EMPLOYMENT TRIBUNALS

Claimant
Mr Neil Tarry

Respondent

Niton UK Limited

Heard at: **Southampton (by VHS)** **On: 12 October 2021**

Before: **Employment Judge Dawson**

Appearances
For the claimant: Ms Step-Marsden, counsel
For the respondents: Mr Macdonald, counsel

REASONS

JUDGMENT having been sent to the parties 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:

Decision on Liability

Introduction and issues

1. By a claim form presented on the 26 July 2020, the claimant presented claims of unfair dismissal, breach of contract and for holiday pay. At the outset of this hearing the parties confirmed that the claims were those of unfair dismissal and breach of contract in respect of notice pay but the claimant explained that the claim of holiday pay was claimed as part of the compensatory award and "parasitic" on the unfair dismissal claim. Thus in this part of my judgment, I determine the claims of unfair dismissal and notice pay.

2. Except where otherwise stated, references to pages are references to pages in the "A" section of the hearing bundle. There appears to be no "B" section. I observe that the bundle did not comply with paragraph 24 of Presidential Guidance on Remote and In-Person Hearings. Whilst that failure has had no impact on the outcome of this hearing, it has made it more difficult for me to

navigate the electronic bundle. The parties should note, for future cases in which they are involved, that compliance with the Presidential Guidance is not optional.

3. Having said that, I pay tribute to the way in which both advocates have conducted this case on behalf of their clients. I was greatly assisted by the concise but comprehensive way in which they both cross-examined witnesses and presented their closing arguments.

4. The issues were identified at a hearing before Employment Judge Roper on 16 March 2021 and appear at page 58. It was agreed at the outset of this hearing that the questions of "Polkey" and contributory fault (issues 1.5 and 1.6) would be dealt with within the part of the hearing deciding liability.

5. I asked the respondent's counsel to clarify what the alleged the breaches of contract were which, it says, enabled the respondent to dismiss the claimant without notice. The respondent asserts that the breaches were behaving aggressively towards and/or harassing and/or threatening the claimant's former partner on 2 December 2018 and 7 June 2020, thereby causing her severe distress and fear for her safety and sending abusive messages on WhatsApp.

6. I was not referred to any specific contractual terms which would allow the respondent to dismiss the claimant without notice.

Application to Amend

7. The claimant, prior to the hearing, applied to amend his claim, to add a claim under section 38 Employment Act 2002. The respondent resisted that application. The application had not been determined by the time that this hearing started and, for reasons I gave orally, I granted permission for the claimant to add that claim. I determined that there was no real prejudice to the respondent in granting the amendment, having applied the principles set down in the overriding objective, the Presidential Guidance on General Case Management and in particular Guidance Note 1, *Selkent v Moore [1996] ICR 836, 843F* and Vaughan v Modality Partnership UKEAT/0147/20/BA. The respondent could easily deal with the point in evidence, whereas if the claimant was precluded from bringing the claim, that would be to his prejudice. I also noted that until the case of *Levy v 34 & Co UKEAT/0033/20/DA*, it was normal practice to determine those claims without the matter being pleaded. The respondent had been on notice of the point since the claimant's application on 12 September 2021.

Application of Article 8 of European Convention on Human Rights

8. I raised with the parties, at the outset, my concern that the claimant's former partner's article 8 rights could potentially be impacted by the decisions in this case. In particular allegations have been made about her giving the claimant chlamydia and her boyfriend/partner using prostitutes. It is apparent from the evidence that she has children.

9. Neither party objected to a rule 50 order being made but, having regard to the lack of press attending the hearing, it was agreed that the matter would be dealt

with by me only referring to the former partner by initials in this judgement. I refer to her as ZZ, which letters do not correspond to her name.

10. It seemed to me that way forward was the appropriate balance between the need to conduct a fair and public hearing under article 6 and ZZ's rights under article 8. If ZZ becomes aware of this judgment and seeks any further orders then she may apply to the tribunal accordingly.

<u>Findings of Fact</u>

11. The claimant was employed by the respondent from 10 May 2010, most recently as an Installation Engineer. According to the ET3 the respondent employs 16 people in Great Britain.

