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EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr D Kurmajic	**AND**	Sainsbury's Supermarkets Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham **ON** **15 16 February 2018 and 18 April 2018 (In Chambers)**

EMPLOYMENT JUDGE Woffenden

Representation
For the Claimant: In Person
For the Respondent: Ms E Williamson of Counsel

RESERVED JUDGMENT

1 The claim of unfair dismissal succeeds.

2 The claiamnt's claim for notice pay succeeds.

REASONS

1 The claimant (a part time customer assistant at the respondent's Kings Heath store ('the store')) was employed from 15 January 2005 to 15 May 2017 when he was dismissed without notice for gross misconduct. He was aged 69 when he was dismissed. On 15 August 2017 he presented a claim of unfair dismissal and for notice pay.

2 There was an agreed bundle of documents to which was added a copy of the claimant's contract of employment dated 15 January 2005, the respondent's Keeping Information Safe Policy and a 'James Journal' at pages 131 to 134 ,135

to 147, and 148 Although the claimant did not object and I therefore granted leave for their inclusion in the bundle the respondent provided no good reason why (although they were manifestly relevant to the issues in dispute) they had not been included in the bundle of documents prepared by the respondent in compliance with the case management order made by the tribunal dated 21 August 2017.

3 At the commencement of the hearing the claimant had given a handwritten document to Ms Williamson which it transpired was a second witness statement in reply to the witness statement of Mr Hopwood which had been sent to him. Ms Williamson had prepared a second witness statement for Mr Hopwood. Both parties sought permission to rely on their additional witness statements, neither objected to the admission of the other party's and I granted leave.

4 Therefore I had two witness statements for the claimant and heard oral evidence from him and for the respondent I had two witness statements and heard oral evidence from Mr James Hopwood, the manager of the store and the dismissing officer. The claimant had appealed against his dismissal and that appeal was heard by Mr P Mitchell but he was not in attendance to give evidence nor was there a witness statement from him. I had regard only to those documents to which the parties referred me in their witness statements or under cross-examination. I also told the parties that I had read the claimant's appeal against dismissal dated 20 May 2017 and the notes of the appeal meeting and the attendant 'deliberation' document prepared by Mr Mitchell.

5 There was an agreed list of issues for me to determine:
5.1 Can the respondent show a potentially fair reason for the dismissal? The respondent relies on conduct in accordance with section 98 (2) (b) Employment Rights Act 1996 ('ERA').
5.2 Did the respondent act reasonably in treating the misconduct as sufficient grounds for dismissal such that the dismissal was fair in all the circumstances? In particular, applying **British Home Stores Ltd v Burchell [1978] IRLR 439:**
a) Did the respondent have a genuine belief in the claimant's guilt?
b) Did the respondent have reasonable grounds upon which to sustain that belief?
c) Did the respondent carry out as much investigation as was reasonable?
5.3 Did the respondent apply a fair procedure?
5.4 Did the dismissal fall within the range of reasonable responses, applying **Iceland Frozen Foods v Jones [1982] IRLR 439?**
5.5 Is the claimant owed notice pay?
5.6 If the tribunal concludes that the dismissal was unfair, should there be a deduction in accordance with **Polkey v AE Dayton Services Ltd [1987] 3 WLR 1153** on the ground that the claimant would have been dismissed in any event?
5.7 If so what percentage deduction should be made?
5.8 Did the respondent unreasonably fail to comply with the ACAS Code of Practice?

5.9 If so, is it just and equitable in all the circumstances to increase compensation as a result, in accordance with section 207A of the Trade Union and Labour Relations (Consolidation) Act 2002?
5.10 If the tribunal concludes that the dismissal was unfair to what extent did the claimant's conduct cause or contribute to his dismissal?
5.11 If so, is it just and equitable in the circumstances to reduce any compensation awarded in accordance with section123 (6) and/or section122 (2) ERA?
5.12 If the tribunal concludes that the dismissal was unfair, has the claimant taken all reasonable steps to mitigate his losses?
5.13 If the tribunal concludes that the dismissal was unfair, has the claimant suffered losses and, if so, what level of compensation is just and equitable in the circumstances, in accordance with section 123 (1) ERA?
Although it had been intended that the hearing would address liability and remedy, evidence and submissions were not concluded until the end of the second day so there was no time for me to deliberate and announce my judgement on liability so judgment was therefore reserved. However I had made it clear to the parties that I would permit cross-examination and make findings on the issues of **Polkey** and contributory fault.

6 From the evidence I saw and heard I make the following findings of fact:

6.1 On 15 January 2005 the claimant commenced employment at the store as a part-time General Assistant Grade 2 and was issued with a contract of employment dated 15 January 2005. He had come to Great Britain from his native country Serbia under the auspices of the United Nations and English is not his first language. He was 69 when he was dismissed on 15 May 2017.

6.2 The respondent has a "Colleague" Handbook for employees. The current version says under the heading "Social media and networking":
"The Internet and social networking are great ways to stay in touch with family and friends and many of its use them outside work. We need to be aware of our responsibilities to each other, to customers and to the business, wherever and whenever we use social media
That means:
You're personally responsible for everything you say online
Only discuss non-confidential topics
If you want to talk about your work, think carefully about how you represent the company, our customers and your colleagues. Is it true and accurate? Would it be appropriate to say it to their faces? What could the consequences be for you or us?"

