Appeal No. UKEAT/0188/14/DA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 3 November 2014

Before

HER HONOUR JUDGE EADY QC

MR B BEYNON

MR I EZEKIEL

GAME RETAIL LIMITED — APPELLANT

MR C LAWS — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JOHN MEHRZAD (of Counsel) Instructed by: Game Retail Limited HR Department Unity House Telford Road Basingstoke Hampshire RG21 6YJ
For the Respondent	MR MATTHEW COLLINS (of Counsel) Instructed by: Peter Dunn & Co Solicitors 20 Athenaeum Street Sunderland Tyne & Wear SR1 1DH

SUMMARY

UNFAIR DISMISSAL - Reasonableness of dismissal

Claim of unfair dismissal for conduct reason relating to misuse of Twitter.

Application of section 98(4) **Employment Rights Act 1996** and the range of reasonable responses test, **Iceland Frozen Foods Ltd v Jones** [1982] IRLR 439.

Appeal on basis: (1) the Employment Judge had fallen into error of substitution mindset; and/or (2) had reached a conclusion that was perverse.

Appeal allowed: the Employment Judge had erred in substituting his view for that of the reasonable employer and/or had reached conclusions that were either inconsistent given earlier findings or failed to take into account relevant matters or were simply perverse. The EAT did not consider, however, that only one outcome was possible in this case and thus ordered that the matter should be remitted to a new ET for determination of the application of the range of reasonable responses test to the question of disciplinary sanction.

Declined to lay down fresh guidance for future unfair-dismissal cases involving alleged misuse of social media. Cases were likely to be fact-sensitive and the relevant test would continue to be that laid down in **Iceland Frozen Foods**.

HER HONOUR JUDGE EADY QC

Introduction

1. We refer to the parties as the Claimant and the Respondent. This is a unanimous Judgment of this Court.

2. The appeal is that of the Respondent against a Judgment of the Newcastle-upon-Tyne Employment Tribunal ("the ET") (Employment Judge Hargrove sitting alone, on 12 February 2014), sent to the parties on 21 February 2014. By that Judgment, the ET held that the Claimant had been unfairly dismissed but that the basic and compensatory awards should be reduced by 40 per cent for contributory conduct. The Claimant was represented by Mr Collins, Counsel both before the ET and before us. The Respondent was represented by its solicitor, Ms Nicolaou, before the ET but has been represented by Mr Mehrzad, counsel, before us.

3. The appeal raises the issue of misuse of Twitter by an employee in the context of an unfair-dismissal claim. We are told this is possibly the first such case to come before the Employment Appeal Tribunal. Whether or not that is so, ultimately the appeal we are considering concerns the rather more prosaic questions whether the Employment Judge erred in substituting his view for that of the reasonable employer and/or whether the conclusion he reached as to the unfairness of the dismissal was perverse.

The Background Facts

4. The Respondent is a games retailer with, in 2013, over 300 stores across the UK. The Claimant was employed by the Respondent or its relevant predecessors since 18 August 1997 and, at the material time, was its risk and loss prevention investigator, with responsibility for

approximately 100 of its stores based in the north of England. As such he was required to investigate losses, fraud and theft and to conduct audits in those stores for which he had responsibility. Each store had a manager and/or deputy manager in charge at a local level.

5. The Respondent's stores depend upon Twitter and other social media as tools for marketing and communications. Each store had its own Twitter profile and feed, to which the manager and/or deputy manager had access for posts. A large number of customers followed their local stores on Twitter, and their posts could therefore appear on the store Twitter feed.

6. Some time prior to July 2012 the Claimant opened his own Twitter account and began to follow the Respondent's stores for which he had responsibility in order to be able to monitor their tweets. He did this in order to monitor inappropriate activity by other employees. The Employment Judge records (paragraph 4.4) that his line manager understood the Claimant to be doing this "to see if anything had happened with communication that had been unacceptable".

7. On or about 18 July 2013, an unidentified store manager notified one of the Respondent's regional managers about tweets posted by the Claimant on his Twitter feed. These would not have appeared in any tweets the Claimant posted when actually following the Respondent's stores. There was an investigation by a senior manager at the Respondent's head office, a Ms Vallis, who obtained a download of the Claimant's Twitter profile and a series of downloads from his Twitter feed. She identified some 28 of these as being offensive. Of the 100 of the Respondent's stores that the Claimant was following it was discovered that some 65 had followed his posts in return. One of the tweets downloaded - presumably having been re-tweeted by the Claimant - was from the Respondent's Preston store, where the local manager had posted a recommendation that, "[…] if your [sic] a Game or GS shop you need to be

following this guy". It was after this tweet that the other 64 stores started following the Claimant. That appears to have been quite early on in the Claimant's Twitter life.

