Case Number: 3201264/2018

RA

EMPLOYMENT TRIBUNALS

Claimant: **Mr Alexandru Ioan Botez**

Respondent: **Kuehne+Nagel Ltd**

Heard at: **East London Hearing Centre**

On: **19, 20 and 21 March 2019**

Before: **Employment Judge A Ross (sitting alone)**

Representation

Claimant: Mr Padure (paralegal) – on 19 and 20 March 2019
Mrs Padure (solicitor) – on 21 March 2019

Respondent: Mr Sheppard (Counsel)

JUDGMENT

1. **The complaints of unfair dismissal and breach of contract are not upheld.**
2. **The complaint of unpaid holiday pay is dismissed on withdrawal.**
3. **The Claim is dismissed.**

REASONS

1. The Claimant was continuously employed by the Respondent as a driver from 2 March 2015 until Summary Dismissal on 19 March 2018. The stated reason for dismissal was gross misconduct for breach for the Respondent's Social Media Policy.

2. After a period of early conciliation, the claim was presented on 18 June 2018 complaining of unfair dismissal, breach of contract and unpaid holiday pay.

3. I was informed on the outset of the hearing by Mr Padure that the holiday complaint pay was no longer in issue and subsequently this was dismissed following his confirmation that it was withdrawn.

The issues

4. At the outset of the hearing, the issues on liability were agreed with the parties and defined as follows:

4.1. What was the reason for dismissal? Was it a potentially fair reason? The Respondent contends that the Claimant was dismissed for gross misconduct;

4.2. Was the decision to dismissal procedurally fair?

4.3. If procedurally fair, did the Respondent act reasonably by treating that reason as sufficient reason for dismissal? That is, was the decision to dismiss within the band of reasonable responses open to the employer? Sub-issues include:
4.3.1. Whether the dismissing manager had an honest belief that the Claimant was guilty of the alleged gross misconduct;
4.3.2. Whether such belief was based on reasonable grounds;
4.3.3. Whether the Respondent had carried out such investigation as was reasonable in the circumstances.

4.4. If procedurally unfair, what was the percentage chance that the Claimant would have been dismissed in any event, had a fair procedure been adopted.
4.5. Did the Claimant contribute to his dismissal? if so, what percentage deduction is just and equitable?
4.6. Whether the Respondent has breached the contract of employment by failing to pay notice pay. The Claimant contends that he is entitled to three weeks' notice pay.

5. On 19 March 2019, after 5pm, Mr Padure indicated that the claim was also for unpaid wages which I noted was not claimed within the Claim Form, nor identified as an issue in the Preliminary Hearing. Subsequently, Mr Padure accepted that there was no money claim remaining (save the breach of contract claim for notice pay) and no application to amend was made.

6. Due to the lack of judicial resource, the length of the hearing was reduced to three days. Given that there were ten witness statements, I explained that I would deal with liability only in the first instance. With a further hearing for Remedies being fixed, if required. Given the unavailability of certain of the Claimant's witnesses, the hearing was adjourned at 3pm on 20 March 2019 and reconvened at 12pm on 21 March 2019, to complete the evidence and thereafter submissions. Given the time left, judgment was reserved.

The Evidence

7. There was a joint bundle of documents prepared for the hearing. Page references in these set of reasons refer to pages in that bundle.

8. I read witness statements for and heard oral evidence from the following witnesses.

8.1. For the Respondent:
- 8.1.1. Waldemar Pilipczuk; Investigating Manager;
- 8.1.2. John Bremner; Disciplinary Manager;
- 8.1.3. Steve Hammond; Appeal Manager;
- 8.1.4. Zydrunis Valukonic; Operations Controller.

8.2. For the Claimant:
- 8.2.1. Radovan Plucinsky;
- 8.2.2. The Claimant;
- 8.2.3. Alex O' Donnell;
- 8.2.4. Geani Cristian Bucner;
- 8.2.5. Layrentiu Alexandru Ristea.

9. In addition, I read a witness statement of Sorin Lulian Lazae and attached such weight to it as I thought fit.

10. I found the Respondent's witnesses to be honest and broadly reliable. I am satisfied, in particular, that they were reliable on all the key facts. Whilst Mr Bremner made errors in his witness statement, such as referring to Mr O'Donnell as a trade union representative rather than a driver representative, I find that these were minor mistakes, which can be expected given the time lapse before the witness statement was made.

11. Conversely, I found the Claimant to be unreliable and, in places, not credible as a witness. This was for several reasons including:

11.1. The Claimant gave evidence that I found implausible in places. For example, in respect of the Respondent's intranet, the Claimant's evidence was not credible. He stated in cross-examination that he did not know of the intranet and could not access it. This was not credible because:
- 11.1.1 He denied knowledge of it but did accept that he had received the Statement of Terms and Conditions (page 64) when he began work. I pointed out that this referred to the intranet at which point the Claimant stated that he had forgotten that. I did not believe him.
- 11.1.2 Secondly, the Claimant had been acting up as a frontline manager in the office for several months. I found it very unlikely that he would not have come across the intranet in such a role.
- 11.1.3 Thirdly, the Claimant accepted that he was good with computers and I considered that it was not credible that such an employee, given his experience, would not have known of the intranet.

