Reserved

EMPLOYMENT TRIBUNALS

Claimants: Mr S Rathod

Respondent: Pendragon Sabre Limited

Heard: at Nottingham (Hybrid CVP) **On:** 27 July 2021

Before: Employment Judge Clark (Sitting Alone)

Representation
Claimant: Mr A Johnstone of Counsel
Respondent: Mr N Bidnell-Edwards of Counsel

JUDGMENT

The judgment of the tribunal is that: -

1. The claim of unfair dismissal **succeeds.**

2. The claim of Breach of Contract (Notice) **succeeds.**

3. Remedy will be determined at a Remedy hearing to be listed in due course unless the parties are able to agree terms.

4. The claim for accrued but untaken holiday is **dismissed upon withdrawal**.

REASONS

1. Introduction

1.1 This is a claim for unfair and wrongful dismissal, that is, breach of contract in respect of notice. The claims arise from the summary termination of the claimant's employment with the respondent effective on 30 December 2020.

2. Issues.

2.1 The live issues are: -

a) Whether the respondent has proved the reason for dismissal or, if more than one, the principal reason.

b) If so, whether the responded acted reasonably in relying on that reason as sufficient to dismiss the claimant.

c) Whether the respondent has shown that the claimant was guilty of any conduct prior to his dismissal which would entitle it to dismiss him without notice.

3. Preliminary matters

3.1 The facts of this case include allegations of misconduct by others who are neither parties nor otherwise participating in the process. Their actions will form part of a public judgment. For that reason, and in accordance with my powers under rule 50, their identity will be anonymised. Many can be referred to in relative abstract terms. However, one person is central to the facts. That person will be referred to simply as "O" in this and, where necessary, in any further public record of these proceedings.

4. Evidence

4.1 For the claimant I have heard from Mr Rathod himself. For the respondent I have heard from Mr Mason, the dismissing officer, and Mr Partington, the appeal officer.

4.2 I have received a bundle running to 212 pages.

4.3 All witnesses gave affirmed evidence and were questioned

4.4 Both Counsel made oral closing submissions.

5. The Facts

5.1 It is not my role to resolve each and every last dispute of fact between the parties. My function is to make such findings of fact as are necessary to answer the issues in the claim and to put them in their proper context. On that basis, and on the balance of probabilities, I make the following findings of fact.

5.2 The respondent is part of the Pendragon Group. It is a large group of companies retailing motor vehicles of various marques. This case takes place within its Porsche franchise.

5.3 The claimant commenced his employment on 12 March 2018. He was employed as a car sales executive under a written contract of employment.

5.4 As might be expected of a large employer such as this, it is resourced with specialised HR advisers and applies various employment policies. It is relevant to set out what applicable policies have been put before me, and what have not. I have seen the Grievance policy and the Dignity at Work policy. I have not seen any other policies. There seems to be no doubt that there is a discipline procedure in existence but, for reasons not explained, even the fact that this was a summary dismissal has not prompted its disclosure and inclusion in this case. I can infer it prescribes a procedure broadly in line with that which was undertaken in this case. However, in its absence I can make no other findings of relevance. Similarly, many large employers now publish a statement in a handbook, a code of conduct or otherwise declare their organisations "values and behaviours" from which one might find reference to the standards of conduct the employer expects from its staff in their day-to-day interactions with each other. Nothing of that nature is before me and there is no reference to it in any evidence. Finally, the prevalence of various social media platforms and its potential impact on the employment relationship has also led many large employers to set out boundaries to the conduct that they expect from their employees. Nothing of that nature is before me either. I therefore find that there are no such statements of expected behaviour relevant to this employment. Any such behaviour as might amount to disciplinary conduct must therefore be gauged by general, or ordinary, principals of what might be expected in the particular interpersonal relationships that are relevant to the case before me.

5.5 One policy I do have is the dignity at work policy and which the respondent relies on extensively is the Dignity at Work Policy. It defines various aspects of bullying and harassment and, in respect of the latter, adopts essentially all the same concepts as are found in s.26 of the Equality Act 2010. Contrary to how the respondent's case was put in evidence and submissions, I do interpret the passages I was taken to in this policy to require a complainant of some description, even if that person is not the "target" of the offending conduct itself. I accept that read at a very general level, it goes someway to influence behaviours and conduct and neither party directed me to section 6 which requires employees to be aware of the effect their conduct might have on others and to treat colleagues with dignity and respect. That, however, falls substantially short of the kind of express statements of expected conduct I have referred to above to provide a basis for what conduct the employer might take issue with outside the concept of harassment, particularly in the circumstances of this case.

5.6 The facts of this case take place within the sales team. I need to describe its make-up and culture more particularly. All the sales staff were male. One of the sales executives was "O". There were two sales managers. There are female employees in other roles. I find the culture was "laddish", crude and immature and this manifested in the day-to-day interactions in the workplace on the sales floor. Topics of conversation

included graphic and crude sexual references; sometimes generic, sometimes focused on a particular female and sometimes even young females attending the dealership with their family. There were regularly acts performed that they would no doubt dismiss as merely practical jokes including food fights and wrestling. This particular laddish culture developed a more sinister level as it was infected by the overt prejudices, opinions and attitudes of some of its members. I find their comments and contributions were neither inadvertent nor simply misguided. They amounted to deliberate and aggressive expressions of misogyny, hostility towards homosexuality and racism. I find this influenced the way the team interacted, and the peer pressure meant it became the norm. One of the sales executives openly shared racist views, including his own rejection of a family member who had invited a black friend home. The role of those higher up the hierarchy, particularly the two sales managers, is crucial where bullying or peer pressure within a local culture is concerned. Inaction by such a person can appear as if they are positively condoning the behaviour. I find there was inaction but there was also active participation in some aspects of the culture. A particular crude phrase had become common parlance throughout the entirety of the male workforce within the branch, including the management. This was the use of the phrase “lick my dick”. It was used directly at each other and usually in the context of responding to requests for assistance with work matters.

5.7 That sort of culture allows other forms of offensive language and behaviour to be excused under the misnomer of “banter”. That is the environment that Mr Rathod joined in 2018. He describes himself as British Asian and became the only non-white member of the sales team.

5.8 I find Mr Rathod displayed an engaging and sociable character, as may well be typical of all those successfully working in sales. I find it was in his nature to do what he could to get on with his colleagues. However, I find the terms of his acceptance was subject to the team’s existing culture. I accept Mr Rathod’s description of being an outsider and having to conform to the existing team culture. From early on this manifested in him being subject to some extreme examples of bullying and harassment and his ethnicity was itself a target. Nothing in these findings should suggest that Mr Rathod was silently suffering. Conforming meant he not only had to accept his treatment, but to participate in like terms. Put simply, it appears to reflect the classic situation where the bullied finds himself mirroring the behaviour of the bullies. To a degree it worked. There was some socialising outside of work and the relationships had the appearance of being relatively close and strong. However, his actions need to be seen in the context of his actual experiences in this workgroup as I find over time he did in fact begin to suffer and was a victim of some particularly serious misconduct.

