Case Numbers:1400459/2019
1400652/2019

EMPLOYMENT TRIBUNALS

Claimants: **1. Mr R Sharp**
2. Mr Dean Lewis

Respondent **Xylem Water Solutions UK Limited**

Before Employment Judge Hargrove sitting at Exeter on 14 and 15 August 2019, and 27, 28, 29, 30 and 31 January 2020. Deliberations (closing written submissions and replies) 2,5 and 6 March 2020.

Appearances: For the claimants: Mr D Stewart of Counsel.
For the respondent: Ms A Ahmed of Counsel.

RESERVED JUDGMENT AND REASONS

The judgement of the tribunal is that:

1. **The claimants' claims of unfair dismissal are well founded, but the first claimant's claim of wrongful dismissal, is not well founded.**
2. **Further, the Tribunal finds that the claimants would have been dismissed if a fair procedure had been carried out, and that because of their contributory conduct, it would not be just and equitable to make any basic or compensatory award.**

REASONS

1. These claimants bring claims relating to their summary dismissal from their employment with the respondent on 28th September 2018. Mr Sharp was employed as General Manager, building services and industry, UK and Ireland, from 22nd of February 1990 until his dismissal. He claims unfair dismissal and breach of contract in respect of notice . Mr Lewis was employed as Managing Director of sales and marketing from 21 January 1982. He claims only unfair dismissal.
2. During the same period in September October 2018 five other employees of the respondent were also dismissed allegedly for the same reason, namely breach

of the respondent's code of conduct and policies relating to social media usage and acceptable use of information technology resources policy in respect of the usage of company owned and provided mobile phones in communicating with each other via a WhatsApp group entitled Xylem Massacre. The other employees within the sales and marketing organisation under the line management of Mr Lewis, in addition to Mr Sharp, were: –
Simon Traylen (ST) general manager,
Austin Kennedy (AK) Head of sales and operations, Ireland,
Matt Arnold (MA),General manager internal sales,
Duncan Leathley, (DL), General manager treatment.
Also a member of the WhatsApp group who was dismissed was Kieron Gagg, Head of UK and Ireland, operational.
All except one of these others have also brought claims relating to their dismissals in the Nottingham tribunal, due to be heard later in the year. The exception is AK, who , employed in the Irish Republic, brought proceedings there. This was disclosed during the first tranche of the hearing, but the outcome was not mentioned in any evidence put before this Tribunal at the hearing. It was mentioned only in the Respondent's written closing submissions, with a reference to the outcome, which is at the end of Bundle 1. No submissions have been made by the claimants as to its significance, and I have accordingly ignored it.

3. The claims before the tribunal of RS and DL were brought in the Bristol tribunal separately and it has been ordered that they be heard separately, on the application of the claimants, principally because they were able to be listed much earlier than the Nottingham cases.
4. These claims were originally listed to commence on 15 August 2019 but were adjourned part heard, because additional matters came to light during the evidence of the dismisser, Megan Briggs, (MB) which required further disclosure and witness evidence. Both MB and BCB were permitted to submit much more detailed witness statements. The claimants had the opportunity to respond in further witness statements.The hearing was resumed on the 27th of January 2020 following a further reading day.
5. These claimants initially and at the start of the hearing disputed the reason for dismissal put forward by the respondent, namely gross misconduct and or conduct causing a breakdown of trust and confidence. They originally asserted that the real reason for their dismissal was a planned reorganisation which would have resulted in their redundancy, and to save the respondent the costs thereof having regard to their length of service. This part of their case was abandoned only during the second tranche of the hearing. It was a realistic concession because the post dismissal chart referred to above shows that the claimant's posts still exist. However, substantial attacks are launched on the fairness and adequacy of the investigation (by Martin Greenhalgh – MG), and the fairness of the dismissal process and its outcome by MB, who at the time was General Counsel, Sensus International, an associated company, based in New York, and the appeal process to Bernadette Christmas Boulton (BCB). MB and BCB gave evidence for the respondent, and RS and DL gave evidence in their own cases. There was an excessively lengthy amended bundle of documents of over 1000 pages. The original bundle limit was fixed at 400 pages, but this tribunal allowed an extension for reasons which will be explained later. Bundle One files 1 to 3 contain the policies and details of the investigatory and disciplinary process. Bundle 2 consists of a single file of 365 pages containing all of the WhatsApp

texts between the group dating from 30 January 2018 to around the 10 September 2018. They will be referred to as B1 followed by a page number, and B2 followed by a page number.