8. There was an investigation meeting with the Claimant on 22 July 2013 at which the allegedly offensive tweets were put to him. He accepted he had the Twitter account in question, that he followed a lot of the stores and that he was aware that people and individual stores could choose to follow his tweets. It was found by Ms Vallis that the Claimant's tweets were in the public domain, clearly accessible by stores and that some were of an abusive nature. She recommended disciplinary action be followed.

9. On 23 July 2013 the Claimant was suspended. By that time he had enlisted the assistance of his 14-year-old son and taken down his Twitter feed. He was invited to a disciplinary hearing to meet a charge of gross misconduct, in that:

> **"Between July 2012 and July 2013 you posted a significant number of offensive, threatening and obscene Tweets on your Twitter account, which were in the public domain and therefore able to be viewed by anyone on Twitter, including Game employees in stores that follow you or that you follow."**

10. Copies of the relevant tweets were enclosed, and the covering letter further observed:

> **"Whilst this is your personal Twitter account and you do not specifically affiliate yourself to the company on that account, you also use your account to monitor Twitter activity from the company's stores that you are responsible for in your capacity as risk officer."**

11. The disciplinary hearing was conducted by the Respondent's Ms Harrison, a senior merchandiser at its head office, on 29 July 2013. The Claimant said he had not given any consent for local managers - such as that of the Preston store - to tell others to follow him, saying, "If I'd known more about Twitter I would have told him". Ms Harrison decided the Claimant should be summarily dismissed; that was communicated to him by letter of 31 July 2013. The Claimant appealed against that decision. At the appeal stage (heard by one of the

Respondent's regional managers, a Mr Smith), enquiry was made of the manager of the Preston store, who was asked whether he had instructed others of the Respondent stores to follow the Claimant. He responded he had because he thought as the Claimant was following the stores "he would want a follow back". Mr Smith confirmed the original dismissal decision.

The Employment Tribunal's Reasons

12. It was not disputed the principal reason for the dismissal was the Claimant's conduct, and the Employment Judge so found. Applying **British Home Stores v Burchell** [1978] IRLR 279 (with appropriate qualification to allow for the change in the burden of proof pursuant to section 98(4) of the **Employment Rights Act 1996**), the Employment Judge first considered the quality of the Respondent's investigation. Although arguably there had been certain defects in the investigation, ultimately he did not consider that it failed the range of reasonable responses test. The issue had been whether the Claimant had posted material on his Twitter account that was offensive; that was not materially in dispute. Further, no real issue was taken as to the reasonableness of the Respondent's belief in the Claimant's misconduct. The case was thus largely fought on the issue of sanction.

13. On this question the Employment Judge concluded that the decision to dismiss on the basis of the Respondent's belief did not fall within a band of reasonable responses of the hypothetical reasonable employer. First, because the Claimant had not registered on Twitter as part of his job but principally in order to communicate with acquaintances outside work, using his own mobile phone and concerning matters that were nothing to do with work. Second, because the evidence was that he only engaged in tweeting the offensive material in his own time and not work time. Third, although the Claimant did not dispute that some of the tweets

were offensive, he did provide explanations for some of them. In this regard the Employment Judge considered it necessary to examine the tweets in some detail as follows (paragraph 5.3):

> **"… In her dismissal letter Ms Harrison described them as not merely being offensive but also "intimidating, racist and anti disability". In her witness statement she added that they were offensive to other groups of people including dentists, caravan drivers, golfers, the A&E department, Newcastle supporters, the police and disabled people. What may be described as the most offensive and which was the subject of the reference to management from presumably a store manager was that Tweeted on 13 July 2013 to be found at page 57:-**
>
> > **"Some ppl are just vile c**ts I wouldn't piss on you if you were on fire but would love to rip ur head off and shit down ur neck #cunts."**
>
> **The claimant claimed during the disciplinary process that this and at least one other Tweet to similar effect was a reference specifically to his deceased brother's former partner who had apparently engaged in sexual activity soon after the brother's funeral. Many of the offensive Tweets were clearly football related and were directed at friends who were fellow Sunderland supporters, particularly around the time of the notorious Newcastle/Sunderland derby match. There are a number of obscenities directed at Newcastle supporters and one apparent reference to the police, who maintain a heavy presence at such matches as "fucking pigs".**
>
> **The supposed derogatory reference to A&E is at page 69:-**
>
> > **"A&E with me dad useless twats popped his hip out I better not miss the Sunderland match 2 nite."**
>
> **In fact, as the claimant explained, the claimant had accompanied his father to A&E and the derogatory reference was clearly a reference to his father not to people in A&E.**
>
> **The supposed insult to dentists was at page 68:-**
>
> > **"Another trip to the dentists needed to replace cracked filling hope he's wearing a mask and stripy jumper 49 pounds fucking robbin bastards."**
>
> **On the same page there is the supposed insult to caravaners:-**
>
> > **"This week I have mainly been driving to towns the arse end of nowhere .. shut roads and twats in caravans = road rage and loads of fags smoked."**
>
> **And to golfers, also at page 68:-**
>
> > **"Golf geeks everywhere and there cracks shit plz shut the fuck up."**
>
> **Contrary to the claim by Ms Harrison the Tribunal's attention was not drawn to any racist references. …"**