11.2. At times the Claimant gave evidence for which there was no evidential basis. For example, when he was asked about the timings of the posts on the screenshot that he was shown (the original of which was seen on the phone of Mr Pilipczuk at the hearing), at first the Claimant refused to admit them on the basis that the post could have been made from someone based abroad. Given the wording of the posts and that these addressed "K & N" and were available to staff based at West Thurrock Depot of the Respondent, this was incredible.

11.3. The Claimant gave a number of different explanations for how the two posts could have come to be made. These were designed to show that he was not responsible. One of these explanations was that a bogus account had been created in his name. I found it was inconsistent that at no time did he report this to Facebook. I found that this was not credible. Further, at the investigation meeting (page 148) he suggested that there could be another person named Alex Botez who had done this, even though the photo on the post profile was similar to or the same as the one on his account and even though it was part of a thread involving the Claimant's colleagues. In the light of the Claimant's failure to report the alleged bogus account to Facebook, I found this explanation not credible.

11.4. The Claimant refused to give access to the Respondent to his Facebook account. He was asked at the investigation meeting and the disciplinary hearing to give access with the option of access by him logging in (so he did not need to give his password). At this time, the Claimant had the Social Media Policy (on any view of the facts) and must have known that this refusal was a breach of the duty to cooperate with it. In cross-examination the Claimant said that this was for personal reasons, but this explanation was new, and I rejected it.

11.5. The Claimant alleged that notes of the investigation meeting were inaccurate in material ways. This allegation was only made during his cross-examination. It was not mentioned before, such as at the appeal or in his witness statement and nor was that allegation put to Mr Pilipczuk. I concluded that this allegation and the claim that certain part of the notes were incorrect was not credible.

11.6. The Claimant refused to admit that some fairly clear evidence before the disciplinary officer was correct. For example, he refused to admit that the post originally made by Mr Ristea wishing everyone Happy New Year, was a public a post on Facebook (as stated by Mr Ristea in interview at page 190).

11.7. The Claimant claimed in his disciplinary hearing that he could not find the second account in his name but the HR Officer and his representative were able to find it at a hearing, within a few minutes. I found that the Claimant's evidence in this respect was unlikely to be true.

12. From all the above I infer that the Claimant had sought to mislead the Respondent and the Tribunal because he had something to hide. This was the fact that he had made the posts at or around 02:40 to 02:50 on 1 January 2018, containing the offensive and abusive language. I did not find that the witness evidence called by the Claimant assisted him. The evidence of Mr Plucinsky, Mr O'Donnell, Mr Bucner and Mr Lazar was largely irrelevant. Mr Ristea's evidence was of marginal relevance.

Findings of Fact

13. The Respondent is a logistics company employing about sixty thousand employees worldwide. The Claimant was employed from 2 March 2015. At the commencement of his employment the Claimant was provided with an employee handbook. This included the following:

> "*The Handbook makes reference to various company policies. This list is not exhaustive of all polices in place within the company. Full copies of all policies and procedures can be obtained from the company intranet or if can't access the intranet (KNET) from your line manager. Policies and procedure are non-contractual and are subject to change from time to time*
> *….*
> *Social Media Policy*
> *Social Media should never be used in such a way that breaches any other company policy or the Code of Conduct. Personal use of Social Media is not permitted during working times or by means by company computers, networks, communication systems or other I.T resources.*
>
> *If you disclose your affiliation as an employee of the company you must state that your views do not represent of those of KN. You must avoid posting comments about sensitive business-related topics such as the company's performance. Please refer to the Company's Social Media Policy for further information*".

14. I found the Claimant's evidence that he had not received such a Handbook unreliable. I accepted the Respondent's case that the Claimant was likely to have received this document on commencement. It was never put to the Respondent's witnesses that he did not receive this, nor that the provision of this Handbook was not the usual process when an employee started work for the Respondent.

Relevant policies

15. The Respondent's Social Media Policy is at pages 43 – 47 of the bundle. It includes at 9.1(A):

> *"Staff must not post disparaging or defamatory statements about: (i) our organisation, (ii) our clients, (iii) suppliers and vendors, (iv) other affiliates and stakeholders"*.

16. In addition, at paragraph 9.3(A) the Social Media Policy provides:

> "*Do not post anything that colleagues or customers, clients, business partners,*

suppliers, vendors or other stakeholders would find offensive, including discriminatory comments, insults or obscenity".

17. The Respondent's Disciplinary Policy is at pages 48 and following pages. The procedure includes at paragraph 8.3.6:

"*Sanction 4: dismissal*
Dismissal will usually only be appropriate for: …

- *Any gross misconduct regardless of it there are active warnings on the colleagues' record. Gross misconduct will usually result in immediate dismissal; without notice or pay in lieu of notice (summary dismissal)."*
- *Appendix 1 of the Disciplinary Policy provides examples of gross misconduct. This includes "serious breach of any company policy*".