6. **Chronology of main events.**
   6.1. The respondent is the British and Irish arm of a waste water management organisation and is one of a number of subsidiaries of an American company, Xylem Inc.
   6.2. There are organisation charts of the commercial team West at B1/109L which show the senior management structure of the respondent under a regional director, Eric Le Guern, Including RS, MG and KG, in May 2018. Eric Le Guern subsequently left the respondent. At B1/166, there is a chart showing the sales and marketing organisation under the leadership of DL as of September 2018. The chart at page B1/109P purports to show the post dismissal structure of the respondent in October 2018.
   6.3. On 10th of September 2018 ST attended an investigation meeting into allegations against him of bullying and harassment. At the same time an anonymous whistleblower had reported that senior managers were exchanging offensive messages via a WhatsApp group. That person has not been identified. ST was requested to handover his mobile phone and did so. The mobile phones were owned and provided by the respondent to staff for business use, but private use was also allowed.
   6.4. Bundle B2 consists of the download from ST's phone showing all WhatsApp communications for the period between January and the 10th of September 2018. In consequence, ST's communications are all outlined in green in the right-hand column. The others communications are in a left-hand column, together with the dates and times of each, identifiable to individuals. There are text messages and images which the respondent sites as objectionable. There are disputes as to the extent to which these constituted a breach of the respondent's then code of conduct and policies which I will deal with later. It is not in dispute that ST had set up the WhatsApp group in January 2018, and that by the 30th of January 2018 each of the participants had been invited to join, and had joined.
   6.5. MG, managing director service and rental UK and Ireland, was appointed to investigate. Shabana Pottle (SP) was nominated as HR support. There are issues raised as to the fairness of this process, including the lack of impartiality of MG and of SP.
   6.6. During the course of the investigation, meetings were conducted with each of the participants by MG in the presence of SP. A summary of the interview of RS is contained within the investigation report at B1/169-171, and a summary version at pages 229 to 235. DL's summary version is contained at pages 182 to 183, and the full version at pages 325 to 330. Prior to the investigatory interviews, on 13th of September, each had been sent a letter of invitation to the meeting. This letter notified that the purpose was "to investigate the allegation that you have been involved in sharing offensive and potentially discriminatory messages on WhatsApp with other employees". No further details were given in that letter of which WhatsApp messages were said to be offensive, either generally or specifically, to each claimant. Enclosed with the letter were: –
   (1) copies of the respondent's disciplinary policy and procedure;
   (2).A copy of the Respondent's code of conduct;
   (3).The Social Media policy;

(4). A sample of the What's app messages.

6.7. MG and SP also interviewed the other members of the What's App group. I have not been invited to read their notes, and only very limited reference was made during the hearing to what they said at this stage and in their disciplinary hearings. MG also interviewed two other members of staff, PA, a female, and Andrew Welsh. Neither had seen the What's App texts, but they were aware of their existence from DL. However AK had made Welsh aware of them some 2 months before, and said he felt uncomfortable about unacceptable posts. He had also repeated his concerns about two "very Inappropriate posts" some 2 weeks before. The dismissers were entitled to accept these statements, and no specific challenge was made to their reliability during the hearing. The whistleblower remained unidentified. MG was not called to give evidence at the hearing.

6.7. At this stage it is convenient to set out the undisputed history of the group. It had been set up by ST in January 2018 who had invited the others to join. Each had elected to join the group. Records of messages were downloaded from the 30th of January to 10th of September 2018. None had left the group by that stage. The passages had been posted on the company owned mobiles issued to all staff, which they were expressly permitted to use for private calls unconnected with the business.

6.8. On 18 September RS and DL were suspended which was confirmed by letter stated 19 September which set out the same general allegations set out in the investigatory interview invitation letter. The letter also notified that there could be a serious breach of the companies policies including "the social media policy and code of conduct …. and may amount to gross misconduct". It further notified that they would be invited to a disciplinary hearing.

6.9. MG produced a confidential investigation report which is contained at pages 166 to 185 at page 166 there were key findings"…". There were also recommendations of the investigation manager "…". There are criticisms made as to the fairness and impartiality of the investigation process.