6.3 The Respondent also has a "Social Media Policy". It was last updated on 21 November 2016 and under the heading "Why is it important for me to consider how I will use social media?" says "Whether it's clear that you're a Sainsbury's colleague from your profile or not, external individuals (e.g. suppliers or

customers) could assume you're talking on behalf of Sainsbury's and therefore you are responsible for what you write about work and Sainsbury's as a business. It is therefore important that posts and comments are respectful and considerate of others around you and do not have the potential to cause offence to others or have a negative impact on Sainsbury's." It goes on to say that "conversations posted on social networking sites could end up being seen by millions of people. Any comments you make which relate to or reflect on any element of Sainsbury's, can be visible not only members of the public but are increasingly monitored by mainstream media, journalists etc. When discussing anything related to Sainsbury's online you must do this in the same professional way that you would if you were at work talking to customers. If you wouldn't say it to a customer, don't post it online." Later in the policy employees are reminded "Always remember that if you discuss anything related to Sainsbury's, you must always do it in the same way that you would if you were saying it to customers and colleagues at work,
If you wouldn't say something to, or in front of, or about a supplier, customer or colleague, then you shouldn't post it on a social media site." Under the heading "what can happen if I don't follow this policy" it is said "Any postings that you make on either Sainsbury's social media sites or on any other sites that are acceptable or inappropriate can result in disciplinary action. This could include… "Any postings that might damage our business interests or reputation". It concludes "In serious cases summary dismissal may be the outcome".

6.4 The respondent's disciplinary and appeals policy provides a non-exhaustive list of examples of gross misconduct. These include "Bringing our brand into disrepute, including seriously failing in service standards, being involved in criminal activities, being involved with activities that have a negative impact on our brand by association or by inappropriate use of social media in personal or company time which directly or indirectly refers to customers, colleagues, contractors or company." The policy also states that employees will be provided with all relevant documentation relating to the situation.

6.5 Under the respondent's "Keeping our Information Safe" policy, employees are informed that the respondent's information is defined as "any information that you need to carry out your job role will support our business. This includes, but is not limited to any type of information about our customers, colleagues, third-party contractors or agency workers, finances, suppliers, third parties, competitors for future initiatives/events.' An example of information needed for an employee to do his or her role includes "customer, colleagues, agency and third-party personal details including names, contact numbers, addresses, nectar and bank details." Employees are told on page 37 how to handle information "in a safe way". They are reminded to keep in mind "Confidentiality: making sure the right people have access to information and locations and that unauthorised people don't have access" and "Handling: only using information for the purposes intended unless you have obtained permission to use it in other ways." Customer Information (which includes names and addresses) is described as highly

sensitive information to be kept in a locked cabinet (page 142). Employees are informed that following all requirements of the policy is mandatory and that "Any breaches of this policy may lead to disciplinary action in line with our current Disciplinary and Appeals policy."

6.6 New policies are placed in a folder in the store's canteen but employees are not made aware of any new policies in any specific way. Mr Hopwood sends employees a newsletter for the store called 'James' Journal'. It is attached to wage slips issued to employees. The only one disclosed (which was for 27 September 2016 some eight months before the incident involving the claimant) said under the heading 'Social Media Policy' "Please be really mindful of what you are putting on social media i.e. Facebook and Twitter et cetera. For more info please see the policy on Our Sainsbury's. Some key points to remember are: you are personally responsible for everything you say online. Be mindful of your privacy settings. Don't give your opinion about something on behalf of Sainsbury's. If you wouldn't say it directly at work, don't set in a social media context-make sure your comments are in line with our equality diversity and inclusion policy." The respondent also uses 'table talkers "which are documents in a triangular shape similar to a Toblerone placed on tables in the canteen and 'Loo news 'which are posters placed in toilets as a means of providing written information to employees. Although it was Mr Hopwood's evidence that these had provided a summary of the respondent's Social Media Policy none of them were produced to me in evidence and Mr Hopwood could not tell me when they were deployed. There was no evidence before me of any training (formal or informal) given to employees about either the Social Media policy or the Keeping our Information Safe policy.

6.7 On 4 May 2017 the claimant (and other staff members) assisted a driver who got into difficulties when his car became stuck on a ramp in the store's free multi-storey car park. Members of the public can use it whether or not they buy anything from the store.

6.8 On 5 May 2017 a colleague placed two photos of the incident on a personal Facebook page with the comment 'whoops'. This prompted someone else to ask 'How did they manage that?' and the claimant posted a comment identifying the driver as the person who knew how it had happened, giving his name age (86) address and car registration number. It was Mr Hopwood's evidence in chief that he was not involved in the initial investigation and had not spoken with Mr France (a departmental manager in the store who conducted the investigation) about the case prior to the disciplinary hearing which he subsequently conducted. However that evidence was disingenuous; in reply to a question by me about how the store came to know about the post in question Mr Hopwood said on the evening of 5 May 2017 a colleague had shown it to him on their mobile phone and he formed the view from that post that the claimant had potentially committed an act of gross misconduct and had told Mr France his view when he asked him to conduct an investigation.

6.9 On 6 May 2017 the respondent's HR team wrote to the claimant to confirm he had been suspended on full pay following 'your alleged Gross Misconduct; namely

- Bringing the brand into disrepute. On 5, May 2017 you breached the Company's Social Networking policy by using Facebook to directly reference customers, colleagues, contractors or the Company.
- A serious breach of the Company's Keeping Our Information Safe policy on 5,may (sic) 2017. You have posted on Facebook a customers (sic) personal details."

6.10 Mr France wrote to the claimant on 8 May 2017 to ask him to attend an investigation meeting into the above allegations on 10 May 2017 and informed him of his right to be accompanied at that meeting. When I asked Mr Hopwood what had happened to the colleague who had placed the photos on Facebook Mr Hopwood told me he had conducted a disciplinary hearing and having taken advice from the respondent's HR team decided to issue her with a final written warning rather than dismiss her as he did with the claimant because the claimant had shared a customer's information. He said he could not remember when he had held that hearing. His involvement in the colleague's disciplinary process was wholly omitted from his evidence in chief. The disciplinary hearing he conducted must have however taken place by the time of the investigation meeting on 10 May 2017 because Mr France referred to it in the manuscript notes of the meeting(see paragraph 6.11 below) . Again I found Mr Hopwood's evidence disingenuous.