14. The Employment Judge accepted that any customers or other employees of the Respondent who were following the Claimant would not have been privy to his explanations as given in the disciplinary process and might have been shocked or offended by the tweets in question. He considered, however, that the Respondent had made at least two assumptions in this regard. First, it had never been established that any member of the public or of the Respondent's staff had access to the Claimant's Twitter feed and thus to the offensive tweets

other than the Preston manager and the manager who had reported the Claimant's tweets in the first place; whilst customers and other members of the public - potential customers - might have followed their particular store and thus seen the Claimant's name on the store's Twitter feed, that would only be as one of many members of the public, he had not tweeted any reference to the Respondent or to his work in any way. Second, in considering the Respondent's bullying, harassment and disciplinary policies, the Employment Judge concluded that the disciplinary policy in force at the relevant time did not expressly contain a clause that would have demonstrated to all members of staff that offensive or inappropriate use of social media in private time would or could be treated as gross misconduct. He held (paragraph 5.5):

> **"… it is not axiomatic in the absence of such express policy that the distribution of obscene or offensive material by an employee acting in a private capacity outside work would amount to gross misconduct. …"**

The Employment Judge apparently reached that conclusion having regard to the ACAS Code of Practice on discipline and grievance, which relevantly states at paragraph 23:

> **"Disciplinary rules should give examples of acts which the employer regards as acts of gross misconduct."**

15. That said, the Employment Judge accepted that, after some 16 years of service, the Claimant could be taken to be aware of the existence of the Respondent's bullying and harassment policy and allowed that that policy stated that it could apply to conduct whether in or out of the workplace and could cover:

> **"Sending or displaying pornographic or offensive material (including … text messages, video clips, images sent by phone or via the internet, Facebook, Twitter or other social networking or other websites[])];**
>
> **Offensive comments or gestures or insensitive jokes or cracks;**
>
> **Derogatory or stereotypical remarks …"**

16. Finally, the Employment Judge considered an issue as to a previous final written warning that had been given to the Claimant in October 2011. That had followed his successful appeal

from an earlier decision that he be dismissed for incidents of inappropriate and intimidating behaviour. As the final written warning had been given more than 12 months before the events in question, Ms Harrison had not taken the warning itself into account but did have regard to the fact that the circumstances of that previous warning had made clear what the Respondent's position was as regards intimidating behaviour. The Employment Judge did not criticise that approach. Nevertheless, for the other reasons he had given, he considered the decision to dismiss did not fall within the range of reasonable responses; see paragraph 5.7 (a paragraph that both parties have characterised before us as a crystallisation of the Employment Judge's reasoning):

> **"Notwithstanding this factor, the Tribunal has decided that for the other reasons given the decision to dismiss did not fall within the band of reasonable responses. The offensive material was communicated for private use only and not in work time. There is no evidence that any customer or member of staff did view the material and was offended by it. The claimant did not post anything derogatory of the respondent or anything which would reveal that he was an employee of the respondent. The claimant had restricted his use of the Twitter account with regard to the respondent who monitor [sic] stores only as part of his duties. He thereby created a theoretical risk that a member of the public might view other posts of his which had nothing to do with the respondent's business. The Tribunal concludes that the claimant was thereby guilty of some misconduct and, by reason of this misconduct and the circumstances of the final written warning, that it would be just and equitable to reduce the basic and compensatory awards by 40%."**

The Appeal

17. The Respondent appeals against the conclusion on unfair dismissal. There is no cross-appeal on the finding of contributory-fault. The Grounds of Appeal can be summarised for present purposes as falling under the following heads: (1) the Employment Judge fell into the substitution mindset; alternatively, (2) the Employment Judge's conclusion was perverse.

18. For his part the Claimant relies on the Reasons given by the Employment Judge, observing that the test for perversity is a high one.

