EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr D Kaye	v	**Royal Mail Group Limited**

Heard at: **Leeds** **On:** **6 & 7 July 2017**

Before: **Employment Judge J M Wade**

Appearance:

For the Claimant: **Mr P Smith, of Counsel**

For the Respondent: **Mr J McCardle (legal executive)**

Note: The written reasons provided below were provided orally in an extempore Judgment delivered on 07 July 2017 which was sent to the parties on 14 July 2017. A written request for written reasons was received from the respondent on 10 July 2017. The reasons below are now provided in accordance with Rule 62 and in particular Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues. The transcript has been corrected for sense and elegance of expression and otherwise as indicated below. The Judgment given on 07 July 2017 was:

JUDGMENT

1 The claimant's complaint of wrongful dismissal succeeds.
2 The claimant's complaint of unfair dismissal is well founded.
3 The parties shall seek to agree remedy, in default of which within twenty eight days they shall apply to the Tribunal for a remedy hearing.

REASONS

Introduction

1. Mr Kaye complains of both unfair and wrongful dismissal. He previously made complaints of disability discrimination, but they were struck out as having no reasonable prospect of success.

2. The claimant is deaf and he also has speech impairment associated with that deafness. In dealing with the evidence I have taken those communication difficulties into account. The disciplinary events concern alleged social media activity.

Evidence

3. By way of evidence I heard from Mr Corr on behalf of the respondent, who took the decision to dismiss the claimant, and Mr Walker, who heard his appeal. I heard from Mrs Kaye yesterday and from Mr Kaye today.

4. I have had to deploy a wide range of fact finding tools available to the Tribunal in these circumstances. They include looking at the contemporaneous evidence at the time, and my assessment of the witnesses giving their evidence, the substance of their answers and the way in which questions were addressed before me. I also used the tool widely available to the Tribunals: what is more plausible or less plausible when weighing up any conflicts that I have to decide.

Findings of fact

5. There are many undisputed matters of course, but I also record those to make sense of these events.

6. On 29 September 2016, by an email forwarded to Mr Stones, the relevant Depot Manager, a Mr Allen, an apparent customer, complained of hate speech by a respondent employee, the claimant in this case.

7. The whole chain of emails with Mr Allen was not in the papers before me, but the chain ended with him saying words to the effect: 'I find I did keep a copy of this screen shot'. That screen shot, to all intents and purposes, looked like the claimant's Facebook page, or a Facebook conversation identifying the claimant's profile, and attributing to him the following words: "get every demolition squad, destroy every mosque in the UK, start from tomorrow and kick all Muslims out of this country".

8. The claimant had attended a presentation on social media and was aware of the respondent's policy some months before these events. At the time that these events came to light, the claimant had been on sick leave because of an operation, and he had been in great pain with that. At the time of the Allen email he was due to return to light duties.

9. Mr Stones invited the claimant, by text, to a meeting on 3 October. That text did not tell the claimant the purpose of the meeting, but Mr Stones then spoke to the claimant's wife. (He could not easily speak to the claimant by telephone because of his hearing and speech impairment). He re-arranged that meeting for 5 October at a different depot. The depot was selected because it was near to the claimant's home.

10. The meeting was described as "informal" or "semi" by Mr Stones, whatever that means, which was a recollection in a document prepared by the claimant's wife at page 71 of the bundle. There was no indication to the claimant or his wife, (the parties are agreed about this) that this was potentially an extremely serious disciplinary matter to be discussed. The respondent referred to that meeting in later correspondence from Mr Corr as a "seek an explanation" meeting.

11. In any event that meeting took place. Mr Stones showed the claimant his laptop screen, (Mr Stones' laptop screen), with the offensive screenshot open. What

happened further at the meeting is a matter of dispute and I will come to that shortly.