6.11 The manuscript notes of the investigation meeting record the claimant's admission that he had put the driver's details on social media. He expressed his concern about the driver's fitness to drive and asked for a definition of the word "customer". Mr France said that the driver had parked his car on the respondent's land so he was a customer of the respondent. He told the claimant that his colleague had been "dealt with". He said "the rules say you should <u>not</u> put any information on social media. He reminded the claimant that there were "talkers" on tables in the store's canteen saying "about not posting on social media." The claimant accepted he had seen them but said he had not read them. He was asked whether he thought it was right to post on social media but denied it was the wrong thing to do. He told Mr France he would do it again if the clock was turned back even though Mr France reminded him he had explained that it was wrong and shown him the "talkers". Mr France told him that he worked for a large company and should be protecting the respondent and the driver's family. When asked if he had anything else to say the claimant referred to a driver in Glasgow who had killed 3 or 4 people and people had known that he was not fit to drive. Mr France said that he had to understand that customers had to be protected too. He was asked again whether he would still post on social media and said that he would not now. When he was asked if he would like to add anything else he said he'd wait for the next letter. After a brief adjournment Mr France said

having read the notes he had decided it would go forward to a disciplinary hearing. He told the claimant he had posted details on Social Media and after the rules had been explained to him had said he would do it again. He commented the claimant didn't seem to understand what he did was wrong. In reply the claimant said "No-next time I would judge differently."

6.12 Mr France completed a "Decision Making Summary". In it he summarised the allegation against the claimant as "breach of companies (sic) keeping our information safe policy." He set out his findings which were that the claimant had posted customer's details on social media and that "after explaining rules/regulations still insists he would post again. He thinks he is in more danger. Does not seem to understand what he did was wrong." Indeed having recorded the decision was to send the claimant to a hearing he gave the reasons as being that after he had explained he respondent's rules regarding social media the claimant had insisted (my emphasis) he would post again and did not understand what he did was wrong.

6.13 On 10 May 2017 Mr Hopwood wrote to the claimant inviting him to attend a disciplinary meeting on 15 May 2017 to discuss his alleged gross misconduct which were in identical terms to those set out in Mr France's letter to the claimant dated 6 May. The only enclosures referred to were Mr France's notes of the investigation meeting and a copy of the screenshot from Facebook. No reference was made to the inclusion of any policies. Nonetheless the claimant accepted that by the disciplinary hearing (if not before) he had received copies of both policies. The letter went on to say he had the right to be accompanied and that the allegation was very serious and if upheld could result in his summary dismissal.

6.14 In his first witness statement Mr Hopwood described having read only the notes of the suspension meeting and investigation meeting in preparation for the disciplinary hearing .No mention was made of any policies or of the letter inviting the claimant to the disciplinary .He told me that this was in error and he had also read both the respondent's Social Media policy and its Keeping Our Information Safe policy and the letter of invite although he had not spotted that as far as the latter is concerned it did not appear the policies had been enclosed. His first witness statement said he had noted in particular that the claimant had told Mr France he would do it again if the clock was turned back. However it did not mention that later the notes of the investigation meeting also indicate that on two subsequent occasions the claimant told Mr France during the meeting that he would not. Mr Hopwood could not explain why he had not also included those comments in his first witness statement except to say that the statement had been prepared by solicitors and he had not spotted their omission. I conclude on the balance of probabilities his first witness statement contains the accurate version of events; he had only read the suspension and investigation meeting notes not the policies or the letter inviting the claimant to the disciplinary hearing

nor had he spotted the two occasions in the notes of the investigation meeting when the claimant said he would not make posts on Facebook in the future.

6.15 At the disciplinary meeting before Mr Hopwood on 15 May 2017 the claimant was accompanied by a colleague. However she was called to the meeting at the claimant's request shortly after it began and although she was described in the manuscript notes taken at the meeting as a representative she simply accompanied the claimant and played no active part. In reality the claimant was alone. The claimant pointed out that he had not described the individual as a customer only as a driver and queried when the driver became a customer. He had not included the place where the incident occurred. Mr Hopwood said that he had posted details of the driver on Facebook which "could be brand damaging." The claimant said he had deliberately not described the individual as a customer but as a driver. Mr Hopwood reminded him that the comments related to an accident in the store and asked him to explain why he had done so .He replied that he had put the information on Facebook because he believed the individual should not be driving and referred again to the accident in Glasgow. Mr Hopwood then asked him where he got the individual's details from. The claimant's reply was evasive; he cited Russian hackers. The notes record that Mr Hopwood read out to the claimant the respondent's Social Media policy and its Keeping Information Safe policy. These are lengthy documents and Mr Hopwood's oral evidence was that in fact he had referred him to the relevant sections of those policies only although the notes do not record this. The claimant He asked the claimant whether he believed the comment he put on Facebook was or was not in line with the respondent's policy. The claimant said no but pointed to a lack of training that he did not have information about the policy he had been shown and that he went to the canteen to eat .Mr Hopwood then referred to information on the 'white boards,' loo news'' ,the 'James' Journal 'and in the folder containing policies in the canteen.

