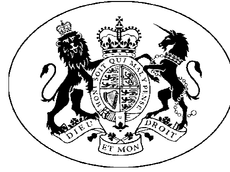

EMPLOYMENT TRIBUNALS

Claimant: Mr T. O'Brien

Respondent: Scentomatic (T/A Bloom Perfumery)

Heard at: **London Central (Remotely by CVP)**
On: **19, 20, 21 April 2021**

Before: Employment Judge Heath (sitting alone)

Representation
Claimant: Mr Tom Emslie-Smith (Counsel)
Respondent: Ms Lorraine Aboagye (Counsel)

JUDGMENT having been sent to the parties on ***22 April 2021*** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The claimant was a sales consultant in the respondent perfume boutique. By an ET1 dated the 28 May 2020 he claimed unfair dismissal, wrongful dismissal, deductions from wages, and holiday pay. The respondent in its ET3 and Grounds of Resistance dated 6 November 2020 denied the claimant's claims and indicated, in respect of the wages and holiday claims, that sums have been paid.

Claims and issues

2. The parties produced a draft list of issues, and also each produced a note about the draft list of issues. There was initially a disagreement as to the date of dismissal, but the parties in advance of the hearing reached a consensus on this point. The issues remaining to be determined between the parties were therefore as follows: -

<u>Unfair dismissal</u>

a. What was the reason for the claimant's dismissal?

b. Was the reason for dismissal a potentially fair reason for the purposes of section 98(1) and (2) Employment Rights Act 1996 (ERA 1996)?

c. Was the test of fairness in section 98(4) ERA 1996 satisfied?

d. On the basis that the claimant was dismissed for misconduct, the ***Burchell*** test applies, namely: -

    i. At the time of the dismissal did the respondent genuinely believe that the claimant had committed misconduct?

    ii. At the time of dismissal where there are reasonable grounds for that belief?

    iii. At the time of forming that belief had the respondent carried out such investigation as is reasonable in the circumstances?

e. Was dismissal in the range of reasonable responses?

f. Also there was a ***Polkey*** issue, namely, if the tribunal were to find a procedural flaw, did such flaw make any difference or would the decision to dismiss have followed in any event?

g. Did the claimant cause or contribute to his own dismissal, and if so to what extent?

<u>Wrongful dismissal</u>

h. Did the claimant, on the balance of probabilities, commit gross misconduct, namely by posting defamatory statements about the respondent on social media?

i. If so, was the respondent entitled to dismiss the claimant without notice?

j. What was the claimant's contractual notice entitlement?

3. Mr Emslie-Smith confirmed in his closing submissions that the claimant did not pursue his claims relating to deductions from wages or holiday pay.

Procedure

4. This matter had been set down with a three-day time estimate to consider both liability and remedy. I raised with the parties whether it was an appropriate approach for me to make a decision on liability first, and then to move on to consider remedy if appropriate. The parties were content with this approach.

5. There was a 297 page bundle and I will refer to page references in this bundle as follows [number]. The claimant provided a witness statement and gave evidence on his own behalf, and Mr Shane McDermott, the claimant's partner, produced a witness statement and gave evidence on the claimant's behalf but was not cross examined. For the respondent, its sole director, shareholder and manager, Ms Polyakova, produced a witness statement and gave oral evidence. Both counsel provided helpful written submissions on liability which they amplified with oral closing submissions.

6. I gave an oral decision on liability on the morning of 21 April 2021, after which I gave the parties some time to see if there was any agreement or narrowing of the issues on remedy. Apart from the basic award and the sum for loss of statutory rights there was no agreement between the parties on compensation. I heard evidence from Ms Polyakova and from the claimant on remedy, and I gave an oral decision on remedy on the afternoon of 21 April 2021.

Facts

7. The respondent is a boutique perfume shop in Covent Garden in central London which showcases and sells perfume from around the world. As indicated above, Ms Polyakova is the respondent's sole director, shareholder and manager. Additionally she has sole responsibility for its human resource functions.

8. The respondent at the time of the claimant's dismissal, had nine employees.

9. The claimant was employed by the respondent on 27 November 2017 as a sales consultant. He was employed on a part-time contract working 18 hours per week flexibly. He was able to work additional hours as overtime, and for around a year before his dismissal was largely working full time hours.