12. Mr Stones, the same day, but later on that day in an email to his then boss, said this about that meeting: "I asked if he had a Facebook account which he confirmed he had, I explained that there had been a complaint about a post he had made on Facebook, I showed him the screenshot of the post and he confirmed he had written it, I asked Mr Kaye if he was aware of the social media guidelines within Royal Mail and he replied the post had nothing to do with Royal Mail. I asked him if he could recall a briefing at Holmfirth specifically about the use of social media, he said he could not". Mr Stones then refers to having copies of a receipt from the claimant, and the briefing that he did give, earlier that month, and at which the claimant was present.

13. The claimant then continued on sick leave. Mr Stones arranged a further meeting on 19 October, described as a formal fact finding meeting, at which the claimant had his union representative, Mr Harpin, present. On both 5 and 19 October Mr Stones did not have a note taker present with him.

14. Notes were produced by Mr Harpin, and it was apparent from those notes that the claimant did not accept (on 19 October) that he had made the offensive post. There was great discussion of what had been said on the earlier occasion (5 October) when the screen shot had been shown. Mr Stones then went on to discuss the claimant's health. He accepted that the claimant could return to work on light duties, but he then suspended him because of the hate speech allegation that had been made. He later summarised that allegation as "posting racist comments on Facebook". The single allegation that concerned him was the alleged face book post to which I have referred.

15. On 19 October Mr Stones also said that this was a very serious matter and he may have to pass it up to a more senior manager. On 6 November Mr Stones confirmed that he would be passing the matter up the chain of command for formal conduct proceedings. The significance of that, of course, is that the respondent's Conduct Policy provides for the most serious of penalties, namely dismissal, or suspended dismissal, to be made by a certain level of manager (above that of Mr Stones). Other disciplinary penalties, final warnings, serious warnings and the like could have been decided upon by him.

16. The suspension imposed on the claimant was subject to necessary reviews to consider its ongoing necessity by virtue of the respondent's Disciplinary and Conduct Policy. Those reviews happened several times and Mr Stones completed documentation on each occasion asserting his reason for continuing that suspension as follows: "Due to the serious nature of the alleged incident I feel that until the case has been fully investigated it would be inappropriate for you to attend work". That reflected advice that he had taken from the "Advice and Guidance" team.

17. In fact there was no further investigation of the complaints against the claimant, save that Mr Stones asked for the claimant's comments on the notes of the meetings of 19 October, and also from his union representative. Those comments were provided. The claimant or someone on his behalf, had noted each of the paragraphs of the discussion, and detailed comments were made. The claimant said in an accompanying document (page 72): "The offending comment no longer existed at the time of going through the account. It was gone when the IFFM was done. The account was clean when gone through

prior to the FFM (the Formal Fact Find) DK could not find the offending comment on 5 October 16. The account was gone through thoroughly after during which time we spoke to Darryl Harpin. It likely it was removed during the removal of spam etc following the hacking of the account".

18. My finding on the balance of probabilities is that this document, and indeed many of the documents produced on the claimant's behalf, were produced by his wife. I formed that conclusion not as a result of direct evidence, but on assessment of the claimant and his wife during the course of his evidence and the other contemporaneous consistent documentation.

19. At paragraph 18 on page 75 (the note of the interview with Mr Stones), the claimant and his wife left unchallenged the following note: "David had also told him {Mr Harpin, the union representative} when I initially interviewed him informally he had not seen the comment posted, he had only seen it when he checked his account when he had gone home. At this point he and his wife went through the whole of the account and had removed anything they thought may be dodgy or that someone else may have posted". These words were comments attributed to the claimant's union representative Mr Harpin.

20. Returning to the undisputed chronology, on 14 November the claimant's union representative wrote a grievance on his behalf complaining that his communication difficulties had not been addressed through the disciplinary process, and that Mr Stones had purposefully put him at a disadvantage, deliberately setting out to confuse him.