6.16 The claimant reiterated his post had referred to a driver not a customer and his concerns about the individual's fitness to drive and implied road traffic law concerning this was more important than and conflicted with the respondent's policies. He summarised his position as having made the post in question for self-protection. Mr Hopwood said that whether or not the driver bought something he'd had an accident in the store's car park and they had a duty of care to him. The claimant's comments related directly to someone to whom the respondent owed a duty of care. The claimant accepted that made sense. Mr Hopwood said the respondent's policies were to protect colleagues and customers and employees had to work in line with them whether they agreed with them or not. He asked the claimant whether he understood that by putting details on Facebook he had breached those policies. The claimant responded with "what is my damage? Need to look at my intention." Mr Hopwood asked him to consider if the newspapers had got hold of it and seen his comment what story would be written; the claimant was doing a service or that he shamed a customer and treated them badly? The claimant said he did not know and it wasn't important to

him. He was asked how he would feel if his details had been put on Facebook if he had been a driver and had an accident? He commented what he had said was true. He was asked about his comment to Mr France that if the clock was turned back he would do it again. The claimant said that was a "trigger reaction". He confirmed that if he could turn the clock back he would not have put it on Facebook and when he was asked why he explained it was better to ignore than tackle the problem but if everybody ignored it that was not good for society. Mr Hopwood said "but you don't understand why, do you?' and the claimant said "no I feel innocent. You decide." The claimant then referred to his 12 year service with the respondent during which he'd had no absence and was colleague of the year that year. The job had given him a normal life and he'd been able to learn another language and he was happy in the job.

6.17 Mr Hopwood adjourned the hearing for approximately 45 minutes and took advice from the respondent's HR team. Despite the length of the adjournment he told me he was unable to recall what advice was sought or given. He then announced his decision to dismiss the claimant. He had set out in the manuscript notes the "*fors*" and '*against*' dismissal. The factors against dismissal were the claimant's length of service and good disciplinary record and that the claimant '*in hindsight*' would not post the comments again. The factors in favour of dismissal were that the posting of the comments *'clearly breached social media policy*.' The comment was insensitive, disrespectful and '*potentially brand damaging*.' It had the *'potential* 'to be seen by 422 friends creating a negative impression of the respondent and colleagues and the claimant had not apologised or shown empathy. He read out the notes he had made to the claimant and told him about his right of appeal. The claimant asked for and was given a copy of the notes of the disciplinary meeting.

6.18 Mr Hopwood had filled in a "Decision Making Summary" form. He summarised the allegations against the claimant as "*bringing brand into disrepute and a serious breach of the company's keeping our information safe policy*. " Under the heading '*Findings*' he recorded the claimant's rationale for making the posting as his belief it was his '*civil*' duty to make people aware the individual was a dangerous driver. He had made wild allegations and brought up irrelevant information. He did not believe the driver was a customer and did not understand that as an employee he had to work in line with the respondent's policies whether he agreed with them or not. His comments had breached both the respondent's policies, he showed no empathy for the driver and although the store and the respondent was not mentioned the post was made in relation to the colleague's post which showed pictures of the incident and also a Sainsbury's employee.
In the section giving reasons for the decision Mr Hopwood recorded the claimant had '*clearly*' breached the respondent's Social Media and Keeping our Information Safe policy. His remarks were insensitive and disrespectful to the individual and had the '*potential to be brand damaging'*. It had the '*potential* 'to be seen by 422 Facebook friends who would (in his belief) form a negative opinion about the respondent and how its colleagues treat members of the public who

had accidents in store. He had not apologised and showed no empathy. Although the form also recorded he had considered dismissal final written warning and no further action as outcome options it did not (as the form requires) explain why. Neither his first or second witness statement states that he considered any alternatives to dismissal or provides any rationale for their rejection. In oral evidence he was unable to provide any cogent explanation for having rejected alternatives to summary dismissal. I conclude on the balance of probabilities although he was aware there were alternatives to dismissal he did not give more than superficial consideration to any sanction other than summary dismissal. Although he told me he had concluded that the claimant had been not been motivated by malice but by health and safety concerns which was a mitigating factor against dismissal he had not taken the claimant's motivation into account.

6.19 Mr Hopwood wrote to the claimant on 15 May 2017 to confirm the decision to dismiss summarily had been for gross misconduct namely: 'Bringing the brand into disrepute. On 5, May 2017 you breached the Company's Social Networking policy by using Facebook to directly reference customers, colleagues, contractors or the Company' and 'A serious breach of the Company's Keeping Our Information Safe policy on 5,may (sic) 2017. You have posted on Facebook a customers (sic) personal details". The claimant was informed of his right of appeal.

6.20 Mr Hopwood's first witness statement said that he had found the claimant had detailed the gentleman's age name and address and that he had therefore breached the respondent's '*social media policies'*. He said he believed the comment had been insensitive and disrespectful to him and '*was likely to'* lead to a negative view of the respondent and its treatment of members of the public. He took into account his length of service that he had no live warnings and that he '*now*' said he would not post the comment again. In his second witness statement Mr Hopwood said one of the reasons for dismissing the claimant was his breach of the Keeping Our Information Safe policy in particular pages 137 and 142.He had reached that conclusion because he was aware an accident report log had been made with the driver's details on it and he could not see where else the claimant had got the information from and that therefore the claimant was in breach of that policy. However he considered the breach of the Social 'Networking' policy was the biggest concern because putting that sort of information on social media put the respondent's reputation at risk. In oral evidence Mr Hopwood said he had not concluded (as the letter to the claimant dated 15 May 2017 stated) that the claimant had brought the brand into disrepute; he believed that the Facebook post had the potential to do so and although he had checked the letter before it was sent to the claimant he had not spotted this' oversight'. He had concluded that the claimant was aware of and read the Social Media policy because it was in the canteen and referred to in the James' Journal; he was not however confident the claimant was as aware of the contents of the Keeping Our Information Safe policy and that a breach of that

policy could lead to disciplinary action. He accepted that no complaints about the post were received.