18. The Claimant stated in cross-examination that he had not received a copy of the Social Media Policy before disciplinary action against him was taken in 2018 at the investigation interview on 15 January 2018. However, when asked if he had been given the policy and whether he understood it at the disciplinary hearing he said that he did. He never mentioned that he did not understand it. Indeed, he confirmed in his investigatory interview that the contents of the posts were abusing colleagues and the company; and before me, in answer to my question, he accepted that it was not necessary for a policy to tell an employee that he should not post such abusive posts.

The investigation

19. In the early hours of 1 January 2018, a post was made in response to a Facebook post on the Facebook page of Mr Ristea, who had sent New Year wishes. It was brought to the Respondent's attention that an account in the Claimant's name had made remarks on the Facebook post about the Respondent and work colleagues. These remarks are set out in full at page 126 of the bundle.

20. In the context in which those remarks were made amongst posts from staff at the Respondent's West Thurrock Depo and made in the name, apparently with the photo of the Claimant, a fair and reasonable interpretation by the investigating and disciplinary managers was that "K & N" refers to the Respondent company.

21. The copy of the post at page 126 included a photo as well as the Claimant's name.

22. The Claimant was suspended on 5 January 2018 for alleged breach of the Respondent's Social Media Policy.

23. Mr Pilipczuk was appointed to investigate a potential breach of the policy. I found there was no evidence of any bias or ulterior motive behind the decision to investigate. In the light of the evidence before the Respondent, in the form of the Facebook posts in the name of the Claimant, this was a reasonable step, if not an inevitable one.

24. On 8 January 2018, Mr Pilipczuk held an interview with the Claimant about the two posts made in the early hours of New Year's morning, containing the words at

page 126. The notes of this meeting are at page 137 – 142. I find these notes are accurate, if not verbatim. It was never suggested to Mr Pilipczuk that they were fabricated. I find that the notes are accurate insofar, as they record that the notetaker read the notes out to the Claimant at the end of the investigation hearing but the Claimant refused to sign them (see the note at page 155).

25. During the investigation meeting the Claimant denied that he had posted the two messages. He stated that the photo on the posts looked like him but it may not be him because it was blurry. Mr Pilipczuk formed the view that the photo in each post was that of the Claimant.

26. The interview was adjourned at the Claimant's request so he could prepare. He asked for an adjournment to the 12 January 2018 which was granted. A copy of the Social Media Policy was provided to him. The Claimant informed Mr Pilipczuk that he would use the time to demonstrate that he never placed the post on his Facebook account. During the adjournment Mr Pilipczuk took statements from three witnesses: Jacek Mroziewicz; Alexandru Ristea; and Robert Lipinski.

27. The Claimant alleged in cross-examination that Mr Lipinski's statement was made up. This was a good example of the Claimant making allegations where there was no factual basis for it. The Claimant had never previously suggested this and I rejected it as not as credible. The Claimant had not raised this during the appeal nor in the Grounds of Appeal.

28. Mr Mroziewicz's evidence, the first of the witnesses I just referred to, was that he saw the two posts on Facebook which he described as abusive and vulgar. He considered it abusive himself and did not know why it was made. Mr Ristea's evidence was that his original New Year's greeting post was a public post. He also understood that the posts at page 126 were from Mr Botez. Mr Lipinski's evidence was that he found the two posts, which he took to be from Mr Botez to be "*low*".

29. The investigation interview continued on 15 January 2018. The Claimant stated that lots of people on Facebook were called "Alex Botez" and denied the posts were his.

30. Mr Pilipczuk asked the Claimant for his password to Facebook so he could check the Claimant's activity with the Claimant present. He referred the Claimant to the Social Media Policy that required employees to cooperate with it [page 44]. The Claimant refused. Mr Pilipczuk then asked the Claimant to log into his Facebook page. Mr Pilipczuk did this in an attempt to allow him to view the account with the Claimant. The Claimant refused and stated that he did not want to. When he was accused of not cooperating, the Claimant asked to adjourn the meeting.

31. At the second part of the investigation meeting on 15 January 2018, the Claimant argued that anyone could have created an account using his photo. He admitted that it could be him in the photo. When questioned, the Claimant stated that he had not reported to Facebook that someone was posing as him and sending abusive messages. Mr Pilipczuk genuinely believed the Claimant had had sufficient time to make such a report.

32. In the investigatory meeting, the Claimant admitted that the contents of the post were abusive of colleagues and the company [see page 152].

33. Mr Pilipczuk concluded from this that the Claimant knew that the comments were abusive.

34. Between the first and second parts of the investigatory meeting, the Claimant had changed his photograph on his Facebook profile. The Claimant's only explanation for this was that he did this now and again.

35. Mr Pilipczuk doubted the Claimant's honesty about the events because of his refusal to allow him to view the Facebook account. The photo and name appeared to be the Claimant's, the Claimant had not complained to Facebook, and the Claimant had now changed his photo.

36. I accepted that Mr Pilipczuk was an impartial investigating manager. It was not put to him that he was not impartial. I had to ask him this question. There was no reason why he was allegedly lacking impartiality raised with Mr Pilipczuk.

37. I found that Mr Pilipczuk had a genuine belief on reasonable grounds that the Claimant had breached the Social Media Policy. The Claimant did not help his cause by becoming challenging, stating that Mr Pilipczuk had to prove it was him. The Claimant was provided with notes taken at the investigation interview after the second part of the meeting had concluded.

