



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4111776/2018

Hearing Held at Dundee on 14, 15, 16 & 17 May 2019

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Employment Judge I McFatridge

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**Claimant
Represented by:
Mr Lawson
Trainee Solicitor**

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Tesco Stores Limited

**Respondents
Represented by:
Mr Dunlop
Advocate**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The claimant was unfairly dismissed by the respondents. The respondents shall pay to the claimant a monetary award of Seventeen Thousand, Three Hundred and Thirty Nine Pounds and Seventy Six Pence (£17,339.76). The prescribed element is Ten Thousand, Nine Hundred and Eighty Four Pounds and Fifty Eight Pence (£10,984.58) and relates to the period between 20 April 2018 and 20 April 2019. The monetary award exceeds the prescribed element by Six Thousand, Three Hundred and Fifty Five Pounds and Eighteen Pence (£6355.18).

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REASONS

1. The claimant submitted a claim to the Tribunal in which he claimed to have been unfairly dismissed by the respondents. He also claimed wrongful dismissal. The respondents submitted a response in which they denied the claim. It was their position that the claimant had been summarily dismissed for gross misconduct and that the dismissal was procedurally and substantively fair. At the hearing evidence was led on behalf of the respondents from Mark Kerr, one of their lead managers, Charles Burness their store manager at Riverside and Derek McDonald, a store manager at Blairgowrie who heard the Claimant's appeal. The Claimant gave evidence on his own behalf. A joint bundle of productions was lodged. On the basis of the evidence and the productions I found the following facts to be proved or agreed.

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Findings in Fact

2. The respondents are Tesco Stores Limited who are a national supermarket chain employing a substantial number of people throughout the UK. They operate a store at Riverside Drive, Dundee which employs between 350 to 400 people.
3. The claimant commenced employment with the respondents in or about June 1998. He started his career as a trolley collector. In or around 2008 he was promoted to the role of Team Support which was at that time termed Team Leader. His home store was the store at Riverside but on occasions he worked throughout Scotland and parts of England in order to provide support to other stores.
4. Within the Riverside store there is a Manager, two Lead Managers and around 20 Team Leaders. The claimant's role in Team Support came below that of Team Leader. Most departments did not have Team Support but the claimant worked in the department dealing with the front end of the store. This department dealt with checkouts, the kiosk, the petrol pumps and the

Customer Service desk. There were five Team Supports within that department who reported to the Team Leader.

5. In addition to his role with the respondents the claimant was also a shop steward. He became a shop steward in or around 2008.
6. The claimant's conditions of employment were lodged (pages 47-50). The claimant attended some training courses with the company. He did team building training when he started as Team Leader in or about 2008/09. He also carried out legal training known as "Keep the store legal" on a yearly basis. This was primarily concerned with teaching the requirements of the Scottish Licencing Acts. He also attended Dignity at Work training in or about 2014. This involved he and the Team Leader reading through the Dignity at Work policy. This policy was lodged (page 35). The claimant signed the policy to indicate that he had received training. The claimant's training record card (page 51) indicated that in the box for date next refresher due

"As required".

Up until the events which led to his dismissal the claimant had a clean disciplinary record and had not received any formal warnings.

7. As one would expect Tesco have a disciplinary policy and this was lodged (pages 36-46). The policy is made available to employees through a company website. Over the years the claimant had had experience of representing individuals at disciplinaries and grievance hearings in his capacity as a trade union shop steward.
8. In April 2018 the claimant's Team Leader was Emma Lyttle. At some point Emma Lyttle contacted Mark Kerr the Lead Fresh Trade Manager in the store to advise that an allegation had been made against the claimant and that she and Wendy Cooper the Services Manager had taken statements from E, a member of the respondents' checkout staff. E who is female had joined the store in November 2017 when she was 17 years old. She was a

student who worked at the store part-time as a Checkout Operator. As such she would have worked closely with the claimant. The claimant would have been her first point of contact within management. He would be a contact in relation to arranging time off and would also deal with rotas and shifts. He would provide support to E during the course of the working day helping her with things like looking up PLU codes or assisting her with customer queries.

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9. Emma Lyttle passed to Mr Kerr the statements which she indicated she had taken from E. These statements were lodged. The statement lodged at page 53-57 was dated 7 April 18. The interviewer was Wendy Cooper the Services Manager and Fiona Little of the respondents took notes. There is a box for a representative for E and the box states this was declined. The notes are completed on a standard Tesco form which has space at the bottom for the interviewer, the note taker, the employee and the representative to sign. There are three signatures in each box. Mr Kerr assumed these to be the signatures of Wendy Cooper, E and Fiona Little.

10. The statement begins with WC stating

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“Just take a statement from you.
Around texts and behaviours from S. ...”

- E then confirms that she started in the middle of November that the team leaders had generally been good with her. The note then goes on to state

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“When did you find things changing with S?”

The next statement is

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“He started coming over and speaking to me a lot more. Then Jennifer from said he spoke to a lot of younger girls and it was a bit creepy.”

“How did he get your number?”

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“He doesn’t. He has me on Facebook and started to private message me.”

- 5 11. E was asked how it made her feel to start with and said, “Just thought he was being nice as I was new and was trying to make conversation as I was quiet.” E was then asked when that feeling changed and the response was

10 “Around Christmas time. Christmas Eve, he waited outside for me. He had finished either 30 mins-60 mins before me. When I got out he wanted me to get in his car and said we’ll drive to McDonald. I said I wasn’t hungry. He said he’d drive me to my car but it was in the car park too, so I told him it was fine. Thought it was a bit weird.”

15 E was then asked if she’d had messages since that had changed in tone and stated

“Yes. Just the way he was saying things.”

20 E was then asked “Did you feel uncomfortable at this point?” E said yes.

- 25 12. E was asked if she had spoken to anyone and said she had spoken to her mum. She said that her mum had told her to “say to someone”. She went on to say that the claimant and E had had a conversation about how old he was and that the claimant was older than her mother. He had said he had a daughter the same age as E. He then went on to say

30 “He was saying things like ‘you’ve got 3 days to get your cute ass to the doctors’ when I wasn’t well. He was using inappropriate emojis that when used with the message felt wrong/weird.

He came to Wormit where I stay one night and started texting me saying to come out and meet him at the beach. He said he was out for a drive. It was 18th December at around 8pm.”

E was asked how the claimant was in work and is noted as saying

“Yesterday (6/4/18) he had me off the till doing tags and cases. We were up at the top checkouts. He kept asking ‘What was wrong with my face’ but I said there was nothing wrong and I wasn’t in a mood. He then said ‘is it your time of the month again’” I just gave him a dirty look and said no and walked away.”

E was asked if she had received a text from him last night and said “No. The last text was Thursday asking if I could stay later.” E was asked if she had anything to add and stated “No. Just don’t want to get him in trouble.” E was asked if the claimant was messaging anyone else and said

“Speaking about it last night, Nadia and Pamela had said it wasn’t the first time and that he had text Dawn before.”

Ms Cooper is then noted as saying, “Okay. We’ll investigate it from here. Better not to chat about it from here with others while we investigate it.”

13. The next statement was lodged (pages 58-66). It was dated 10 April 2018. It bears to be completed by Emma Lyttle with Wendy Cooper as note taker. E again was not represented. The document contains boxes to be signed by the interviewer, note taker and colleague. All the boxes contain signatures. The first page shows Emma Lyttle introducing the meeting as

“Revising last statement on back of screenshot messages.”

Emma Lyttle is then reported as going on to say

“We took screenshots of conversations that have been happen and there are some circled sections on the screenshots that you have circled yourself. For notes why did you circle them?”

E – “Because they’re the ones which were really inappropriate and made me feel uncomfortable. There were other ones too but they were the worst ones.”

Emma Lyttle is then noted to say

“You mentioned about an incident with a ‘post it note’ – can you explain.”

5 E – “I went for break and there was an emoji that had been stuck to my till monitor, I asked Jennifer who had done it she said (S) the emoji was the smiley sticky out tongue (see page 1 of screenshots.)

10 E went on to say that she had been asked if the claimant had been messaging by a colleague. The colleague then said, “He does that to a lot of the young girls and he’s a bit of a creep.” E was asked, “Anything happen after that?”

“I had it in my hand and showed him it and he just made a facial expression.”

15 “How long ago was this?”

“Before Christmas 2017.”

E was then asked about the messages and stated

20 “I thought he was messaging me because I was new and quiet but the messages continued, I thought he was being nice, but then they started to get inappropriate and I didn’t want to tell him to stop in case it got awkward in work.”