6.10. <u>Relevant policies</u>. These consist of the following: –
The respondent's code of conduct pages 1/80-89 B.
The social media policy pages 1/90–94A
The acceptable use of information technology resources policy pages 1/100 G – 100 X.
Mobile device policy pages 1/109A – K
Disciplinary policy pages 1/101–109.
I will refer to these in more detail later in this judgement. The claimants asserted that the policies do not prohibit private communications between employees via WhatsApp with its end to end encryption; that WhatsApp is not mentioned even in the social media policy. Only following the claimant's dismissal was an updated social media policy introduced dated the 31st of October 2018 the pages 95 to 98.
The respondent by contrast asserts that the existing policy made it completely clear that communications of the kind engaged in by the claimants group using the respondent's communication systems were outlawed.

6.11. <u>The disciplinary process.</u>

On 20th of September 2018 Christian Blanc, senior Vice President of Xylem Inc emailed MB requesting her to conduct the disciplinary hearings. At page 195 he added: “Note that as per our policy, if you recommend termination as a disciplinary sanction for any of these employees, you will need to consult with me before imposing this sanction. Caroline Foster will provide support during the proceedings.”

Letters of invitation was sent out to the claimants on Thursday 20th September (see pages 238 to 230 for RS and pages 332 to 333 for DL. The letters did not identify the allegations against the claimant in any greater detail than the earlier correspondence. Conventionally however the letters warned that dismissal was a possible outcome; and notified the entitlement to be accompanied. By this stage a complete list of WhatsApp messages, including photographs, had been collated from ST‘s phone. Although hardcopies of the sample of WhatsApp texts had been distributed to the claimant at the investigatory interviews on 17th of September, the respondent was not happy to provide the claimants with hardcopies of the complete list, which amounted to 365 pages, I accept because of concerns that details might leak out. Accordingly, the letter notified that a unique link to an external read only X connect site would be sent to the claimants. There are issues as to whether and if so when the claimants had access to the complete list before or during the disciplinary process.

6.12. It is convenient at this stage to summarise the categories of WhatsApp messages collated in the course of the investigation and disciplinary processes, and in the course of the legals proceedings. First, as referred to above, MG prepared a sample of some 80 pages of material which was mentioned in his report and sent to each of the claimants. This is at pages 109Q – CC. Secondly there was the complete bundle of messages amounting to 365 pages now contained in the bundle 2 to which it was intended the claimants should have access via the X connect link. Thirdly, as only became clear during the first listing of the hearing on the 15th of August 2019 when MB started to give evidence, was her attempt to analyse the extent of the participation of each of the seven members of the group, as opposed to taking an overview, referred to as mini-bundles. This had not been referred to in her first witness statement, allegedly because a word limit had been put on the witness statements. These have now been added to the bundle and in the case of the two claimants, are at Pages 110–130 (RS) and 131–164 (DL). These had not been disclosed or referred to before, although it is said that they were present on the table at each of the disciplinary hearings. There has been little reference to them in this hearing. Instead, MB and BCB were permitted to submit additional witness statements as outlined above, without word limit. Fourthly, in MB’s additional witness statement at paragraph 17, there is a further list of objectionable material for each of the claimants RS and DL which MB said she relied upon. Although the claimants had the opportunity to rely upon witness statements by way of reply, there are contentious issues in this case whether MB did rely upon these specific texts at the time and if so, whether they were put to the two claimants during the disciplinary process, and they had the opportunity to comment on them. This is relevant to the core issue of the fairness of the dismissals. The contents are also highly relevant to the Polkey and contributory fault issues; and, in the case of RS,

his claim of wrongful dismissal. I directed that for closing written submissions a list be compiled by the respondent of the specific texts to which the each claimant was referred at the investigatory meeting, the disciplinary hearing, and the appeal. This is in Appendix A to Ms Ahmed's closing submissions.

6.13. The disciplinary hearings were originally scheduled for Monday, the 24th of September. At 7:15 pm on 20th of September MG sent the link to RS on his company-owned mobile phone. RS was away on holiday in Devon at the weekend. On 21st of September he emailed MG asking for PA to accompany him to the disciplinary.He also notified that he would not have access to the X connect site over the weekend. see page 241. He says he was at a caravan site in the West Country. MB responded to the effect that PA would not be available as she was away in Brussels on the 24th of January. MB asked if RS had anyone else in mind. MB also said that RS would have the opportunity to view the WhatsApp file if he arrived half an hour early for the meeting on the Monday. RS says that he was not given the opportunity to view it before the disciplinary hearing began at 3 pm, being merely left in a room on his own without the means to view it. The notes, taken by Kerry Tanfield, described as an independent HR consultant, but in fact from the respondent's solicitors, are at pages 250 to 253. They are not verbatim and are not easy to follow. The hearing took place between 3 pm and 4:52 pm with two breaks lasting 46 minutes in total. Accordingly the hearing proper must have lasted just over an hour.There are issues here as to whether the claimant was effectively denied access to someone to accompany him, or whether he agreed to the hearing going ahead anyway.