12. At the time in question, all of the respondent's employees were on furlough.

13. On 7 June 2020 at 11 AM, Mr Sibbald, managing director of the respondent, received a call from ZZ. She also worked for the respondent as a financial controller. It is apparent that she had a close relationship with Mr Sibbald. He described how, as financial controller, she was very well trusted and he had an hourly meeting with her every morning. He states that she had fulfilled the role for a number of years.

14. Mr Sibbald's evidence which I accept, in this respect, is that when she called she was crying and in distress.

15. He also says, in his statement, that ZZ explained that she had been attacked by the claimant and was terrified for her and her children's safety. She told Mr Sibbald that the police were taking statements at the scene and were speaking to her male friend. Mr Sibbald did not take a note of that conversation and, whilst I accept the gist of his evidence as being accurate, in circumstances where he would not have been expecting the call and ZZ was in an emotional state, it seems to me possible that the precise detail of what he was told may not have been remembered by him.

16. Later on the same day, Mr Sibbald invited ZZ to the office for a meeting to take place on the following day.

17. The meeting took place on the following day with ZZ who was supported by Anne Stephenson, another employee of the respondent. Mr Sibbald was there as was his father who was chief executive. Mr Sibbald took a note of the meeting which appears at p139. The note is brief, but I accept was contemporaneous. It states ZZ was in some distress and was frightened of a further attack by the claimant. In respect of the incident the previous day, the note records that the claimant was very abusive, that he was walking purposefully towards ZZ, that her children fled and were very scared. The word "confrontational" appears.

18. Mr Sibbald's statement goes further and says that in that meeting ZZ told them of an earlier incident in 2018 and that she was terrified of the claimant and did not want him in the office. Mr Sibbald also states that Anne Stephenson said she was fearful of sharing an office with an individual like the claimant after

what had occurred. Those points do not appear in the note, nor does the suggestion that Mrs Stephenson was frightened appear in her witness statement. Given the lack of contemporaneous notes in respect of those matters it seems to me there is a risk that Mr Sibbald's recollection has varied over time.

19. However, I do find that in the meeting Mrs Stephenson showed Mr Sibbald a WhatsApp message which had been posted on a WhatsApp group by the claimant.

20. The WhatsApp group had been set up and used by members of staff who were on furlough. I am told, and accept, that there were no non-employee members of the group. The post appears at pages 142 – 143 and was posted at 13:47 on 7th June 2020. I find, therefore, that it was posted at least two hours after the incident between the claimant and ZZ that I have described.

21. The claimant wrote "Hi, just leaving this group now as I've just found out Whoregina is shagging one of my mates! See you all at some point in the future!". He then left the group and someone replied "… Neil, you broke up 12 months ago….. Move on."

22. I record that the claimant's case is that he and ZZ had carried on seeing each other until more recently than 12 months ago, but I find that nothing turns on that for the purposes of this decision.

23. At page 140 of the bundle is a typed statement from ZZ, which includes allegations from December 2018 when, she says, the claimant had attacked her previously. In relation to the incident on 7 June 2020 she says her partner and her children were out for a walk and that the claimant was walking towards them "with an intent". She says that the claimant walked up to her partner and proceeded to throw a punch while shouting that her partner slept with prostitutes and that she had a sexually transmitted disease. She described a physical exchange taking place which resulted in the claimant receiving a blow to the nose and a nosebleed. The police were called. She refers to a witness statement from a window cleaner and states that "Neil will be charged, as it stands, with assault and a public order offence. Neil cannot contact me and I am in the process of applying for a restraining order…". The statement is signed by ZZ on 22 June 2020 but, in evidence, Mr Sibbald said that the statement had been dictated by ZZ on 8th June. I accept that evidence.

24. At 5 PM on 8 June 2020, a meeting took place between Mr Sibbald, his father and the respondent's General Manager and Service Manager. Mr Sibbald says, and I accept, that the management team discussed the information provided by ZZ and the evidence and all members of the team agreed that "it" was totally unacceptable behaviour and fell well short of what was expected by the company". He states, in his witness statement, that "we" have built the business up as a family over 21 years and were all upset shocked and disturbed over the 2 events that occurred on 7th June whilst also taking in into consideration the incident in 2018.