The disciplinary hearing

38. The Claimant was charged with gross misconduct, with the allegation being a breach of the Social Media Policy. A Human Resources officer requested that John Bremner be the disciplinary hearing officer. Prior to his involvement in this, Mr Bremner had never met or heard of the Claimant and he knew nothing of the Claimant's earlier grievance at that time.

39. An invitation letter was sent to the Claimant which enclosed a copy of all the investigation notes, the Social Media Policy, the Disciplinary policy and information on the role of a companion. The letter warned that a potential outcome was dismissal. The disciplinary hearing commenced on the 6 February 2018.

40. The Claimant confirmed that he understood the Social Media Policy and had received two versions of it; one dated December 2014 and one dated June 2017. Mr Clark, Human Resources, informed him at the meeting that these were the same in content. At this part of the disciplinary hearing, the Claimant's evidence also included the following. He stated that it was not reasonable for the managers to ask for his Facebook password. His evidence was that someone could have created a fictitious account for him and "*anyone can meddle*" with a screenshot or create an account. The Claimant stated it was possible that comments can be edited using a software program. The Claimant did not believe his account had been hacked because he had checked this.

41. The Claimant wanted to know who had reported the posts. Mr Bremner

adjourned the meeting so that he could investigate this. The notes of the meeting indicate at this point of the meeting, Mr Bremner was able to establish that Eugene Yrienkyi had heard a rumour and had asked Samir Patel to see if there was any truth behind it, resulting in one of the drivers sending the posts in. It appears that the Claimant's concern at that point was that Mr Patel was not the right person to investigate because of the previous grievance of the Claimant. Parts of the grievance of the Claimant had been upheld, and the Claimant had appealed, but there was no evidence to indicate any link between the grievance and the managers referred to therein and the outcome of the disciplinary investigation or disciplinary process.

42. Mr Bremner informed the Claimant that he could provide a witness statement from an agency worker whom the Claimant stated was with him on New Year's Eve and that the Claimant could print off and rely on the time frame of whether there were activities on his Facebook account.

43. In respect of this part of the disciplinary hearing, the Claimant agreed that Mr Bremner was impartial. I found the notes of this part of the meeting [page 174-180] accurate albeit not verbatim.

44. After this part of the hearing concluded, further investigations were carried out. Mr Valikunis was requested by Ms Clark to take a statement from the drivers who had reported the posts. A statement was taken from Mr Wacko, who stated that the Claimant had made the post and "*it was very sad and upsetting*". A screen-print of it had been sent to Mrs Wacko (who had a Facebook account) by Mr Lipinski. Mrs Wacko explained who had seen the posts and sent a copy of the screenshot to Mr Patel. By telephone, Mr Bremner who was based in the Midlands interviewed Mr Patel, who explained that Mrs Wacko had said drivers had brought it to her attention because it was out of order and offensive [see page 183].

45. In addition, Human Resources arranged for Mr Ristea to be interviewed. Mr Ristea was interviewed on 12 February 2018 [page 189 following pages]. His evidence was that the Facebook settings were public and that it was a public post not a group post, that he had taken the post down because of all the attention, and that he had now changed all his settings to "Friends only".

46. The disciplinary hearing did not re-start until 19 March 2018. It was delayed at the Claimant's request. The notes of this second part of the disciplinary hearing are at page 216- 230. I found these were accurate but not verbatim. Again, there was no challenge made to them when Mr Bremner was cross-examined.

47. I accepted Mr Bremner's evidence about the evidence at the second part of the disciplinary hearing set out at paragraphs 23 – 29 of his witness statement. I find that Mr Bremner remained impartial both during the hearing and when reaching his decision. He was not based at West Thurrock Depot and there was no evidence that he knew the employees referred to in the grievance. He did not know any of the witnesses who gave evidence and none of the evidence collected referred to the Claimant's grievance. Mr Bremner had advice from the HR officer, who was with him at the hearing and there was no evidence that this had any effect on his impartiality.

The decision to dismiss

48. I accepted Mr Bremner's evidence as to why he decided to dismiss the Claimant. It had nothing to do with the Claimant's grievance which Mr Bremner had never seen, let alone dealt with.

49. Mr Bremner spent around 50 minutes reaching his decision. He honestly concluded that on the evidence before him, the Claimant had made the two Facebook posts at page 126 in the name of the Claimant. Mr Bremner believed these to be offensive and a serious breach of the Social Media Policy. He believed that the Claimant made the posts. In particular, Mr Bremner relied on the following grounds for his conclusions:

49.1. The two posts were made in the Claimant's name and with what Mr Bremner believed to be the Claimant's photo on the account. Mr Bremner considered the Claimant had failed to provide any credible explanation for the comments posted in his name.

49.2. Mr Bremner found the Claimant had provided different explanations for the posts, including that the screenshot may be fabricated, then that someone could have created a fictitious account. Despite this explanation of a bogus account the Claimant had never reported the allegation to Facebook which Mr Bremner found inconsistent. Moreover, the Claimant had stated that the account had been deleted so it could not be reported but his representative and the HR officer at the second part of the disciplinary hearing had found it in a few minutes.