5.9 First, much of his participation was in the nature of passive tolerance, particularly the racial slurs. I find his participation was often actually little more than pre-emptive

and deliberately self-effacing. As he put it, he joined in "*in order to get to the joke before they did*". The practical jokes seemed to draw him as the target. A cup-cake was held over the claimant's head whilst he was on a telephone call to a customer only to be smashed into his head as the call ended. Soon after he was first employed the racial harassment started. I find he had brought Asian flatbread food for lunch which he had eaten using his fingers. He had been filmed doing so by colleagues who shared it with comments about how disgusting it was. This "in-joke" of how disgusting it was for Mr Rathod to be eating with his fingers was regularly repeated, even if he ate western take-away food for his lunch and even if the other white members of staff were also inevitably eating the same food with their hands. I find thereafter he was repeatedly referred to as "Chapati and Poppadum" or the members of the team would simply say those words in close proximity to him or message it to him.

5.10 Despite this sort of treatment, I find the idea of belonging remained important to him for some time and he would often attend at the workplace on his alternate Saturday off with his young son and would sometimes bring in MacDonalds' food for the sales staff working. On one such occasion, one of the sales team took a banana from a fruit bowl and threw it on the floor at his son saying "I want to see how he reacts", before laughing intensely.

5.11 I can be confident in reaching these findings of fact as the essence, and many of the specifics, were accepted by the employer in what would eventually become the grievance lodged by Mr Rathod in 2020. I return to that later. For completeness, however, it seems to me that the few matters that that grievance investigation was not able to reach a conclusion on did, on balance, also happen. They related to the generic reference to anyone of an apparent Asian origin, including customers, as "Rajputs". Mr Rathod was himself questioned about this term and the Indian caste system. Whenever two Asians arrived in the same vehicle, that vehicle was referred to as a bus arriving. The culture evolving was no doubt viewed as innocent humour by those using it, and Mr Rathod's initial engagement with it will only have reinforced that view.

5.12 On 23 March 2020, the dealership faced the first national lockdown and the staff were placed on furlough leave. On the evening of 23 March, Mr Rathod set up a new WhatsApp group entitled "Porsche Sutton Coldfield", although at some time its name was changed to "Sutton Sales Team". There were other WhatsApp groups amongst the workforce for different purposes and involving different employees. Some related to social or training events. This group was specifically targeted at the all-male sales team only. Mr Rathod introduced it with the post "*Just thought I'd set this group up whilst covid 19 is around*". It included the two managers. It has been described as a "work" WhatsApp group. I do not entirely accept that description without some qualification. It was social in nature and purpose and created in anticipation of the sales team being absent from work on furlough leave. The intention was to keep in touch over lockdown.

Whether intended or not, it must have been clear it would provide a medium for their particular style of interaction to continue and, in that respect, it is no accident that it did not include the wider workforce, especially the female members of staff. The contention that this was a work WhatsApp group was premised principally on the basis that the messages included questions about work matters. I reject that as a fact. I have not been taken to any evidence before the employer or otherwise showing any messages posted on the WhatsApp group that related to work matters.

5.13 The better point is that the group did, for some time at least, have "Porsche Sutton Coldfield" in its title and was made up entirely of employees of that franchise's sales team. Some of them were referred to with a pseudonym including "Porsche". (I assume as a result of how O had stored their numbers in his own contact list). Whilst WhatsApp is an app providing encrypted messages within a closed group, anyone gaining physical access to a member's phone, or being shown the posts, would be likely to identify the association of the participants with this employer. To some extent, I also accept the respondent's analogy of this being a digital version of an out of hours works social event is not entirely inappropriate insofar as how the conduct of employees might reflect on the employer, although that analogous event would have had to have been held in private. The messages are not, however, a public posting to a wider public, or even the world at large, as might apply with truly social media platforms such as Twitter or Facebook.

5.14 I find that although there was the group through which all members of the sales team would see all other members' posts, it is also possible for WhatsApp user to use the app to message with another WhatsApp user on an individual, 1:1 basis. Such 1:1 messages work very much as if they were SMS text messages. The screen shots for two parties exchanging messages on the group would appear almost identically as the same two parties exchanging messages on a 1:1 basis. The respondent's contention that this was a work group is itself based on a misconception that all the messages that it would later consider in the disciplinary were from the group. They were not. Most were these individual 1:1 exchanges between Mr Rathod and O. I find that the employer did not appreciate that distinction at the time.

5.15 Not all of the messages exchanged either in the group or in 1:1 exchanges have been put before me. Indeed, only a few have been disclosed to the employer. I return to the content of what was before the employer. For present purposes it is sufficient to say the extreme laddish behaviour that occurred in this sales team when physically present in the workplace continued in its same misogynistic, racist and homophobic tones albeit now remotely through the medium of WhatsApp messaging.

5.16 The claimant returned to work after around 3 months of furlough leave. Some in the sales team had returned already to work on aftersales services.

5.17 Many of the incidents of the laddish behaviour had been taking place before lockdown. Some of the more serious incidents described above took place on the return, particularly some graphic comments about females and the incident with Mr Rathod's son and the banana. Mr Rathod may have been trying to integrate into this team so as not to be the outsider, but I find around this time it began to affect him physically and mentally. Furlough may have been the opportunity for him to reflect on it. He spoke with one of the managers about what he had experienced. He said he was sick of the banter, particularly in respect of that between him and O, and that it was making him feel uncomfortable. The manager's response was little more than dismissive which may itself have reflected the fact that his perception was that Mr Rathod gave as good as he got. His contribution was to advise Mr Rathod to speak to them to tell them how he felt. I find when he was approached again he later realised the situation was more serious but his contribution was simply suggest Mr Rathod either speak to them or make it formal.

5.18 Mr Rathod went off sick with stress, anxiety and depression from September. He attributes his absence to the situation in the workplace with his colleagues and that was what prompted him to raise his grievance.

5.19 On 27 September 2020, the Claimant submitted a grievance alleging that various colleagues had racially harassed him at work, including specific allegations against O and other complaints about his consequential treatment. He set out the incidents I have referred to above and also the implication this culture had had on his position in the sales team. He said it was only ever him that seemed to have to chase his wages and commission and that his sales were not correctly credited to him.

5.20 Ms Nix, the franchise finance leader, investigated the grievance on behalf of the Respondent. She interviewed one of the managers and O. The outcome was that she partially upheld his complaints. The phrase “partially upheld” is often seen in grievance outcomes and often masks what, in reality, amounts to the complaint being dismissed. This is different. I find Ms Nix not only took these allegations seriously but the evidence she gained from the interviews led her to positively find in favour of a number of the claimant's discrete allegations, including the particularly serious ones. The use of the word “partially” relates to the fact that for some of the discrete allegations made, she was unable to reach a conclusion one way or another. None of the allegations concerning the conduct of others was specifically rejected but she did reject the contention that Mr Rathod had asked O repeatedly for the comments to stop. I return to the reasoning for this below.