6.14. <u>DL's disciplinary hearing.</u>
The invitation letter dated 20th of September notified a hearing date on Monday 24th of September at 11 am. the X Connect link was sent on the 20th of September and he confirmed receipt on the 21st of September.See page 333A. On Sunday, the 23rd of December DL emailed SB stating that he was unable to attend due to emotional tiredness and a short timeline, and that he needed time to prepare and to consult. He also notified a grievance and subject access request. The meeting was then put back to 27th of September. On 26th of September he notified an intention to approach Emma Barnes to accompany him to the hearing. DL confirms that he was initially able to access the X connect link and to view the complete bundle online, but that the link was lost between his disciplinary hearing on the 27th of September and his appeal. The notes of the disciplinary meeting on 27th of September are at pages 347 to 358. DL attended but without any accompaniment. CF attended as HR support to MB. There is an issue is her to her participation in the process overall. The hearing took place between 4.06 and 6.39 pm.

6.15. <u>Disciplinary outcomes.</u>
RS was notified of his dismissal by telephone from CF on 27th of September 2018 see page 203. He said he was going to appeal. The dismissal was notified by letter signed by MB dated 28th of September pages 259–260. There is evidence that the letter was drafted by CF (see email timed at 15.11 on 28th September page 207). The dismissal letter refers to the reasons as a breach of the social media policy and code of

conduct constituting gross misconduct causing a breach of trust and confidence. Confirmation had come from Christian Blanc.

There is evidence that on 26th and 27th of September 2018 draft circulars were prepared by MG, the first announcing the dismissal of RS and others See page 461A, and the second timed at 11:08 am on 27th of September 2018. Neither of these claimants had been dismissed or notified of it at the time. The claimant's case is that this is evidence not only of pre-judgement but also undermined the credibility of the subsequent appeal process. The respondent asserts that it was provisional planning for the eventuality that dismissals might occur of the senior sales team, which would constitute a major problem to the business.

At 9:38 am on the 28th of September CF emailed DL for a copy of the statement which he had produced at the hearing on the 27th of September. At 12:29 CF notified DL of his dismissal by email. This was followed up by a letter from MB of the same date drafted in similar terms to that to RS - see page 392.On the same day it was recorded that DL had stood down as director and that MG would be appointed with immediate effect. In addition, Christian Blanc circulated staff that the claimants had been dismissed – Page 209. BCB, who had already been earmarked to conduct any appeals, emailed HR expressing concern at the premature announcements. See page 208. On 3 October MG circulated customers to similar effect see page 212.

5.18. Appeals.

On 1 October 2018 RS appealed against his dismissal in a detailed letter at Pages 261-262.It is not in dispute that on 10th of October RS notified the respondent that he could not access the X connect link for the WhatsApp messages. He received the link and accessed it on 11th of October (see page 269). In preparation for the appeal BCB prepared a timeline and notes (pages 270–275).She also read the WhatsApp transcripts and notes of previous meetings. The minutes of the appeal hearing on 16 October are at pages 283–295. The claimant was warned that it would be some time before BCB gave a result because she had holiday booked and wanted to complete all the appeals before announcing outcomes.

DL's appeal letter is dated 5 October at pages 397–399. DL received the disciplinary hearing notes on 12th of October 2018 and drafted corrections which we were sent to BCB on the 17th of October. In fact it transpired that there were no major disputes relevant to the merits of this case, although the disputes were discussed at the start of the appeal on 19 October, the notes of which are at pages 347–358. The claimant attended unaccompanied. BCB had also prepared for DL's appeal in the same way as she had for the RS appeal, including making up the WhatsApp transcripts for relevant entries. BCB also prepared questions and a script for use at the Appeal. Following the appeal, on 24 October DL emailed further notes (pages 430–440) which she considered.

5.19. BSB sent very detailed outcome letters, rejecting the appeals on the 26th of November 2018(See pages 298–301 for RS, and 446–450 for DL.

6. The remaining issues. Unfair dismissal and wrongful dismissal. The relevant statutory provisions and the Tribunal's self direction on the law.