25 E was then asked about anything else and said,

30 “I always thought he was always getting really close whenever I put my buzzer on any of the other team support would stand at other side of till and ask what was needed. He came round and lean over me, I felt he was far too close in my personal space.”

35 Emma Lyttle then noted that E looked upset. She told E that they had changed shifts so she wouldn’t have to see him. She then asked E how she was feeling and E responded, “Bad, didn’t want to get him in trouble but I know this has to be done.”

14. Ms Lyttle also provided Mr Kerr with the note of a meeting which she had had with the claimant on 11 April 2018 at which the claimant had been suspended. This e-mail was lodged (pages 63-65). Along with the three meeting notes was a bundle of messages. These were messages which were passed between the claimant and E over Microsoft Messenger. The messages which were lodged with the Tribunal are to be found at page 168-270 of the bundle. It is frankly unclear which messages were passed to Mr Kerr and indeed which messages were available to the other managers who dealt with this case. The messages provided to Mr Kerr were in black and white. It is impossible to determine the date of most of the messages. It is not clear whether or not the messages are in date order. It is clear that the list is incomplete as messages which begin on one page are not necessarily completed on the next page. Certain of the messages on pages 168-185 are circled in black.
15. It is clear that Mr Kerr and all of the managers had at least those messages circled in black.
16. The claimant attended the suspension meeting on 11 April. Prior to this he had absolutely no knowledge that anything was going on. The note of the meeting contained at pages 63-65 is accurate. The claimant and Emma Lyttle and Wendy Cooper all signed this. The claimant was told "need to speak to you there has been numerous inappropriate comments to a colleague at front end – and also inappropriate actions towards the same colleague. So on basis of this allegation – we need to suspend you today." The claimant was told the reason for suspension was so that the investigation could be carried out. He was told that there would be an investigation meeting with Mr Kerr at 4pm the following day and the claimant should get someone to represent him. The claimant is noted as stating that he was shocked. He said "You must have had someone come to you and tell you or give you a letter or something?" The response was
- "We have had and seen evidence to support this. You will have your chance to say your side at the investigatory meeting."

The claimant was asked if there was anything else to add and stated that he was speechless. At that stage the claimant did not know the identity of the person who was alleged to have made inappropriate comments to or made inappropriate actions towards.

17. Following the meeting the claimant was handed a letter confirming his suspension. This was lodged (page 67). The letter stated

“Re: Suspension from work

I write to confirm that you have been suspended from work on 11.4.18, pending the outcome of an investigation into allegations of

- Numerous inappropriate comments to a colleague who works in the front end team, including some of a sexual nature.
- Inappropriate actions towards the same colleague.

A thorough investigation will be carried out during the period of your suspension. Please attend an investigation meeting on:

Date: 12.4.18

Time: 16.00

Location: Interview Room, Tesco Riverside Dundee

This meeting is an investigation and you can be accompanied by either a Tesco colleague or an authorized Trade Union representative.

During your suspension, you will be paid your contractual pay (this means you'll be paid for the hours you're contracted to work, but not for any overtime or premium shifts) please don't come into work or discuss the investigation with your colleagues.

If you'd like to read a copy of our disciplinary policy, please log onto [OurTesco/Working at Tesco/people Policies/Solving Problems](#).

Please contact me on Upon receipt of this letter to confirm your attendance and the name of your chosen representative (or if you need me to arrange an Usdaw Representative for you).”

18. The claimant was not sent any documentation with this letter.

19. In order to assist their managers in conducting disciplinary investigations the respondents' HR department provides an investigation checklist. This is a dynamic document which is completed by the manager concerned during the investigation process. The investigation checklist in respect of the claimant's investigation was lodged. In advance of the hearing Mr Kerr completed certain paragraphs on page 70. Under the paragraph "Read the information you have been provided with (if there is any) to ensure you fully understand what allegations/concerns are being investigated – identify the key issue(s)" he wrote

"Inappropriate messages
Inappropriate comments at work"

In the next paragraphs where it stated "Write down the key areas you intend to discuss with the colleague (these will not be the only questions you ask, but will help remind you of the key points so you don't get side-tracked) he wrote

- Explore allegations of inappropriate comments at work
- Explore behaviour toward (E)
- Check understanding of how behaviour/messages have made E feel
- Previous issues "let's talk"
- Appropriate behaviour for a Line Manager"

20. It should be noted that the claimant was not E's Line Manager. With regard to the "previous issues" Mr Kerr had gone through the claimant's personnel file on receiving the request to carry out the investigation. In that file he had come across a document lodged at page 52 of the bundle. The document was completed on a standard Tesco form which is used to record informal conversations between a manager and employee. It is used for all sorts of conversations not necessarily those relating to any wrongdoing by an employee. It is not part of the formal disciplinary process. It is simply a record of a conversation. The document is dated 1 September 2017 and was completed by Emma Lyttle, the claimant was named as the colleague.

The document gives two signatures. It contains three boxes. The first box states “what we talked about”,

5 “Conversation around phoning/texting members of staff outwith work,
not for work but personal reasons.”

In the box headed “Our actions or agreed outcomes” states

10 “Please take all phone numbers out of your phone.”

In the box headed “Do we need to catch up again?” it states

“No, unless it carry on.”

15 Mr Kerr did not seek any information from Emma Lyttle regarding the
circumstances of this conversation in advance of the investigatory meeting.

21. The claimant attended the investigation meeting on 12 April. He was
accompanied by Kathleen Band his representative. Mr Kerr conducted the
20 meeting and Mark Allison, a Dotcom Team Manager with the respondents,
took notes. The notes were lodged (pages 76-96). At the end of the
meeting the claimant was asked to read the notes and if he was happy to
sign them off. The claimant signed each page as did Mr Kerr, Mr Allison and
Ms Band. I considered the notes to be an accurate record of what took
25 place at this meeting. At the outset the claimant was asked if he knew why
he was at the meeting and he replied that he hadn’t a clue. He was then
told the allegation had come from E, that she had supplied the respondents
with information verbally and on paper. The claimant asked when the
allegation was made and was told it was made in the last couple of days.
30 He was told the basis of the allegation was that ‘over a period of time over
Facebook you have made some inappropriate comments and said some
inappropriate comments instore’. The claimant was told the most recent
was on 6 April. It was then put to the claimant that he had said what’s wrong
with your face to E and that she had responded and the claimant had then
35 responded, “Is it the time of the month again”. She found this upsetting.

The claimant's response was, "Yes – took her off to do put backs on shop floor – I haven't seen E or a lot of them with being off ill ... hence why I said 'what's up with your face' she said she wasn't in the mood and was stressed with exams. I said to her is 'TOM' here as I don't refer to it as time of the month." Mr Kerr then responded, "OK so that's what you meant. Do you think that's appropriate way to talk to a young girl asking her that type of question?" The claimant responded, "E is the same age as my daughter that's what I refer to it with her – I know young people have issues but didn't do it to cause embarrassment or offence." Mr Kerr then stated, "As a team manager/support do you not think its inappropriate comment to make to a young woman/girl?" The claimant then said, "No it's obviously not acceptable". Mr Kerr then said, "OK so why ask?" and the claimant responded, "Just making sure she was OK. It's not just E that I say that to – the guys at front end refer to it too."

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22. Mr Kerr asked you can understand why some people would find that too personal a question and he said yes. Mr Kerr then stated, "E feels you have been making inappropriate contact with her – making her feel uncomfortable an example is on Xmas Eve you waited outside for E when you had finished your shift and waited outside – when she appeared you asked her to get in your car to go to McDonalds which she declined. You then offered to give her a lift to her car which was in the car park. What's your rational behind that?" The claimant's response was, "Xmas Eve all finished facing of aisles – a few said going for bite to eat – either Clarkys or McDonalds – I had to go and do something else. Left them in aisle, when I came back everything was faced. I went and got coat and went to my car waiting for my guys to come out. E was first out - I just asked if we were going for food. She said not hungry just going home it was freezing so I said 'want a lift to your car – she declined." Mr Kerr said did the other guys go with you in the car, the claimant responded no. Mr Kerr said I thought you were waiting on the rest of the guys? The claimant said E was first out so I just assumed no one was going. Mr Kerr challenged that and stated that he found this to be odd. The claimant repeated his explanation that he assumed that because she said she wasn't going that no-one was going. He said he didn't think anything of it. He said

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“As I did say are any of the guys going for food – she said no I’m just going home.”