6.21 By a letter dated 20 May 2017 the claimant appealed against his dismissal. The grounds were:

1) There was no damage to the driver or the respondent's brand or to society;
2) He had no malicious intent to hurt anyone;
3) He wasn't supposed to know the driver's personal details;
4) He didn't know the details of either policy and if he had he wouldn't have made the comment he did;
5) His comment was triggered by the earlier comment of a colleague;
6) He had a remarkably good sickness absence record given his age;
7) He summarised his past work history; and
8) He apologised to everyone involved and accepted his action was wrong, that he would not do anything similar in the future, he was trying to do his best and understand his action was inappropriate;
9) The decision to dismiss him was unfair after 12 years' service with an exemplary record and his contribution to the store.

6.22 The claimant's appeal was heard by Mr Mitchell on 5 June 2017.He was accompanied by an HR representative. This time the claimant was accompanied by a different colleague who actively participated in the appeal. Mr Mitchell subsequently wrote to the claimant to inform him that the decision to dismiss him was upheld. Since no further explanation for that decision is given in the letter and Mr Mitchell was not called to give evidence it is necessary to set out the unchallenged manuscript notes which were made of the appeal hearing in some detail to establish the reasons why Mr Mitchell reached that decision.

6.23 Those notes record Mr Mitchell began the appeal by saying it was an appeal against dismissal for bringing the brand into disrepute. The HR representative asked the claimant if he understood the respondent's Social Media policy. He said he did now but if he had read them before he would not be there. The HR representative told him there was a folder in the canteen with all the policies in one of them, there were 'table talkers' and a white board on the stairs, the Social Media policy was put on line about 6 to 9 months before and colleagues had been given ample time to know their responsibilities The claimant confirmed he had read a company handbook but it was one from 'years ago'. The claimant reiterated having used the word 'driver' not 'customer'; the latter was someone who bought something. It was put to him that he had not previously disputed that the respondent 'could have been in disrepute, 'but the discussion then returned to whether the individual was a customer or a driver and whether the location could be identified as that of respondent.

6.24The claimant confirmed he had put the individual's details on Facebook and Mr Mitchell asked him where he had got them from. Again the claimant was reluctant to divulge this information digressing to bring up his high IQ. It was put

to him by the HR representative that if he was that clever how come he did not know about the Social Media policy? He explained again that he worked hard and when he was having lunch he liked to relax; training needed time and there was no record of signing for the policy. The colleague who accompanied him expanded on this point to explain the claimant was hoping he would have been trained in relation to the Social Media policy.

6.25 Mr Mitchell moved on to point 4) of the grounds of appeal and said 'basically we have covered this you didn't know even when the info is everywhere and you have read the handbook. 'The claimant reminded him he had read the old handbook and the social media policy was more recent.

6.26 In relation to point 5) Mr Mitchell said that the colleague in question had been dealt with so that 'answers point 5'.The claimant went back to this point .His colleague said understood him to be saying that the other person had not been sufficiently punished and the claimant said 'everyone needed the same punishment'; his colleague should not have invited him on Facebook; the person should have kept to personal friends and then this problem would not have happened. Mr Mitchell assured the claimant that the respondent had dealt with the matter in a consistent way. The colleague said that someone had kept their job and the claimant's case was similar to that person's and both should have the same 'justice'. The HR representative pointed out that in the claimant's case he had posted customer details. He was asked about the reference he had made to Russian hackers in his disciplinary meeting which he described as him 'joking'; the respondent had had the Facebook post for 24 hours and if it had been deleted nothing would have happened. His colleague explained the photos had been left on line from the day before and it was only when someone asked the question that naively he had provided the information. The claimant was asked about having said at the disciplinary hearing he believed he was doing a public service in putting the details on Facebook. He explained the effect of the Social Media policy would be to prevent him from giving the details of a car number plate of someone who had had a car accident and killed someone. His motivation had been to make society better in preventing accidents and again cited the incident in Glasgow. He said he now believed it was better to ignore things.

6.27 Mr Mitchell acknowledged the contents of point 8) of the grounds of appeal but said the claimant had said in the investigation that he would post again. The claimant said that was in the heat of the moment. He asked the claimant how he would feel he were the driver and his details were on Facebook. The claimant did not deal with that point directly but turned to the events of the day itself and the efforts made to help the driver and the length of time taken. He was asked if he had anything else to say and commented if he were in the driver's position he would send a thank you letter and praise the respondent's colleagues who had helped him. When he was asked if there was anything else he wished to say he referred to what he knew that there had been no intention to hurt anyone and had received no training in his role; he had received positive comments about his

work. The notes show Mr Mitchell thought he was going off the point and so brought the meeting to a close after the claimant reminded him he had no previous warnings on his record. His colleague then summed up the claimant's case. She said he did not really know the policies and if the sanction was overturned she would want him to read all the policies using his break to do so and he should calm down and stick to his role. The claimant tried to explain that in his past life information about people was freely available; they had to carry ID cards. He was reminded by Mr Mitchell that in the UK carrying ID was a choice. The claimant then thanked the respondent for his twelve years' work and the opportunity it gave him to become 'normal' again; he apologised to his line manager and accepted he had made a mistake and had been naïve. He denied he had revealed the details to shame the driver. Mr Mitchell said it was relevant to him where he had got the information from but the claimant declined to say as it would be putting another colleague in danger. His colleague described the claimant as reckless said he would not do it again and the claimant asked Mr Mitchell for another chance.