25. On the next day the management team came to a collective decision that the claimant should be dismissed.

26. Mr Sibbald's statement states that on the basis of the severity of both incidents and in the interests of safety and security of ZZ and Anne, it was decided that Mr Tarry would not be invited to the office to make a statement. In those circumstances a letter was drafted to Mr Tarry dismissing him (page 65). The letter is dated 10 June 2020, sets out the respondent's findings that the claimant had verbally abused and harassed another member of staff and then posted a derogatory and abusive message on WhatsApp and dismisses the claimant. It offers no right of appeal.

27. The claimant replied to that letter on 18 June 2020. He set out a defence to the allegations. He stated that he had not had any visit from the police and not been charged for assault or a public order offence. He said that he did not verbally abuse or harass a member of the respondent's staff and only had a short exchange with a former friend who was accompanying ZZ - with the outcome that he was punched in the face. He stated that he admitted to sending the text message to the WhatsApp group but "I was unaware of using any known abusive word within its content…". The letter goes on to state that the claimant believed that if he had been given the chance to personally address Mr Sibbald, a different outcome would have resulted. He also refers to an alleged incident at a previous Christmas party where a member of staff pushed "Malcolm", who I understand to be Mr Sibbald's father, to one side whilst intoxicated but no action was taken.

28. On 24 June 2020, Mr Sibbald replied to state that the respondent did not agree with the contents of the claimant's letter, finding them to be untruthful and inaccurate.

29. Given the issues in this case, it is necessary for me to make findings of fact as to what happened on 7 June 2020, 2 December 2018 and at the Christmas party in respect of Malcolm.

30. On 15 August 2020 the claimant, having taken legal advice, admitted to the police a charge that on 07/06/2020 he, with intent to cause ZZ's new partner harassment alarm or distress, used threatening, abusive or insulting words or behaviour or disorderly behaviour, thereby causing that person or another harassment alarm or distress. He was given a conditional caution.

31. The claimant did not admit to any offences in relation to ZZ or any offence of assault. Moreover it appears that the claimant was never charged with any such offence.

32. The claimant, in his witness statement, admits that on 7 June 2020 he saw ZZ and her partner who was a long-term friend of his walking hand in hand. He says that came as a huge shock to him because he was still seeing and texting ZZ frequently. He says that he approached them and made a comment to ZZ's new partner regarding him being obsessed with prostitutes and said that ZZ had given him chlamydia. That led to him being punched and he described holding onto ZZ's new partner before wrestling free. He says afterwards ZZ's

new partner posted a picture of him on a different WhatsApp group with the caption “cunt”.

33. The claimant admits posting the message about ZZ on the work WhatsApp group stating that he was extremely hurt and upset by events . He says, in his witness statement, that he did not believe the comment to be abusive but rather an insult.

34. The claimant also says that when the WhatsApp group was set up, all participants were on furlough and not working and the WhatsApp group was for non-work-related purposes only. He did not think the posting was contrary to or in breach of any workplace policies.

35. The claimant says there was a culture of workplace banter and refers to a colleague in a T-shirt with a cat logo and a pride flag which underneath spelt out “Purride” and that his colleague is also holding up a mug with “Fanta Pubes” written on it. He says they were gifts given out during Secret Santa. He also refers to there being a “bell end of the day” award to employees and a “bell end of the year” award.

36. The respondent accepts that there was a “bell end of the day” award to employees and a “bell end of the year” award, but I accept Mr Sibbald’s assertion that he had no knowledge of it and it has now been stopped.

37. The claimant denies assaulting ZZ either in 2018 or on 7 June 2020.

38. The respondent’s Grounds of Resistance makes 2 inaccurate assertions. In paragraph 19 it states that the Conditional Caution indicated that the offence was committed against ZZ and that the respondent believed that the claimant was subject to a restraining order. In fact, the conditional caution did not indicate that the offence was committed against ZZ and whilst the respondent may have believed that the claimant was subject to a restraining order, he was not and the respondent cannot have seen any such restraining order.

