a gross exaggeration – or that Ms Shugart knowingly made an inaccurate note. That seems to us to be equally unlikely.

84. The Respondent relies on Ms Shugart having received confirmation from the Claimant during the meeting she and Mr Yurcik had with the Claimant on 12 December that she had touched Ms Norman's breast. There was confirmation of touching but the allegation was not put to the Claimant that her hand was held against Ms Norman's breast for 30 seconds. The actual allegation used by Ms Shugart during the interview was of "putting your hands on the breasts of an employee, in a public space, at a company event" and the admission came in the form of the Claimant saying that Ms Norman had been jiggling her breasts because that was a joke that she and the Claimant had and that then she invited the Claimant to touch her breasts which, by implication, the Claimant admitted she did.

85. A misunderstanding of what she might have been told does not, we think, provide reasonable grounds for Ms Shugart to form her belief that the Claimant held her hand against Ms Norman's breast for a period of 30 seconds.

86. But Ms Shugart gave evidence that it would not have mattered to her whether she had been told that the period that the Claimant's hand was on Ms Norman's breast was 1 second or 30 seconds. We were unable to accept this evidence. A hand held against a woman's clothed breast for 30 seconds, we would suggest, makes for a qualitatively different incident to one in which a hand makes fleeting contact with the same of no more than a second's duration. It seems to us that it only becomes possible for Ms Shugart to form the view that the Claimant's action, in touching Ms Norman, was sexual if she laboured under the misapprehension that the contact lasted for 30 seconds. Had she understood that the touching was of a fleeting nature and in the course of a continuation of a jokey exchange in which Ms Norman was an enthusiastic participant, we do not believe she could have arrived at such a conclusion.

87. Mr Yurcik, in asserting he did not believe he had misled Ms Shugart as to the length of time that the Claimant's hand was in contact with Ms Norman's breast, protested that it was a "very serious piece of sexual harassment." We disagree. We do not understand how Mr Yurcik arrives at that conclusion because that entails ignoring Ms Norman's own activity preceding the touching incident where she cupped her own breasts and moved them up and down and her willingness to put her chest forward in the direction of the Claimant standing up ahead of touching Ms Norman's breast. The key to the definition of harassment as defined in the Staff Handbook was "unwanted" conduct. And it is perfectly clear, from a viewing of the video, that the Claimant's contact was far from unwanted.

88. We did not hear from Ms Norman. But our viewing of the video evidence persuades us that it would have been almost impossible for anyone seated in the position of Mr Yurcik to have concluded that what he witnessed was sexual harassment, let alone "a very serious piece of sexual harassment".

89. So we do not accept that Mr Yurcik genuinely held the view that what happened at that luncheon party was sexual harassment. And, furthermore, given that we do not accept he could have formed that view, we do not accept Ms Shugart's assertion that Mr Yurcik is, to this day, spooked and haunted by this incident.

90. At the stage at which Ms Shugart formed her belief that the Claimant had held her hand against the breast of Ms Norman for 30 seconds, we do not consider she had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. For a start, we would have expected Ms Shugart to have questioned Mr Yurcik a bit more thoroughly than evidently she did. Even with her interest in the conversation she was conducting with the man to her left and even with defective vision in her right eye, it would have been somewhat surprising to her to learn from Mr Yurcik that the Claimant had held a hand against Ms Norman's breast for 30 seconds without her being cognisant of the incident when Ms Norman was sat next to her. Secondly, we would have expected some better investigation of the proposition advanced by the Claimant at the 12 December meeting, that the touching that had taken place had occurred in the context of a long running joke. While the evidence indicated that some members of staff had been spoken to ahead of the meeting on 12 December, there was no indication that staff – and, in particular, Ms Norman – had been questioned as to the Claimant's contention that such touching was in the context of a long running joke between the two women. Furthermore, it is evident that,

notwithstanding Mr Yurcik's view that this was a serious piece of sexual harassment, there had been no complaint from Ms Norman concerning the incident. Not only has she not appeared as a witness for the Respondent for whom she continues to work but when, as revealed in the transcript of the meeting on 12 December, the Claimant asked whether Ms Norman had complained, the question was not answered satisfactorily or at all.