5.21 Despite the generally positive response, the claimant raised an appeal. The principal reason given in his evidence was because during his initial exploratory discussions with HR about raising what would become his grievance, he had been led

to believe that an independent investigator would be appointed and the entire culture of the sales workforce examined. On reflection, I think he may have given that answer confusing the two appeals in this case. He certainly would raise this point in respect of his dismissal appeal. The grievance appeal was simply related to aspects of his sales and commission that had been overlooked originally. In that context, my initial concern that Miss Nix appears to have conducted the appeal of her own decision on what appears to have been a paper review disappears. I need say no more about that part of the chronology

5.22 Two things emerged from the original grievance process and outcome. The first is that O subsequently found he was facing serious disciplinary allegations of "*Racial harassment directed towards [the claimant] and professional conduct in the workplace*" for which it was made clear could lead to dismissal. I presume that latter allegation was intended to mean *un*professional or professional *mis*conduct. It never came to a disciplinary decision because O promptly resigned.

5.23 The second matter is that during the investigation interview O had defended his conduct on the basis that he and Mr Rathod were friends, that they had a good working relationship and that Mr Rathod behaved in the same way. After having accepted the essence, if not the detail, of most of the alleged acts towards Mr Rathod. O was asked why he did not see the effect it was having on him. The answer again drew on the context of their positive relationship which in turn drew on examples within the messages they exchanged. He was asked to share any messages with the claimant on this point.

5.24 The context of O's response is crucial to the facts of this case. At no point was he saying he was offended or uncomfortable with the posts or messages posted by Mr Rathod. At no point was he alleging Mr Rathod had harassed him either intentionally or otherwise. Viewing the events from O's perspective, he was questioning why he should find himself facing allegations of offending a friend who had appeared throughout to be actively going along with it and contributing in like terms.

5.25 Following that interview, on 17 November 2020 O sent some selected screen shots from his phone to Ms Nix. They are summarised by Mr Mason who would in due course conduct the claimant's disciplinary hearing. I have considered whether I need to spell out the content in this public judgment and have decided I must for my decision to be seen in its full context. I adopt his description of most of the screen shots provided set out in the following list but make clear the finding as to whether the image was a 1:1 message or part of the group chat, or neither is mine not the employers. On that distinction, Mr Mason accepted he could not tell one from the other and, I find, regarded them all as being part of a group chat.

a) [93-95] still images of a video taken by O when on a night out with Mr Rathod depicting him appearing to prepare to take illicit substances in a nightclub. Not sent by Whatsapp.

b) [94] a 1:1 message in which Mr Rathod asks O "*fam! Are you bollock deep yet?*" and then goes on to say "*two in the gash and two in the arse*".

c) [97-98] a serious of 1:1 messages depicting Mr photos of O with the message from Mr Rathod that he had a "*wonky eye*", and other exchanges

d) [99] a 1:1 message between Mr Rathod and O in which O says "*need you to sort an invoice for me this morning if you can*?" Mr Rathod replies "*how about you lick my dick?*"

e) [100] a 1:1 message between Mr Rathod and O. O asks "*what do you want me to tell you?*" Mr Rathod replies "*tell me you want to lick my dick*"

f) [102] a 1:1 message in which O asks Mr Rathod what he has had for lunch. Mr Rathod replies "*Chapati and poppadoms*"

g) [103] a group message showing a screenshot of a Facebook post forwarded by Mr Rathod depicting a Sikh couple with a new born baby with the words "*Doctor: what would you like to name him? Me: Social Distant Singh*".

h) [104] a group message showing a cartoon shared by Mr Rathod of a female sat on a wooden puppet's head with the caption "*lie to me Pinocchio. Tell me villa are staying up*".

i) [105] a group message shared by Mr Rathod depicting Boris Johnson holding saying "*do what you like*!" and "*I don't give a shit. I'll be at chequers snorting lines of [coke] off Priti Patel's tits*"

j) [106] A group message shared by Mr Rathod containing the words "*this fucking lockdown is getting to me now... when I see a nurse in a porno I stand up and clap before I masturbate!!*"

k) [107] A group message shared by Mr Rathod containing an image of a male with a black eye with the words "*Doctor: how did this happen? Patient: I was banging my neighbour over her kitchen table when we heard the front door open. She said, "It's my husband! Quick, try the back door!" Thinking back, I really should have ran but you don't get offers like that everyday.*"

l) [108] A group message from Mr Rathod containing an image of a female lying down with no top on, with what appears to be semen on her face, with the words "*can't talk now mum I'm at a baby shower*".

m) [109] a group message from Mr Rathod is an image of a female's lower body wearing underwear with the words "*THE VAGINA. The best engine in the world is the vagina. It can be started with one finger. It is self-lubricating. It takes any size piston, and it changes its own oil every four weeks. It is only a pity that the management system is so fucking temperamental*."

n) [113] a group message from Mr Rathod showing an edited image depicting a naked black male crouching on top of a statue podium with the caption "*finally Bristol will have a statue that celebrates black history*".

5.26 Those screen shots were sent by O attached to an email. The email opened with:-

> ***As discussed yesterday I have felt the need to highlight to you the attached screenshots of conversations between myself and Shay. You will see various screenshots of Shay speaking as normal with me and also being very inappropriate.***

5.27 He goes on to explain the first series of images from a video of the claimant in a nightclub. He explains that the "memes" were sent by the claimant to a work group chat and finally seeks to attribute the claimant's recent sickness absence and state of mind to an incident earlier that summer where he had been arrested. There is no doubt he describes Mr Rathod's conduct as "inappropriate". Mr Mason described it in evidence as being done so in a retaliatory sense. I find it was done an exculpatory sense. He was suggesting that these were "normal" exchanges between the two such that what he is accused of couldn't possibly amount to harassment. In that respect, Mr Mason did not seek to describe all of the screen shots in the way he had the crude or offensive ones. One in particular sequence provided by O [110-111] appears to have been shared by O to demonstrate the normality of their relationship and friendship. It is a 1:1 message, not a group one, in which after the availability of a stock vehicle is discussed they exchange pleasantries at a time the two were obviously not in work together. The exchange goes - "How are you"; "All good, you?"; "All good my end"; "do you miss me?": "Obv".

5.28 The formal grievance outcome was sent to Mr Rathod in a letter dated 19 November. Whilst that sets out the positive findings in response to Mr Rathod's allegations as I have set out above already, it raises aspects of Mr Rathod's own conduct. In disagreeing with his contention that on he had repeatedly asked for these comments to stop, Ms Nix says

> ***After investigating this point, and after Oliver stated you actually engaged in this sort of conversation yourself, I am unable to agree with your point. Furthermore I am receipt of some messages between yourself and Oliver to confirm his side of the events. Given the gravity of the messages I have since been Privy to, I have no alternative other than to also***

investigate these points with you I will deal with that investigation separately, but will be inviting you to an investigation meeting.