39. Whilst I do not consider it surprising that the respondent did not call ZZ to give evidence, it does leave me in some difficulty in assessing what happened. The evidence which the respondent can call as to what happened on 7 June 2020 and 2 December 2018 is hearsay evidence, except in respect of the WhatsApp message.

40. I am concerned that the hearsay evidence which the respondent asks me to rely upon may well be inaccurate for the following reasons.

    a. The report by ZZ to Mr Sibbald on 7 June 2020 was made at a time when ZZ was highly emotional and Mr Sibbald was not taking a note and would not have been expecting a phone call. It is entirely possible that, in that situation, either ZZ did not present a clear and accurate account of what had happened or Mr Sibbald did not entirely understand and then recollect what he was being told.

   b. The note of the meeting taken by Mr Sibbald on 8 June 2020 was very brief and notably contains little statement of fact. The facts which are recorded are that the claimant was abusive and walking purposefully towards ZZ. No violence is recorded and no record of what was said is recorded.

41. I am, therefore, unwilling to rely on the recollections of Mr Sibbald as to what he was told by ZZ where the claimant has had no opportunity to cross-examine her.

42. I am also unwilling to rely upon ZZ's written statement made to Mr Sibbald when;

   a. the claimant has had no opportunity to cross-examine ZZ,

   b. the statement was made in circumstances where ZZ would have been likely to realise that it was to be used for disciplinary proceedings and

   c. ZZ had reason to be hostile towards the claimant.

43. However, in respect of the incident on 7 June 2020, even on the claimant's account of events as set out in his witness statement, he was unpleasant to both ZZ and her new partner. He does not say, in his statement, whether ZZ's children were present at the time or not, but I note that he does state that ZZ, her new partner and he were present (penultimate sentence of paragraph 4 of his witness statement). In those circumstances it is likely that the children were, at least, in the vicinity.

44. Thus I find, based on paragraph 4 of the claimant's own statement, that on 7 June 2020 when ZZ, her new partner and the claimant were present and when ZZ's children were in the area, the claimant said to ZZ and her partner that ZZ had given him chlamydia and her new partner was obsessed with prostitutes. I find that resulted in a physical altercation between the claimant and ZZ's partner.

45. It seems to me that finding is consistent with ZZ telephoning Mr Sibbald in a state of distress. It is also consistent with his note on 8 June.

46. I am not satisfied, on the balance of probabilities, that any more than that occurred on 7 June 2020, apart from the posting of the WhatsApp message.

47. In respect of the incidents in 2018, given the passage of time and the fact that the first time ZZ made a statement about the events of 2018 was on 22 June 2020, in circumstances where, as I have said, she must have known that she was making a statement for the purposes of likely disciplinary proceedings being taken against the claimant and had reason to be hostile towards him, I am not willing to rely upon her assertions about December 2018. The respondent has not satisfied me on the balance of probabilities that those things occurred.

48. There is no doubt that the claimant posted the relevant WhatsApp entry. I am satisfied that the WhatsApp group was a work related group.

49. In respect of the WhatsApp message, it was put to the claimant in cross examination that the post was clearly inappropriate behaviour on his part. He replied “no”. He was asked why he thought it was appropriate and he said “in terms of the circumstances and the banter that went around, I don’t think calling somebody “Whoregina” is any different calling someone a bell end.”

50. I disagree with the claimant. I find that it was inevitable it would have been distressing for ZZ to be described in those terms on that WhatsApp group in front of her colleagues. The message has to be seen not only in terms of the word “Whoregina” but also the rest of the post talking about the fact that she is “shagging” one of the claimant’s “mates”. That WhatsApp message was, I find, not banter and would not be seen as banter. It was a personal and unpleasant attack on one of the claimant’s colleagues in terms of her personal life. That can be seen by the response from another colleague telling the claimant that he broke up 12 months ago and it was time to move on.