5 23. Mr Kerr then put another question to the claimant. He said another occasion
– mid December you’ve driven to Wormit whilst on route text or messenger
and asked her to come out to meet you, do you recall that? The claimant’s
response is yes, went to visit my friend in Balmerino, hadn’t seen them for
a while and a bit of a drive. We were messaging backwards and forwards
10 from teatime just general stuff like what you up to? She was out with one
of her friends in the car and I said if you’re nearby do you want to meet up?
She said that was her back home now and I just said catch up with you later
or similar. He was asked if he intended to have relationship with E and he
stated, “No attraction definitely not. She is only a young girl. The convo I’ve
15 had with E eg food I speak to the rest of them down there like that - there is
nothing.”

24. Mr Kerr put to the claimant that he had sent a message instructing her to
“get her cute ass” to the doctors. The claimant said, “I don’t recall that but
20 it’s a statement I would probably make.” The claimant was asked if he could
understand why she found this to be inappropriate and he responded yes.
Mr Kerr then stated, “Particularly as a Team Support?” The claimant
responded, “Obviously is to E. Yes.” The claimant’s representative then
asked Mr Kerr, “I take it you have actual evidence?” Mr Kerr responded
25 that he did and that he was going to adjourn for 10 minutes.

25. After the adjournment Mr Kerr asked if the claimant had anything he wished
to bring up. The claimant stated, “The only contact I have with E is through
Messenger. I don’t have her mobile number – I’ve just looked through my
30 messages to find out what E has said to Mark. I can’t find the ‘cute ass’
comment.” The claimant’s representative then stated

“What we can’t understand is and I’m not saying what’s right and
wrong but it goes back to December so why has she been replying to
35 (claimant) until recently.”

Mr Kerr then stated

5 “OK so E has felt that she didn’t know how to deal with the situation and on a number of occasions hasn’t responded to you at all. However you have subsequently sent her a number of messages which she has felt pressurised into responding to you. She didn’t want to make things awkward at work and was unsure how to deal with the situation.”

10 The claimant’s representative then said,

“When we were out (S) had his phone- didn’t read word for word but there was a lot of messages so asked the question.”

15 Mr Kerr then said that they had a paper copy of the message about “cute ass”. Mr Kerr then said, “Before adjournment you had said that’s how I speak to everyone down there or similar? Do you understand not everyone may understand these phrases and may be deemed inappropriate?” The claimant said, “Yes.”

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26. Mr Kerr then said he wished to go through some more of the messages but in order to prevent embarrassing the claimant he would summarise them. The claimant said that he had embarrassed himself. Mr Kerr then read out examples of inappropriate messages. They were

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“Check your cute smile today when you saw me.”

“I’m going to tickle you till you pee.”

“You refer to her as pisspants.”

“Every time you saw me today you smiled at me.”

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“You’re definitely overdue a tickle.”

The claimant responded

“I said that to her as she looked miserable at work.”

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Mr Kerr continued,

“I missed your smiling pretty face today.”

“Did you miss me?”

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“I will give you a cuddle when I see you.”

Mr Kerr then went on to say

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“There are loads more but one more – she had mistyped a word – it came up as kiss instead of putting see.

You have elaborated on it saying ‘You want to kiss me’. These are examples of some messages she feels are inappropriate as her Team Support – can you understand why that makes her feel uncomfortable at work and given her age doesn’t know how to deal with this.”

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The respondents’ response was

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“Definitely not my intention to cause embarrassment, harm or malicious towards her or anybody. I’ve upset myself that I’ve upset her . Just as (union representative) said she is only young the same age as my daughter so making her feel uncomfortable at work is not my intention. As I said before call it TOM to save embarrassment with the younger generation – however I have obviously offended E which I’m sorry for.”

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Mr Kerr then put to the claimant

“You understand why you are in this position – as her Team Support.”

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The claimant responded yes. Mr Kerr then went on to say

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“There are a number of other instances but at this point of the investigation we have captured your thoughts – I don’t feel necessary to go through the rest as they are all of same context to what’s been discussed.”

27. Mr Kerr then raised a new matter. He said

“In your file is a ‘Let’s Talk’ which is from the tail end of last year.”

5 The claimant stated that he knew what it was. Mr Kerr said

“So it was around deleting phone numbers from your phone and deleting contacts with regards to contact staff outside of work. What’s your understanding of that Let’s Talk?”

The claimant said

10 “The Let’s Talk was me and F – it was a misunderstanding ok – she thought that I was attracted to her.”

Mr Kerr said

“What happened then?”

The claimant said

15 “Was told best for my interests to delete F from my phone.”

Mr Kerr asked the claimant if he had sent her messages and the claimant’s response was

“Yes as I said in notes I don’t treat anybody different.”

Mr Kerr then stated

20 “She clearly escalated that at the time as she felt uncomfortable – hence the Let’s Talk.”

The claimant said

“Yes. I’m not attracted to anybody.”

Mr Kerr then said

25 “My asking is to ensure your understanding of the Let’s talk to desist from that type of behaviour.”

The claimant said

“Yes I deleted F’s number.”

Mr Kerr then said he had no further questions and was going to adjourn. He asked the claimant’s rep and the claimant if they had anything to say. The claimant said

5 “Captured in notes - not here to be malicious or hurt anyone. I was gutted to hurt F’s feelings so for me to hurt E’s feelings is or make her feel awkward is not what I wanted.”

The meeting was then adjourned and the parties were asked if they had anything else to say. They said no. Mr Kerr then stated

10 “So to conclude investigation I’ve read all evidence, witness statements, your investigation meeting today and my conclusion is there is a disciplinary case to answer – that disciplinary will be with Charlie Burness ...”

15 The claimant was then reminded of the terms of his suspension and that he wasn’t allowed to discuss the matter with anyone. He was warned that the meeting with Mr Burness may result in disciplinary action being taken up to and including dismissal.

28. The respondents wrote to the claimant on 14 April 2018 inviting him to a disciplinary meeting to take place on 20 April. The letter was lodged (page 20 97). It stated:

25 “The purpose of the hearing is to discuss allegations of:

- Numerous inappropriate comments to a colleague who works in the front end Team, including some of a sexual nature.
- Inappropriate actions towards the same colleague.”

30 There was enclosed with the letter a copy of the notes of the claimant’s investigation meeting with Mr Kerr, copies of the two statements from E and a bundle of messages. Again, it is not clear whether or not the claimant received copies of all of the messages which were eventually lodged for the Employment Tribunal. His impression was that there were fewer messages in the bundle sent to him than were eventually lodged at the hearing. The

claimant was not sent a copy of the Let's Talk. He was not sent a copy of any disciplinary policy or the dignity at work policy. The letter went on to say however

5 “If you'd like to read a copy of our disciplinary policy, please log onto OurTesco/Working at Tesco/People Policies/Solving Problems.”

The claimant was also told that the hearing may result in disciplinary action being taken up to and including dismissal. The claimant was also aware
10 from his experience that in general the Store Manager Mr Burness would only hear cases which were of a serious nature.

29. Within the respondents' disciplinary policy there is a disciplinary checklist provided to managers who are tasked with carrying out disciplinary
15 hearings. Mr Burness completed such a checklist for the claimant's case. In advance of the hearing he completed the entries on page 100. In section 4 which asked him to list the allegations he stated

- 20 “• Inappropriate comments
• Sexual harassment
• Abuse of position”

In the section which asked him to write down the questions he intended to discuss with the colleague he wrote down

- 25 “• Is it normal that new starts Facebook. How long after she started
• Explore comments TOM, cute ass etc – (eligible)
• Waiting in car/Wormit Beach
• Process grooming?
30 • Explore previous Let's Talk”

In advance of the hearing Mr Burness had read through the papers in advance of the hearing. It was his view that the claimant's conduct was “verging on grooming”. It was his belief that the claimant had a sexual
35 intention to E who was 17 at the time. He believed that the dignity of work

policy was relevant and was in any event familiar with it. In advance of the hearing he had been given the two witness statements from E, a copy of the note of the investigation meeting between the claimant and Mr Kerr, a bundle of messages. Once again it is not clear how many. In addition he had the claimant's file from which he extracted the claimant's training record (page 51) and the Let's Talk note (page 52). None of the two latter documents were sent to the claimant. Mr Burness was aware that although Mr Kerr had been the Investigating Officer Mr Burness had the power to carry out further investigation himself if he wished. He was also aware that he had the power to ask for the charges to be reframed. Despite the fact that he had come to the view that the claim involved sexual harassment which had not been raised with the claimant he did not feel it appropriate to advise the claimant in advance of the hearing that this was his view. The meeting duly took place on 20 April. Mr Burness' notes were lodged (pages 114-125). The notes were signed on each page by the claimant, Mr Burness, the employee's representative and the note taker. I considered these to be an accurate record of what took place at the hearing. In order to assist the Tribunal the respondents had transcribed the handwritten notes into typescript and this was lodged (pages 108-113).