21. In late November or early December Mr Stones referred the matter to Mr Corr and Mr Stones said this in a note to Mr Corr at around that time: "As per our conversation yesterday I can confirm that during my informal discussion with Mr Kaye at Scissett delivery office on Wednesday 5 October he did admit posting the comments on Facebook. He said he had done so because he had been annoyed with people on the site. As you will see from my notes, by the time of the formal fact finding interview on 19 October Mr Kaye's version of events had changed and he now said it was not him that posted the comments, I have captured in notes that he was telling me something completely different to what he told me at the informal, his response when challenged was he had not posted the message, if you need any further information give me a ring".

22. The claimant's grievance, either before or after that note, was not acknowledged at all in writing. Mr Corr considered it could be dealt with on appeal in the conduct proceedings (and in fact it was the respondent's procedure to deal with such a grievance in that way).

23. The respondent's Conduct Procedure also made provision for an individual to be told if a grievance was to be dealt with in that way, but Mr Corr did not write to the claimant to tell him that his grievance would not be considered separately, which was a recommendation in the Management Guidance to the grievance procedure.

24. The case proceeded to a disciplinary hearing with Mr Corr on 9 December. The claimant was again represented by Mr Harpin. Mr Corr was not accompanied by a note taker and he wrote up his own notes.

25. Given the claimant's withdrawal of the alleged admission, Mr Corr decided to interview Mr Stones. He did not put to Mr Stones that the claimant had suggested in his grievance that Mr Stones had deliberately put him at a

disadvantage. The extent of the interview, by telephone, between Mr Corr and Mr Stones, was "to talk about David Kaye and clear up things which took place on the initial discussion". The record of the interview says this:

"He says you showed him a picture on your screen but it was only for a few seconds and he did not have time to see the comments"

Mr Stones is then recorded as saying:

"rubbish I showed him the screen asked him if it was his Facebook account he said yes, I asked him if they were his comments he said yes, I then asked him why he posted those comments and he said it was because some people had annoyed him".

At any point did he raise the issue of his account being hacked?

"No not at this point only at the formal fact finding".

So to be clear are you adamant that he saw the screen clearly, both image and contents [sic] comments.

"Yes"

They then discussed the Occupational Health issue and then Mr Corr said

"So returning to the first point he did admit to posting it"

Mr Stones: "Yes he then changed his mind at the formal fact finding stage"

And that was the end of that interview.

26. Nothing was put to Mr Stones at that stage about the claimant's communication difficulties, and as I have said the allegation that he, Mr Stones, had deliberately put the claimant at a disadvantage taking into account those difficulties.

27. Mr Corr did not, having conducted that interview, consider that any further investigations were necessary. He believed Mr Stones's account of the 5 October meeting.

28. My finding on the evidence before the Tribunal is that Mr Corr had a predisposition to believe Mr Stones, and a predisposition to believe that employees routinely put in grievances when faced with conduct proceedings, or once those become clear. He therefore placed great weight on the admission, or alleged admission on 5 October, and he discounted the later interview notes and the comments made by the claimant in those notes, and about those notes.

29. Mr Corr did ask for the claimant's comments on the interview with Mr Stones. The claimant then, or his wife on his behalf, put forward difficulties concerning the image and content of his face book profile, highlighting to Mr Corr that the start date for his employment on the alleged screenshot, was wrong, considerably wrong, and mentioning other potential technical difficulties with that image and profile.

30. There was no further investigation at that stage. Mr Corr relied on Mr Stones. He decided to dismiss the claimant for gross misconduct and he communicated that in some detail in findings confirming summary dismissal on 30 December. The claimant had been suspended from 19 October and was first made aware of this allegation on 5 October. Mr Corr produced a report summarising his key findings. Mr Corr relied on the nature of the screenshot itself – that is the comment he attributed to the claimant. He relied on the Royal Mail's prohibition

on such material understandably, and he relied on the admission, and later retraction. He concluded that there were no mitigating circumstances, a customer had been offended, and those were the reasons for his dismissal decision.

31. The claimant appealed that decision and Mr Walker was allocated to hear that appeal. He conducted the appeal by way of a full rehearing from scratch. He conducted a full discussion with the claimant and a different union representative, including a reconstruction of how Mr Stones had showed him the laptop screen on 5 October. Mr Walker also provided to the claimant subsequently additional evidence on which he relied. In the appeal hearing there was also discussion of why the claimant had not reported the incident, if he was concerned his account had been hacked.