The Relevant Legal Principles

19. The relevant legal principles are not in dispute in this case. In misconduct unfair-dismissal cases a useful summary of the approach is provided by Mummery LJ in the case of **London Borough of Brent v Fuller** [2011] ICR 806:

> **"12. A summary of the allocation of powers and responsibilities in unfair dismissal disputes bears repetition: it is for the employer to take the decision whether or not to dismiss an employee; for the tribunal to find the facts and decide whether, on an objective basis, the dismissal was fair or unfair; and for the Employment Appeal Tribunal (and the ordinary courts hearing employment appeals) to decide whether a question of law arises from the proceedings in the tribunal. As appellate tribunals and courts are confined to questions of law they must not, in the absence of an error of law (including perversity), take over the tribunal's role as an "industrial jury" with a fund of relevant and diverse specialist expertise.**
>
> **…**
>
> **27. Unfair dismissal appeals to this court on the ground that the tribunal has not correctly applied section 98(4) can be quite unpredictable. The application of the objective test to the dismissal reduces the scope for divergent views, but does not eliminate the possibility of differing outcomes at different levels of decision. Sometimes there are even divergent views amongst appeal tribunal members and the members in the constitutions of this court.**
>
> **28. The appellate body, whether the Employment Appeal Tribunal or this court, must be on its guard against making the very same legal error as the tribunal stands accused of making. An error will occur if the appellate body substitutes its own subjective response to the employee's conduct. The appellate body will slip into a similar sort of error if it substitutes its own view of the reasonable employer's response for the view formed by the tribunal without committing error of law or reaching a perverse decision on that point.**
>
> **29. Other danger zones are present in most appeals against tribunal decisions. As an appeal lies only on a question of law, the difference between legal questions and findings of fact and inferences is crucial. Appellate bodies learn more from experience than from precept or instruction how to spot the difference between a real question of law and a challenge to primary findings of fact dressed up as law.**
>
> **30. Another teaching of experience is that, as with other tribunals and courts, there are occasions when a correct self-direction of law is stated by the tribunal, but then overlooked or misapplied at the point of decision. The tribunal judgment must be read carefully to see if it has in fact correctly applied the law which it said was applicable. The reading of an employment tribunal decision must not, however, be so fussy that it produces pernickety critiques. Over-analysis of the reasoning process; being hypercritical of the way in which the decision is written; focusing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid."**

20. In perversity appeals a high test must be met by any Appellant. There must be an overwhelming case that the decision in question was one that no reasonable ET, properly appreciating the law and the evidence, could have made (**Yeboah v Crofton** [2002] IRLR 634). Where an ET has properly directed itself according to the principles laid down in **Burchell**, then, save where there is a proper basis for saying that it simply failed to follow its own self-direction, the EAT should not interfere with the decision reached, unless there is no proper

evidential basis for it or unless it is perverse (**Salford Royal NHS Foundation Trust v Roldan** [2010] EWCA Civ 522).

Submissions

The Respondent's Case

21. The Respondent starts by observing that it is not apparent that there has been any previous EAT decision concerning dismissal for social-media misuse in respect of Twitter. It is urged that we might provide guidance in this case. To this end we have been referred to a number of first-instance decisions, whether before the ET or the High Court. These demonstrate a variety of responses to cases involving use or misuse of social media by employees. The Respondent has also explained to us the relevant context in terms of the huge growth in the use of Twitter, particularly (and relevantly) as a business and marketing tool.

22. It accepts that in terms of the perversity appeal it has a high burden. It also accepts that the ET's Judgment must be read as a whole; we are not to apply a fine-tooth comb but must take the Reasons in their entirety. In so doing, we must be astute not to substitute our view for that of the ET. That said, the Respondent contends that the Employment Judge did err in this case either by falling into the substitution mindset or alternatively by reaching a conclusion that was perverse. The submissions made by the Respondent analyse the ET's reasoning under the following heads: (1) the private-usage reason; (2) the offence reason; (3) the content reason; and (4) the restriction reason.

23. On the private-usage reason the Respondent observes that as a matter of mechanics Twitter is not restricted to any one group of people unless the restriction setting is enabled. Here, that had not been done. It was therefore wrong of the ET to conclude that, "The offensive

material was communicated for private use only", or to apparently fail to appreciate the public nature of the Claimant's Twitter account. Further, a finding as to whether or not the Claimant registered his Twitter account for work purposes at the outset was irrelevant. It was his sole Twitter account, he was using it to follow upwards of 100 of the Respondent's stores, and some 65 of those stores were following him in response and would therefore see any tweet posted by the Claimant. Moreover, in considering it was relevant that the Claimant was tweeting in his own and not work time, the EJ failed to take into account the fact that the tweets were available, whenever posted. That point simply had no relevance; albeit it that it might be an aggravating feature if an employee spent work time engaged in a private social-media activity.