10. Outside of his employment with the respondent the claimant had an online profile in the perfume and fragrance world. He maintained a YouTube channel with around 22,000 followers, ran a Facebook page called Ouch110 which had around 2000 members, and he participated in other online forums concerned with perfume. There was an element of crossover between the claimant's work for the respondent and his online influencing. On occasion he would tell the respondent's customers of his online channels, and some of the respondent's customers were, or became, his online followers. The claimant did not make vast sums with his online activity. I have accepted as evidence that this was a hobby that reflected his passion for perfume and fragrances, which brought in modest sums, though he had high overheads.

11. Prior to his dismissal the claimant enjoyed a good working relationship with Ms Polyakova.

12. The claimant's contract of employment appears at [70]. At clause 11 the contract refers to non-contractual disciplinary and grievance procedures applicable to the claimant's employment which were contained in the staff handbook. The staff handbook was at [224-297], and I find that the claimant, as is often the case with workers, did not read the staff handbook during the course of his employment. Disciplinary rules are set out at paragraph 11 of the staff handbook [250].

13. At paragraph 11.7 of the handbook gross misconduct is described as "*serious breach of contract and includes misconduct which, in our opinion, is likely to prejudice our business or reputation or irreparably damage the working relationship and trust between employer and employee. Gross misconduct will be dealt with under our Disciplinary Procedure and will normally lead to dismissal without notice or pay in lieu of notice (summary dismissal)*". At paragraph 11.8 is a list (expressed to be a non-exhaustive guide) of examples of matters that are normally regarded as gross misconduct. They include "*f) serious misuse of our property or name;"* and *"j) bringing the organisation into serious disrepute*".

14. At paragraph 12 of the handbook a disciplinary procedure is set out, which includes a hearing [255] and an appeal [257].

15. The respondent did not have a social media policy.

16. As is well known, the coronavirus pandemic has had a devastating impact on retail, as well as on other sectors of the economy. In the early period of the pandemic there was profound confusion, fear and uncertainty among both businesses and employees alike.

17. On 23 March 2020, the day on which the first "lockdown" took effect, Ms Polyakova emailed all staff working for the respondent with an update [41]. She referred to the fact that all non-essential retail had been shut down, that help in the form of the Job Retention Scheme (JRS) was promised by the government although no real detail was available, that nobody really knew how this would impact retail in the future and that Ms Polyakova was "taking one day/step at a time".

18. The claimant messaged Ms Polyakova on WhatsApp the same day [42], asking "*what are your instructions?*" Ms Polyakova responded "*stay home. I will go to the shop to pack orders. Going out for exercise, foods, etc is allowed*".

19. On 24 March 2020 Ms Polyakova again emailed all staff to say that further details were coming in about the JRS [43]. She mentioned that the government would not give the respondent any money for a couple of months and that any staff kept on the payroll she would need to sponsor 100% herself for a couple of months. She would later be reimbursed with 80% of people's salary, which she anticipated would come in the form of a PAYE credit. She pointed out that she, as a director, would not get 80% compensation towards her salary and observed "*I am supposed to work*

for free, travel while everyone is self isolating, pack orders, keep things going, take a loan out to fill the missing cash flow, etc".

20. On 26 March 2020 Ms Polyakova again emailed all staff saying that she was still awaiting advice from solicitors and accountants regarding best practice towards employees in the current situation [44]. She said that the likelihood was that the team would become smaller but how much smaller was unknown. She said that she would be "*making offers individually and everyone will have some option*s".

21. On 1 April 2020 Ms Polyakova emailed the claimant with some options after deliberation and consultation with a solicitor [45]. The first was for the claimant to be furloughed on his contractual hours of 18 hours per week and 80% of his current salary. The second option was "*three weeks notice (terminating your employment at Bloom) as the future of retail is very uncertain*". She concluded her email "*whatever you choose, please bring the keys today*".

22. Later that day the claimant emailed Ms Polyakova saying that he accepted the furlough offer but queried the 18 hours as he had been working average of 39 hours per week over the previous year as requested by her [45]. He also said "*I have the keys and they are safe with myself, as it's not an essential journey if you urgently need them back today, you could arrange for DHL to pick them up*".

23. A short while later Ms Polyakova emailed the claimant to confirm the furlough pay to be at the contract rate of 18 hours, with furlough starting on 24 March 2020 [46]. She went on to say "*you can bring the keys on Wednesday or Thursday. I will be packing some orders from 11 on both days. Sending them by DHL is not safe. Maybe someone can drive you to Covent Garden*". She pointed out that while others were self-isolating she would have to continue work and would not get compensated. She concluded "*I guess we will all be making sacrifices for the greater good sometime*".