49.3. The Claimant had referred to having a colleague with him on the night in question but he provided no evidence from that colleague. There was no evidence before the dismissing officer that the colleague had faced any pressure or threat of reprisal if a statement was given.

49.4. The Claimant had refused to allow access to his Facebook account either at the investigation stage or at the disciplinary hearing. This would have enabled the Respondent to confirm whether the Claimant's account of events was correct. The Claimant had failed to cooperate with the Respondent, whether by providing his password or by logging himself and supervising the access of the Respondent.

49.5. Mr Bremner accepted there were two accounts in the Claimant's name but decided that the Claimant had been the person to create the second account and block the first to divert blame from him.

49.6. The Claimant produced no evidence that anyone had made up the posts to get him into trouble. Mr Bremner found that the Claimant had not even done simple things, such as reporting the account that had made the two posts in issue to Facebook.

49.7. Mr Bremner believed the Claimant had made the Facebook posts because he had felt down on the night in question due his ongoing

grievance.

50. Mr Bremner took advice from Human Resources before making the decision to dismiss.

51. Mr Bremner decided to dismiss the Claimant for the following reasons:

51.1. He considered the actions of the Claimant were a serious breach of the Social Media Policy. “Serious breach of policy” is one of the examples of gross misconduct within Appendix 1 of the Disciplinary Policy.

51.2. He considered that the comments were serious, being offensive and derogatory to colleagues and the company, and made on a public thread on Facebook. At the disciplinary hearing, the Claimant did not contest that the comments were made on a public thread.

51.3. The Claimant had not admitted his guilt and apologised. Had the Claimant done so, Mr Bremner may have taken a different view of the severity of the offence.

51.4. The Claimant’s approach to the disciplinary process was a factor. The Claimant was unresponsive to the request for evidence to support his case.

52. The Claimant was summarily dismissed. This was confirmed in a dismissal letter at page 233 - 238 of the bundle.

The appeal

53. The Claimant appealed by Grounds of Appeal at page 244 – 246, dated 27 March 2018. Nowhere in the Grounds of Appeal does the Claimant allege that the notes of the investigation meetings with him nor the notes of the disciplinary hearings were inaccurate, nor does he allege that the statement of Mr Lipinski was fabricated.

54. Although not pleaded as unfairness and although not raised as an issue at the outset of the case, when I was drawing up the List of Issues, I considered the time taken for the appeal to be heard and whether there was delay which took the appeal process outside the band of reasonableness. The Claimant was invited to an appeal hearing on 1 May 2018 by a letter dated 20 April 2018. In response, the Claimant indicated that he could not attend because he wished to follow the ACAS process and because he was going abroad: see the correspondence at page 256 – 257. Human Resources had asked him for a return date but the Claimant was unable to give one: see page 254. After the Claimant confirmed that he had returned, he was invited to attend an appeal on 18 June 2018. Given the fact that the Respondent was going through a large redundancy exercise between approximately February and June 2018, and given the Claimant’s absence abroad and his desire to follow the ACAS process before holding the appeal, I did not find that any delay which the Respondent was responsible for had any effect on the fairness of the appeal process. It should be pointed out that the Claimant made no attempt to call any witness at the appeal. Thus,

the question of memories fading, as the Claimant suggested in cross-examination, was of little or no weight.

55. I found Mr Hammond to be an honest and reliable witness. I accepted his evidence. He had never met the Claimant before the appeal and knew nothing of his grievance until he began the appeal process. I found that he was an impartial hearing officer. In cross-examination, it was never suggested to him why he was not impartial. Moreover, Mr Hammond no longer worked for the Respondent. I found that there was no reason for him not to tell the truth.

56. Mr Hammond explained that he found the Claimant to be awkward and quite vague in the appeal. In cross-examination, Mr Hammond explained that he made several attempts to get into the detail with the Claimant to try to help the Claimant help himself. He tried to explain the seriousness of the incident and tried to get the Claimant to walk him through his Facebook process. The Claimant refused and would not allow him to see his Facebook account on his phone.

57. Repeatedly the Claimant stated that the burden was on Mr Hammond to prove his misconduct, not for the Claimant to help him disapprove it: see, for example, the entries at page 300.

58. Mr Hammond felt the Claimant was trying to stop him getting near the truth, leading Mr Hammond to believe that the Claimant was guilty of making the posts.

59. The appeal meeting lasted four hours. During this, Mr Hammond demonstrated from his Facebook account that content could be deleted. This was why Mr Hammond rejected the Claimant's timeline evidence (screenshots), because of the Claimant's failure to permit him access to his account (whether supervised or not). Mr Hammond believed from experience that the Facebook timeline and history could be adjusted by deleting entries.

60. After the appeal, Mr Hammond undertook further investigation into points raised by the Claimant. Mr Hammond interviewed Mr Bremner on 29 June 2018 to discuss some of the issues raised at the appeal. The notes of this meeting are at page 330 - 338. There is nothing in those notes to suggest any lack of impartiality by either by Mr Hammond or Mr Bremner.