5.29 On 25 November 2020, he was invited to an investigation meeting to discuss the messages which took place on 3 December 2020. During that meeting, he accepted that he had sent the relevant messages to O, he accepted some could be seen as racist or sexist. He explained how everyone did it. It was put to him that his own conduct did not look like someone who would be offended by things with a sexual connotation. He explained how the phrase "Lick my dick" was an expression that was used by "literally everyone in the sales department".

5.30 During the investigation, Mr Rathod explained his experience in the sales team and played to Ms Nix recordings that had been sent to him with offensive and racists content and again referencing "chapati and poppadums".

5.31 In responding to the situation generally, Mr Rathod posed his own questions and answered in these terms: -

> ***"Have I said those things, have I sent those pictures? Then yes. [Am I] trying to justify it? The only thing I can say is when you are in that environment, you either go against it or with it. I never wanted to go down this route. Taking it to management level etc. So you tend to go along with it or try to be part of the social bubble there. The click. So yes when he is shouting popadom and chapati, I used to shout it back to him hoping it would disappear one day.***
>
> ***"… I was trying to be accepted. So I went along with the things. Do I find them offensive, no, but I could imagine other people could. I get that. I understand there is a line, and I understand how some people might find these offensive. Were they done out of maliciousness? No. The voice recordings and other things of sexual nature etc, we work in a dominantly male environment. Did we all say things? Then yeah we did. I just didn't like the ones when it came to young kids."***

5.32 Mr Rathod named certain other individuals during the meeting making it clear that the entirety of the sales team were all involved in the same level of conduct and behaviour. Ms Nix asked if he agreed that "*some of the messages may cause offence? For example I am offended by some of these*". He agreed. He accepted his conduct and conceded he could not excuse himself but that it was not intended in an offensive way.

5.33 I find Ms Nix reflected on what was before her. She clearly had an issue with the entire sales team and I find there was sufficient information before her for her to reasonably commence an investigation with those other employees and, perhaps particularly, the sales managers. I find Ms Nix did not undertake any further investigation. Neither she nor anyone else attempted to speak again with O.

5.34 On 15 December 2020, the Respondent invited the Claimant to attend a disciplinary hearing. That letter set out the allegations in these terms: -

- ***Racial harassment directed toward O***
- ***Sexual harassment directed toward O***

5.35 The letter enclosed the supporting documentation which I find amounted to the notes of her investigation meeting with Mr Rathod and the screenshots sent to her by O. Mr Rathod was told that the potential outcome of the meeting was dismissal and reminded him of his rights to representation.

5.36 Mr Rathod's disciplinary hearing was postponed and eventually came before Mr Mason on 30th December 2020. Mr Mason had before him the screen shots, and the investigation notes of the meeting with Mr Rathod. I find he did not have anything concerning the claimant's original grievance which had prompted O's disclosure. I find the list of potentially relevant material he did not have also included any of the notes of the grievance investigation meetings to explain how these screenshots came to be disclosed nor did he have the covering email under which the screen shots were sent. At that hearing, the Claimant again accepted that he had sent the messages, repeated his position on the ubiquitous use of the phrase "lick my dick"; and, again, readily accepted that his messages could be deemed as offensive. He described all the crude phrases and comments he had made as not being the language he would ordinarily use and he had not "brought it to the company", it was something everyone else used that he had picked up. He had engaged in this type of behaviour "to participate in being accepted" and "because I wanted to keep my job, to be part of that group. I had no choice". I find Mr Mason essentially accepted in the hearing that the phrase "Lick my dick" was a common phrase used amongst the sales team which is reinforced by the fact he accepted he took no steps to investigate that situation. Instead, he focused on challenging the claimant as to whether it was acceptable or not even if everyone else was using it, which Mr Rathod accepted it was not. The meeting explored each of the images and the exchanges continued in the same way, Mr Rathod accepted it is not appropriate, could be offensive but expressing how it was commonplace amongst all and that managers were aware and participated. The essential issues in his grievance were also explored but Mr Mason viewed that as being in a similar context to the messages before him, despite not seeing the claimant's grievance or the investigation into it. In evidence before me, Mr Mason maintained his view that the incident with Mr Rathod's son being thrown a banana was in the same league as Mr Rathod's own conduct as "you cannot 'league' racism". According to Mr Mason, Mr Rathod's racism was found in the pictures of the Sikh family and the black male on the plinth but, curiously, also in his message to O in which he had answered the question about what he had for lunch with "chapati and poppadom". That was said to be not only racist but

racist toward O. I find Mr Mason interpreted exchanges in the messages as indicating a lack of reciprocity on O's part and in some cases interpreting that he had been offended which the messages did not reasonably convey.

5.37 I find, as Mr Mason accepted, that he had no evidence of the views or feelings of O on the messages and no evidence on which to form a view about how O viewed the material nor that there had been a breach of the dignity at work policy. He conceded that he didn't think the dignity at work policy covered private social media use. I find he did have a sense that O's disclosure was retaliatory in the face of the grievance against him and in evidence accepted that O was not saying Mr Rathod's conduct had had the purpose or effect set out in the dignity at work policy's definition of harassment. I find there was evidence that the messages were mutually exchanged and Mr Mason would say as much in his reasoning. In his evidence, Mr Mason seemed to move towards a position whereby the person who had been harassed was Ms Nix as she had found it offensive when investigating it.

5.38 His decision was communicated on the day. In deciding that the disciplinary charges of racial and sexual harassment toward O were made out, and imposing the sanction of summary dismissal, he said (as it is recorded): -

> ***Personally I honestly believe this is banter that has got out of hand for whatever reason. Something I alluded to earlier, and as I said earlier, banter is okay until it's not okay,. Now you have felt aggrieved in that situation which has led us to here through O in the first instance, I cannot get away from the fact that O has sent and said things to you and believe some of it what confirmed by O but by the same token you have done it back in the same vain. Referring back to our dignity at work policy you have contravened several points in here, factually. When it comes to harassment of a sexual and racial nature. As a company we have zero tolerance towards it. My view and my conclusion is I have no alternative to dismiss you from the business today.***

5.39 I find he did not give any consideration to whether a lesser sanction might have been appropriate in the wider circumstances of the original grievance which he knew about in abstract and his knowledge that there was a widespread issue in the entire sales team. His approach in this regard was expressed in the hearing with the comment "*that is not my place, as disciplinary officer I am here to deal with the case in hand…with yourself*". It forms an insight to what I find was his interpretation of the meaning of zero-tolerance. That is anyone sending this type of content in messages should be dismissed, whatever the circumstances and irrespective of the mitigation.

5.40 The dismissal decision was confirmed in writing as was the notice of the claimant's right to appeal against the decision. The outcome letter changed the wording of the allegations to "*Sexual and racial harassment by way of text messages and memes directly contravening our Dignity at work Policy*". Mr Mason confirmed that this

was stylistic only, that the original charges stood and that he had made his decision on the original charges of “sexual and racial harassment ***toward O***”.