24. At 11:30 AM on 2 April 2020 the claimant emailed Ms Polyakova to say that he would accept the furlough option as discussed [46]. On the question of the keys he said "*I'm not really prepared to go against government guidelines and make a non-essential journey and risk a fine from the police. Please make arrangements for them to be collected if it is absolutely vital that you have them back. If not there are hundred percent safe with me*".

25. Minutes after receiving this email Ms Polyakova called the claimant on his mobile phone. The claimant did not pick up the call either once or twice. Ms Polyakova's evidence was that it was a series of calls, however Mr McDermott, who was not cross-examined, confirmed the claimant's evidence (and he was not challenged on this point) that the claimant missed one call.

26. Ms Polyakova then called Mr McDermott's number, as he was the claimant's emergency contact in the respondent's records. It is not entirely clear whether Mr McDermott took the call and handed his phone to the claimant, or whether the claimant called Ms Polyakova back. However, the conversation took place between Ms Polyakova and the claimant in which Ms Polyakova told him that she was going to get a locksmith to change the locks and would deduct the cost from his wages. The claimant found this conversation upsetting, as he considered that he was being pressurised into making what he considered a potentially unlawful journey into central London. Mr McDermott took the phone from him and continued to talk to Ms Polyakova. Mr McDermott tried to explore alternative methods of getting the keys to the respondent, but nothing seemed acceptable. Exasperated by this lack of progress, Mr McDermott said words to the effect "*what would you accept? Sending them in a police car or an ambulance?*" I accept Mr McDermott's unchallenged evidence that neither he nor Ms Polyakova raised their voices during this conversation. Ms Polyakova asked to speak to the claimant, who was still upset and did not wish to speak. Ms Polyakova therefore said to Mr McDermott words to the effect "*tell Tom I'm taking the money for a locksmith out of his wages and I am withdrawing my offer of furlough*" before hanging up.

27. At 11:50 AM, 20 minutes after the claimant's email in which he had accepted the offer of furlough leave, Ms Polyakova emailed to the claimant to say that the respondent was "*withdrawing the offer of furlough since you are not happy about it and we will be serving three weeks notice according to your contract. Since you refuse to return the keys (company's property) or make sensible arrangements to do so I have no choice but to change the locks. The cost will be deducted from your final pay*" [47].

28. At 1:57 PM the claimant emailed Ms Polyakova saying that he was exercising his right to request the reason for his dismissal. At 4:08 PM Ms Polyakova responded that "*it's a 3 weeks notice as per your contract. You are being laid off, not dismissed*" [48]. At 6:40 PM Ms Polyakova emailed the claimant saying "*regrettably I have to serve notices to members of the Bloom team terminating their employment*" [49]. She set out the circumstances in which she said this decision arose, namely the current economic catastrophe. She provided an address for the claimant to return the keys by post and said "*failure to return the companies property will result in the cost of changing the locks and reprogramming the fobs being deducted from your final pay*". The claimant posted the keys to this address the following day, and they were received by the respondent.

29. By letter dated 2 April 2020 the claimant was given notice of termination of his employment to take effect in 3 weeks on 16 April 2020 (which was in fact two weeks away) [50]. All but two of the Respondent's staff (one of whom was on maternity leave) were given the same or similar notices.

30. Going back a day, on 1 April 2020 the claimant had agreed to do a Facebook live stream to his followers on his Ouch110 Facebook group. On 2 April 2020, the day his employment was terminated by the

respondent, the claimant commented on his Facebook group on the subject of the proposed live stream [53] "*I'm gonna have to retract this for the time being. I lost my job today and really not in any kinda chipper mood. I need to chill for a while sorry guys*". A Ms Purves, a member of this group, commented *"I hope that when this is all over they open up again and take you straight back*". The claimant replied to this comment "*I won't go back. Not after the vile way I was treated today. Horrendous! New horizons for me!*"

31. It must be borne in mind that the claimant made this comment on the day he had accepted the terms of a furlough offer, felt that he had been pressurised into making an unlawful and unsafe journey, and had had his furlough offer withdrawn some 20 minutes after accepting it. It was also the day he was told that he was not dismissed but laid off, and then given notice of termination of his contract. I find that the claimant genuinely believed at the time of writing this comment that he had been treated in an appalling manner. The claimant did not mention his employer by name, but there would have been some members of this Facebook group who would have known the identity of the employer.