61. Mr Hammond genuinely believed there had been a clear breach of the Social Media Policy. Because the Claimant had given misleading evidence, Mr Hammond believed the Respondent could not trust him anymore. He reviewed whether what Mr Bremner had done was correct and concluded that it was. An appeal outcome was sent to the Claimant on 17 August 2018. I found that the delay in reaching the decision was in part due to the redundancy exercise. The delay was also used by Mr Hammond to clarify what one could or could not do on a Facebook account.

62. The outcome letter [page 240 A2340H] gave detailed reasons as to why the decision to uphold the Claimant's dismissal was made.

63. In evidence, Mr O'Donnell said that at the disciplinary meeting he had noticed that one witness statement had not been disclosed to the Claimant, being that of Mrs

Wacko. He admitted that this was not raised at the disciplinary meeting. This allegation was not raised in the Claimant's witness statement nor was it mentioned in the Grounds of Appeal. In the light of those omissions, I have decided that Mr O'Donnell is mistaken in his recollection, because I am satisfied, having seen the Claimant pursue this case, that this issue would have been raised at the disciplinary meeting and at the appeal stage.

Findings of fact in respect of breach of contract and contributory fault

64. As I have explained, I have found the Claimant's evidence to be unreliable and parts of his evidence not credible. I found the following:

64.1. The Claimant knew of the Social Media Policy at all times from the commencement of his employment. This was due to the reference in his Statement of Terms and Conditions [see page 64] and because he received a handbook. I find the Claimant's evidence that he had not received a handbook unreliable. I accepted that it was never put to the Respondent's witness that he had not received it.

64.2. The Claimant had received a copy in or around 2015 of the Social Media Policy. I inferred this from the evidence of the Respondent's witnesses and because the Claimant had a copy of the 2015 version of the Social Media Policy, which would be consistent with him receiving it after commencing employment. But if I am wrong about this, the Claimant knew of and had access to the intranet. This is referred to in the Statement of Terms and Conditions and I have no doubt that because he was good with computers and dealt with some information technology in his acting up role as frontline manager, he would have been aware of it and how to access it.

64.3. The Claimant knew that the language used in these two posts on Facebook would amount to serious misconduct as he accepted there was no need for a policy to tell an employee that a public message containing swearing at an employer and colleagues is such misconduct.

64.4. On the overwhelming balance of probabilities, the Claimant made the two posts in the early hours of 1 January 2018. In particular:

64.4.1. The posts are by an account in the name of the Claimant.

64.4.2. This account has a photo which was in the form of the Claimant's photo on his account at that time, and probably was that of the Claimant.

64.4.3. These posts were public posts: see the evidence from Mr Ristea provided to the Respondent. There was no evidence from the Claimant that these were not public posts.

64.4.4. The Claimant removed these posts from his account timeline. This was because he realised the seriousness of what he had done and tried to conceal it. The Claimant refused access (whether supervised by him or not) to his Facebook account to prevent his employer seeing the true account history. I infer from these refusals that the Claimant had something to hide

namely, what the account would show, which was that the two posts had been made by him on the public thread, and that these were the two offensive posts at page 126.

64.4.5. The Claimant acted inconsistently having been charged with the breach of policy. Any person in his position would have contacted Facebook if they believed that a bogus account had made such mischief.

64.4.6. The Claimant produced very limited evidence as opposed to the weight of evidence he faced, that he was not responsible.

64.4.7. The Claimant was aggrieved with his employer and certain colleagues at or about the time of the posts. This was the motivation for his actions.

65. Given the nature of the offensive remarks, their targets and the fact that they were made publicly, I found that this was of serious breach of the Social Media Policy; and, in any event, these actions amounted to gross misconduct. The Claimant admitted in cross examination that if a person was guilty of such posts they should go to a disciplinary and "*maybe some sanction*" would be applied. The Claimant was not honest in the disciplinary process. Despite strong evidence that he was responsible, he sought to blame others, raised various possibilities, and alleged impartiality. There were no real grounds for such allegations.

66. The Claimant adopted a challenging approach in the disciplinary and the appeal. His attitude was that it was for the Respondent to prove that he made the post. This overlooked the fact that the account was in his name, with his picture or a similar picture to himself, and was made in a thread started by a colleague and contributed to by other colleagues. Indeed, when Mr Ristea replied to the first of the posts by the Claimant. The Claimant responded by a second post.

67. For all the above reasons, I have concluded that the Claimant committed gross misconduct by posting the two offensive comments on a public thread on Facebook.

The Law

Unfair Dismissal

68. A potentially fair reason is one which relates to conduct: see section 98(2)(b) Employment Rights Act 1996 ("ERA").

69. Gross misconduct is conduct which is so serious that it goes to the root of the contract by its very nature. It is conduct which could justify a dismissal even for a first offence.

70. I directed myself to section 98 (4) ERA which provides as follows:

> "*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 reasons shown by the employer)*
>
> *(a) depends on whether in the circumstances including the size and*

administrative resources of the employers 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.

71. The burden of proof on the issue of fairness is neutral. In considering the fairness of a dismissal, the necessary questions for a Tribunal to consider are:

71.1. did the employer have an honest belief that the employee was guilty of misconduct?