24. Second, on the offence reason, the Employment Judge (paragraph 5.7) had stated:

> **"There is no evidence that any customer or member of staff did view the material and was offended by it."**

25. That was wrong. A member of staff had plainly viewed the tweets in question and had drawn the nature of those tweets to the attention of the regional manager; to suggest otherwise was simply wrong. Further, if this was to be read as finding there was no evidence of actual offence taken, that ran counter to the express finding that it was not materially in dispute that there was material posted on the Claimant's Twitter account that was offensive if viewed.

26. Turning, third, to the content reason, the Judge had concluded it was relevant that the Claimant had not posted anything derogatory of the Respondent or anything that would reveal that he was an employee of the Respondent. Again, that conclusion did not withstand scrutiny. First, the Respondent's staff had identified the Claimant: the local manager who had raised the concern in the first place had obviously identified the Claimant within the Respondent's organisation. Second, managers or deputy Game store managers would have known who the

Claimant was, or that would have become apparent to them over time. Third, members of the public might consider that they were encouraged to follow the Claimant because the Respondent's stores were following him and thus, by inference, endorsing him. Indeed, the Preston manager had actively encouraged others to follow the Claimant. There was thus an association of the Claimant with the Respondent that was likely to have been explicit for other employees but could be implied or inferred in the case of customers.

27. Lastly, turning to the restriction reason, here the Respondent relied on the passage in the Employment Judge's reasoning at paragraph 5.7:

> **"The claimant had restricted his use of the Twitter account with regard to the respondent who monitor [sic] stores only as part of his duties."**

28. First, the sentence did not actually make sense. Second, to the extent that sense could be made of that sentence, it seemed to fail to appreciate that the Claimant had not used the restriction setting on his Twitter account.

29. The Respondent submitted that the proper outcome of this case was that the appeal should be allowed and that, given the perverse nature of the conclusion reached, there was only one permissible outcome. Taking on board the injunction against this EAT substituting its view for that of an ET (see per Laws LJ in **Jafri v Lincoln College** [2014] IRLR 544 CA), this case came within the potential exception (see paragraph 21(b) of that Judgment) where the EAT could conclude that the result would have been different to that reached and could itself substitute the correct outcome (see also the Judgment of Maurice Kay LJ in **Burrell v Micheldever Tyre Services Ltd** [2014] IRLR 630 CA).

The Claimant's Case

30. On behalf of the Claimant it was submitted that, on the question of substitution, there was no evidence that the Employment Judge had substituted his view for that of the reasonable employer. As warned by Mummery LJ in **Fuller**, this Court must be careful not to fall into the very same error that it was suggested had been committed by the Employment Judge. It was necessary to be clear as to the distinction between a real point of law and a challenge to a primary finding of fact dressed up as the law; this appeal was really a case of the latter. One could see a proper application of the relevant legal principles to the ET's reasoning (paragraphs 5.3 to 5.6); that reasoning was crystallised at paragraph 5.7 but must be read in its entirety.

31. Descending into the detail of the Respondent's argument and addressing first the mechanics of Twitter use, one of the issues before the ET had been the level of access to the Claimant's Twitter account. For his tweets to appear on a store page they would have to be re-tweeted; it would require some active engagement on the part of a store. Moreover, any store could have a very large number of followers, hundreds if not more. For his part, the Claimant was monitoring the Twitter activity of stores in his remit to see whether there was any untoward activity on the part of staff, such as offering video games for sale. There was no reason for him to be other than an entirely invisible follower of the stores' Twitter feeds; indeed, to be identified would run counter to the purpose for which he was using Twitter. As for the staff, there was no evidence that anyone had particularly linked the Claimant with his role at the Respondent. The evidence was that no stores had followed him until after the Preston manager had tweeted encouragement that they should do so. Thereafter some 64 other stores did. Otherwise, one would have had to trawl through the huge list of followers for a particular store, pick up on the Claimant's name as a follower and then decide to follow him. The fact that the Claimant's own line manager had not realised that the Claimant had been the author of the

offensive tweets was evidence indicative of the failure of the Respondent's employees to draw any link between the tweets and the Claimant.

32. What was relevant to the Employment Judge was that the Claimant's Twitter feed did not have a sufficiently work-related context (to use the language used in the High Court case of **Smith v Trafford Housing** [2013] IRLR 86). In **Smith**, where a housing manager had been demoted following the posting of religious views on his Facebook page, it was held that his Facebook wall had not acquired a sufficiently work-related context to attract the prohibition against the promotion of political or religious beliefs; and that was so notwithstanding the fact that Mr Smith had identified himself on his Facebook wall as a manager of the Respondent trust, and it was not purely private in the sense that it was not simply available to his invitees because he had a "friends of friends" extension.