5.41 Mr Rathod submitted his appeal on 11 January 2021.

5.42 Before dealing with the appeal, I need to record the fate of the rest of the sales team. There was clearly a glaring issue in need of addressing in view of the evidence that had emerged from Mr Rathod’s original grievance and later disciplinary. If the mantra of zero-tolerance is to be accepted, one might feel entitled to expect there to be evidence of that investigation and further disciplinary action. Ms Nix herself seemed to ackowldge there was a much wider problem for the respondent in the sales team, yet the respondent has adduced no evidence of what actions it took in respect of that. The most that can be said arose in passing during cross examination. It seems at some point, and the witnesses were not clear, the Sutton Coldfield sales team was subject to something described as a “re-brief”. I have no evidence of the form of content of that re-brief and Mr Partington could not say anything about it. The employer had a solid basis for at least suspecting, if not evidence to believe, that others had conducted themselves in the same way as O and Mr Rathod. It necessarily follows that a number of individuals conducting themselves in a like manner faced no disciplinary action at all including the two sales managers. I do acknowledge that Mr Rathod has declined to share any further posts but I do not accept the respondent’s position that that meant it had no basis to act still less did it mean it could ignore those facts when assessing the individual case before it. There is simply no evidence of any wider investigation or action. The significance engages with the case in two respects. First and foremost it has relevance to Mr Rathod’s own circumstances. Secondly, it causes me to find that the respondent’s assertion of a “zero tolerance” to this type of conduct is simply not in fact the case. This was referred to explicitly by Mr Mason and has featured repeatedly in the way the case has been put before me but it simply is not borne out by the actions in response to the evidence put before it.

5.43 The Claimant’s appeal was put on two grounds. That the impact of his own experience of racial abuse had hit him hard. That he did not believe a comprehensive investigation had been undertaken and that it had not been done correctly by an external investigator which would have shown the context of the memes.

5.44 Mr Partington conducted the appeal on 5 February 2021. I have not seen any notes of that appeal. The meeting was audio recorded. No transcript of that recording have been prepared. Mr Johnstone had access to the audio recording yesterday and has been able to listen to it. I have not heard it. My understanding of what happened I limited to the areas of each parties’ evidence.

5.45 I find the appeal was limited to considering the two areas that Mr Rathod raised and took the form of a limited review of the challenges. It was not a rehearing of the allegations or a reconsideration to all the evidence. Mr Partington again did not have before him the original grievance or grievance investigation. Despite this Mr Partington formed a view about the charges themselves including being able to conclude that O's reference to Mr Rathod's use of inappropriate content therefore meant O was offended by it in order to establish the necessary harassment under the dignity at work policy. Despite this, his conclusion was that he must dismiss the appeal because it was not necessary that O had been targeted as the conduct was itself a breach of the respondent's policies. Mr Partington concluded his evidence with the view that even if the dismissal decision was not correct, there were other breaches that would lead to his dismissal.

5.46 It is during the appeal that Mr Rathod declines the invitation to provide details of the other messages shared amongst the sales team so as not to drop anyone in it. The appeal was dismissed. The decision to summarily dismiss the Claimant stood.

6. The law

6.1 The law of unfair dismissal is well settled. Section 98 of the **Employment Rights Act 1996** ("the Act") states, so far as relevant:

> ***"(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 sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.***
>
> ***(2) A reason falls within this subsection if it—***
>
> > ***(b) relates to the conduct of the employee,***
>
> ***(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer)—***
>
> > ***(a) depends on whether in the circumstances (including the size and administrative resources of the 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 **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439** set out the approach to adopt in answering the question posed by section 98(4) of the Act is as follows:

> ***"(1) the starting point should always be the words of section 57(3) themselves:***

> ***(2) in applying the section an industrial tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the industrial tribunal) consider the dismissal to be fair;***
>
> ***(3) in judging the reasonableness of the employer's conduct an industrial tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;***
>
> ***(4) in many (though not all) cases there is a 'band of reasonable responses' to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;***
>
> ***(5) the function of the industrial tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is far; if the dismissal falls outside the band it is unfair."***

6.3 In **Post Office v Foley [2000] IRLR 827** Mummery LJ at paragraph 53 commenting on the approach set out in **Iceland Foods** for the ET to adopt, observed:

> ***"…that process must always be conducted by reference to the objective standards of the hypothetical reasonable employer which are imported by the statutory references to 'reasonably or unreasonably' and not by reference to their own subjective views of what they would in fact have done as an employer in the same circumstances. In other words, although the members of the tribunal can substitute their decision for that of the employer, that decision must not be reached by a process of substituting themselves for the employer and forming an opinion of what they would have done had they been the employer, which they were not."***

6.4 The hypothetical reasonable employer must be engaged in the same field as the employer (see **Siraj-Eldin v Campbell, Middleton Burness and Dickson [1989] IRLR 208)**

6.5 The approach to be adopted by an ET where an employee is dismissed on the ground that the employer had entertained a suspicion or belief of misconduct by the employee was explained by this Tribunal (Arnold J) in **British Home Stores Ltd v Burchell [1978] IRLR 314**:

> ***"What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case."***

6.6 In **Sainsbury's Supermarkets Ltd v Mr P J Hitt [2002] EWCA Civ 1588** Mummery LJ made clear that it is necessary to apply the objective standards of the

reasonable employer to all aspects of the question whether the employee had been fairly and reasonably dismissed (para 29). At paragraph 30 Mummery LJ stated:

> ***"… the range of reasonable responses test fo (or, to put it another way, the need to apply the objective standards of the reasonable employer) apply as much to the question of whether the investigation into the suspected misconduct was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss for the conduct reason." (See also para 34).***

6.7 The respondent referred me to **Game Retail Ltd v Laws UKEAT/0188/14/DA**. This is a case concerning offensive posts on social media, twitter to be precise. It is a decision on the facts of the particular case and does not lay down any general guidance. Its approach to social media, privacy and the degree of offense potentially arising from the nature of the content posted provides some general steer as to factors that might be relevant when assessing the band of reasonable responses.

6.8 On sanction, the claimant referenced **Brito-Babapulle v Ealing Hospital NHS Trust UKEAT/0358/12/BA** for the proposition that a finding of gross misconduct should not automatically be equated with a conclusion that dismissal was within the range of reasonable responses.