6.1. Notwithstanding that the claimants are no longer disputing the respondent's reason for dismissal, it is for the respondent to prove that the

reason or principal reason was at least a belief in the misconduct.It does not seem to be relevant that the dismissal letter also records a breakdown in trust and confidence, because such a breakdown will almost inevitably follow a belief in the sort of misconduct alleged here to have taken place over a period of eight months. What remains substantially in dispute however, is the fairness of the processes which led to the dismissals. Section 98 (4) of the Act provides:

"…. 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 employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case. "

6.2. In a misconduct dismissal, the tribunal has to apply the three stage test first set out in British Homes Stores v Burchell 1980 ICR 303, as elucidated in a number of appellate authorities since, including Sainsbury's Supermarkets v Hitt, 2003 ICR 111.

The tribunal has to decide, with a neutral burden of proof: –

(1) Whether the dismissers, both at the first stage and at the appeal, entertained a reasonable belief in the misconduct alleged;

(2) that the belief was based on an investigation which was reasonable in the circumstances of the case; and

(3) that the decision to dismiss fell within a band of reasonable responses.

The band of reasonable responses test applies to each of the stages: – could a reasonable employer have acted in the way that this employer did, sometimes called the hypothetically reasonable employer? The fact that one employer might have acted in one way, and another differently, does not mean that one must materially or necessarily have acted unreasonably, because there is a band of reasonable responses or actions which are reasonable, in relation to the <u>investigation</u>, and the <u>beliefs</u> of the dismisser, and the <u>sanction</u>. For this reason in particular, an Employment Tribunal is not entitled to substitute its own view of what would have been reasonable for that of the hypothetically reasonable employer

6.3. If the tribunal were to find that the dismissal was to any extent unfair, the tribunal had then to go on to consider, applying its own judgment, the two remedies issues arising under section 123(1) and (6) of the Act in relation to the compensatory award, and Section 122(2) in relation to the basic award. The first applies only to the compensatory award. That section requires the tribunal to award only 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 insofar as that loss is attributable to action taken by the employer". This encompasses the Polkey principle, which requires the tribunal to assess what the chances are that if a fair procedure had been carried out a fair dismissal would have taken place, and if so when, and to make a percentage reduction reflecting that chance. The percentage reduction may be anything between nought and 100%. Next, the tribunal has to

consider contributory fault under sections 123(6) and section 122(2). The tribunal may further reduce the compensatory award by such amount as is just and equitable if it finds that any blameworthy conduct of the claimant caused or contributed to the dismissal. The basic award may also be reduced on ground of any conduct of the claimant before the dismissal on similar principles. The burden of proof is on the respondent to establish a Polkey reduction and/or a reduction for contributory fault.

The contrast between the initial assessment of the fairness of the dismissal, and the later application of the Polkey test is emphasised in Lord Bridge's judgment in Polkey. In the initial assessment the employer cannot argue in response to a failure to follow the appropriate procedural steps that a fair procedure would have made no difference to the result. The latter test only applies when the tribunal is assessing the amount of the Polkey reduction having made a finding of unfair dismissal. That distinction falls to be considered in this case.

6.4. Wrongful dismissal. Here the burden lies upon the respondent throughout to prove that the claimant, in this case RS, was guilty of gross misconduct justifying summary dismissal.

7. Conclusions.

7.1. I have considered the lengthy contents of the closing submissions and replies submitted by counsel on both sides. I will summarise them shortly, but I also note and record that, at the tribunal's request, Miss Ahmed supplied at appendix A attached to her closing submission a list of the WhatsApp messages identified specifically to each claimant at each stage of the process. The accuracy of that list is not disputed. I have considered the explanations for them contained in the claimant's witness statements. In summary these are the principal issues raised as to the fairness of the procedure.

(1) The respondent failed to identify clearly in advance of the disciplinary hearings the specific WhatsApp messages, thus not giving the claimants a proper opportunity to respond in particular to those messages which they participated in. Reference was made by Mr Stewart to Byrne v BOC Ltd 1992 I RLR page 505.
(2) Each of the claimants was merely treated as part of the group rather than on their individual merits.
(3) That the disciplinary process, particularly by the appeal stage, was prejudged and/or was a sham.
(4) The HR advisors attending at the various stages exceeded their remit by participating in the decision making process.
(5) The respondent failed in breach of its policy at paragraph 2.14 to consider the mitigation put forward.
(6) In the case of RS he was not given the opportunity to access the full WhatsApp list, having apparently deleted it from his mobile phone on 12th of September.
(7) There was a failure to ensure that the claimants, particularly RS, were accompanied at the disciplinary hearings.