33. Ultimately, Twitter was nothing more than another form of social media not unlike Facebook. To the extent it was relevant to have regard to the suggested guideline principles contained within the Respondent's submissions, the Claimant urged that application of those principles would lead to a conclusion in the Claimant's favour. In terms of the presence and content of any IT or social-media policy: here, the Employment Judge had found that the Respondent did not have a clear statement of policy in place at the relevant time. As for the nature of the misuse, the Employment Judge had clearly taken this into account. Whether or not the social-media use in question had been clearly labelled as representing the employees' own views seemed irrelevant given the approach adopted by the court in the **Smith** case. It was right that IT and social-media policies should not stifle comment, and indeed regard would need to be given to fundamental human rights under the **European Convention on Human Rights**

and Fundamental Freedoms (ECHR) before restricting, for example, the right to freedom of expression. That in truth was what the Respondent was seeking to do here.

34. As to whether there had been any previous warning, again the Employment Judge had taken that into account so far as it was relevant. As for any complaints by the members of the public or staff, the Employment Judge had been entitled to find that there was no evidence of complaints from members of the public and at most the Respondent was seeking to draw an inference that members of staff had complained from the fact that it was apparently a local manager who had raised the issue of the content of certain of the Claimant's tweets. In relation to the suggested factor of actual or potential damage to customer relationships as a result of relevant posts, there was no evidence of that here. As to how quickly the material had been removed by the employee, in this case the finding was that the Claimant had quickly taken steps to remove the Twitter account.

35. Should the EAT be minded to allow the appeal, the correct order was that the case should be remitted for fresh consideration.

Respondent in Reply

36. The Respondent noted that there had been no real attempt to defend paragraph 5.7 as a crystallisation of the Employment Judge's reasoning. On the question of identification, the submissions failed to address the question as to how the Preston manager had managed to identify the Claimant (which was not apparent from the Employment Judge's reasoning) and did not properly engage with the point that another manager had managed to identify the Claimant sufficiently to raise the nature of his tweets with the regional manager. The Claimant's submissions seemed to rely on his naivety, but on the Employment Judge's findings

as to the investigation he had there accepted that he knew that other stores and people more generally could follow his tweets.

37. On the **Smith** case it was to be noted that the court had expressly stated that each case will be "intensely fact-sensitive" in terms of whether or not the use of media in question had become work-related. In any event this case could be distinguished from that of **Smith**: first, this was a case where the Claimant was following upwards of 100 of the Respondent's stores for a work-related reason; second, Mr Smith's Facebook page had partial privacy settings, the Claimant's Twitter feed had none; third, in the Claimant's case, one of the Respondent's store managers had drawn attention to his Twitter feed and to the nature of the tweets in question.

Discussion and Conclusions

38. As set out at the outset of this Judgment, this case relates to the misuse of Twitter by an employee. Twitter is an online social-networking service enabling users to send and read short 140-character messages, or tweets. Registered users can read and post tweets; unregistered users can read them but not post themselves. Unless senders choose to restrict tweets to their followers, those tweets are publicly visible by default. We are told that the growth of Twitter since its establishment in March 2006 has been phenomenal: in 2007, 400,000 tweets were posted by quarter; by 2012, there were over 100 million users posting some 340 million tweets per day. It is not merely a social tool but has been embraced by professionals and, as here, businesses, which use it as a means of communication and marketing. Moreover, as ACAS has identified, in providing its advice and guidance on the use of social media:

> **"There can be confusion over what is acceptable behaviour in the use of social media. Some employees can see it as a platform for free speech and believe they should be able to say what they want. This can prompt an angry employer to over-react."**

39. It is in this context that the Respondent urges that we should take this opportunity to lay down guidance of a more general nature as to cases involving an alleged misuse of Twitter in the context of a claim of unfair dismissal. We return to this point below but make the preliminary observation that the context of this case cannot detract from the fact that the appeal before us is put on the grounds of substitution and perversity, and the difficulty for the Respondent in seeking to overturn a decision of an ET on those grounds remains, whatever the factual background.

40. The relevant task for the Employment Judge here required the application of the range of reasonable responses test: the range that was open to the reasonable employer in the circumstances of this case (**Iceland Frozen Foods Ltd v Jones** [1982] IRLR 439). The Employment Judge plainly had that test in mind; the question for us is whether he then correctly applied it to the facts he had found in this case.