6.9 The claim of breach of contract invokes a different test, albeit usually covering much of the same factual ground. The difference can be summarised thus: for unfair dismissal I am assessing the respondent's approach to the evidence and how it reached its decision; for breach of contract I am performing my own assessment of the evidence to reach my own decision on the relevant test. The test of what amounts to conduct entitling the employer to dismiss summarily has been variously stated in the authorities, but consistently so : -

a) "*the question must be — if summary dismissal is claimed to be justifiable — whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service.*" (**Laws v London Chronicle** **[1959] 1 WLR 698**, pages 700-701)

b) It must be of a "*grave and weighty character*" and "*seriously inconsistent – incompatible – with his duty as the manager in the business in which he was engaged*" (**Neary v Dean of Westminster [1999] IRLR 288**, paragraph 20),

c) "*of such a grave and weighty character as to amount to a breach of the confidential relationship between employer and employee, such as would render the employee unfit for continuance in the employer's employment*" (**Ardron v Sussex Partnership NHS Foundation Trust [2019] IRLR 233** at paragraph 78).

7. Discussion and Conclusions

Unfair dismissal

7.1 The respondent caries the burden of proving the reason for dismissal. In the light of Mr Mason's evidence and the written documentation, the reason relied on appears to be that Mr Rathod's messages amounted to "sexual and racial harassment toward Mr O". This is a case where I have had to give consideration to whether that is the real reason in fact. That question arises from the accepted absence of evidence of the necessary intent or result of the conduct in question so as to amount to racial or sexual harassment and the repeated hints from both respondent's witnesses either that the mere content alone was a breach of the policy or that if the harassment allegation was wrong there were other breaches.

7.2 Each Counsel proceeded on the basis that that reason was the factual reason for dismissal and there are no alternative reasons contended for. I have decided that I should not interfere with that position as it is a question which carries a legal burden and is essentially not an issue in dispute between the parties. In any event, there is certainly evidence to properly reach that conclusion. It is, after all, the original allegation and the evidence of Mr Mason confirms it is what he had in mind when he made that decision. On that basis I accept the factual reason for dismissal was racial and sexual harassment toward O as stated. That is the genuine belief and is clearly a matter which is amounts to conduct to establish a potentially fair reason to dismiss with section 98(1) of the 1996 Act.

7.3 I turn then to section 98(4) in respect of which the legal burden is neutral. Each party merely has an evidential burden to advance the particular case they argue for.

7.4 The first aspect is the procedure adopted to reach the decision. There is no challenge to the process by the claimant. I can see that Mr Rathod was invited to an investigation meeting knowing the issues he would be required to explain. He was similarly invited to a disciplinary hearing with notice of the issues and supplied with the evidence to be relied on. He had a right to be represented. He was able to put his response. A decision was made and communicated in writing together with a right of appeal which was exercised. There is nothing in the procedure alone which takes this dismissal outside the range of reasonable responses.

7.5 I then turn to substantive matters. In a conduct case such as this, the general test is largely informed by the remaining two stages of the test set down in **Burchell**. Whilst that general test is broad, by this stage of the analysis it has to be linked directly to the stated reason for dismissal. It is that factual reason therefore which determines the course by which the general test of reasonableness is navigated further.

7.6 Whilst distinct, the two remaining limbs of the **Burchell** test are very much intertwined. Was the evidence before Mr Mason such that it was reasonable for him to

hold the belief that O had been sexually and racially harassed by Mr Rathod's messages? I have no hesitation in answering that question in the negative. There was no basis for proceeding on allegations that there was any harassment of O. My reasons are: -

a) First and foremost, it was accepted that there was no evidence of either the necessary intent by Mr Rathod or effect on O in respect of the messages exchanged to amount to harassment. For the reasons that follow, no reasonable employer could infer O's use of the word "inappropriate" to amount to him being offended. In any event, that word, found in his covering email, was not in fact before Mr Mason. Nothing in Mr Partington's appeal improves the state of investigation or evidence before the employer to remedy the absence of this essential piece of evidence.

b) The focus for Mr Mason and Mr Partington was on the messages themselves, and their own disapprobation of the content. It was not the context or circumstances in which they were exchanged or their consequences on the recipient. Even if there was a prima facie case of harassment, I do not accept that any reasonable employer would have excluded that wider context. That included the relevance of Mr Rathod's original grievance complaint; the outcome of that grievance complaint; the circumstances in which O came to disclose the content of the messages in defence of his own charges of harassment; and the culture of the sales team itself manifesting in the physical workplace and permitted to exist by the local management.

c) Much of that wider context was known to the employer but I am not satisfied that the hypothetical reasonable employer would act reasonably in keeping the detail from Mr Mason when he came to reach his decision. Moreover, some aspects of that wider context were sufficiently known to Mr Mason for him to appreciate their significance and to make inquiry of it himself. He certainly had sufficient direct understanding of the culture in certain respects, such as the prevalence of the phrase "lick my dick". I am not satisfied it would have been open to the reasonable employer to dismiss such factors, particularly where reasonably investigating the basis of O's position was so central to an allegation Mr Rathod had been harassed.

d) Once the reasonable employer had before it a reasonable understanding of the context, other factors take on greater significance and the failure to have regard to those factors would itself fall outside the range of reasonable responses. One is the fact of the claimant being a victim of harassment throughout his employment. Another is the extent to which his conduct was an attempt to confirm to the group norm. Another is that this was a closed group and that many of the

messages are 1:1 messages, the totality of which show no offence was intended or taken.

7.7 I have also considered whether there is evidence of disparity of treatment in this case as between the claimant and the other members of the sales team. To have an effect of the general test of fairness it must arise out of the same incident or otherwise be truly comparable circumstances as set out in **Hadjiouannou v Coral Casinos [1981] IRLR 352**. The extreme variance between the claimant's dismissal and the nebulous *"re-brief"* that the rest of the sales team received is stark. It is particularly so where members that team were themselves part of the overt racial harassment that the claimant suffered. However, three factors cause me to step back from such a conclusion. First, it is not argued on behalf of the claimant. Secondly, the claimant's own position in not "dropping others in it" has meant detailed evidence necessary to conclude the point in respect of identified individuals is not before me. Thirdly, the variance between his treatment and their treatment is already reflected in the unfairness in the respondent's failure to investigate and consider the wider context of the alleged conduct.

7.8 I have also considered the role the "zero-tolerance" approach has had on the fairness. Zero tolerance is a phrase adopted to reinforce the importance of the policy objectives in question. However, it is important that a rigid application does not undermine the fairness of any process under it so that it might lead to injustice. Zero tolerance should not be used as a means to vary the standard of what is a reasonable or to justify ignoring genuine mitigation or other relevant factors. Zero tolerance is absolute and its force is lost the moment the policy is not enforced. In this case there are a number of aspects where it may well be that the concept of zero-tolerance has clouded the respondent's approach towards Mr Rathod and it has lost sight of what it is actually alleging he had done wrong. Further, the force has been undermined by its light response to the issues in the wider sales team.