32. Mr Walker also interviewed Mr Stones again. He put some challenging questions to him. He did not put to Mr Stones expressly the claimant's grievance allegation (that he had deliberately sought to put the claimant at a disadvantage given his hearing and speech impairments). He asked Mr Stones about his relationship with the claimant which was said to be fine. He asked him about his interviewing the claimant and the notes of that are at page 136.

33. Those initial notes recorded that Mr Stones said, on 7 February 2017 when asked the question 'how did you invite David to a meeting on 5 October', "text message I think as he was on sick leave at the time". The notes indicate again that Mr Stones did not have a note taker present with him at that time, and that he was perhaps relying on his own memory of that. Those notes were subsequently corrected to record that he communicated it by phone message; the correct position is as I have described it above (a text concerning 3 October and then a conversation with the claimant's wife).

34. The appeal hearing was conducted on 2 February. Mr Walker's interview with Mr Stones took place on 7 February. Later in the afternoon of 7 February Mr Walker sent the claimant new material that he relied upon, which was a much better, clearer and colour image of the alleged screenshot which had been provided by Mr Allen, the complainant (which appeared at page 139 of my bundle). The claimant and his wife later responded to the notes and further information.

35. It is fair to say that the bundle before Mr Walker for his hearing of that appeal ran to some 80 or so pages, and included much of the information in the Tribunal's bundle. There were then further additions to that of course when the parties exchanged further information after the appeal hearing.

36. That included a repeat by the claimant of the provision of the text message that he had received seeking his attendance at a meeting on 3 October, which made no reference about the nature of the meeting, or the allegation that was to be discussed. Again, there was a great deal of further information provided by the claimant's wife after the 2 February hearing as to how it was possible to fake a screenshot of a Facebook page, in the round, challenging the authenticity of the screenshot, and suggesting that the claimant's account was not hacked, because if it had been, Facebook would have intervened.

37. After that information was provided on 11 February Mr Walker notified a rejection of the appeal based on his belief that the claimant had indeed posted the offensive message. He considered significant something which appeared in

the bottom left hand corner of the better colour image, namely reference to a "URL" link which included the claimant's email account details, or part of them, which Mr Walker believed identified him as the Face book user in question.

38. Mr Walker set out detailed reasons for not accepting the claimant's denial of having posted the post in question. He considered the better copy of the screenshot at page 139 to be conclusive evidence that the claimant had made the post with particular reference to the URL at the bottom left hand side. He also put great weight on the comment of the claimant's union representative, Mr Harpin, at the meeting on 19 October, to the effect that the claimant had seen the post that evening and it had been there on his account on 5 October when that was examined by the claimant and his wife.

39. Mr Walker also relied on the claimant saying in the appeal hearing that the account had not been hacked, and that therefore his consideration of the plausibility of Mrs Kaye's evidence to the effect that it could have been, was to reject that evidence. He similarly rejected Mrs Kaye's evidence that the screen shot could have been faked.

40. Mr Walker considered in his deliberations whether a lesser penalty than dismissal would be appropriate. It was open to him to consider something called 'suspended dismissal' in these circumstances, but his reason for rejecting that, taking into account the claimant's long service of 27 years, was that to do so might be seen, or would be seen, as condoning the message given that his finding was that the claimant had posted that message.

41. Mr Walker also took into account of the respondent's universal service obligation, the cultural mix of its staff and so on, all compelling reasons for the decision he reached.

42. So they are my findings of facts in summary form, the law in this case is straight forward, the representatives understand it very well.

Discussion and Conclusions

Wrongful dismissal

43. It is convenient to deal with this complaint first.

44. The issue for me is whether, on the balance of probability, I find that the claimant engaged in deliberate and wilful misconduct in repudiatory breach of his contract of employment.