32. The claimant was a member, but not an administrator, of another Facebook group about perfume called Fragheads. At some point on a date unknown in early April 2020 there was a conversation in this group in which it was clear that the treatment of the respondent's staff was being discussed [55]. The original post is not in the bundle, but the first reply to the post by a Mr Keen said "*Yup true. They certainly got rid of Thomas O'Brien. Appalling treatment valued staff*". A Ms Lockley-Hobson responded "*so they just couldn't be bothered to fill in a form or two!!*" Another member of the group responded that the respondent would not be getting custom from them. Mr Keen, seemingly replying to Ms Lockley-Hobson, said "*I don't know the full story but Thomas O'Brien announced in his lovely perfume group Ouch110's on Facebook that he had lost his job. He also indicated that the manner in which it happened was appalling. I think it's a disgrace, especially when you look at how good he was in the store and the knowledge he has. I don't think I will ever be going back to use them after this*".

33. On 8 April 2020 someone emailed the respondent's website to say that they would "*never purchase another item from your shop you nasty excuse for an individual. You should be ashamed of yourself!!!*" [60].

34. On 10 April 2020 the claimant did a live stream on his YouTube channel to his followers. The complete transcript of this is at [113ff]. Early on in this live stream he says "*The bad thing that happened to me recently was I lost my job, which really, really sucks. I won't say too much about the details. But yeah, I lost my job about a week ago, which was kind of devastating. But I guess it's all for the best. And I will move onwards and upwards and see where the world leads me*". I was told that the respondent's solicitors sought disclosure of this transcript, and it was supplied to them.

35. Ms Lockley-Hobson left a message on the respondent's website on 13 April 2020 that she had "*heard rumours that you laid off rather than furloughed all your shop staff. Can you let us know what the truth is please?*" [57].

36. On 14 April 2020 Ms Polyakova emailed a letter to the claimant headed "Notice and takedown letter under Article 14 of the E-Commerce Directive (2000/31/EC)" [61]. The letter observes that the respondent had been made aware that the claimant was making and had made defamatory statements in relation to the respondent and its owner in particular. It continued "*you have made defamatory and untrue comments regarding your employment, the company's actions as a result of your refusal to return companies property and directors decisions in regards to that. These comments have been made with the clear intention of damaging the company's reputation and this is unacceptable. The offending comments are therefore defamatory*". The letter required confirmation that the claimant had corrected offending statements within 24 hours, and reserved the right to issue proceedings against him for defamation seeking damages, costs and interest.

37. Also on 14 January 2020 Ms Polyakova emailed her business partner to indicate that there were lies circulated by a former employee, and that some employees (plural) tried to blackmail her.

38. On 15 April 2020 Ms Polyakova emailed the claimant a letter headed "Notice of termination and confirmation of summary dismissal" [64]. The letter acknowledges the previous letter of 2 April 2020 terminating the claimant's employment "*due to the COVID-19 situation*". The letter goes on "*given your actions over the last few days, whilst you are under notice, your disengagement with me, your acts of defamation, which are serious breaches of trust and confidence, these acts which constitute gross misconduct. Therefore, we have decided that your employment with us should be terminated for gross misconduct without notice and without any warnings, this will take effect from 9 April. I shall deduct the cost of the replacement keys from your notice pay, (clause 5.5 of your contract) which commenced on 2 April. Given your dismissal for gross misconduct you will be paid up to the 9 April.*"

39. The claimant instructed solicitors who responded to Ms Polyakova on 15 April 2020 [141]. They asked what defamation was being alleged as none had been specified in the letter of 14 April 2020, and pointed out that his dismissal for gross misconduct was unfair.

40. There was evidence in the bundle to indicate that certain customers, including one Ms Saville who returned a purchase on 12 April 2020, spent less with the respondent from April 2020 onwards [134-140].

The law

41. Under section 98(1) ERA 1996 it is for the employer to show the reason for the claimant's dismissal, and that this is a potentially fair reason under

section 98(2) ERA 1996. In this context, a reason for dismissal is "*a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee*" (***Abernethy v Mott, Hay & Anderson* [1974] ICR 323**).

42. Given the reason for the dismissal is said to be misconduct, the approach to fairness is the test set out in ***British Home Stores V Burchell* [1980] ICR 303** set out in the issues at paragraph 2d) above.

43. Under the principal in ***Polkey v AE Dayton Services Ltd* [1987] IRLR 503** where there is a failure to adopt a fair procedure at the time of dismissal, dismissal would not be rendered fair just because the procedural unfairness did not affect the end result. Compensation can be reduced to reflect the chance of dismissal taking place had a fair procedure been adopted.