6.28 The appeal concluded at 12.33 and resumed at 13.28. Mr Mitchell announced his decision. He said the claimant had been asked to say where he had got the information from but he would not tell them. His apology and acceptance of wrong doing had been taken into account. It was however a 'serious breach of company policy'. The post showed he worked for the respondent and could be classed as the respondent's point of view and the comments would form a negative view of how the respondent treated customers; the comments were of a 'highly sensitive nature ' which should not have gone into the public domain.

6.29 Mr Mitchell had also filled in a "Decision Making Summary" form. He summarised the allegations against the claimant as "1 Bringing brand into disrepute.5 May breach of social media policy 2 Serious breach of the company keeping our information safe policy. " Under the heading 'Findings' he recorded they had gone through the' 5 points of appeal 'and 'covered' his understanding of the policies; he had refused to tell them how he got the information. They had spoken about levels of warning and the need to be consistent and fair (which referred to the colleague's disciplinary case).It was 'acknowledged' he was apologetic and accepted his action was wrong and that there was no malice. In the section giving reasons for the decision Mr Mitchell recorded 'A serious breach of company policies, social media and keeping information safe' .On Facebook he had said he worked for the respondent so this could have been thought to be the respondent's point of view. However he noted 'potentially there isn't damage to directly to customer/driver but could be to the company –bringing the brand into disrepute 'Having noted the driver was in a Sainsbury's car park he said the comments 'would form a negative opinion of how colleagues treat our customers ,therefore brand'. The information brought into the public domain had been 'of a highly sensitive nature. 'He then noted separately the 'fors' which were 'did apologise for comments made at the end of the appeal, length of service., no live

warnings, Dusan stated wouldn't happen again at appeal stage, colleague of the year.'

6.30 Although the form also recorded Mr Mitchell had considered reinstatement, reinstatement with a warning and no further action as outcome options it did not (as the form requires) explain why. There is no evidence before me on which I could conclude that he gave the alternatives to dismissal any more consideration than did Mr Hopwood.

6.31 The claimant accepted under cross-examination that he had seen the driver's personal details in a car accident report. It was not marked confidential. He had not wanted to drag another employee into it so told Mr Hopwood about Russian hackers. He also accepted he knew of the existence of the respondent's Social Media Policy although he had not studied its contents. Although he was aware of the existence of the respondent's disciplinary procedure the only copy he had was in the "Colleague" Handbook for employees dated from 2005.

6.32 The claimant is a healthy man and subject to his health intended to have carried on working until his early seventies. He is now receiving what I believe to be a state pension though his evidence about this was not clear.

7 I heard and considered oral submissions from the claimant and Ms Williamson.

8 Section 98(1) and (2) of ERA provide that:

"(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 –

relates to the conduct of the employee."

9 Under section 98(4) ERA"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."

10 In conduct cases the tribunal derives considerable assistance from the test set out in the case of **British Home Stores Ltd -v- Burchell [1978] IRLR 379 EAT,** namely: (i) did the employer believe that the employee was guilty of misconduct; (ii) did the employer have reasonable grounds for that belief; (iii) had the employer carried out as much investigation into the matter as was reasonable in all the circumstances. The first question goes to the reason for the dismissal. The burden of showing a potentially fair reason is on the employer. The second and third questions go to the question of reasonableness under Section 98(4) ERA and the burden of proof is neutral.

11 I remind myself that it is not for the tribunal to substitute its view of what was the right course for the employer to adopt. The function of the tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; if the dismissal falls outside the band, it is unfair **(Iceland Frozen Foods Ltd v Jones 1982 IRLR 439 EAT).** It was held in the case of **Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 CA** that the range of reasonable responses test applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason.

12 In the case of **Taylor v OCS Group Ltd [2006] EWCA Civ 702 tribunals** were reminded they should consider the fairness of the whole of the process. They will determine whether ,due to the fairness or unfairness of the procedures adopted the thoroughness or lack of it of the process and the open-mindedness or not of the decision –maker the overall process was fair, notwithstanding any deficiencies at an early stage Tribunal should consider the procedural issues together with the reason for dismissal .The two impact on each other and the tribunal's task is to decide whether in all the circumstances of the case the employer acted reasonably in treating the reason they have found as a sufficient reason to dismiss.

13 In the case of **Elsmore v The Governors of Darland High School and others UKEAT/0209/16/DM** it was held that despite the absence of a reasoned appeal decision or evidence from a member of the appeal panel the employment tribunal was entitled to infer that the appeal panel upheld a capability dismissal for the same reasons as those relied on by the capability panel itself. In paragraph 23 the President Mrs Justice Simler said "*However, since the matter was argued by Mr O'Dair and in case I am wrong, I do not accept there is a legal requirement in every unfair dismissal case where reasons for dismissing an appeal not given for the appeal officer to give evidence at a tribunal hearing in*

order to enable a tribunal to find that the dismissal procedure as a whole is fair. Whether or not an appeal officer is required to give evidence is a fact sensitive question that inevitably depends on the circumstances of the particular case. I can well imagine, as Mr Ali submitted, that in a case when new evidence or new arguments advanced at the appeal stage, a failure to provide a reasoned appeal outcome decision together with a failure to proffer an appeal panel witness might lead to the conclusion that the respondent has failed to discharge its evidential burden. However each case must be judged on its own facts."

14 Under section 122 (2) ERA " Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."

15 Section 123(6) of ERA provides that:
"(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

16 If a dismissal is found to be unfair compensation can be reduced to reflect the likelihood that the employee would still have been dismissed had a proper procedure been followed (**Polkey v AE Dayton Services Ltd 1988 ICR 142, HL**). The burden of proving that an employee would still have been dismissed falls on the employer.