51. Mr Sibbald told me, and I accept, that he would have dismissed the claimant for that message alone.

52. However, I also accept the claimant’s view, having observed Mr Sibbald give evidence, that Mr Sibbald is a man who will not change his mind when he has formed an opinion. That is unfortunate when considering whether or not to dismiss somebody, particularly if one forms an opinion before they have heard the accused employee’s side of the story. That is of some relevance in respect of this case because I find that Mr Sibbald reached a fixed view once he had heard from ZZ.

53. I accept the respondent’s evidence that the claimant is mistaken as to someone pushing Malcolm aside.

54. Finally, I turn to the question of whether, when the proceedings were begun, the employer was in breach of its duty to give a written statement of initial employment particulars or particulars of change.

55. In his witness statement, the claimant states that he was not given a statement of terms at the start of his employment. He does not assert that there was a failure to provide him with details of any change to those terms.

56. In answer, the respondent points to the claimant’s offer letter dated 19 April 2010 which contains details of the employer, the place of work, the remuneration, the hours and the claimant’s salary payment dates. The claimant has signed the offer on 21 April 2010. The claimant says that is not his signature. I do not accept the claimant’s evidence in that respect. I find that the claimant was sent that letter and did sign for it- but even if he had not signed it, it was sent to him.

57. I am also satisfied that the staff handbook was provided to the claimant. At page 138 of the bundle the claimant has signed to say that he is received it on 1 May 2019. The claimant disputes that the version of the staff handbook which is in the bundle was the one he signed for because the first page is dated July 2020, but although that is a powerful point, I am satisfied that it is more likely than not

that the staff handbook which the claimant had been given would have contained the relevant particulars under section 1 Employment rights Act 1996. I gained the impression that in this respect the company is conscientious in providing the appropriate documentation to its staff. Whilst I cannot say that I am certain the claimant was provided with all of the relevant particulars, I find that it is more likely than not that he was.

Law

Unfair Dismissal

58. Section 98 Employment Rights Act 1996 provides that it is for the Respondent to show the reason for dismissal and that it is a potentially fair reason.

59. Section 98(4) states that "The determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)- 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 shall be determined in accordance with equity and the substantial merits of the case".

Procedural Fairness

60. The ACAS Code of Practice and Disciplinary and Grievance Procedures provides that if there is a disciplinary case to answer the employee should be notified of this in writing. The notification should give details the time and venue for the disciplinary meeting and advising employee their right to be accompanied at the meeting. It does not require a statement of the possible outcome of the meeting, although often letters do state, if it is the case, that dismissal is a potential outcome.

61. The Code also states that it would normally be appropriate to provide copies of any written evidence with the notification.

62. In *Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23 the Court of Appeal held that the range of reasonable responses test (or to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision.

Misconduct

63. In considering a dismissal for misconduct the tribunal must have regard to the test in *BHS v Burchell* that "First, there must be established by the employer the fact of that belief; that the employer did believe it. Second, it must be shown that the employer had in his mind reasonable grounds upon which to sustain that belief. And, third, the employer at the stage at which he formed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case"

64. The parties drew my attention that for the purposes of section 98(2) ERA 1996 'conduct' means actions 'of such a nature whether done in the course of employment or outwith it that reflect in some way upon the employer/employee relationship (*Thomson v Alloa Motor Co Ltd* [1983] IRLR 403, EAT)

65. The respondent also drew to my attention the decision in *Sharkey v Lloyds Bank plc [2015] UKEAT/0005/15* that any procedural defect must be considered in context. Procedural issues do not sit "in a vacuum":

66. In *A v B [2003] IRLR 405* the EAT held

> **60** Serious allegations of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by laymen and not lawyers. Of course, even in the most serious of cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him.
>
> **61** This is particularly the case where, as is frequently the situation and was indeed the position here, the employee himself is suspended and has been denied the opportunity of being able to contact potentially relevant witnesses. Employees found to have committed a serious offence of a criminal nature may lose their reputation, their job and even the prospect of securing future employment in their chosen field, as in this case. In such circumstances anything less than an even-handed approach to the process of investigation would not be reasonable in all the circumstances.

Law on Compensation in respect of Unfair Dismissal

67. In circumstances where it is found that a decision to dismiss was unfair the tribunal must consider how much compensation to award in accordance with sections 122 and 123 the employment rights 1996.