44. Exceptionally, a dismissal might be considered fair in the absence of any fair procedure (my attention was drawn to the case of ***Gallacher v Abellio Scotrail Ltd* UKEATS/0027/19,** an SOSR case, but the principle can apply to a conduct related dismissal).

Conclusions

<u>Reason for dismissal</u>

45. The expressed reason for dismissal in the dismissal letter [64] is the claimant's disengagement and acts of defamation. Ms Polyakova in her witness statement at paragraph 49 again focuses on defamation. Mr Emslie-Smith, for the claimant urged me to find that this was a pretext to cover up an earlier unfair dismissal communicated on 2 April 2020.

46. I accept the respondent's reason for dismissal as being related to conduct. The respondent had received an abusive email on 8 April 2020 and entertained a belief that the claimant had spoken negatively about the business. This was the reason the respondent dismissed him. This is a potentially fair reason under section 98(2) ERA 1996.

<u>Did the respondent genuinely believe that the claimant was guilty of misconduct?</u>

47. I do not propose to be overly legalistic in my approach to defamation, not least as it is an area of law I do not claim expertise in. However, the "takedown notice" of 14 April 2020 alleged that the claimant had made "defamatory and untrue comments". A key element in defamation is that a publication is not true.

48. It is not entirely clear what Ms Polyakova saw prior to dismissing the claimant. Paragraph 35 of her witness statement refers to being made aware of comments on various social media platforms (YouTube channel and two Facebook groups). In all likelihood this would have included the Ouch110 comments and those in the Fragheads group.

49. Ms Polyakova would not have considered that she had acted in a “vile” or “horrendous” way. In the circumstances I consider that she had a genuine (that is to say subjective) belief that the claimant had defamed the respondent.

Were there reasonable grounds upon which to sustain that belief?

50. I am not enquiring into the actual truth, but whether there were reasonable grounds to sustain a belief that the claimant was guilty of misconduct that he was dismissed for. Again, it is important to maintain focus on the fact that he was dismissed for defamation, that is to say making untrue statements. He was not dismissed for failure to correct information online, as was at times suggested during oral evidence by Ms Polyakova.

51. The fact that it is not entirely clear what exactly Ms Polyakova had seen prior to dismissing creates difficulties in determining whether there were reasonable grounds for her to entertain belief in the claimant’s misconduct. All that before me are the posts in the bundle. I am prepared to operate under the assumption that Ms Polyakova saw, prior to dismissal, the evidence of online posts put before me by the parties. Again, the focus was on the Ouch110 post.

52. This post was the claimant expressing a value judgement on the way he perceived that he had been treated. It was made on the very day that had been told that he lost his job. His perception at the time was:-

    a. that he had been pressurised into making an unlawful and unsafe journey into central London

    b. that he had an offer of furlough withdrawn minutes after he agreed to it on the spurious basis that he was not happy with it,

    c. that he had been told that he had been laid off and not dismissed,

    d. that he had then been told that he was effectively redundant.

53. The claimant’s perception that he had been badly treated is understandable in all the circumstances.

54. Additionally, under cross-examination Ms Polyakova admitted that the comment on Ouch110 on its own did not constitute gross misconduct. So, what else was there? The Fraghead forum was not run by the claimant. Mr Keen’s comments on that forum were little more than a restatement of what the claimant had said in his Ouch110 comment.

55. There were references to the treatment of others, and at [57] refers to rumours that staff had been laid off rather than furloughed. Ms Polyakova points to the words “laid off” is pointing towards the claimant having been behind this information. But even if the claimant was the source this reference to other employees being laid off, or made redundant, rather than being furloughed (which he denied), it was in fact true. It is difficult to

see how the respondent could reasonably entertain the belief that any of this was defamatory.

56. There is also the YouTube live stream of the 10 April 2020 which Ms Polyakova was prepared to assert was defamatory without providing any detail. This is the live stream in which the claimant had said that he had lost his job and that this "*really, really sucks*". He specifically said during this live stream that he did not propose to go into any detail, and he did not name his employer. During this live stream he mentioned that "*job stuff is crap*", but other than this there were no other real references to employment. This transcript was secured because the respondent's solicitors sought disclosure of it. Ms Polyakova in evidence made the complaint that the claimant was reluctant to provide social media conversations, but I was not aware of any specific complaints about lack of disclosure, and no applications for disclosure were made to me. I am not prepared to make the assumption that there must have been something more out there.