7.2. There are the following genuine concerns which arise as to the fairness of the process. First, the failure of the respondent to identify clearly and in writing to the claimants at any stage of the proceedings a specific list of the most objectionable messages referable to each claimant individually. Secondly the announcement of the outcome of the disciplinary

hearings before even any appeal had been notified and before the appeal hearings took place, which clearly undermined or gave the appearance of undermining the integrity of the process, and added support to the appearance of the pre-judgement of the issue. The precise factual details are set out at paragraph 6.15 above. In addition, I note that the entire process leading to the dismissal of the claimants, and the public announcement of it, was done with considerable speed from start to finish. In the case of RS, this was compounded by the fact that his hearing was not postponed to enable him to seek someone else to accompany him, as DL's was in slightly different circumstances, and the lack of opportunity to examine the X connect link. I find that taking into consideration the substantial administrative and HR resources available to the respondent, these failures were sufficient to satisfy the test of unfairness on the part of a hypothetically reasonable employer in both cases . It would have been a simple matter to have compiled a list for each claimant and including it within the letter of invitation to the first disciplinary hearing. The lack of clarity of the process is demonstrated by the four versions of the WhatsApp messages to which references are made at paragraph 6.12 above. It was only on the first day of the hearing of evidence that MB disclosed that she had prepared mini- bundles for each client, which were themselves not disclosed to the claimants at all during the disciplinary process, although they were apparently present on the table at the disciplinary hearings conducted by MB. Finally, on this aspect of the case, MB had a further chance to identify messages in her revised witness statement at paragraph 17. I find that this list was compiled with hindsight and not contemporaneously, but I accept that it represents her genuine view as of the date of the revised statement, 27 January 2020. It was notable that when the contents were put to the claimants in cross examination they effectively conceded that the messages were offensive, and a breach of the Code of conduct, and social media policies. This is highly relevant to the Polkey and contributory fault issues. As to the latter, I have to consider what the result would have been had those messages been specifically referred to during a fair disciplinary process, and I have concluded that dismissal would have been inevitable, and that it would not be just and equitable to make any award of compensation. The respondent was entitled to consider not merely the individual contributions of the claimants to the messages, but also the effect of the messages as a whole in a Group to which all contributed. Unless it could be shown that someone, although a member of the Group, never or very rarely contributed, or that he was put under pressure not to leave, (which arises in this case in relation to another member of the group), I consider that dismissal would have been inevitable. By way of summary of what is in the texts, and by reference to paragraph 17 of MB's statement, there are numerous references to women in a highly derogatory context – for example being kept handcuffed in an attic; there are sexualised images and images of women's breasts and nudity. There is a picture of a woman looking down the front of her nickers at her private parts, and of a supposedly Moslem woman wearing a Burka but with her breasts exposed. There are frequent instances of women being marked out of 10 by reference to their physical appearance. As Miss Ahmed emphasised, these are not counterbalanced by any positive references to women's abilities or business acumen. More seriously yet,

there are specific highly offensive references to and images of or purporting to represent female co-employees: To give some examples: – a manager anonymized as A, about whom there is a fantasy exchange of tasering her nipples and "sticking it up her Fanny".There is also a very negative reference to the appearance of a fellow manager, in this case a male, D. There are cartoon images of SnowWhite, an oblique reference to another female co-employee, which purported to show her sitting astride Pinocchio's extended nose, a sexual pose. There are discussions about and actual photographs of upskirting women, including naming a co-worker. In addition to references which are very clearly offensive to women in general, there is at least one list of racist and Islamophobic "jokes". There are also derogatory comments about other races, and the disabled.There is also a mocking exchange concerning an email recently circulated by the CEO (at pages 213-214) to all staff reminding them of the Respondent's harassment policy, which was clearly an aggravating feature.

As to the respondent's Code of practice and policies, which I have referred to by page number at paragraph 6.10, it suffices for me to state without citing specific passages, the following propositions:

First, the content of the messages very clearly breaches a number of the specific policies, those prohibiting harassment related to protected characteristics, the protection of dignity at work, and misuse of information technology resources including mobile phones. It is no answer that the policies, some updated in 2013, did not expressly refer to WhatsApp. They did refer to social media of which WhatsApp is but one example. It is also no answer that it had end to end encryption. The policies make it clear that there is to be no expectation of privacy, and in any event, the existence of the Group was known outside it, as the investigation showed from the interviews with PA and Andrew Welsh. The whistleblower must have been aware of the general content. It came out during the hearing that one of the claimants had showed content to members of his family. There could be no assurance that no one else within the Group would not reveal anything to third parties. The content was clearly contrary to the ethos which the respondent reasonably expected to convey.