68. In respect of the basic award, section 122 (2) ERA 1996 provides

    "Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly"

69. In respect of the compensatory award, s123 ERA 1996 provides

> (1)Subject to the provisions of this section and sections … , 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.

...

(6)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.

70. It is also necessary to take account the principles laid down in *Rao v Civil Aviation Authorit*y [1994] IRLR 240. In making the calculation, the Employment Tribunal should first assess the amount of the loss taking account of *Polkey*, including the chance of employment continuing if the employee had not been unfairly dismissed. Thereafter, and in light of that finding, the Tribunal should decide the extent to which the employee caused or contributed to the dismissal and the amount by which it would be just and equitable to reduce the compensatory award in that respect.

71. The question for me, in considering s123 ERA 1996*,* are firstly what would this employer have done if a fair procedure had taken place and, secondly, if this employer would have dismissed, would that dismissal had been within the range of reasonable responses.

<u>Breach of Contract</u>

72. In a claim for notice pay, the correct analysis is that there is a contractual obligation upon the respondent to give notice of termination. If the respondent seeks to assert, as it does in this case, that it was entitled to dismiss the claimant without giving notice, it must show that either it had the power to do so under the contract without being in breach of the contract, or that the claimant was in repudiatory breach of the contract so that the respondent was discharged from that obligation.

73. As indicated above, I have not been taken to any contractual provision which would allow the respondent to dismiss the claimant without notice.

<u>S38 EA 2002</u>

74. This section provides

(3)If in the case of proceedings to which this section applies—

(a)the employment tribunal makes an award to the worker in respect of the claim to which the proceedings relate, and

(b)when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996 ...,

the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.

(4)In subsections (2) and (3)—

(a)references to the minimum amount are to an amount equal to two weeks' pay, and

(b)references to the higher amount are to an amount equal to four weeks' pay.

Conclusions

75. I set out my conclusions by reference to the list of issues set out by Employment Judge Roper at page 58.

76. I accept that the reason for the dismissal was the claimant's misconduct. I conclude that Mr Sibbald and his colleagues who made the decision to dismiss the claimant had a genuine belief that the claimant had, on 7 June 2020, verbally abused and harassed another member of staff and then posted derogatory and abusive messages about her on the WhatsApp group. They also genuinely believed that there had been a previous assault in December 2018.

77. I also find that there were reasonable grounds for that belief in that the respondent had been told of those matters by ZZ, it had been able to observe ZZ's distress and had seen the WhatsApp message.

78. However, I do not find that there was a reasonable or sufficient investigation. The investigation in this case was largely non-existent. I find that having heard from ZZ, the possibility of the claimant being innocent never even crossed Mr Sibbald's mind. He believed ZZ and looked no further.

79. Although Mr McDonald urges me to consider any procedural failings in context, I do not find that assists the respondent in this case. There was no desperate urgency to make a decision, the respondent's employees were on furlough. There was no imminent likelihood of the claimant and his former partner coming into contact in the workplace and a swift decision to dismiss the claimant was unlikely to make any difference to what would happen if they came into contact outside of the workplace.

80. It is apparent that the respondent had not heard the whole story at the point it made its decision to dismiss, the claimant had a different version of events which he wished to put forward and the two inaccuracies in the Grounds of Resistance which I have highlighted above are examples of at least two areas where an investigation might have provided the respondent with different information.

81. Even when Mr Tarry wrote to the respondent in a form which should reasonably have been interpreted as an attempt to appeal against the decision, the respondent refused to change its position. Apart from the taking of a statement from ZZ, the procedural deficiencies in this case were about as bad as they could be.

82. Thus I find that this dismissal was unfair.

83. It is then necessary to consider what would have happened if the respondent had used a fair procedure (issue 1.5).

84. If Mr Sibbald had fairly listened to both sides of the story, I conclude that he would have found that on 7 June 2020, the claimant approached a work colleague and was offensive to both that colleague and her new partner by saying that ZZ's new partner regarding him being obsessed with prostitutes and said that ZZ had given him chlamydia. He would also have found that the WhatsApp message was insulting and abusive and was not part of any culture of workplace banter.