57. In all the circumstances I find that there were not reasonable grounds for the respondents to entertain the belief that the claimant had defamed the respondent company at the time of his dismissal.

<u>Had the respondent carried out a reasonable investigation?</u>

58. I remind myself that my role here is to assess whether the investigation fell within the band of reasonable responses.

59. The purpose of an investigation is to establish facts about whether misconduct has been committed, and to give the employee the opportunity to respond to allegations and put forward mitigation.

60. Ms Aboagye submitted that the claimant was given a fair opportunity to respond to allegations of misconduct in that the "takedown letter" of the 14 April 2020 requested that the claimant removed posts, and that the claimant has not made a public retraction or corrected the posts or any subsequent posts. With the greatest respect, this does not engage with the relevant issues.

61. The respondent was a very small company, with no human resources function and only one manager. I will not judge it against high standards, but will judge it against ACAS minimum standards and against the company's own standards (that is to say its own procedure which allows for an investigation, a hearing, a decision and an appeal).

62. The letter of the 14 April 2020 which Ms Aboagye was self-expressed to be a "Notice and take-down letter under Article 14 of the E-Commerce Directive (2000/31/EEC)". It did not initiate an investigation or invite a response to alleged defamation. It required removal of publications under the threat of legal proceedings. The day after this letter the respondent proceeded to dismissal.

63. At the very most, the respondent may have got to step one of the ACAS Guide to Discipline and Grievances at Work, namely, to inform the employee of the problem. But this too is debatable considering the nature of the Take Down letter. In any event, it got no further. There was no hearing followed by a decision, and no right of appeal.

64. A disciplinary hearing is a fundamental element of a fair disciplinary procedure as is a right to appeal. These rights are to be dispensed with only in wholly exceptional circumstances.

65. Ms Aboagye submitted that there were here exceptional circumstances in that:-

    a. The business faced a growing reputational threat;

    b. Procedure would have been futile in that:-

        i. the damage had already been done,

        ii. trust and confidence had already disappeared, and

        iii. the claimant would not come back in any event.

66. The evidence I heard did not support the submissions. On the question of the reputational threat, Ms Polyakova's oral evidence was that the takedown letter had actually achieved its goal - the threat was already contained. She said this in the context of linking the claimant with the negative posts, saying that she knew it was him behind the posts, because after he received the Take Down letter there were no further negative posts. Additionally, there was no evidential basis to support that dispensing with procedure was necessary to contain the threat.

67. In terms of the alleged futility of the procedure, the fact that damage has already been done is neither here nor there. This is very often the case in misconduct disciplinary processes where, for example, the money has already been stolen, the fight has already happened or the customer has already been sworn at.

68. To assert that trust and confidence has already been lost is an assertion very much from Ms Polyakova's perspective. The claimant's value judgment about the way he had been treated is objectively insufficient grounds to destroy trust and confidence.

69. The reference to the claimant saying he would not come back to the respondent is presumably a reference to his post on the Ouch110 group where he said "*I won't go back*". This was said by the claimant on the very day he learnt of his dismissal. Employment case law is full of examples of the high emotion that often accompanies dismissal, which often subsides in time, and such an expression ought to be tested rather than be taken at face value.

70. In short, there were no exceptional circumstances justifying a wholesale dispensation with procedure. This was a case crying out for proper investigation to get to the bottom of allegations and give the claimant a chance to respond. As is the case with virtually all examples of workplace misconduct.

Was dismissal within the range of reasonable responses?

71. Again, I remind myself that my function is not to substitute my own view here, but to apply the range of reasonable responses test.

72. The respondent's handbook gives examples of gross misconduct, one of which is "*Bringing the organisation into serious disrepute*". The respondent had no social media policy, and there is no guidance as to how and employees to conduct him or herself online, and what is regarded as conduct worthy of dismissal.

73. I am assessing the decision to dismiss on the information known by the respondent at the time. At its highest there is a publication by the claimant that he was treated in a "vile" and "horrendous" manner. As I have already pointed out, given the claimant's treatment on 2 April 2020, his description of the respondent's treatment of him is, at the very least, understandable. Had the claimant not used such emotive language, but instead set out in dispassionate factual terms exactly what had happened to him in the course of this day, it would have looked no better for the respondent. Arguably it could have looked worse.