45. I have had a lengthy bundle or a bundle of some 200 pages. I did not hear from Mr Stones, upon whom Mr Corr and Mr Walker placed reliance about the alleged admission on 5 October.

46. There was no explanation of Mr Stones' not attending in this case, save that the respondent was entitled to rely on the assessment of Mr Stones' evidence by Mr Corr and Mr Walker. That may be a fair submission in relation to the unfair dismissal complaint (save for my findings about Mr Corr's approach to Mr Stones' evidence) but this was a two day case, and Mr Stones still works in Holmfirth I am told.

47. I take a different view on the balance of probabilities to that taken by Mr Corr and Mr Walker, having not heard from Mr Stones.

48. I take into account that the claimant's advocate accepted fully in this hearing that had the claimant posted the offensive message, and given the training provided, that would have been repudiatory conduct.

49. I record that it was not put to the claimant by the respondent's representative in clear terms that the claimant had posted that offensive message on Facebook. However, I am satisfied there is not a great deal of unfairness in that because the claimant said on a number of occasions, in the course of his evidence, that he had not done so. That was said unprompted on a number of occasions.

50. In fact the only evidence of the claimant ever having accepted that he had posted the offensive message is the evidence of Mr Stones, from the meeting on 5 October, and the most contemporaneous evidence of that of course is the 5 October email to his boss. I therefore come back to the importance of Mr Stones as a witness and I have had to do my best with that.

51. I have weighed up the way in which Mr Stones written evidence about the 5 October exchange with the claimant undoubtedly developed over the course of a period which became from 5 October to 7 February, some four months. It developed to include that the claimant had said the post had nothing to do with Royal Mail and his motive for making the post (his interview with Mr Corr), and that he had read out the offensive post and used the mouse to point to it (the interview with Mr Walker some four months later). These matters not were included in the original 5 October email, nor was any statement taken to include them at an earlier point.

52. I also take into account that Mr Stones' recollection was demonstrably not reliable about small matters (such as how he invited the claimant to the meeting and whether the claimant was alerted to the seriousness of the matters to be discussed). A lack of precision over small matters, when communications difficulties are apparent, can produce significant and unfortunate results.

53. It is therefore most likely from the 5 October email, which I take at face value, that Mr Stones believed that he had secured an admission that the claimant had made the post. But I also weigh in the mix, as was indicated by Mr Smith, that Mr Stones did not have to be lying about the course of the meeting on 5 October in his email: he could very easily have been mistaken in his recollection or his analysis.

54. I consider that was the case, having now had very direct experience of the communication difficulties which arise given the claimant's impairments, which are profound. The claimant and all those who are managing him have to grapple with those difficulties. It only takes one small mistake in recollection or communication or analysis for the claimant to be regarded as having admitted to making the post, whereas in reality all he could see was a screen with his profile, and he was accepting that was his profile, rather than that he had made an offensive post himself, which was in very small font and he could not read it.

55. I also take into account that Mr Stones was very hostile in his rebuttal of the suggestion that the claimant did not admit making the post: "complete rubbish", he said. He was not prepared to consider that he might have been mistaken when the suggestion was put to him.

56. Allegations of making offensive Facebook posts now arise very frequently in the Tribunals. They are often very serious in their nature, as is the case here. It is

also true, as Mr Corr said in his evidence, that the conduct in question is potentially criminal conduct.

57. I have asked myself, on the balance of probabilities in that context, whether it is more likely than not, that somebody with the claimant's profound communication difficulties and unblemished record, on the direct evidence that I have heard, posted that message, when I have heard from him directly that he did not do so.

58. I also weigh in the mix that it is very difficult to both note take and conduct an interview, or any kind of communication with somebody who has these impairments and communication difficulties. I mean no criticism of the claimant by that, it simply is very difficult on a practical level, and that may no doubt have affected Mr Stones recollection and analysis (one has to speak slowly, and enunciate very carefully whilst looking at the claimant (rather than at notes or elsewhere), in order for him to lip read.