85. In those circumstances I am entirely satisfied that Mr Sibbald would have decided that the claimant was guilty of gross misconduct both in what he said to ZZ on 7 June 2020 and what he posted on the WhatsApp page. Had he done so, that is a decision which would, I find, have been within the range of reasonable responses and led to the claimant's dismissal.

86. However, a fair procedure would have taken 2 weeks to complete, given the need to send the evidence to the claimant, allow him time to attend a disciplinary meeting, attend the disciplinary meeting and then have a right of appeal. Often such a process may have taken longer than 2 weeks, but I find that the respondent would have acted swiftly given its concerns.

87. In those circumstances the compensatory award is reduced to 2 weeks loss.

88. I must, then, consider whether the claimant contributed to the dismissal by his culpable conduct. I find that he did.

89. In my judgment the most culpable conduct of the claimant was posting the WhatsApp message about ZZ to her colleagues. It was designed to humiliate ZZ and was clearly connected to work. It was not a post which is properly to be seen as being made in the heat of the moment; the heat of the moment was the incident on the street. By the time the claimant posted the WhatsApp message at least 2 hours had passed and he had returned to his vehicle and driven home (see paragraph 4 of his witness statement).

90. Having said that, it is also the case that by his behaviour on 7 June 2020 on the street, the claimant contributed to his dismissal. His conduct at that point led to him being given a conditional caution, albeit in respect of his conduct to ZZ's partner.

91. It seems to me that on the basis of the claimant's conduct it would be reasonable to reduce the basic and compensatory award to nil, however, I must consider what is just and equitable. I have concluded that, notwithstanding the claimant's conduct, he is entitled to some compensation to reflect the very poor way in which he was treated within the disciplinary process.

92. Taking all of the matters into account I consider that the basic and compensatory award should be reduced by 70%.

93. I have not at this stage engaged in the question of any uplift for failure to comply with the ACAS code.

94. I must then consider the claim of breach of contract. This is an all or nothing question, either the claimant was in repudiatory breach of contract and his claim for notice pay fails or he was not and it succeeds.

95. There is, in every contract of employment, an implied term of trust and confidence and also of obedience. The respondent's handbook makes clear that a person must not post any content on social media which is abusive or harassing. In my judgment, the WhatsApp post was both of those things. It was unwanted conduct which was sex-specific in its terms which would have caused ZZ to feel humiliated and her dignity to be violated.

96. The post was, in my judgment, both a breach of the implied term of trust and confidence and the implied term of obedience. It was gross misconduct. In those circumstances the respondent was entitled to dismiss the claimant without notice.

97. For the reasons I have given the claim under the Employment Act 2002 fails.

Remedy

98. The parties discussed matters in respect of remedy over a short adjournment which took place after I had given my judgment.

99. They asked me for some indications about whether the figures should be gross or net of tax. I explained that, in my opinion, that was a matter for the parties to make submissions on. I did not know how the Inland Revenue would treat the claims made by the claimant in the context of his personal situation. I explained that I would be happy to give a judgment on a gross basis and make that express (in accordance with *Walters v Barik*).

100. I then invited further submissions on the question of any uplift under section 207A Trade Union and Labour Relations (Consolidation) Act 1992. That section provides:

> (2)If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—
>
> (a)the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
>
> (b)the employer has failed to comply with that Code in relation to that matter, and
>
> (c)that failure was unreasonable,
>
> the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

101. Given the significant failures in respect of compliance with the ACAS code of Practice on Disciplinary & Grievance Procedures, the lack of a fair investigation, the lack of a meeting and the lack of an opportunity to appeal, the appropriate uplift is the maximum of 25%.

102. Having delivered that part of my decision to the parties, they took some time to agree the figures and asked me to enter judgment in a single amount that comprised both the basic and compensatory award. Having clarified that the claimant had not received benefits and therefore it was not necessary to consider the recoupment regulations and at the request of the parties, I entered a judgment for £1937.11.

Employment Judge Dawson
Date: 02 November 2021

Reasons sent to the parties: 25 November 2021

FOR THE TRIBUNAL OFFICE