30. At the outset of the hearing the claimant was advised that the meeting was to discuss inappropriate comments and harassment of a colleague. His response was that he accepted it was of a serious nature. He handed over a personal statement that he had prepared. He said he understood that the outcome could be from no further action to dismissal. Mr Burness then said he was looking mostly at Facebook with E but he would explore more later. He asked the claimant when E started and he responded November. He said that he had started to speak to her online not long after that and said that this was normal for new starts. He said it was easier when they were new to use Facebook Messenger for shift patterns etc. He accepted that this was not a company process. He then asked if he had seen all the material. He said he had. Mr Burness said "so we read all the material E I assume you knew how old she was." The claimant responded, "yes as she joked to me that I was older than her mum we had that instore". The notes go on

“CB when I read this it seemed normal banter to start with the it seemed to change can you give me any background on that”.

5 “SA it’s not indexed we are on the 16th of December after would say the rest of the convo its start becoming different further down there is a response from E which is unacceptable”.

“CB which one specifically”.

10 “SA 24th Dec ‘I have u bitch’ 2301 which is unacceptable overall there is a conversation of two parties which could be stopped.”

The claimant’s representative then stated

15 “If I was making anyone feel uncomfortable I would delete and unfriend them and have a convo but there was nothing like that from E.”

Mr Burness then responded

20 “There are a lot of comments undies, tickle, kiss do you think that’s team support to say to a 17 year old checkout operator?”

The claimant responded

25 “It wasn’t malicious in any way convo between 2 people I understand E has been offended and it won’t happen again.”

Mr Burness took that exchange as the claimant accepting that his actions were not correct.

31. Mr Burness raised the issue of the claimant having asked E to get into his car on Christmas Eve. The claimant’s response was

30 “Everyone was facing up I had to go do something else so I’d finished earlier in aisle they were all talking something to eat. I went outside sat in car and when they came out E was first out and I called her over

to the car I asked if anyone was going for food she said no she was going home. I thought everyone was going separate ways.”

5 He then asked the claimant if he had asked anyone else. The claimant said that E had been first out and they had then waited a couple of minutes and when no one else came out he had gone. The claimant said that he had offered E a lift in his car because it was freezing and her car was parked at the bottom of the car park. Mr Burness then raised the issue of inviting E on 18 December when he was in the vicinity of Wormit beach. He then went
10 on to say

“We can come back to that so summarise 17 year old, just started you start speaking to her join you on wormit beach and incident to come into your car and joint you then the convo which starts off fairly
15 innocuous then leads to undies, pee, tickle kiss is that a fair assessment?”

The claimant responded that he felt that was one sided. The meeting was then adjourned.

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32. Following the adjournment, the claimant responded that, “everything in fb is convo between 2 adults some of convo me I could be equally offended I am adamant in saying I did not tell E to get into my car.” The claimant was asked about mentioning TOM and gave an explanation (page 111) similar
25 to that he had given Mr Kerr. It was then put to him that if he was in a senior position is that a conversation he should be having. The claimant’s response was that he did not see himself in a senior position. He liked to do his job and have a laugh with the team and make sure the person is ok. He said he was never be malicious or deliberately embarrass someone.
30 The claimant was asked about the post-it notes and said that post-its with smiley faces didn’t just go between himself and E, others used it. It was put to the claimant that he just kept in touch with younger girls and was a creep. He said that he didn’t just keep in touch with younger staff but all staff. The claimant’s rep asked if any other names were raised and Mr Burness said
35 that there were none but that he would take that into account.

33. There was another adjournment. Following this the claimant indicated that he had now come off Facebook and Messenger completely and that he had an apology letter for E. He read the letter out. (p167) Mr Burness summarised the claimant's position as being that he had engaged in banter but didn't think he was causing offence. Mr Burness said, "so some comments you realise now weren't very good but you didn't at time." The claimant indicated that he would have stopped right away if he had.

34. Mr Burness then adjourned to make a decision at 11.24. During this time he considered the personal statement which the claimant had handed in at the start of the hearing (page 166). He decided to dismiss the claimant. He set out his conclusion and rationale on page 105. He considered that what supported the allegation was

"E's statement
Hard copy Facebook comments
Previous"

He found that the evidence which did not support the allegation was

"S claims two way banter didn't mean to offend."

In his rationale he stated

"I believe comments to be inappropriate.

So is in a trusted position as a Team Leader. I believe that there was a bigger intention than just friendship and could be seen as sexual harassment even grooming case.

I have a big concern that 3½ months after a similar complaint he engages in this kind of dialogue.

The comments are certainly not acceptable taking into account S's position and also that E is a 17 year old student.

Taking into consideration the above I can no longer have any trust or confidence that this would not happen again.

I need to protect the company and colleagues therefore my decision is to dismiss for gross misconduct.”

5 35. The hearing reconvened at 12.11 and Mr Burness advised the claimant that he was dismissed.

10 “I have made a decision. I believe that they are inappropriate you are in a trusted position as a team support I believe that there was more than a friendly nature and it had a sexual element. I believe that you are in a trusted position I cannot have any trust that this would not happen again given it is less than three months since a similar incident therefore my decision is to dismiss for gross misconduct.”

15 36. The respondents confirmed the decision to summarily dismissed the claimant in a letter dated 21 April 2018 which was lodged (page 126). The letter was signed by Mr Burness. It stated

20 “... I am writing to confirm my decision to summarily dismiss you for gross misconduct. The reason(s) for this are:

- 21 1. Numerous comments to a colleague, who works for you, over social media of an unacceptable nature including some of a sexual nature.
- 22 2. This occurring only 3 months after a complaint by another colleague against you for similar behaviours.
- 25 3. You have fundamentally breached the trust placed in you by Tesco as a Team Support colleague.”

30 The claimant was advised of his right to appeal. The claimant submitted an appeal form on 28 April 2018. This was lodged (pages 127-128). The appeal form contains several boxes which can be ticked. The claimant ticked the boxes which stated

35 “The outcome was too harsh.
The investigation was not complete.
I was not given a fair hearing.

I feel that my version of events wasn't adequately considered.
Other."

Below that he stated in handwriting

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"Firstly I'd like to thank you for hearing my appeal.

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I feel that this outcome was too harsh as I've worked for Tesco for 19 years and have never had a hearing for misconduct. Tesco policy has 3 warning steps then demotion before dismissal. Law at Work states all have to be considered before dismissal however dismissal was this outcome. I also have no witness statements that have been mentioned in E's interview/statement. This outcome has been done on hearsay not facts. I also feel it wasn't a fair hearing as the questions that were asked were one sided and seen from the others persons point of view instead of both people. I feel my side was heard but not actually listened to. The version of events was also one sided. The points in my disciplinary outcome referring to social media is inaccurate. Messenger is not a social media network site it is a private conversation between people and in this case two adults having banter with each other. At any time any person can unfriend, delete, block or do all to someone in that conversation. There were comments made to me that I could be offended by.

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As I said in my personal statement there is a lot of people within the store. Days and nights of all grades come and ask me for advice whether it being work or home life or just speak about their own physical or mental health. This is because I'm trustworthy not my grade. I've been described by colleagues including management I have a big heart. I have not breached trust in Tesco this is Charles' opinion, I would never bring Tesco in disrepute.

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At disciplinary meeting, notes that I've not been given it was asked if more time was needed for witness statements and Charlie replied saying if he thinks this necessary he will take that into consideration before outcome however his outcome was still the same. Not only investigation incomplete the disciplinary is also incomplete.

Charlie comments of me being in contact with someone younger than myself caused great offence to me. He implied that I was sexually grooming and sexually harassing someone. I feel that this is character assassination against me. Upon being dismissed on Friday 20th April people were talking about my dismissal throughout the store which is a breach of confidentiality.

Thank you for your time.”

37. The respondents wrote to the claimant on 2 May inviting him to an appeal meeting to take place on 11 May 2018. Derek McDonald the manager of the respondents' Blairgowrie store was asked by the respondents' HR department to deal with the appeal. Mr McDonald had previously been manager of the Tesco Riverside store and was acquainted with the claimant. Mr McDonald had previous experience in disciplinary and disciplinary appeals. He had heard around 8-10 disciplinary appeals during his career. On various previous occasions he had overturned the decision to dismiss. Mr McDonald arranged with the respondents' Employee Relations Manager to pick up the notes and other documentation from the Riverside store. They put out a folder for him to collect. Mr McDonald also spoke to Mr Burness. Mr McDonald was provided with the two statements taken from E at the outset. The note of the suspension meeting, the notes of the investigation meeting, the notes of the investigation meeting and the investigation checklist. The notes of the disciplinary meeting and the disciplinary checklist. He was also give a copy of the Let's Talk form and the letter of dismissal. He was provided with a copy of the claimant's appeal document (pages 127-128). He was also given a bundle containing various messages between the claimant and E. His impression was that he was not provided with all of the messages which eventually appeared in the Tribunal bundle.