74. The respondent submitted, essentially, that the respondent made a connection between the claimant's social media posts and the company, that its business reputation was under threat and Ms Polyakova was under personal attack and there was no retraction or apology and therefore dismissal was reasonable.

75. Again, the evidence was from Ms Polyakova that the takedown letter was effective in containing the threat. It is unclear how dismissal would address the threat, and given the fact that the social media posts concerned the the fairness of the claimant's notice of dismissal on 2 April 2020, a summary dismissal could have risked making matters worse. I do not consider that a failure to retract or apologise for his expressed value judgment about the way he had been treated justified dismissal.

76. No reasonable employer could have established, in all the circumstances, that the claimant had committed an act of gross misconduct as set out in the handbook, with no guidance from a social media policy.

77. No reasonable employer would have concluded that this was defamation, carrying the necessary implication that it was untrue. The claimant merely set out, albeit in emotive terms, his understandable belief that he had been very poorly treated.

Polkey

78. I have largely dealt with the factors under consideration for a Polkey argument under the procedural element of the Burchell test. Essentially the respondent says adopting a fair procedure would have been futile, and that a proper investigation, hearing and possibly appeal would have led to a fair dismissal. Given the difficulties in establishing quite what Ms Polyakova knew at the time of the dismissal I have applied the Burchell test on the basis of the evidence in the bundle today.

79. Given the conclusions I have reached, especially relating to the reasonableness of the employer's belief, and the dismissal falling within the range of reasonable responses, it is difficult to see how a hypothetical fair hearing, with a chance to state a case and put forward mitigation at a hearing, and an appeal if appropriate, would have led to a fair dismissal. In the circumstances I make no reduction under Polkey.

Contributory fault

80. This was raised in the pleadings, but not really advanced at the hearing. On the basis of my findings above I can identify no conduct such as to reduce the award under section 122 and 123 of the ERA 1996.

Wrongful dismissal

81. Although I have up until now focussed on unfair dismissal, I have made findings and conclusions about the claimant's actions. For the avoidance of doubt, I find that he did not defame the respondent as alleged and did not commit an act of gross misconduct. His summary dismissal was wrongful. He was entitled to two week's notice under his contract.

Remedy

82. As indicated under the Procedure heading above, I gave an oral decision on liability, and proceeded to a remedy hearing after giving the parties the opportunity to explore common ground.

83. I was emailed, on the claimant's behalf, a note on remedy to accompany the Schedule of Loss at [39], a pay table analysing in tabular form the payslips of the respondent's staff members in each month of 2020, a PDF and a Word document setting out emails the claimant received in respect of job applications, and a spreadsheet documenting them. On the respondent's behalf I received an annotated version of the claimant's pay table with hours worked by staff added by Ms Polyakova.

84. Ms Polyakova gave evidence and was cross-examined; the claimant gave evidence and was cross-examined. Both counsel made oral submissions on remedy. I was told that the basic award and loss of statutory rights were agreed and that all other figures were in dispute. Mr Emslie-Smith indicated that he had not included a figure for wrongful dismissal in his calculations to avoid double recovery.

Conclusions on remedy

The law

85. As the basic award was agreed, I will only set out the law relating to compensatory loss. Under section 123 ERA 1996 "*the amount of the compensatory award shall be 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*". For an employer to rely on a hypothetical alternative dismissal to the unfair dismissal as extinguishing or reducing compensation, that alternative dismissal must be fair (see ***O'Donoghue v Redcar and Cleveland Borough Council*** **[2001] EWCA Civ 701**).

Dismissal would have happened anyway

86. The respondent first took the point that at the time of his dismissal the claimant was under notice of termination of his contract, expiring 15 April 2020, and therefore that his contract would have terminated anyway and that he should not be compensated beyond that date.

87. To rely on the submission, this dismissal on notice must be a fair dismissal. It would not have been. As I have found in my consideration of liability, the decision was proffered for various different and conflicting reasons and followed immediately upon the claimant accepting furlough which had been offered to him. Accordingly I do not limit compensation on the basis of this dismissal as it would have been unfair.

The rate of loss

88. I have found that to members of staff were kept on by the respondent and the rest were made redundant. During the remedy phase this hearing it became clear that a number of those members of staff were re-engaged.