91. Looking more generally at the procedure adopted by the Respondent, we are not satisfied that the Respondent acted reasonably in treating the conduct of the Claimant in respect of the breast-touching incident as being sufficient reason for dismissal. The Claimant was given no warning of the issues that were to be discussed at the meeting to which she was invited on 12 December and thus had no time to prepare. She was never properly apprised of the charges she faced. The 12 December meeting appears, with a number of allegations being vented ahead of promised further and better particulars of the charges, to have been designed to pressurise the Claimant into accepting a compromise agreement whereby she would receive money in lieu of notice in return for agreeing to end the contract without having to face disciplinary charges on various allegations, only one of which is relied on in these proceedings – an outcome described by Mr Yurcik as allowing the Claimant "to resign gracefully rather than be dismissed". This was a pre-determined strategy decided upon ahead of confronting the Claimant with the rather inchoate allegations and hearing her response.

92. Further, the one meeting that Ms Shugart and Mr Yurcik had with the Claimant served to conflate, as it turned out, the investigatory meeting demanded under the Respondent's procedure with the disciplinary meeting similarly required.

93. We consider the way the varied and serious allegations of misconduct were sprung on the Claimant carried with it a foreseeable risk that the Claimant would suffer such distress as to render her unfit to attend for duty, a risk which did eventuate. When her solicitors contacted the Respondent and announced she would be unfit to attend the disciplinary meeting on 13 December, the Respondent gave no consideration to postponing the meeting until such time as the Claimant was well enough to attend. This is all the more startling when the doctor's certificate that was forwarded to the Respondent by the Claimant's solicitor only specified she was unfit for work for a week.

94. We have indicated earlier that the appeal hearing conducted by Mr Simonson was flawed in certain respects. As we indicated, we were not satisfied that Mr Simonson either understood or acted in the impartial and independent way that a person hearing an appeal should.

95. We have indicated that the Respondent has failed to satisfy us that the Claimant was dismissed for a reason related to conduct. Various unspecified allegations of conduct were stated in the dismissal letter to be the reason for the Claimant's dismissal. Only one of those incidents is relied upon in these proceedings. We have found that there were no reasonable grounds for Ms Shugart to form the belief that the Claimant held her hand against Ms Norman's breast for 30 seconds. Proper investigation would have revealed that Ms Norman was a willing participant in a jokey dialogue which had been ongoing between the two women over a number of years. We do not accept that Mr Yurcik reasonably could have come to the view, on the basis of what he was able to see and hear and on what

we have been able to see, that this was any sort of sexual harassment. We do not accept that Ms Shugart, had she understood properly the duration of the Claimant's contact with Ms Norman and had received confirmation in the course of a proper investigation of these two women having an ongoing joke concerning their breasts, could have viewed the Claimant's action as sexual. We do not accept that the fleeting touch of the clothed breast of Ms Norman constituted action which, using the language of the Claimant's service agreement, "may in the reasonable opinion of the Board bring the Company or any Group Company into disrepute or discredit, or prejudice the interests of the Company or any Group Company". Insofar as the actual opinion of the Board might be said to be reflected in the views of Ms Shugart and Mr Yurcik, it is our view that no reasonable Board could form the opinion that the Claimant's action in putting her hand on Ms Norman's clothed breast for, at most, one second brought the Respondent into disrepute or discredit or prejudiced the interests of the Respondent.

POLKEY & CONTRIBUTION

96. Counsel for the Respondent has urged us, in the event that we find the Claimant to be dismissed unfairly, which we do, that we should make reductions to any award of compensation under the Polkey principle [Polkey v Dayton Services [1988] A.C. 344] and on account of, what he describes, as the Claimant's culpable and blameworthy conduct which led to her dismissal, pursuant to sections 122(2) and 123(6) of the Employment Rights Act 1996.

97. We do not agree. We are not satisfied that, had a correct procedure been followed, there would inevitably have been a dismissal which would have been fair. We say so for the reasons outlined two paragraphs ago. In all the circumstances, we do not agree that the Claimant's conduct was culpable and blameworthy. It may have resulted in her dismissal but we do not consider it would have done had the Respondent investigated the incident properly and fairly.

Signed: Paul Shwarz

EMPLOYMENT JUDGE

On: 6 March 2015

DECISION SENT TO THE PARTIES ON

6th March 2015

AND ENTERED IN THE REGISTER

.....

FOR SECRETARY OF THE TRIBUNALS