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38. The respondents' appeals process is not usually a full re-hearing of the case. The purpose of the appeal is to deal with the appeal points which are raised and look at the decision making to date to ensure that it is being carried out correctly and in line with the respondents' policies. The respondents provided an appeal checklist and this was used by

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Mr McDonald during the course of the appeal. Like the other documents it is a dynamic document which is completed over a period of time as matters unfold. The checklist was lodged (pages 130-137). Part of it was completed prior to the appeal hearing. (page 132). He ticked the first five boxes which relate to procedural matters. He did not tick box 6. This states

“If a disciplinary matter, does the invite letter match the reasons for the outcome letter? If not, the disciplinary decision is automatically unfair, but you need to focus on the evidence and whether or not you believe the right decision was made regardless of this procedural error.”

Mr McDonald had noticed that in this case the outcome letter at page 126 did not match the invitation letter at page 97.

39. Mr McDonald convened the appeal hearing which took place on 11 May. The claimant attended accompanied by Jack Faulds an Area Organiser with USDAW. Mr McDonald was accompanied by Craig Mathieson a People Partner with the respondents who took notes. Mr Mathieson’s handwritten notes were lodged (pages 144-164). Each page is signed by the attendees at the meeting. I considered these to be an accurate record of what took place at the meeting. For the purposes of the Tribunal a typed transcript of the notes was provided at pages 138-143.

40. During the hearing the claimant was asked if he thought the comments he made were appropriate. His response is noted as, “I have spoken to you Jack and now no.” He was asked about the previous “let’s talk”. He said, “F about a talk to go for something to eat. The let’s talk was different to what was said.” The claimant was asked, “at the let’s talk did they say why you were to stop speaking to F”. The claimant’s response was, “no I was told to delete her from messenger and I did.” The claimant was asked about witnesses and referred to the other people mentioned within E’s statement. He gave their names. Mr McDonald asked if their statements would have made a difference and the claimant said: “yes I kinda hope so as I’m not that person”. He was asked if he felt they should have been interviewed and stated

“I think they probably should have been interviewed. I know it said they said I was creepy but if there’s names within something I think it should have been looked at.”

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41. The claimant confirmed that he had received the notes of the disciplinary hearing but had received these after he had sent in his appeal. Mr McDonald read out some of the comments to the claimant and asked him if he agreed they were inappropriate. The claimant’s response was,
10 “yes I also said the personal statement I didn’t mean to cause her any offence in any way. It was a personal huge failing for me to do that.”

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42. He was asked of what his intention was and responded, “nothing sexual at all. I have a 17 year old daughter I know they have mental stresses and exams”. The claimant repeated that he felt he was being helpful and friendly. When Mr McDonald challenged this the claimant said, “no having
20 read them a few times and jack has said to me no”. The claimant repeated his suggestion that it was a conversation between two adults and was banter. The claimant was again asked if Mr McDonald should interview the three people mentioned and this time the claimant said, “no I don’t want anyone else to go through this”. The hearing was adjourned. It was then reconvened and the claimant was told, “so we have finished off anyone to ask or interview” the claimant said, “no there is no one else”. Mr McDonald then indicated there was no need to adjourn. The claimant’s representative
25 said if you have a decision to make on reflection S has had an impact on the individual. He has realised the severity of it. It is not straight forward could he be re-instated to another store or a demotion as an alternative.

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43. Mr McDonald adjourned the meeting for 30 minutes and then announced that he was upholding the original decision to dismiss.

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44. Following the termination of his employment the claimant registered for Universal Credit. One of the requirements of Universal Credit is that he satisfies the Benefits Agency that he is taking adequate steps to find alternative work. The claimant is required to carry out job searches and

apply for jobs on a weekly basis. From the date of his dismissal to the date of the hearing the claimant had applied for over 500 jobs. Despite this the only job he was able to obtain was as an Amazon driver for a period of around four weeks at Christmas time. At the time of his dismissal the claimant's gross weekly wage with the respondents was £346.42. His net weekly wage was £298.90. The respondents made a pension contribution of 6% of gross salary in addition to this. The claimant was also a member of the respondents' Colleague Bonus Plan and the respondents paid 2.56% of gross salary into this. The sum which the claimant received for the four weeks he worked at Amazon was £1064.38.

Observations on the Evidence

45. I found the claimant to be a credible and reliable witness. It was clear that he wished to assist the Tribunal by telling the truth even when this did not particularly suit his case. One example of this was where he was asked to comment on the suggestion, made to all of the respondents' witnesses that the fact that E had signed off all of her messages with xx signifying kisses (and on one occasion with xxxxx) was significant. The claimant candidly said that he read absolutely nothing into this as this was the way that most young people signed off their messages. As will be noted below I considered that the fact-finding part of this hearing should effectively be divided in two. My findings in fact above relate to what the respondents did and whether the dismissal was fair or unfair. I have required to make additional findings in fact in order to deal with the issues of contribution/Polkey and these are noted below. They are based primarily on the evidence of the claimant and the written materials. I also found Mr Kerr to be a credible and reliable witness. He also made suitable concessions. In cross examination he accepted that there were a number of matters which he could have investigated further. He accepted that it was clear from the statement that Wendy Cooper the interviewer knew about the issue before the first meeting with E and he said he was unclear as to how this meeting had come about. He accepted that one could not tell from the documentation how the original allegations came about. He also agreed that context was important. He accepted that there were many

questions which he could have put to E had he interviewed her which would have assisted himself and the eventual decision maker. Also in cross examination he accepted that the issue of context as to how the allegations came about could make a difference as to how he had dealt with the allegations. He also accepted that the word uncomfortable was first used by Emma Lyttle and not by E. His response to a number of points made in cross examination was "I understand where you are coming from". He also stated that he assumed that E had taken the screenshots but that in the statement Emma Lyttle says "we" took screenshots. He accepted that he did not have information as to who had taken the screenshots. When specifically put to him that he should have spoken to Emma Lyttle his response was "it is a possibility- yes". He accepted that at no point was E asked what her relationship was with the claimant. I felt that he was an honest witness who with the benefit of hindsight and the pointed questions asked in cross examination accepted that his original investigation was somewhat lacking. His view however was that that did not affect matters going forward and he stood by his decision.

46. I found Mr Burness to be a less impressive witness. It appeared clear to me that he wished to tailor his evidence so that it advanced the respondents' case. An example of this was that in examination in chief he said that he had spoken to Emma Lyttle about the circumstances surrounding the let's talk. He gave evidence as to what these circumstances were. Subsequently in cross examination it appeared to me that he realised that this would put him in some difficulty since the conversation with Emma Lyttle is not recorded or indeed referred to at any point in the disciplinary hearing. He then said that he had not spoken to Emma Lyttle at all before the dismissal but may have spoken to her since. In submissions the claimant's representative described his body language as seeming closed off and that he seemed agitated by any questions not agreeing with his view. I would concur with that interpretation. He was unwilling to make any reasonable concessions. During cross examination the claimant's representative put the dictionary definition of grooming to him and despite pausing for a lengthy period of time before answering he was entirely unwilling to concede that his statement was unjustified in the circumstances. In examination in chief

he made much of the fact that in his view this was the second instance of the claimant carrying on similar behaviour and as a result of this he could not trust the claimant, in cross examination however he said that he had not put any weight on the informal let's talk conversation. This was in the context of the claimant's solicitor pointing out that it was unreasonable to take this into account when the claimant had had no notice of it. It was also clear in examination in chief and in the documentation of the case that he had placed considerable emphasis on the relative age of the claimant and E and believed that the claimant was guilty of sexual harassment but when it was put to him in cross examination that none of the allegations mention sexual harassment or refer to age he said that age had not been key to his decision. At the end of the day it appeared to me that Mr Burness, who gave evidence that he does not use social media himself, had been shocked by the exchanges between the claimant and E and had gone in to the disciplinary meeting with the belief that the claimant was some sort of sexual predator. It appeared to me that this coloured his approach to anything said by the claimant and his representative and the way that the disciplinary hearing was conducted. It appeared to me that he had had no intention of listening to anything that the claimant might say and did not approach the matter with an open mind.