89. It is difficult to look back into what was happening the early days of the pandemic and confidently assess what would have happened had the claimant not been unfairly dismissed. However, there were a number of factors which suggested that the claimant would have been one of the members of staff kept on throughout the pandemic. First, is the fact that he was offered furlough, which indicates that he was seen as part of the respondent's plans going forward. Second is his length of service; I heard that he had around the second longest service with the respondent. He was also the only member of staff who spoke English as a first language, which was useful in assisting with some of the tasks required by the respondent. Finally, he was a highly skilled salesperson, the respondent ranking him in the top three or four, and the claimant believing he was up there in the top two or three. The likelihood is, therefore, that the claimant would have been either retained or at least re-engaged very swiftly.

90. The claimant had, prior to the pandemic, been working between 130 and 170 hours per month (according to the respondent's calculations). Had he been retained, the hours he would have done would have had a knock-on

effect on the hours worked by others. From the respondent's table it was clear that Arune's hours jumped from pre-pandemic levels of 32 to 45 hours to 70, 80 or even 100 hours. Katie went from around a hundred hours to between 56 and 89 hours. It was not possible to do a comparison staff member known as AK.

91. However, hours alone do not tell the full story. AK earned an average of £399.58 in the four months before the pandemic, and she earned on average £581.30 in the five months after. Similarly, Katie averaged £641.44 in the months before the pandemic, and £676.37 in the eight months after.

92. Arune was the staff member who was kept on full-time during the pandemic. I consider that there would have been a strong likelihood, for the reasons I have given, that the claimant would have been a staff member kept on had he not been unfairly dismissed. However, I recognise that this is a difficult exercise and that it is extremely difficult to know how many hours he would have worked or how much he would have earnt. I consider that a 10% reduction in the claimant's earnings would have been reasonable to cover these contingencies and reflect this slightly conflicting picture.

Failure to mitigate loss

93. The respondent shoulders the burden of proving the claimant failed to mitigate his loss. In this regard Ms Aboagye submits that 1) the claimant should have counted for his online earnings, 2) he should have made more of this income stream.

94. Ms Aboagye has a point with 1). The claimant should have set this out in his schedule of loss. But I have found the claimant an otherwise reliable witness. The fact that he has sought to work full-time hours with the claimant, and following his dismissal has sought and found full-time work with another employer strongly suggests he earns his income from retail rather than Youtube. I heard, and accept, that the claimant receives an income of around £100 per month from his YouTube channel, but that he has high overheads, such as buying perfume to review, software and other overheads.

95. In terms of maximising this income, I accepted the claimant's evidence that he is earnings depends on the number of "clicks" he gets on his videos. He has always uploaded an average of three videos per week, but this depends on a number of things. His output has not really changed during the course of the pandemic. The respondent has not proved that he has been unreasonable in how he was approached this income stream. I consider that the respondent has been entirely reasonable in focusing on retail, battered though it was during the pandemic, seeking work in this field, and eventually finding it.

96. In the circumstances I considered it appropriate to compensate the claimant for 34.5 weeks until he found full time employment.

Statutory uplift

97. Ms Aboagye submitted that the respondent was a small business trying to stay afloat in the pandemic. She urged me to make any uplift under section 124A ERA 1996 minimal. Mr Emslie-Smith submitted that this was a wholesale failure of process that was totally unreasonable, and urged me to award a 25% uplift.

98. I do take account that this was a small business, but I agree that this was a wholesale failure to apply the very basic minimum standards of fairness set out by the ACAS code. This dismissal came just after a notice of dismissal which in of itself would have led to an unfair dismissal. The respondent took legal advice about defamation and was not wholly without recourse to advice on employment law. It also had the benefit of its own procedures.

99. In setting the level of uplift I have had regard to the overall size of the award, and in the scale of things, this is not a particularly large award.

100. I gave serious thought to awarding 25% uplift, as I largely agree with how Mr Emslie-Smith characterises this dismissal. However, the unprecedented nature of the stresses to a very small business caused by the pandemic, and the personal stresses Ms Polyakova was under, persuade me to set the level of uplift at 20%.

Other matters

101. The parties agree the level of loss of statutory protection at £500, and I consider this is a reasonable sum to award. The claimant seeks compensation for loss of long notice. However, he was only entitled to two weeks notice and I do not compensate him for this loss.

102. In all the circumstances I award compensation as set out in the judgment sent to the parties on 22 April 2021.

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was [V – video, conducted using Cloud Video Platform (CVP)]. It was not practicable to hold a face to face hearing because of the COVID-19 pandemic.

Employment Judge **Heath**

11 May 2021

REASONS SENT TO THE PARTIES ON

14/05/2021.

FOR THE TRIBUNAL OFFICE