7.9 Finally, I have considered the respondent's submissions in respect of the application of **Game Retail** and have concluded it is of limited assistance. First this is not a social media case but involves closed private circulation or 1:1 messages. Whilst it is not impossible for the messages to be viewed outside the intended recipient(s) that is not likely without deliberate disclosure. That closed circulation included willing individuals, all of whom contributed in similar terms. There is no complaint about the content other than the claimant himself and his complaint is focused on conduct in the workplace of a different character. O's purpose for disclosing the messages arises in the context of an argument that his own actions should not be treated as harassment. Perhaps the most significant factor is that these posts are a digital version of the sort of conduct and behaviour that for some time has characterised the interaction in the physical workplace under the noses of the sales managers who have, at best,

acquiesced in it and, at worst, contributed to it. Finally, there is no relevant policy statement in existence concerning employees conduct in the nature of this case beyond the general thrust of the dignity at work policy. There is no expression of the employer's expectations for conduct in the workplace that might be found in a social media policy, a computer misuse policy, or other such statement of standards of conduct.

7.10 I have accepted the Dignity at Work policy does provide some level of generalised indication of expected conduct insofar as employees are required to reflect on how others might perceive their conduct, even where it is thought to be a joke. I am satisfied that if there had been intent or effect caused by the messages they obviously could amount to breach of the policy.

Breach of contract

7.11 Clause 12.1 of the claimant's contact of employment entitled him to receive notice of termination reflecting the statutory minimum. In his case 2 weeks. Clause 12.3 entitled the employer to terminate without notice "in the event of gross misconduct".

7.12 I am not limited to the allegations made by the employer in the actual dismissal. It can rely on any conduct occurring before the summary dismissal which would have justified a summary dismissal.

7.13 There were hints that other matters might be in issue, including the reference to Mr Rathod's arrest but that has not been argued. For this claim, and having already rejected the existence of evidence establishing harassment of another, the focus is limited to the content of the messages themselves and the extent to which an employer can censure private exchanges.

7.14 I start with the content itself. I must apply the relevant test to this employment setting. That is a setting where this type of conduct had been persistent for some time and had not only been tolerated but participated in. In assessing that, in addition to my existing findings I can have regard to some of the additional messages posted on the group by others which were not before the employer at the time it reached its decision.

7.15 To call it a laddish culture is to give it a gentile label. It was crude and likely to cause offence. Mr Rathod's messages occupy varying positions on the spectrum of offensiveness. Some are not offensive at all. They were put before the employer in O's defence of him being alleged to have caused offence. Some are potentially offensive but arise directly from the workplace norm. I can see nothing about the claimant using the phrase "lick my dick" which could justify summary dismissal where, in this case, it is condoned in the workplace.

7.16 The next category includes crude sexual comments and memes and those with racial connotation. These take on a different character as they engage with protected characteristics and begin to raise the question as to whether reputational damage could be caused. That is especially so in respect of the final meme with a racial connotation and I have given particular consideration as to whether the underlying beliefs and values that it might suggest was held by those sharing that joke could themselves be sufficient to meet the threshold.

7.17 I have decided that in the particular circumstances of this case Mr Rathod's conduct does not amount to sufficient to justify summary dismissal. My reasons for stepping back from that conclusion are these.

a) The messages are a product of the culture he came into and which has been allowed to normalise without censure by the employer's lower management.

b) There is an absence of clear statements by the employer of the expected standards of behaviour or boundaries employees should observe in their private conduct and behaviour with each other.

c) The messages are sent either in private 1:1 communications or within a limited, closed group of individuals that, by their own previous conduct, Mr Rathod had reasonable basis for believing would welcome this type of content such as to take his conduct outside what limited role the Dignity at Work Policy has in setting employee behaviour.

d) The risk of reputational damage was limited. This is not a publication on a public platform and what risk might exist was no more than existed through members of the public becoming aware of the things said and done in the workplace itself by others and which the employer had acquiesced or condoned.

e) Mr Rathod's own experiences as a victim of harassment in the workplace and the mitigation in seeking to conform to a group norm to the extent he was ill.

7.18 None of that means to say that there is no legitimate basis for the employer engaging with this conduct within a disciplinary context. Indeed, the last point, in respect of Mr Rathod as a victim of harassment done in the name of "banter" illustrates the risk those employees take when they think the recipients are accepting of the conduct. That in itself provides legitimacy for an employer stepping in. But the totality of how this matter unfolds leads me to conclude the conduct does not meet the tests to justify summary dismissal.

8. Remedy

8.1 Remedy will be determined at a remedy hearing if not agreed.

8.2 The claimant is entitled to compensation for losses arising as a result of being dismissed in breach of contract. The claimant does not seek reinstatement or reengagement and is therefore also entitled to statutory compensation for unfair dismissal. In respect of that compensation, the parties have addressed me on the basis for any just and equitable adjustments to any losses that flow from the unfair dismissal and I deal with that here as a basis of any future remedy hearing and to inform any discussions the parties may have towards compromise.

8.3 The scope for adjustments arises under s.123(1) of the Act generally and, in respect if the conduct of the employee prior to dismissal, under section 122(2) and 123(6).

8.4 I begin with contributory conduct. Section 122(2) of Employment Rights Act 1996 provides: -

> ***"122(2) Where the tribunal considers that any conduct of the complainant before the dismissal….was such that it would be just and equitable to reduce …..the amount of the basic award to any extent, the tribunal shall reduce…that amount accordingly.***

8.5 Section 123(6) provides: -

> ***Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."***

8.6 The two sections are subtly different. The latter calls for a finding of causation which the former does not. Both involve a consideration of what it is just and equitable. In **Steen v ASP Packaging Ltd [2014] ICR 56** the EAT set out the following four stage approach to the questions posed by both sections: -

a) First, identify the conduct which is said to give rise to possible contributory fault;

b) Second, consider whether that conduct is blameworthy.

c) Third, the tribunal must ask for the purposes of section 123(6) if the conduct which it has identified and which it considers blameworthy caused or contributed to the dismissal to any extent. If it did not do so to any extent, there can be no reduction on the footing of section 123(6), no matter how blameworthy in other respects the tribunal might think the conduct to have been. If it did cause or contribute to the dismissal to any extent, then the tribunal moves to the next question,

d) Fourth, is to what extent the award should be reduced and to what extent it is just and equitable to reduce it. A separate question arises in respect of section 122 where the tribunal has to ask whether it is just and equitable to reduce the amount

of the basic award to any extent. It is very likely, but not inevitable, that what a tribunal concludes is a just and equitable basis for the reduction of the compensatory award will also have the same or a similar effect in respect of the basic award, but it does not have to do so.