47. As will be noted below I did not consider Mr McDonald's role in matters to be particularly important. I accepted that his evidence was generally accurate however like the claimant's representative I felt that he failed to acknowledge that certain factors such as the let's talk and the relative age of the parties were in fact major determinants of his decision.

Discussion and Decision

48. Both parties made full written submissions which they expanded upon orally. I found these to be extremely helpful. I do not feel I would do justice to them by attempting to summarise them here and I have not attempted to do so. I will refer to specific points made in the discussion below.

Issues

49. The Tribunal required to determine whether or not the claimant had been unfairly dismissed by the respondents. If the claim succeeded the Tribunal required to determine remedy. The claimant was seeking re-instatement which failing re-engagement which failing compensation. It was the respondents' position that re-instatement and re-engagement would be inappropriate given the nature of the dismissal and the loss of confidence in the claimant. It was their position that if the Tribunal determined the dismissal to be unfair that the basic award and the compensatory award be reduced by 100% to reflect the conduct of the claimant.

Discussion

50. Section 98 of the Employment Rights Act 1996 states

“(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.”

51. In this case it was the respondents' position that the reason for the claimant's dismissal was conduct which is a potentially fair reason falling within section 98(2)(b) of the said Act. The claimant's representative in submission accepted that this was indeed the reason for dismissal. Section 98(4) then goes on to state

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

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

52. Both parties were agreed that in applying section 98(4) the Employment Tribunal should have regard to the test in ***BHS Limited v Burchell [1980] ICR 303***. The respondents summarise the test in their submissions as stating that first there must be a belief on the part of the employer, secondly the employer must have reasonable grounds to sustain that belief and thirdly that in forming the belief the employer had carried out as much investigation as was reasonable in the circumstances of the case. I

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15 I accepted that, as pointed out by the claimant, the decision in ***Sainsbury's Supermarket Limited v Hitt [2003] ICR 111*** makes it clear that the band of reasonable responses test applies to the reasonableness or otherwise of the investigation as well as to other aspects of the case.

20 53. It is important to note that in approaching the matter in the manner set out in section 98 it is not for me to substitute my own decision for that of the respondents. It is not for me to decide whether I believe the claimant was guilty of the alleged misconduct or not. Essentially, I am looking at the employer's conduct and deciding whether the decision made by the

25 respondents to dismiss was one which they were entitled to make in terms of section 98.

54. In this case having heard the evidence of the parties I accepted that the first strand of the ***Burchell*** test was met. In my view the respondents in the

30 person of Mr Burness and indeed Mr McDonald had a genuine belief that the claimant was guilty of the conduct for which he was dismissed. The claimant's principal challenge to the fairness of the decision was in relation to the investigation. The respondents' position was that the investigation was reasonable in that the complainer E was interviewed twice and that the

35 claimant attended two meetings before the appeal. Crucially in the

respondents' view the messages were available for all the various decision makers. The respondents sought to characterise the situation in this case as being one of these cases where the claimant had admitted the misconduct in question and there is clear authority to the effect that in those
5 circumstances a reasonable employer may well decide not to carry out any further investigations.

55. I had no hesitation in rejecting the respondents' position. The situation in this case is that the claimant accepted that he had sent messages to E.
10 Although there was some dubiety about whether all of the managers dealing with the matter and indeed the claimant had all of the messages which eventually found their way to the Tribunal bundle it is clear that the respondents had a substantial number of messages and that the managers had the messages which had been circled. It is also true that the claimant
15 admitted to having sent the messages. It is also true that at the investigation, disciplinary and to some extent the appeal the claimant accepted that at that point he believed the messages to be inappropriate. As can be seen however from the extracts of the minutes which have been provided the claimant's acceptance that the messages were inappropriate
20 was not unconditional or unprompted. I accepted the claimant's evidence at hearing that what he meant was that in the context where he was now aware that E had made some sort of complaint about him sending the messages he was upset that he had unwittingly offended her.

25 56. This can clearly be seen from the nature of the written apology which the claimant prepared before attending the disciplinary hearing. He apologises for "making inappropriate comments and inappropriate actions towards you". He says

30 "I certainly did not mean to make you feel awkward, uncomfortable or cause embarrassment. I have learned through your feedback to adjust my behaviour which I will do."

This is entirely consistent with the claimant's position at the hearing which
35 was that he saw E as a friend and had various social media exchanges with

her in the same way as he had social media exchanges with other friends. He was shocked and appalled that he had unwittingly been causing offence to E and quite accepted that it was inappropriate to send messages which upset the recipient.

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57. In my view there were a substantial number of matters which a reasonable employer would have investigated properly before coming to any decision in the matter.

10 58. The first point is that Mr Kerr who was the Investigation Manager did not actually speak to E nor did he speak to the two managers who had taken statements from E. As a result, he and indeed all of the managers who dealt with matters subsequently were unaware of the precise circumstances which had led to E's statement being made. There were also a number of
15 other issues such as who had made copies of the messages and the precise circumstances in which certain messages had come to be circled. It is clear from the internal evidence of E's statements that there must have been other conversations between E and Emma Lyttle and perhaps Wendy Cooper which were not recorded. In my view any reasonable employer
20 would have sought to at least interview Emma Lyttle or Wendy Cooper to find out the course of whatever investigation had been carried out up to the point where E has given her two statements. There are a number of other individuals who are mentioned within E's statement as being in a position to give relevant evidence. They were not spoken to at all. There is also the
25 issue of the "Let's Talk". It was clear from the evidence that Mr Kerr had found the "Let's Talk" in the claimant's file and had resolved to make that part of his investigation. Having spoken to the claimant about it he did not seek to speak to Emma Lyttle who gave the Let's Talk or indeed anyone else. It was the claimant's evidence that Wendy Cooper was also at the
30 meeting to which the "let's talk" refers. It is clear that both of the decision makers in the case placed some weight on the Let's Talk and it is unfortunate to say the least that the respondents had no information other than the text of the document and what the claimant told them. It was also clear that, as noted below, the respondents did not actually accept what the

claimant told them about the Let's Talk but instead made various assumptions which were not based on any investigation whatsoever.

59. Most importantly however there was a complete failure by all three of the managers involved (Mr Kerr, Mr Burness and Mr McDonald) to make any attempt to investigate the various points made by the claimant at the investigatory hearing, the disciplinary hearing and the appeal hearing. All three of them seemed to focus on the fact that the claimant was apologetic and indeed quite appalled to find that his messages were being interpreted in the way that they were. They entirely failed to note that the claimant was in fact setting out his position which was that he was carrying on what he thought was a conversation between two adults who were friendly with each other. At the disciplinary the claimant makes the point several times that it was a "convo between two adults". As early as the investigative meeting the claimant's representative is making the point

"What we can't understand is the not saying what's right and wrong but it goes back to December so why has she been replying to S until recently."

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The claimant made the point that Facebook Messenger provides a substantial number of methods by which someone can break off communication with someone they no longer wish to communicate with. The claimant also makes the point that many of the responses which E makes to his messages could also in certain circumstances be viewed as inappropriate. The claimant also sets out a different version of events in relation to the "Wormit beach incident". He states that he and E had been chatting all evening on Messenger. This was not investigated. From the messages lodged it is unclear which messages would relate to this date. The claimant also gives a different version of the "Christmas Eve incident". His position is that a number of employees had suggested going for a meal. He then went to do other duties and when he subsequently left decided to wait to see if anyone else was going for a meal. None of this was investigated. Instead each time the claimant raised these points the manager concerned would take it upon themselves to answer for and on

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behalf of E. How they could do this on the basis of the limited information in the statements given is difficult to see.

5 60. In my view it is clear that the respondents' investigation fell well outwith the band of reasonable responses. I do not consider that the fact that at the fourth or fifth time of asking at the appeal hearing the claimant indicated that he did not want anyone else to be interviewed really changes anything. The claimant had been dismissed and Mr McDonald's own evidence was that the purpose of the appeal was not a re-hearing of the case but to deal with
10 appeal points made. It would have been open to Mr McDonald to try to recover the respondents' position by interviewing witnesses who quite clearly should have been interviewed at an earlier stage but he did not do so. The fact that he eventually got the claimant to agree did not in my view relieved the respondents of their obligation to carry out a proper
15 investigation.