59. For all these reasons I prefer the claimant's unchallenged evidence before me. The written evidence of the challenging of Mr Stones by Mr Corr and Mr Walker has not been sufficient to persuade me otherwise. I have also heard of course the sworn and challenged evidence of Mrs Kaye, and her answers to me in response to my questions to try and understand some of the technical issues which arose, all other witnesses acknowledging that their technical understanding of Facebook and related matters was limited.

60. Mr Kaye's evidence struck me as coherent and compelling, albeit I recognise that she did not appear as any form of expert in this Tribunal, but she was indicating a great depth of knowledge.

61. In these circumstances I do not consider that the screenshot, which is an image, and only that, and gives no indication of who, if anyone, posted the offensive message, sufficient to tip the balance in favour of the claimant having made that post.

62. Judges of course do not have the monopoly on making findings of fact. They can be wrong, but we have to do the best with the evidence that is presented to us and that is what I have done. On those findings the respondent has not proven repudiatory conduct by the claimant in making that post, and the wrongful dismissal complaint succeeds.

Unfair dismissal

63. It is of course the BHS v Burchell test which has informed the list of issues in addressing the unfair dismissal complaint. The statutory provisions are well known:

64. Section 94 Employment Rights Act 1996 - the right not to be unfairly dismissed,

(1) An employee has the right not to be unfairly dismissed by his employer.

(2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).

Section 98 Employment Rights Act 1996

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show--

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

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

(a) …
(b) relates to the conduct of the employee,
(c) …
(d)…

(3) …

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)--

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

65. The reason for dismissal is the first of the questions for me. There is no doubt that the reason for this dismissal related to the claimant's conduct, and there was no doubt that Mr Corr and Mr Walker believed that the claimant had engaged in making that post. They were certainly genuine in the belief and that was not in reality challenged on behalf of the claimant.

66. Whether they formed that belief after such investigation as was reasonable was challenged.

67. I weigh in my deliberations that it was said to the claimant on numerous occasions that his suspension would continue to allow for a full investigation.

68. I take into account that in reality there was no further investigation by Mr Stones other than, at a later date prior to the conduct hearing, to print off the claimant's new Facebook profile, or as he said it "the Facebook profile that was then there" which has been referred to variously as a smiley face. I also take into account Mr Corr's closed mind to the possibility that Mr Stones may have been mistaken, or that there could be any merit in the claimant's grievance.

69. In that context what did not happen at any stage was contact by the respondent with Facebook, the social media platform provider, nor did it at any stage appear to seek any technical or IT advice, other than the provision of the original screenshot in colour and subject to magnification to some extent. That was an exercise undertaken by Mr Walker, and upon which he relied as flagging up a more visible URL in the bottom left hand corner.

70. I remind myself of the severity of this disciplinary allegation. I take into account that this was an employer with great resources in comparison to many who

appear before the Tribunals. The respondent is a very large employer operating in the field of communications.

71. There was no technical investigation, in reality, of whether in fact the claimant, from any of his available devices, had made that post, or whether someone else had done so, or indeed whether the screenshot demonstrated the authentic making of a post, or whether it recorded something else and was, in essence, a fake; and there was no disclosure of the chain of emails with the customer complainant.

72. I take into account the apparent early belief in admission by Mr Stones; and Mr Walker's position after appeal hearing that someone "hacking" the account, or making the post on the claimant's account, was ruled out by the claimant's wife in a lengthy document commenting on the notes of the appeal hearing. I bear in mind that the reasonable employer would have asked themselves what was the most likely explanation for the complaint from the customer, taking into account the claimant's possible explanations.

73. I have directed myself in accordance with **Sainsbury's v Hitt [2002] EWCA Civ 1588:** the reasonableness of any investigation is to be assessed by reference to the band of reasonable responses test. The representatives did not refer me expressly to that authority but it is a very important authority in a case such as this. That band of reasonable responses test is such that the reasonable employers take into account the gravity of the charge and the potential effect on the employee (see **Salford Royal NHS Foundation Trust v Roldan [2010] EWCA Civ 522**); implicitly where the alleged conduct has career ending potential, that is a matter affecting the degree of investigation.