17 Conduct amounting to gross misconduct justifying summary dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be require to retain the employee in his employment. Whether particular misconduct justifies summary dismissal is a question of fact (**Neary v Dean of Westminster [1999] IRLR 288**). The test is an objective one. The burden is on the respondent to prove that the claimant was guilty of the misconduct described and that this was a repudiatory breach.

18 Mr Hopwood dismissed the claimant for his Facebook post (see paragraph 6.8 above).The claimant has never disputed that he made the post. That related to his conduct and is a potentially fair reason for the dismissal in accordance with section 98 (2) (b) ERA.

19 Although these are matters relevant to section 98(4) ERA the respondent did not address in its response its size or administrative resources nor has it led any evidence about them. Suffice it to say that it is a national supermarket with many sites employing many people. It is likely therefore that it has a large sophisticated

well-resourced internal HR function and it is against that background that I consider whether the respondent acted reasonably within section 98 (4) ERA.

20 Mr France had erroneously concluded as a result of his investigation that the claimant had insisted he would post again although he had said twice in the investigatory meeting that he would not do so and that formed the basis on which he decided to send the claimant to a disciplinary hearing. Mr Hopwood failed to notice from his reading of the notes of the investigation meeting that, although the claimant had indeed initially told Mr France if he could '*put the clock back*' he would do it again he later said twice that he would not do so. As the claimant told Mr Hopwood at the disciplinary hearing when his initial response to the 'put the clock back 'question was put to him, that response had been a 'trigger reaction'. As early as the investigation meeting he twice said he would not repeat his actions. It was plain from Mr Hopwood's first witness statement that he concluded that the claimant had not said he would not post again until the disciplinary hearing .He had no reasonable grounds for that conclusion and although this was a factor which counted against dismissal the inclusion of the words 'in hindsight' indicate that this was not as positively regarded as it might have been had Mr Hopwood realised the claimant had said there would be no repetition at almost the first opportunity he had do so. This error continued and was exacerbated at the appeal stage .Mr Mitchell had no reasonable grounds for his conclusion that it was not until the appeal that the claimant said it would not happen again and although he too included this as a factor which counted against dismissal the reference to timing indicate that he too did not regard it as positively as he might have done had Mr Mitchell appreciated the early stage in the disciplinary process at which the claimant had said there would be no repetition.

21 Mr Hopwood was aware of the existence of the accident log and its contents. It was the basis for his conclusion that the claimant had breached the Keeping Our Information Safe policy. Although it was therefore a relevant document the claimant was not provided with a copy (in breach of the respondent's own disciplinary and appeals policy) nor was it put to the claimant by Mr Hopwood during the disciplinary hearing that this was the source of the driver's details. It would normally be appropriate to provide employees with copies of any written evidence against them in advance so they can prepare to answer the case against them (paragraph 5 of the ACAS Code of Practice Disciplinary and Grievance). I heard no evidence why it was not possible to do so in this case. The accident log was not in the agreed bundle of documents. This is yet another relevant document which the respondent has in its possession but which it has not disclosed to the claimant.

22 The matters set out at paragraphs 20 and 21 were not sufficient in and of themselves to render the dismissal unfair .However other matters were of greater concern. Mr Hopwood was not a frank or credible witness. He was not as was submitted by Miss Williamson doing his best to assist me. His evidence emerged

in a piecemeal fashion and was far from clear about what was actually in his mind at the time he made the decision to dismiss and what has occurred to him with the benefit of hindsight.

23 In my judgment Mr Hopwood initiated the disciplinary process against the claimant predisposed to the view that the claimant had committed an act of gross misconduct. He did not approach his decision making with an open mind. This predisposition as to the seriousness of the claimant's conduct made him careless. He did not pay attention to detail in his reading of the investigation notes, the letter inviting the claimant to the disciplinary hearing and the letter confirming the outcome of the disciplinary hearing nor did he make himself sufficiently familiar with the contents of the policies which it was alleged the claimant had breached. It also unreasonably limited his approach to considering any alternatives to dismissal.

24 Mr Hopwood regarded the alleged breach of the respondent's Social Media Policy as the most serious offence. He did not regard the breach of the Keeping Our Information Safe was being as important. All the correspondence (including the letter of 15 May 2017) to the claimant referred to the allegation of gross misconduct against him as including the bringing of the brand into disrepute by his Facebook post .I conclude on the balance of probabilities that at the time he took the decision to dismiss Mr Hopwood saw no difference between bringing the brand into disrepute and having the potential to bring the brand into disrepute and it was on that basis that he concluded that the claimant was guilty of gross misconduct . I observe in passing that no reasonable employer could have decided on the available evidence that the claimant's conduct had brought the brand into disrepute.

25 It is trite that an employee should only be found guilty of the offence with which he is charged. The absence of damage to the brand was one of the grounds on which the claimant appealed to Mr Mitchell (and on which he relies in his claim to this tribunal) but Mr Mitchell did not address this point; he adopted exactly the same approach as Mr Hopwood; The claimant was thereby placed at a disadvantage. He did not have the opportunity to challenge this.

26 If new policies are introduced the breach of which can expose employees to the risk of dismissal how and when they are communicated to employees and their significance is relevant to whether or not an employer acted reasonably in treating a particular conduct issue based on the breach of those policies as sufficient to justify dismissal. A reasonable employer would put in place and be able to evidence a comprehensive training program and communication trail which caters for the diverse circumstances of all its employees or at the very least ensure that it is made clear to employees that it's their responsibility to acquaint themselves with the contents of any new policies. There was no evidence before me that this was the approach taken by the respondent.