20 61. I also consider that the respondents having failed to carry out a proper investigation, did not have reasonable grounds upon which to base their decision as to the claimant's guilt. It was clear to me from hearing the evidence of Mr Burness and Mr McDonald that both the decision makers saw the age difference between E and the claimant as paramount. They were simply not prepared to entertain that there could be a non-sexual, non-exploitative motive for a 39-year-old man to be carrying on a conversation with a 17-year-old girl. This view of theirs which appears to have been
25 formed prior to the claimant attending each meeting appears to have entirely coloured their view and led to them effectively pre-judging matters.

30 62. The matter is complicated by the fact that, as noted below, there were also a number of procedural failures by the respondents which meant he was not properly told the nature of the allegations on which he was eventually dismissed.

35 63. The position was that the allegations against the claimant were that he had carried on an inappropriate correspondence with E, some of which are a sexual content. There was also an allegation that he had taken

inappropriate actions towards E. Although this would not have been clear at the time I assume this relates to the Christmas Eve incident and the Wormit beach incident none of which were properly specified. With regard to the messages the respondents had the texts of the actual messages themselves. The key issue however was whether this correspondence was appropriate or inappropriate. Mr Kerr was the only one of the respondents' witnesses who was honest enough to accept that context was quite important in this type of situation. Context was clearly important in deciding whether, as the claimant contended, he was on friendly terms with E and that this was the type of conversation which happened between friends or whether, as the respondents appeared to have believed, the claimant was a sexual predator who was bent on exploiting the claimant and grooming her for sexual purposes. In my view the respondents would have required much more information before them before they reached the conclusion they did on this subject.

64. Procedural fairness is an important part of overall fairness and in addition to the substantive issues raised by the claimant in relation to the fairness of the dismissal, the Claimant also alleged that the dismissal was procedurally unfair.

65. I consider that he is correct and there were a number of respects in which the dismissal was procedurally unfair. The first of these was that I did not consider that the claimant had adequate notice of what the allegations were. It is clear that when the claimant turned up to the original investigation meeting he did not have any idea what the specific allegations were. He did not know which colleague was involved. It appears the claimant was not given a list of the messages or anything else. It is clear from the transcript that Mr Kerr simply went through some highlights of the messages putting various points to the claimant without putting them in any particular order.

66. It is also clear that Mr Kerr had in his mind that he believed that the prior "Let's Talk" was important and would form part of the respondents' decision making. This had not been put to the claimant in advance. Furthermore, it

is clear that Mr Kerr had in mind that the fact that the claimant was Team Support meant that he was to some extent in a management position. This was not something the claimant accepted. None of these things were put in the original allegation to the claimant.

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67. By the time we get to the disciplinary hearing matters have not improved. It is clear from Mr Burness' note that in advance of the hearing he considered that the claimant was facing a charge of sexual harassment. He accepted at the Tribunal hearing that he sought to apply the respondents' dignity at work policy. It was also clear that Mr Burness had in mind that the claimant had abused his position. None of this is contained in the original allegations. It is my view that these were genuine procedural irregularities which placed the claimant at a considerable disadvantage in dealing with the allegations against him.

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68. I also accepted the claimant's position that there was further serious procedural unfairness in that Mr Burness went on to find the claimant guilty of allegations which had not been put to him in the letter inviting him to the Tribunal. I agreed with the respondents' position that the fact that the respondents' policy refers to this as rendering a dismissal "automatically unfair" does not mean that the dismissal was in fact automatically unfair in a legal sense. It does however highlight that the respondents' own policy confirms that as a matter of common sense it is highly irregular to find an employee guilty of allegations which have not been put to him in the letter inviting him to the hearing. That is precisely what happened here yet despite this Mr McDonald could see no difficulty in upholding the decision.

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69. Overall it appeared clear to me that the respondents' decision makers both pre-judged the case and jumped to a conclusion which they were not entitled to do on the basis of the evidence. As will be noted below, the exchange of messages between the claimant and Ms E does not make for edifying reading. I strongly suspect that it is not the sort of correspondence which Mr Burness or Mr McDonald would themselves carry on. That having been said it is absolutely clear that for many months Ms E was responding to the claimant in terms which were in many ways similar to the way that

the claimant was speaking to her. The claimant's position was that he saw matters as simply banter between two friends. It is clear that Mr Burness put a much more sinister gloss on this. He did so without himself speaking to Ms E and without in any way checking back as to whether any of the statements made by the claimant were supported by her. I entirely agree with the claimant's representative that from the documentation it is clear that Mr Burness saw the age difference between the claimant and Ms E as the key factor from the outset. It is clear from the terms of the disciplinary hearing that Mr Burness had to a large extent made up his mind and that rather than seek the claimant's explanation he was simply pointing out what he thought of the messages. The dismissal was unfair both procedurally and substantively unfair from beginning to end.

70. It was the respondents' position that even if I were to find the dismissal unfair (which I have) that the basic and compensatory awards should be reduced to take account of contribution. In order that I consider this I felt that it was appropriate for me to make certain further factual findings which are relevant to this issue but are completely irrelevant to the question of whether or not the dismissal was fair or unfair. My reason for saying this is that I heard a great deal of evidence which was not available to the managers who were dealing with the matter at the time. The reason it was not available was that the Respondents did not carry out a proper investigation. I consider that I am required to make factual findings regarding my decision on contribution should be fair. I also wish to make clear that when looking at the issue of fairness I am in no way substituting my decision for that of the respondents' managers.

Additional Findings in Fact

71. The claimant sent all of the messages which attributed to him in the exchange of messages lodged at pages 168-269. Ms E sent all of the messages which are attributed to her and they are generally to be found going down the right hand side of the page. Some of them are in black. Some of the emojis sent are not on a black background but if they are on the right hand side I consider they were sent by Ms E. On the basis of the

two witness statements of Ms E which were provided I am prepared to accept that Ms E was at least involved in circling certain of these messages. I am not in a position to make a finding that she was the one who printed off the messages. The messages lodged do not appear to be in date order and some are missing. For this reason it is sometimes difficult to see the context. I am prepared to accept that a message which appears on the same page as the previous message is probably consecutive to that previous message or, where there is internal evidence which otherwise confirms this. Page 168 is the first exchange lodged. The claimant states

“How’s college going, what u got on tonight??xx”

Ms E states

“Ahaha. And nothing tonight, u?Xx”

The claimant responds

“Erm ... not too sure actually.. probz just faff about in the house or watch the rest of my film since I fell asleep last night!! Hahaha Might come annoy U!! xx”

On page 169 there is a circled comment which is part of the exchange which reads

“U out & about yet, I’m away to be... Going to pick up my m8 from the pub & take him home..... too bloody nice I am!! Grrrr... What cinema r u going too??xx”

There followed a message from the claimant further up the page which refers to her talking about the “slush thing you get in the cinema”. E’s response is “Yeah at KFC, you get them from other places too. Ur a good pal xx” On page 170 there is a circled message which states

“Awwwww check your cute smile today when u saw me... Your smiling now reading this & thinking about it too when I walked out the aisle, U & Lauren looked at me & smiled”

5 E’s response is

“Ahahahah. Nothing I don’t think hahah I can’t remember.”

On page 171 there is a sentence where the claimant says

10 “If u keep saying negative things about yourself I’m gonna tickle u until u Pee then us can have a reason for not being a happy person, Piss Pants! Just home with an Asda Pizza in the Oven, bought a couple of btle of Koppaberg & have Southern Comfort & munchies for films... I’m sorted me thinks & I’m not driving anywhere now!! Hahaha Was
15 your Chinese good, where did ya get it from?”

This appears to have followed an incomplete message further up the page from E where she refers to:

20 “Defo Chinese”.

E’s response to the claimant’s message (where he says he will tickle her) is:

25 “Sounds ace. I’ve got Pringles and Iran Bru. Chinese was ace, got it from a place in Tayport xx”.

72. It would be possible to go through all of the messages however overall my take on these messages is that whilst the claimant said a number of things
30 which it is entirely possible someone could take offence at, Ms E also said a number of things which is entirely possible someone could take offence at. This was noted by the claimant himself at the disciplinary hearing. It would be invidious to go through them all but as an example the claimant states at page 180:

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“Haha I giggle too much. I was so tired. Pure shat myself when it stopped working. Dk just had a really bad day, so glad to have slept all night”.

- 5 73. There are other examples. There are also examples of E spontaneously asking after the claimant such as on page 178 where E says:

“I was in at 11:30 never saw u. Was just wondering bc u usually say hi when ur in xx”.

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74. There are also a number of instances of Ms E making inappropriate comments about drinking and getting drunk at a point she was under the age of 18.