71.2. was that belief based on reasonable grounds; and

71.3. was that belief formed on those grounds after such investigation as was reasonable in the circumstances?

*(*see *BHS -v- Burchell* (1980) ICR 303*).*

72. I directed myself to the principles which I must apply when applying section 98(4) ERA, which are:

72.1. the Tribunal must not substitute its own view for that of the employer as to what was the right cause to adopt for that employer;

72.2. on the issue of liability, the Tribunal must confine itself to the facts found by the employer at the time of the dismissal;

72.3. the Tribunal should ask did the employers action fall within the band of reasonable responses open to an employer in those circumstances.

(see *Foley –v- Post Office* [2000] IRLR 3*).*

73. I reminded myself that the range of reasonable responses test applied not only to the decision to dismiss but also to the procedure by which that decision is reached, including the investigation (see *Sainsbury's Plc v Hitt* [2003] ICR 111*).* Reading *Hitt* and *Foley* together, it is clear that the Tribunal must not substitute its own standards of what was an adequate investigation for the standard that could be objectively expected of a reasonable employer.

74. In *Taylor v OCS Group Ltd [2006] EWCA Civ 702*, *[2006] IRLR 613*, it was stated that ultimately a tribunal must look at the overall fairness of the procedure, and not just consider whether the appeal had taken the form of a rehearing rather than a review.

75. I directed myself that whether a procedural defect is sufficient to undermine the fairness of the dismissal as a whole is a question for the Tribunal. Not every procedural error will do so; the fairness of the whole process should be looked at. In

South Maudsley NHS Foundation Trust -v- Balogan UKEAT 0212/14, the EAT held at paragraph 9:

> *"As this Tribunal has said countless times, the crucial thing is the statutory test in section 98(4) namely whether in all the circumstances the employer acted reasonably in treating its reasons for dismissing the employer sufficient. A procedural defect is a factor to be taken into account but the weight to be given to it depends on the circumstances and the mere fact that there has been a procedural defect should not lead to a decision that the dismissal was unfair. The fairness of the whole process needs to be looked at and any procedural issues considered together with the reason for the dismissal, as the two will impact on each other".*

Contributory Fault

76. Section 123(6) ERA provides that where a Tribunal finds that the dismissal was to any extent caused or contributed to by the action of the Claimant, it shall reduce the amount of the award by such proportion as it considers just and equitable having regard to that finding.

Breach of Contract

77. I reminded myself of the guidance provided by Mummery LJ in *London Ambulance Service NHS Trust v Small* [2009] IRLR 261:

> *44. I agree with the EAT that the ET was bound to make findings of fact about Mr Small's conduct for the purpose of deciding the extent to which Mr Small's conduct contributed to his dismissal. That was a different issue from whether the Trust unfairly dismissed Mr Small for misconduct. Contributory fault only arose for decision, if it was established that the dismissal was unfair. The contributory fault decision was one for the ET to make on the evidence that it had heard. It was never a decision for the Trust to make. That makes it different from the decision to dismiss, which was for the Trust to make. It was not the role of the ET to conduct a re-hearing of the facts which formed the basis of the Trust's decision to dismiss. The ET's proper role was objectively to review the fairness of Mr Small's decision by the Trust.*
> *45. I am unable to agree with the EAT that the ET kept the issues and the relevant facts separate or that it avoided the error of substituting its own judgment about dismissal. Although the ET rightly warned itself against substitution and thought that it was not falling into that error, my reading of the reasons is that its findings of fact about Mr Small's conduct seeped into its reasoning about the unfairness of the dismissal.*
> *46. …..It is not the function of appeal courts to tell trial tribunals and courts how to write their judgments. As a general rule, however, it might be better practice in an unfair dismissal case for the ET to keep its findings on that particular issue separate from its findings on disputed facts that are relevant to other issues, such as contributory fault, constructive dismissal and, increasingly, discrimination and victimisation claims. Of course, some facts will be relevant to more than one issue, but the legal elements of the different issues, the role of the ET and the relevant facts are not necessarily all the same. Separate and sequential findings of fact on discrete issues may help to avoid errors of law, such as substitution, even if it may lead to some duplication."*

Submissions

78. Mr Sheppard for the Respondent provided a set of written submissions, which he spoke to and expanded upon. Mrs Padure made oral submissions.

79. During the submissions, I pointed out that, despite attempting to define the issues on the first day, it had not been clear during the hearing what the Claimant's case was in terms of unfairness. Mrs Padure argued that there were two main reasons why the dismissal was unfair. Firstly, a fair procedure was not followed, and she referred to Mr O'Donnell's evidence, as well as the Claimant's other evidence. In addition, she contended that the Claimant had only seen the notes of the dismissal hearing after his dismissal and they were not signed. Secondly, Mrs Padure argued that the sanction of dismissal was outside the band of reasonable responses. She argued that dismissal was not a proportionate response to a Social Media offence of this nature. She alleged that it was a more minor misconduct matter because the post had only been on the Facebook page for a limited amount of time and the Respondent had not demonstrated any loss. She described it as an isolated incident for which under the ACAS code dismissal was not appropriate. In addition, she submitted that it was not sufficient for the Respondent to have a Social Media Policy in place. The Respondent had to make sure the policy was known by employees and provide appropriate training.