41. We turn then to the Employment Judge's reasons for concluding that the dismissal in this case was unfair. That conclusion was not based on any finding adverse to the Respondent in terms of its investigation or as to the reasonableness of its belief. The Employment Judge was solely concerned with the reasonableness of the sanction imposed given both reasonable investigation and belief. It is convenient in carrying out our task to adopt similar headings to those used by the Respondent in its submissions, although in so doing we do not restrict our assessment to any particular paragraph of the Employment Judge's reasoning but take the Judgment as a whole.

42. We first consider headings (1) and (4), private usage and restriction, taking them together because the points made overlapped to a large extent.

43. The Employment Judge plainly considered it relevant that the Claimant had:

> **"… not registered on Twitter as part of his work but principally in order to communicate with acquaintances outside work and concerning matters that had nothing to do with work [paragraph 5.3] … [and the] offensive material was communicated for private use only and not in work time [paragraph 5.7]."**

44. He also stated (paragraph 5.3) that:

> **"… the claimant made no reference in any Tweet to the respondent or his work in any way. … the store manager or his deputy would have direct access to the store Twitter feed. … by his actions in following many of the stores, for which he was responsible but for a work purpose the claimant did create a risk [that] a member of the public or staff might have access to his Twitter account and the offensive Tweets, but the dismissers do not appear specifically to have weighed the risk, which may have been very small indeed. …"**

45. The difficulty that we have with these conclusions is that they fail to engage with the employer's reasoning in his case. Although we accept Mr Collins' point that no one would have received the Claimant's tweets other than by making a conscious decision to follow him, it would be wrong to suggest, as certain aspects of the Employment Judge's reasoning seem to do, that followers were thereby restricted to social acquaintances. The Claimant had not made use of the restriction setting on his Twitter account. He had also not sought, as he could have done, to create two separate accounts (one with which to follow the stores and the other for purely private use). On the Employment Judge's findings of fact, the evidence before the Respondent was that some 65 of its stores were following the Claimant. Rather than the offensive tweets solely going out to be read by the Claimant's social acquaintances, they were, as the Claimant must have known, going out to all of those 65 stores as well. Moreover, to the extent that any customers had picked up on the Claimant's account - perhaps as a result of the tweet from the Preston store manager - they too would be recipients of the tweets in question.

46. We do not say that private usage is an irrelevant question. We recognise that there is a balance to be drawn between an employer's desire to remove or reduce reputational risk from social media communications by its employees and the employee's right of freedom of

expression; see **Smith**. In the **Smith** case it was considered relevant that Mr Smith's Facebook wall had not acquired a sufficiently work-related context to attract the prohibition against the promotion of political or religious beliefs in the housing trust's code of conduct. That prohibition, it was recognised, had to be considered in the light of the obvious potential to interfere with an employee's right of freedom of expression and belief. Allowing that the present case would involve the right of freedom of expression, rather than that of religious or other belief worthy of protection, the point would still be relevant. Generally speaking, employees must have the right to express themselves, providing it does not infringe on their employment and/or is outside the work context. That said, we recognise that those questions might themselves depend on the particular employment or work in question.

47. Our difficulty in this case is that we do not consider that the Employment Judge properly tested the question whether this was a case that, in truth, should be described as private usage. This was a case where the Claimant had followed upward of 100 of the Respondent's stores for a work purpose and permitted that some 65 of those followed his Twitter feed in return. He had made no attempt to use the restriction settings or taken steps to address the Preston manager's encouragement for other stores to follow him; indeed, the evidence before the Respondent suggested that he had re-tweeted that encouragement. Further, to the extent that the Employment Judge had referred to the fact that the store managers or their deputies would have access to the store Twitter feed and thus to the Claimant's tweets, he apparently then failed to engage with what this would mean. On one view, the Employment Judge allowed his own focus to mean that he failed to engage with a point of concern for the Respondent here; that the offensive messages were going out to those of its stores that were following the Claimant via their Twitter feeds. If so, he substituted what he considered to be relevant rather than asking what might be the view taken by the reasonable employer. Alternatively, he reached a view

that was perverse, in the sense that no reasonable ET could have failed to have regard to the fact that the Claimant had not attempted to ensure that his tweets only went out to a private audience and was knowingly tweeting in the context of having some 65 of the Respondent's stores following his feed.