- 15 75. My overall view taking the exchange of messages as a whole and bearing in mind the claimant’s evidence it does appear to me that the claimant genuinely believed that he was carrying on a conversation which was not objected to by Ms E. A more worldly-wise individual may well have thought twice about saying what he did to a 17-year-old girl who worked in the same place as he did. It was clear to me however that this had not crossed the claimant’s mind. His explanation was that he had a 17-year-old daughter and this was how he talked to her. I do not think this is a particularly good explanation but I do believe that the claimant genuinely felt that he was not doing anything inappropriate and that he did not feel he was saying anything that would offend Ms E. It is also clear to me that immediately he was told that Ms E did and had been offended he agreed that this was inappropriate and ceased immediately. The claimant did in fact close his social media accounts entirely and is no longer in communication with any of his former colleagues. With regard to the Let’s Talk the claimant’s explanation was that he was called in for a short meeting and asked to stop sending Facebook messages to a Ms F. Ms F is either in her late 20s or early 30s. The claimant understood that Ms F thought that the claimant was attracted to her. The claimant’s position was that this was not the case. He said that all he was told was that he should delete her from his Facebook and he immediately did so. He spoke to F shortly afterwards and she indicated that
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- 25
- 30
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she did not have a problem but someone else had complained to management on her behalf. The claimant did not pursue the matter further since he could see no particular problem with deleting F from his Facebook.

5 76. With regard to the "Wormit beach" incident the claimant happened to be in the vicinity. He had been carrying on a text message conversation with Ms E all night and he suggested that if they were in the area they should meet up. When she said no he did not pursue the matter. With regard to the Christmas Eve incident the claimant had been working along with a group of employees which included Ms E. They were "fronting up the shelves" in preparation for the Christmas break. This basically means ensuring that the shelves are stocked and all merchandise is brought to the front. There were a number of employees working in the aisle together and one of them (neither Ms E nor the claimant) suggested that after work they should all go for a meal together probably in McDonalds. The claimant has been part of a group doing this on other occasions. The claimant agreed. His impression was that everyone agreed at that point. The claimant then had to go and carry out other duties in the store and left around 15-20 minutes later. He decided that he would wait for the people he had been working with to see if they did indeed want to go to McDonalds. After a few minutes, the first person out was Ms E. The claimant asked her and she said she was just going home. He offered her a lift to her car which was at the far end of the car park since it was a very cold and miserable day. When she declined he did not pursue the matter at all. He thought that probably no-one else was coming if Ms E said she was going home. He waited a couple of minutes to see if anyone else came out and then went home himself. Ms E would not have known how long the claimant was waiting in the car since the car park is not visible from any part of the store where Ms E would have been working.

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Remedy

77. The claimant sought re-engagement as his primary remedy. The respondents opposed this on the basis that trust and confidence had gone. If it had been simply a question of Mr Burness saying (as he did) that he did

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not have trust and confidence in the claimant then I would have found that this was an insufficient reason to rule out re-instatement and or re-engagement. As noted above, I consider that the respondents carried out a very poor investigation of the case which was well outwith the range of reasonable responses. They leapt to conclusions which they were not entitled to on the basis of the information they did have. Any loss of confidence due to this was their own responsibility and not that of the claimant. That having been said my view is that looking at the course of the messages as a whole the claimant did to an extent contribute to his own dismissal. I do believe that the claimant genuinely believed that there was nothing untoward in the conversations he was carrying on with Ms E so long as Ms E did not herself object to them. It is however my view that it was extremely unwise for the claimant to carry on such a conversation. I am sure that a less naïve individual would have realised that as a 39-year-old man one requires to exercise a degree of caution when carrying on a correspondence with a 17-year-old girl. This is particularly the case where she is a work colleague. Although I was prepared to accept that the claimant had an entirely innocent intent I believe that the claimant ought to have been aware that some of his comments could be misinterpreted. Ms E was only in contact with the claimant because she was a work colleague. The claimant should have exercised considerably more caution in the terms of any correspondence he carried on with her. At the end of the day although the precise circumstances in which Ms E came to complain about the matter are unclear due to failures in the respondents' investigation it does appear clear that at some stage Ms E did consider the matter sufficiently inappropriate to give the two statements which she did. It appears to me that if she had decided that rather than do this she simply spoke to the claimant that that would have sufficed for the claimant to break off the correspondence. The fact is that she did not.

78. I consider that in all the circumstances it would not be appropriate for the claimant to be either re-engaged or re-instated. I do not consider that it would be practicable for either order to be made. If the claimant were re-engaged at another store then his colleagues are very likely to question why he has moved. The respondents are a people business with a substantial

number of employees. The likelihood is that there could be difficulties both for the claimant and the respondents if future colleagues became aware of the circumstances surrounding his move as I believe they would.

5 79. The claimant is therefore entitled to the remedy of compensation. I believe that any compensation must be reduced to take account of the claimant's contribution to his dismissal. There are different provisions in relating to contribution in respect of the basic award and the compensatory award. The position regarding the basic award is governed by section 122(2) and
10 the position regarding the compensatory award is subject to section 123(6). In this case it is my view that there should be a 25% reduction in the basic award on the basis that the conduct of the claimant was such that it would be just and equitable to reduce the basic award by this amount. With regard to the compensatory award I also consider that a reduction of 25% is
15 appropriate. I do feel that the dismissal was, to some extent at least, contributed to by the claimant. Whilst I believe the respondents' managers jumped to conclusions which were unjustified, the basic fact of the matter is that the exchange of messages was unwise.

20 80. The parties were agreed as to the multiplicands which were appropriate which are set out in my findings in fact. The claimant is entitled to a basic award of 17.5 weeks' pay. This amounts to £6062.35. With regard to the compensatory award the claimant sought compensation from the date of dismissal, 20 April 2018 to 20 April 2019, a period of 1 year. He accepted
25 that there was no loss of earnings during the three week period of temporary employment so that the total amounted to £14,646.10 (49 x £298.90). In addition he sought £475 for loss of statutory rights and pension loss of £1080.43. He also sought £461.16 in respect of the colleague bonus plan. The claimant has been on Universal Credit since 29 May 2018. The
30 respondents objected to the compensatory award. It was the respondents' position that the claimant should receive no compensatory award on the basis that he ought to have found a job within the 17.5 weeks of his dismissal and that he was receiving 17.5 weeks' pay in respect of the basic award. I did not accept this.

81. With regard to mitigation it appeared to me that the claimant was taking reasonable and appropriate steps to find alternate work. As is well known an individual who is on Universal Credit is likely to be sanctioned if they are not in a position to satisfy the Benefits Agency that they are taking appropriate steps to obtain work. The Benefits Agency monitor individuals such as the claimant on a weekly basis so as to ensure that they are genuinely seeking work. In those circumstances I consider it weighs heavily in the claimant's favour that he has been in receipt of Universal Credit and has not been sanctioned. Furthermore, the claimant has produced an extensive list of jobs which he has applied for. The claimant's circumstances are that he has been dismissed for gross misconduct. Any enquiry into the circumstances is likely to disclose an explanation which no matter how it is dressed up may well be treated with suspicion by a potential employer. In the circumstances I do not consider that it can be said that the claimant ought to have obtained employment before now. He has clearly been taking appropriate steps to do so but has not been able to. I hope that this judgment may assist him in finding work in the future.
82. I also entirely reject the suggestion that the amount of the basic award should be taken into account in the decision on the compensatory award. The terms of Section 123 are quite clear in that the compensatory award is designed to such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer. In my view the purpose of the basic award is quite distinct from this. In my view the claimant would be entitled (but for contribution) to his full wage loss. I consider the sum awarded by way of statutory rights is too high and would award £350. I agree the sum in respect of pension contributions and the colleague bonus plan. Payment of these sums will simply put the claimant back in the same position as if he had not been dismissed.
83. The basic award before deductions is £6581.98. As indicated above I consider that the claimant contributed 25% to his own dismissal and the basic award is therefore reduced to £4936.49. The total compensatory

award before deduction is £16,537.69 (14646.10 + 1080.43 + 461.16 + 350). Applying the 25% reduction for contribution gives a total compensatory award of £12,403.27. The total monetary award is £17,339.76. The claimant was in receipt of recoupable benefits. The prescribed element is £10,984.58 (14,646.10 x 0.75) and relates to the period between 20 April 2018 and 20 April 2019. The monetary award exceeds the prescribed element by £6355.18.

S50 Order

84. As discussed with the parties at the hearing I consider that it is appropriate in the circumstances that the judgment be anonymised to the extent that the name of the claimant and the two employees referred to in evidence should be redacted and replaced with letters.

Employment Judge:
Date of Judgment:
Date sent to parties:

Ian McFatridge
12 June 2019
12 June 2019