7.3. I now turn to deal with the other complaints about fairness raised by the claimants, which I considered in reaching the conclusions above.

<u>Issue 2</u>. Group participation

There is evidence that both participated in notably offensive message trails – specified in particular at paragraph 17 of MB's statement –, which was confirmed during cross examination of both claimants. But in any event the respondent can reasonably argue that mere active participation in a restricted WhatsApp group exchanging this type of information without specific endorsement could be identified as gross misconduct. This in particular applies in the case of DL, who was the line manager of the other members of the group bar one, and, as was put to him in cross-examination, should have set an example by not participating at all and in closing the Group down. Only a very limited participation in the group chat might have mitigated the seriousness of that employee's position, but that is not relevant to either of these claimants.

7.4. The tribunal intends to deal with <u>issues three and four</u> together because they are closely related. So far as MB's decision is concerned,

the tribunal is satisfied that, despite the failure to specify in advance, individual texts referable to each claimant employee she had to consider, and the opacity of the decision-making process, to which the Tribunal has referred at paragraph 7.2 above, she properly considered the points which each claimant raised during the disciplinary hearings; and that PA's involvement did not go beyond that which was appropriate in advising on the decision-making process genuinely and independently conducted by MB.

The appeal process. Here there is to consider the premature announcement of the claimants' dismissal/leaving the employment of the respondent, which I have already found contributed to the unfairness of the dismissals. The claimants' argument goes further: – that it left BCB with no option but to uphold the dismissal and that she did not therefore independently consider the merits of the appeals. The tribunal rejected this argument. The tribunal considered BCB was an impressive witness, who carefully considered the points raised by the claimants in their appeal letters and at the hearings.She herself raised an entirely reasonable objection to the premature announcement of the result, even before any appeals had been lodged, but after she had been scheduled to hear any appeals. This genuinely demonstrated good faith on her part. I found that she was quite capable of separating her obligations properly to consider the appeals on their merits from any misplaced loyalty to the respondent; and that if she had found that any of the appeals had merit, she would not have hesitated to allow them whatever the consequences. I do not accept Mr Stewart's claim at paragraph 8 of his closing submissions that reinstatement could not have remedied any damage to that claimant's reputation, if accompanied by an appropriate explanation .

The complaint is also made that the detailed letter of outcome was drafted by the HR interim senior manager CF, who must therefore have participated in the decision-making process – a similar complaint is made in respect of the first disciplinary hearing outcome letters. It is not unusual for disciplinary outcome letters to be vetted or drafted by HR managers who have specific training experience in dealing with these issues. There is no basis for the implication or inference that their involvement demonstrates active participation in the decision-making process, and I accept MB's and BCB's evidence that she did not participate. The detailed outcome letters genuinely reflect their views. I also reject the claims that Christian Blanc influenced the outcome because he had power to overrule dismissals. That only arose after, and independently of BCB's decision. He had the power to overrule a decision to dismiss, but not to reinstate.

I reject the claimants' claims that that the decisions were prejudged or a sham.

7.5. Failure to consider mitigating circumstances.

Paragraph 2.15 of the disciplinary policy at page 106 states: "Where an employee has acted in a way which constitutes a gross misconduct with no mitigating circumstances… dismissal or some of the sanction will be applied."At page 105 it is stated that "the employee will be given the opportunity to give a full explanation of the case against him account for his actions and to put forward in the mitigating circumstances including calling relevant witnesses".

The claimants' submissions are that no mitigating circumstances were considered, and, in particular, the claimants' considerable length of service.

I have considered this criticism as against MB, and BCB at the appeal stage. I note that in the case of the claimants it was noted that they consistently put forward the explanation first given at the investigatory meeting that this was merely jokey banter, part of a pub culture, and there was little if any remorse shown. It is not correct that the claimants' length of service was not considered. This is made clear, in the case of RS in the outcome letters of MB at page 259, and B C B at pages 300-301 . " There is a greater expectation of awareness around expected behaviours from an experienced leader and therefore the expected conduct of Employees and managers. Your long service has been considered but as the company has equally given you long service employment and benefits and invested heavily in you over the years I do not find sufficient mitigation from your grounds of appeal."

In the case of DL, there was the added feature that he was in a position of authority over the other members of the group as managing director and should have been setting an example by closing the group down when it came to his attention and not participating. This was expressly dealt with at page 450 by BCB. I am satisfied that both decision makers did consider claimants' length of service, but it was was not sufficient to mitigate the seriousness of the misconduct.