74. The general point of **Sainsbury**s, and this was discussed during submissions, is that the question for me is not whether this was a perfect investigation in the round, but whether it was a reasonable one in all the circumstances, including for the reasonable employer with these resources.

75. That case of course was an allegation of theft, an employee who said "I've been framed", in effect, and an employer who did not investigate the allegation of framing. The gist of it is that it is not reasonable, necessarily, for an employer to investigate every possible explanation for the discovery of a stolen item in an employee's locker.

76. I have given myself the direction and I am very clear that what I am not entitled to say is that this was not a good enough investigation, or a perfect investigation to remove all doubt, or anything of that nature. Section 98(4) requires reasonableness, including a reasonable investigation.

77. Reasonableness is a measure of many factors in a particular set of circumstances.

78. In my judgment it has to take into account that the allegation in this case could both expose the claimant to criminal proceedings or worse, if the allegation had become known. We know that it did become known.

79. It strikes me that a reasonable employer with these resources in these times, where there is a social media policy in place, where there has been education on that, and where the technology difficulties and complexities are everywhere around us to see, would seek to establish with clarity, not just was there a post there at the particular time, but did the claimant post it?

80. It is further indicative to me that technical investigation using Facebook or otherwise would have been reasonable, because it was only during the course of these proceedings that it was established that the likely date when the post might said to have been made was on 19 September 2016. That only became clear in this Tribunal as far as I can discern from the papers before me (rather than those before Mr Walker or Mr Corr).

81. I also weigh in my deliberations that that this was an employee with 27 years' service, an unblemished record, with accepted profound impairments. I do take notice, judicial notice that is, of the real difficulties for those with such impairments in securing and maintaining employment.

82. I consider that a reasonable employer of this size, faced with this allegation, against this person with these difficulties, would have, in the round, taken technical steps to investigate further with Facebook or otherwise using its own resources and not relying exclusively on Mr Walker's view (not being a user of Facebook and having limited technical expertise).

83. I look at that investigation as I have to do, in the round. The respondent focussed almost exclusively on the screenshot itself and interviews with the claimant and Mr Stones concerning the original interview, doubt about which could have been overcome had note takers or witnesses been present at the earliest stage and had the severity of the allegation been made clear before any interview.

84. The investigation in this case, in reality, started on 5 October or perhaps a little before that when the allegation first came to light, and it ended around about 10 February when Mr Walker had the final information from the claimant and his wife and started to reach his conclusions.

85. In my judgment, for an allegation of this gravity in these circumstances, the investigation was entirely outside the band of reasonable responses, including that it did not occur to anybody from the outset that it needed to address at an early stage the profound communication difficulties, notwithstanding a grievance, and the acuteness and gravity of the situation facing the claimant.

86. I have asked myself again, standing back, the 98(4) question, given that I have accepted Mr Walker and Mr Corr held the beliefs they held genuinely, did the respondent act reasonably in treating those beliefs as sufficient reason in all the circumstances, including equity and the substantial merits of the case to dismiss the claimant, and my conclusion in that respect is no, it did not.

87. For those reasons the claimant's complaint of unfair dismissal also succeeds.

88. I have to announce to the parties that the primary remedy for a well founded complaint of unfair dismissal is the reinstatement or re-engagement of the claimant. I understand from documents that have been filed before me that such an order is the claimant's primary position.

89. It strikes me that that is a matter on which the parties may want to reflect given the findings that I have delivered and their positions in the round. It strikes me that those matters are best addressed, if they can be, by agreement without requiring any more time and resource of the parties before the Tribunal. The right order flowing from my judgment is that the parties seek to agree remedy within 28 days of today and if they are unable to do so they notify the Tribunal that a remedy hearing will be required to determine remedy.

Employment Judge J M Wade

Date: 21 August 2017