27 Mr Hopwood now says he was not confident of the level of awareness the claimant had of the contents of the Keeping Our Information Safe policy and that a breach of that policy could lead to disciplinary action. Although the claimant mentioned this as a ground of appeal in relation to both policies Mr Mitchell did not address the claimant's state of his knowledge of that particular policy at all. The consistent evidence the claimant gave Mr Hopwood and Mr Mitchell about not having knowledge of the policies and his explanation for this state of affairs and the (unchallenged) lack of training in their operation or significance was given no credence. This was a relevant mitigating factor to which a reasonable employer would have had regard particularly in relation to the Keeping Our Information Safe policy in sharing a customer's details the breach of which was the reason for the disparity between the claimant's dismissal and the final written warning issued to his colleague. Mr Mitchell only considered whether the colleague had been dealt with.

28 The claimant submitted that the respondent over reacted and the penalty of dismissal was too harsh. The objective standards of a hypothetical reasonable employer must be applied in considering whether the dismissal was within the range of reasonable responses. "Postings that might damage our business interests or reputation" might in "serious cases "only result in summary dismissal (although this is not an example of gross misconduct under the respondent's disciplinary and appeals procedure). As far as the Keeping Our Information Safe policy is concerned it is said that a breach of the policy might lead to disciplinary action in line under the respondent's Disciplinary and Appeals policy but such a breach is not an example of gross misconduct under that policy. The ACAS Code of Practice Disciplinary and Grievance says that disciplinary rules should give examples of those acts which the employer regards as acts of gross misconduct.

29 As I have already observed there is no evidence before me of the steps taken by the respondent on the introduction of the policies which would indicate their enforcement was of particular importance to the respondent.

30 The ACAS Code also reminds employers and employees that 'If an employee's first misconduct or unsatisfactory performance is sufficiently serious", then it may be appropriate to move directly to a final written warning' (Paragraph 20) and that only "Some acts, termed gross misconduct, are so serious in themselves or have such serious consequences that they may call for dismissal without notice for a first offence There is no evidence that either Mr Hopwood or Mr Mitchell turned their minds to the ACAS Code when considering the sanction.

31 As far as the circumstances of the offence were concerned a reasonable employer would have taken into account and given weight to the fact this was the claimant's first disciplinary offence there was only one short post revealing the personal details of one individual the respondent regarded as a customer

on a page on a colleague's Facebook and the potential for brand damage was limited because action was taken as soon as it came to light. As far as mitigating factors put before Mr Hopwood and Mr Mitchell were concerned a reasonable employer in addition to the claimant's long service and blameless record and his recent accolade (Colleague of the year) would have also given proper weight to the claimant's prompt confirmation he would not repeat his conduct ,his apology offered to his line manager via Mr Mitchell ,that he had no malicious intent, that he had not been trained in the policies ,that he was aware of the existence of the Social Media policy he was not aware of its content and during the appeal he pleaded for another chance and said via his colleague he would become familiar with the policies. Once Mr Hopwood and Mr Mitchell had decided that the claimant was guilty of gross misconduct they did not engage in any real consideration of options other than dismissal. The decision to dismiss the claimant fell outwith the range of reasonable responses. Having regard to the reason shown by the respondent in all the relevant circumstances of the case it did not act reasonably in treating it as a sufficient reason for dismissing the claimant.

32 I conclude that the claimant is entitled to notice pay. As I have already said "Postings that might damage our business interests or reputation" might in "serious cases "only result in summary dismissal and this is not an example of gross misconduct under the respondent's disciplinary and appeals procedure. A breach of the Keeping Our Information Safe policy is not an example of gross misconduct. The conduct of the claimant in making the post in question was not such as to show the claimant disregarded the essential conditions of his contract. This was a one off instance of a short post (in response to a prior post by a colleague) which revealed in an insensitive way the personal details of one individual regarded the respondent as a customer on a page on a colleague's Facebook. Action was however taken as soon as it came to light. The conduct was not so serious as to warrant summary dismissal. The respondent has not discharged the burden of proving the conduct was repudiatory.

33 In my judgment there was blameworthy conduct by the claimant and it contributed to his dismissal. He was aware of the existence of the respondent's Social Media policy and chose to reveal on a colleague's Facebook page the personal details of an elderly driver who had had an unfortunate incident in the respondent's carpark in an ill-judged and insensitive attempt to draw attention to his fitness to drive. He was not frank in explaining to the respondent how he had got that information. I consider it just and equitable to reduce the amount of the compensatory award by 30%. I also consider that this conduct was such that it is just and equitable to reduce the amount of the basic award by the same percentage.

34 Miss Williamson submitted that if a fair procedure had been followed it was inevitable that the claimant would still have been dismissed because of the nature of the gross misconduct and the serious view the respondent took of it.

She did not refer me to any evidence she relied on or engage in any other analysis .Although I accept that the claimant had not used the personal details (which the respondent defines as 'highly sensitive information') on the accident log for the intended purpose and had not maintained confidentiality as he ought to have done under the Keeping our Information Safe policy and under the respondent's Social Media policy that the post was not 'appropriate' and might damage the respondent's business interests or reputation (because of negative publicity) I am unable to conclude on the evidence before me whether the respondent could therefore have dismissed the claimant fairly for a gross misconduct offence (the only proposition put to me by Miss Williamson) and would have done so.

35 I am giving the parties the opportunity to agree the amount of compensation to be paid by the respondent to the claimant. The parties have until 28 days from the date on which this judgment is sent to them to confirm in writing to the tribunal whether or not settlement terms are agreed. If settlement terms are not agreed the remedy hearing will be listed and directions given to enable the parties to prepare for the same.

Signed by: **Employment Judge Woffenden**

Date: 11 June 2018