7.6. Failure to give RS the opportunity to access the full WhatsApp list before the first disciplinary hearing. I accept that RS had left the WhatsApp group and had deleted the messages from the company mobile phone on or about the 12th of September. What happened there after is summarised at paragraph 6.13 above. I also accept that RS did not have the opportunity to consider them on the morning before his disciplinary hearing began at 3 pm. This matter is an additional matter of unfairness in his case, but there are two countervailing arguments – first, that he must have had a reasonably good idea of the contents from his past participation in the group. Secondly, and in any event, it is not in dispute that he did have the opportunity to have X connect access from 11th of October (see paragraph 5.18 above) in time for the appeal hearing on 16th October and he had some information about the messages at the original disciplinary hearing. DL agrees that he did have access to the messages via X connect – it was one of his grounds for the postponement of his original disciplinary hearing from 24th of September to 27th of September. He says he lost the link between the disciplinary hearing and the appeal. Both claimants complain that they should have been given hardcopies which, I accept, the respondent refused because they wanted to restrict access to the full content to as few people as possible. I find that that was a reasonable decision in the circumstances, even taking into account that hardcopies of the sample texts had been provided earlier.

7.7. Failure to allow accompaniment. Section 10 of the Employee Relations Act 1999 is explained in paragraphs 15 and 16 of the ACAS code of practice as follows: –

"15. To exercise the statutory right to be accompanied workers must make a reasonable request. What is reasonable will depend on the circumstances of each individual case. A request to be accompanied does

not have to be in writing or within a certain time frame. However a worker should provide enough time for the employer to deal with the companions attendance at the meeting. Workers should also consider how they make their request so that it is clearly understood, for example by letting the employer know in advance the name of the companion where possible and whether they are a fellow worker or trade union official or representative
16. If a worker's chosen companion will not be available at the time proposed for the hearing by the employer, the employer must postpone the hearing to a time proposed by the worker provided that the alternative time is both reasonable and not more than five working days after the date originally proposed."
RS received the invitation to the disciplinary hearing by email from SP at 7:15 pm on Thursday, the 20th of September. He was due to be away at the weekend. At 3:06 pm on Friday, the 21st of September, in addition to notifying SP that he could not have access to the X connect site, he notified a request to have PA in attendance at the hearing fixed for 3 pm on Monday at Farnborough. SP responded at 5:23 pm stating the PA was not available as she was in Brussels on the Monday and asking if the claimant had anyone else in mind. There is no record of the claimant responding to that enquiry, but neither did the respondent postpone the hearing for up to 5 days. It is noteworthy that DL's hearing was postponed on his application. It is recorded at the outset of the hearing on the Monday that CF, the interim head of HR, did ask him to confirm that he had been given the option to have someone present. He responded "yes I tried to see if PA would accompany me but she wasn't available so I'm okay to go ahead on my own". I do not accept that RS was put under pressure to proceed as he alleged in his appeal letter, but I do note that the requirement in paragraph 15 of the ACAS code is mandatory. At the appeal stage RS had also asked for PA to attend, but the respondent's case is the she declined on the basis that there was a conflict because she had given a witness statement to the investigation, and that she told this to RS. The issue was raised again by this claimant at the appeal hearing in his written submissions. He claimed that another witness for him had been warned off. This was not explored further during the evidence. I consider that it would have been far better if the respondent had postponed the original hearing and this is a further instance of the speed with which the respondent was approaching the disciplinary process. This coupled with the lack of opportunity of RS to examine the complete list of WhatsApp messages is an additional feature of unfairness in his case. However I am satisfied that on consideration of the later Polkey issue, whether or not the claimant was accompanied at any subsequent disciplinary hearing would not have affected the outcome.

7. In summary, while I find that the dismissals were to an extent procedurally unfair applying the band of reasonable responses test, I also find that a fair procedure would inevitably with any defects cured have lead to the same result, and that the claimants' contributory conduct would not make it just and equitable to make any basic or compensatory award. The respondent has satisfied me that RS was guilty of gross misconduct justifying summary dismissal.

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Employment Judge Hargrove

9 March 2020.

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The Employment Tribunal (ET) is required to maintain a register of all judgments and written reasons. The register must be accessible to the public. It has recently been moved online. All judgments and written reasons since February 2017 are now available online and therefore accessible to the public at: https://www.gov.uk/employment-tribunal-decisions

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