48. We turn then to the second heading, the offence. Here, the Employment Judge apparently concluded (paragraph 5.5) that:

> **"… there is no evidence that any member of staff in fact had access to that material let alone raised a complaint about it or was offended."**

And (paragraph 5.7) that there was merely a

> **"… theoretical risk that a member of the public might view other posts of his which had nothing to do with the respondent's business. …"**

49. Yet, earlier (paragraph 5.3), the Employment Judge had recognised that at least one other member of staff - the person who had raised the concern as to the nature of the Claimant's tweets - had accessed the Claimant's Twitter feed and apparently felt sufficiently strongly about it to take the matter further. The conclusion thus seems to us inconsistent with the earlier finding of fact. The Employment Judge had found that the Claimant had created a risk that a member of the public or staff might have access to his Twitter account and the offensive tweets. He had further expressly found that the store managers or deputy managers of the 65 stores following the Claimant would have access to his tweets and had also found (as was not materially in dispute), that the Claimant had posted material on his Twitter account that was offensive if viewed. The conclusion does not seem to engage with any of these points. Alternatively, the conclusion imports the Employment Judge's own view as to whether anyone was offended by material that was, as agreed, offensive. The question was whether the Respondent was entitled to reach the conclusion that the offensive material going out to 65 of

its stores via their Twitter feeds and to possibly some of its customers or potential customers might have caused offence (allowing that this matter had been raised with the regional manager by a local store manager who was apparently concerned as to the nature of the tweets).

50. Finally, we come to the content reason. In this regard the Employment Judge seemed to have considered it relevant that the Claimant had not posted anything derogatory of the Respondent or anything that might reveal that he was an employee of the Respondent. Again, that seems either perverse or to constitute an error of substitution. The Claimant was following 100 of the Respondent's stores and was followed back by 65. There was thus some suggestion of a connection that plainly needed to be addressed. Alternatively, the Employment Judge was substituting what he considered to be important rather than considering what the reasonable employer might have concluded. The issue was not restricted to whether the material was derogatory of the Respondent but whether it was, of its nature, offensive and might be going to the Respondent's employees, contrary to its harassment policy, or to customers or potential customers who had been alerted to follow the Claimant either because the Respondent's stores were following him or because the Preston manager had encouraged other stores to do so.

51. In the light of those conclusions, we consider that the ET's Judgment cannot safely stand. That said, we are not persuaded by the Respondent that there is only one answer if the correct tests are applied in this case. It seems to us that, applying the correct tests, the matter could go more than one way. Our concern is that in the light of the reasons given the Employment Judge permitted his own focus to become the test and thereby fell into what has been described as the "substitution trap". We consider that the right course is for this matter to be remitted to the ET, albeit we will hear further from the parties on the terms of the remission.

52. We then turn to the question of general guidance. The Respondent urges that we take this opportunity to provide general guidance and has set out potential points that it considers may assist the ETs of the future. With respect to the industry undertaken in this regard, we decline to do so. No doubt some of the points we are urged to lay down by way of principled guidance will be relevant in many cases. For example, whether the employer has an IT or social-media policy; the nature and seriousness of the alleged misuse; any previous warnings for similar misconduct in the past; actual or potential damage done to customer relationships and so on. In truth, however, those points are either so obvious or so general as to be largely unhelpful. The test to be applied by ETs is that laid down in **Jones**; that is, whether the employer's decision and the process in reaching that decision fell within the range of reasonable responses open to the reasonable employer on the facts of the particular case. That test is sufficiently flexible to permit of its application in contexts that cannot have been envisaged when it was laid down. The questions that arise will always be fact-sensitive and that is true in social-media cases as much as others. For us to lay down a list of criteria by way of guidance runs the risk of encouraging a tick-box mentality that is inappropriate in unfair-dismissal cases.

Disposal

53. The parties were in agreement that, given the nature of our Judgment, it was appropriate for this matter to be remitted for fresh consideration by an Employment Judge sitting alone who had not previously been a decision-taker on this case. Mindful of the criteria set out in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763, we agree.

54. It was also common ground that the remission should be restricted to the question of the range of reasonable responses test and the application of that test in respect of the sanction. Where the parties parted company was on the question whether that may leave scope for further

evidence to be adduced. For the Respondent's part it was urged that this would only need legal submissions; the Claimant contended that this was a fact-sensitive case and new evidence should be allowed at the rehearing. Having discussed this amongst ourselves, we consider that the criticisms we have made relate only to the application of the range of reasonable responses test in the conclusions section of this Judgment. The findings of fact are reasonably full and clear, and we have made no criticism of them. Allowing further evidence to be adduced gives rise to a potential disproportionate mushrooming of the issues to be re-determined on the rehearing. Our Judgment is that this matter should be restricted to legal submissions on the issue that is being remitted. We recognise the difficulty facing an Employment Judge determining this issue on the basis of findings made by a different ET. Those findings are, however, reasonably full, and we do not think that is an insurmountable problem.