8.7 As to what conduct can properly be characterised as culpable, this is encapsulated in the observations of Brandon LJ in **Nelson v BBC(No 2) [1979] IRLR 346**, at paragraph 44: -

> ***"It is necessary, however, to consider what is included in the concept of culpability or blameworthiness in this connection. The concept does not, in my view, necessarily involve any conduct of the complainant amounting to a breach of contract or a tort. It includes, no doubt, conduct of that kind. But it also includes conduct which, while not amounting to a breach of contract or a tort, is nevertheless perverse or foolish, or, if I may use the colloquialism, bloody minded."***

8.8 In **Steen**, the EAT also offered guidance on the assessment of whether the conduct was blameworthy and its relationship to the reason for dismissal: -

> ***It should be noted in answering this second question that in unfair dismissal cases the focus of a tribunal on questions of liability is on the employer's behaviour, centrally its reasons for dismissal. It does not matter if the employer dismissed an employee for something which the employee did not actually do, so long as the employer genuinely thought that he had done so. But the inquiry in respect of contributory fault is a different one. The question is not what the employer did. The focus is on what the employee did. It is not on the employer's assessment of how wrongful that act was; the answer depends on what the employee actually did or failed to do, which is a matter of fact for the employment tribunal to establish and which, once established, it is for the employment tribunal to evaluate. The tribunal is not constrained in the least when doing so by the employer's view of the wrongfulness of the conduct. It is the tribunal's view alone which matters.***

8.9 The first stage is to identify whether there was conduct which could potentially engage the concept of culpability. There clearly is. As I have already indicated, the fact that the totality of the situation meant I stepped back from a conclusion this justified summary dismissal did not mean there was not an issue that an employer could legitimately engage with in a disciplinary context. Mr Rathod had become part of what made up the errant culture in the sales team and was contributing to it. He accepted some of his comments and the memes he shared could be offensive to some. Many of the memes engage with protected characteristics and some touch on particularly sensitive social issues of currency. The fact of his position as a victim within the team and his attempts to conform as a reason why he conducted himself in this way may have some force in the later stages but is not relevant at this stage.

8.10 The second stage is whether that conduct is blameworthy. Again, mitigation to explain why the conduct happened, even where it is well made out, is not the same as

whether it is blameworthy. I am satisfied that there is blameworthy conduct. Mr Rathod's concessions that it could well be seen by others as offensive is enough to engage this. Some of the beliefs underlying one or two of the posts particularly engage a legitimate interest of the employer to step in to control this sort of conduct within its workforce, whether that is through concern about reputational damage or to manage its risk of claims of harassment.

8.11 The third stage is whether it caused or contributed to the dismissal. There is no dispute that the discovery of Mr Rathod's messages was the only reason he faced disciplinary action. Whilst I have identified a number of deficiencies within that dismissal and expressed my view under the breach of contract claim as to its force as abasis to summarily dismiss, I am satisfied the conduct clearly did contribute to the dismissal and substantially so.

8.12 Finally, there is the assessment of whether it is just and equitable to make an adjustment and in what degree. I have accepted Mr Rathod's explanation behind his attempts to conform to the errant culture as a form of defence. That is relevant to what is just an equitable and I therefore reject the respondent's contention that there should be a 100% reduction. However, what is just and equitable is a concept applicable to the dispute as a whole between both parties. His explanation and mitigation does not tip the balance so far as to make it just that there is no adjustment at all. The employer's legitimate interest in controlling this conduct has to be recognised. I set the figure at 50%. There is nothing in this analysis which leads me to differentiate between the reduction under 123(6) and that under 122(1) and the same figure will apply.

8.13 I then turn to the wider concept of justice and equity. What the parties referred to in shorthand as the "Polkey" principles derive from the case of **Polkey v A E Dayton Services Ltd [1988] ICR 142** which itself is based on the just and equitable principles of compensation in section 123(1). That provides: -

> ***Subject to the provisions of this section and sections 124, 124A and 126, 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 in so far as that loss is attributable to action taken by the employer.***

8.14 There can be various applications of the just and equitable principal in different circumstances. The narrow approach considers the prospects of whether this employer, acting fairly, could have fairly dismissed. In **Hill v Governing Body of Great Tey Primary School [2013] IRLR 274, EAT** the EAT explained the features of a 'Polkey' reduction as: -

> ***"First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have been dismissed, or certainty it would not) though***

> ***more usually will fall somewhere on a spectrum between the two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer would have done) … The Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand."***

8.15 A wider approach derived from s.123(1) requires consideration of the employment relationship as a whole and whether it would have continued in any event during the period for which losses are being considered or whether other factors may have independently brought the relationship to an end. The various elements of the test under 123(1) were brought together by the EAT in **Software 2000 Ltd v Andrews [2007] IRLR 568.** Although arising from the consequences of the then applicable dispute resolution procedures, it remains applicable to the general approach to assessing compensatory loss and explicitly requires consideration of how long the employee would have been employed but for the dismissal.

8.16 I start by recording the common ground between the parties that, but for this matter, the claimant's employment would have continued to today. I conclude that state of affairs would continue sufficiently into the foreseeable future for the prospect of it ending in any event to be taken out of consideration in any assessment of compensation.

8.17 I then turn to whether there was a basis on which this employer, and not the hypothetical reasonable employer, could have fairly dismissed the claimant.

8.18 This is a case where there clearly were reasons for the employer to be concerned about what it was discovering. I have already referred to the fact that it seems to have misdirected itself in its approach to Mr Rathod's disciplinary charges, apparently influenced by the application of the mantra of a zero-tolerance approach. However, it has to be the case that it did have a legitimate interest to protect and was entitled to approach this matter as a matter of potential misconduct. There clearly was a basis for focusing on the content itself and what that might mean in terms of managing its risk of allegations of harassment between employees and/or reputational damage.

8.19 On behalf of Mr Rathod, Mr Johnstone submitted that if I accept the breach of contract claim, as I have, I am bound to reject the contention for any just and equitable reduction assessing the chance the employer could fairly have dismissed. I do not agree for two reasons. First, the breach of contract claim is assessed on what evidence that has actually been adduced before me, in this case flowing from what actually happened. The just an equitable assessment of chance is different. One approach open to the employer within a fair process would have been to review the entirety of what had been happening amongst the entirety of the sales team. There has to be a

chance that such an investigation would have altered the overall picture which may have led to different conclusions on the culpability of Mr Rathod and, for that matter, O. Whilst it is possible that the respondent's view of Mr Rathod's culpability may have diminished, it also has to be the case that it could have increased. More particularly, the mitigating factors presently before me that formed part of the basis on which I concluded his actions fell short of the necessary conduct to entitle the employer to dismiss summarily, may have been undermined. There is already a flavour of that in the conclusion Ms Nix came to in rejecting his assertion that he had previously asked the conduct to stop. I am cautious of this having a significant effect on the chance the outcome would have been the same but I am not prepared to say there is no prospect that the employer could fairly have dismissed. I set the chance at 25%.

9. Remedy Summary

9.1 Mr Rathod is entitled to compensation of up to 2 week's pay in respect of the breach of contract claim less any mitigation.

9.2 For the unfair dismissal claim, Mr Rathod's will be entitled to 50% of the appropriate basic award. He will be entitled to 37.5% of the appropriate compensatory award (being 75% of 50%) to be assessed if not agreed.

9.3 For completeness, there does not appear to be a basis for any adjustment arising from compliance with the relevant ACAS code but as the hearing was limited to liability only, I leave any final conclusion on that to a later stage.

Employment Judge Clark

05 August 2021

Sent to the parties on:

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