Conclusions

80. Applying the above findings of fact and the principles of law to the issues outlined at the start of these reasons, I have reached the following conclusions. I can say at the outset that I rejected the submissions made by Mrs Padure.

Issue 4.1 – the reason for dismissal

81. The Respondent has shown that the reason for dismissal was a reason relating to the conduct of the Claimant. I concluded that Mr Bremner had an honest belief based on reasonable grounds that the Claimant was guilty of gross misconduct. I repeat the findings of fact set out at paragraphs 48-49 above, which outline the evidential basis for those grounds.

82. In addition, I concluded that Mr Hammond had an honest belief on reasonable grounds that the Claimant was guilty of gross misconduct. If anything, Mr Hammond had a stronger belief due to the further investigations he had conducted and his more detailed knowledge of Facebook.

83. Gross misconduct is a potentially fair reason for dismissal.

Issue 4.2 – Procedural fairness

84. I concluded that that the dismissal was procedurally fair. The investigation was well within the band of reasonableness. In fact, as Mr Sheppard stated, it was a relatively thorough procedure. The relevant witnesses provided evidence. The Claimant did not suggest in his appeal or before me that there were any other witnesses who should have been interviewed by the Respondent. The investigation

collected relevant evidence which was more than sufficient to provide reasonable grounds for the belief held by Mr Bremner that the Claimant was guilty of the matter charged.

85. The disciplinary hearing was fair. The Claimant was accompanied by a colleague. He was allowed to make points and produce evidence. At no time did he deny knowing what the Social Media Policy stated nor did he allege that he had not been given the statement of Mrs Wacko. It was never put to Mr Bremner during the cross-examination that the Claimant had not been provided with the statement from Mrs Wacko. In any event, even if that were the case, it would have not have affected the fairness of the dismissal because the Claimant well knew the allegation and the evidence of Samir Patel set out the basis of the evidence that Mrs Wacko had provided. There was no suggestion that the Claimant had not received the note of Mr Patel's interview.

86. There was further investigation carried between the first and second parts of the disciplinary hearing. This was arranged by Human Resources and there was no evidence of any lack of impartiality by Human Resources. From what I saw, the Human Resources managers were doing their job.

87. From the ET1 and the Claimant's witness statement, and from the cross-examination of the Respondent's witnesses, I was not able to ascertain precisely what the Claimant was saying made the disciplinary hearing, the investigation or the appeal unfair.

88. In respect of alleged impartiality of the managers involved in the disciplinary process. The Claimant produced no evidence that any of those managers were lacking impartiality. This was an allegation without substance. The Claimant appeared to be fixated on the fact that he had made a grievance but significant parts of the grievance were upheld and there was no evidence that the managers referred to in it (who were at a lower level than those dealing with the disciplinary process) had any influence or any effect on the managers involved in the investigation, disciplinary hearing or appeal.

Issue 4.3 – reasonableness

89. I have found that Mr Bremner had an honest belief based on reasonable grounds after reasonable investigation that the Claimant was guilty of gross misconduct. I have set out my findings at paragraphs 49-51 above. I have concluded that the decision to dismiss was well within the bound of reasonable responses. Mr Bremner dismissed the Claimant for the reasons set out at paragraphs 51 above.

90. It is to be noted that at no point did the Claimant admit the posts were his. Therefore, there was no real mitigation that could be put forward on his behalf at the disciplinary hearing or at the appeal hearing, because he did not accept that he had done anything wrong. In respect of the allegation that the Claimant had not been trained in the Social Media Policy, I have set out above why Mr Bremner believed that the Claimant knew of the policy and understood it. In any event, it is not necessary to know about the Social Media Policy to be aware that using such language in a public forum is likely to be found to be gross misconduct.

Issue 4.5 - Contributory fault

91. If I am wrong, and the dismissal was unfair, I have reached the alternative conclusions that the Claimant was guilty of culpable conduct which was entirely responsible for his dismissal. This is because there was no real mitigation for what he did. Moreover, his dishonesty during the disciplinary process was coupled with his failure to co-operate with the Respondent. This was particularly the case in his failure to let the relevant managers look at his Facebook account, which was itself a breach of a relevant policy.

92. In my judgment, given my findings of fact at paragraphs 64-67 above, and the reasons in paragraph 91 above, if the Claimant was unfairly dismissed, it would be just and equitable to reduce the Compensatory and Basic awards by 100%.

Issue 4.6 – Breach of contract

93. As is clear from my findings of fact on this issue at paragraphs 64-67 above, I have concluded that the Claimant's two Facebook posts on a public thread, plus his dishonesty and not admitting what he had done during the disciplinary process, amounted to gross misconduct. There was no breach of contract. The Respondent was entitled to summarily dismiss the Claimant.

94. This is not a case where the Claimant could rely on the right to freedom of expression, because the comments he made were directed to his colleagues and the name of his employer. This took them out of the private sphere.

Summary

95. The Claim is dismissed. The provisional remedies hearing is vacated.

Employment Judge Ross

17 April 2019