EMPLOYMENT TRIBUNALS

Claimant: Mr R Da Silva

Respondent: BW Broadcast Ltd

Heard at: London South via CVP) **On: 21, 22, 23 and 24 June 2022**

Before: Employment Judge Khalil (sitting with members)
Mr Turley
Mr Wilby

Appearances

For the claimant: Ms Gilbert, Counsel
For the respondent: Mr Valls (no appearance after day 1 for the substantive Hearing)

JUDGMENT

Unanimous Decision

Liability

The claimant's complaint of Unfair Dismissal contrary to S.94/98 Employment Rights Act 1996 ('ERA') is well founded and succeeds.

The claimant's complaint of Wrongful Dismissal is well founded and succeeds.

The claimant's complaint of Marriage Discrimination contrary to S.13 (Direct) and S.26 (Harassment) Equality Act 2010 is not well founded and fails.

Remedy

The Tribunal found the claimant contributed to his dismissal and the compensatory award is reduced by 25% under S.123 (6) ERA and the basic award is reduced by 25% under S.122 (2) ERA for conduct before dismissal.

The claimant is awarded:

a) Damages for wrongful dismissal of £8,354.70 (12 weeks net notice pay) and £750 for loss of employer pension contributions.

b) A Basic Award of £5245.50

c) A Compensatory award of £522.18 (1 weeks' pay)

d) Loss of statutory protection - £300

Reasons

1. This was a claim for unfair dismissal, wrongful dismissal and marital status discrimination. The claim was presented on 30 September 2020.

2. The claimant was represented by Ms Gilbert, Counsel. The Respondent was represented by Mr Valls, assisted by Ms Tucker who is an owner of the respondent. However, the respondent elected not to participate in the proceedings once the Tribunal announced its decision on the preliminary matters raised.

3. The Tribunal had a Bundle (produced by the claimant) running to 489 pages in four parts and a witness statement from the claimant. The Tribunal had no witness statements from the respondent.

4. The Tribunal was directed to a reading list in the Bundle and the images attached to the emails for which the claimant was purportedly dismissed were Ordered to be disclosed to the Tribunal in accordance with the decision set out below.

5. The claimant's counsel closed the claimant's case with oral submissions.

The application for a stay/postponement

6. This application was refused. The claimant's application, notwithstanding the comments of REJ Freer in refusing the application on first consideration remained extremely vague.

7. The Tribunal considered the Respondent's email of 20 June 2022, the letter from JMW Solicitors (instructed in the High court proceedings) and the claimant's comprehensive email objecting, also dated 20 June 2022.

8. The Respondent relied on the Sub Judice principle which the claimant cites as having its origin in S.1 of the Contempt of Court Act 1981. By S. 2(3) the principle applies if there are active proceedings. Active proceedings are defined in paragraph 12, schedule 1 as being active 'from the time when arrangements for the hearing are made'. Nothing the respondent said in submissions or orally indicated the proceedings were active. The letter from

JMW was also silent. The Tribunal noted that the High Court Petition referred to, had a date stamp of 12 July 2018.

9. The letter from JMW did not reference a Hearing/trial date. It did not mention or refer to Sub Judice. It referred vaguely to witness statements 'of this type' being unhelpful and 'it may well be the position' that there is a danger of interference. There was no reference to the overlapping issue or issues. The Tribunal had to extract the nature of the dispute which it was informed was about an allegation that one of the Directors had abused his position (the Tribunal understood this to be an allegation of breach of Fiduciary Duty). The proceedings were between Mr Roger Howe (now deceased) and Mr Scott Incz (also deceased) and Aquarian Broadcast Group Ltd. There was no overlap of parties with those in these proceedings. The Unfair Dismissal and Marital Status Discrimination claims in these proceedings were between the claimant and his (corporate) employer only.

10. The Tribunal determined that there was no risk of the Tribunal determining any issue in this case which cuts across any prevailing litigation in the High Court between the parties in that litigation. For the avoidance of doubt, the Tribunal does not need to make specific and substantive findings in relation to that dispute (and neither would it do so) to determine the claims before it. The Tribunal will treat as background contextual relevance paragraphs 7 to 24 of the claimant's witness statement and only reach findings necessary to determine the issues before the Tribunal. The substantive issue of whether or not there has been a breach of fiduciary duty or an abuse of position is not before the Tribunal. Neither is the claimant implicated in those proceedings.

The Bundle

11. The respondent said the Bundle omissions meant that it has not been able to prepare its witness statements. This issue had already been determined by EJ Dyal and a postponement for the same reasons refused. The Case Management Orders in this case were made in December 2021 and more latterly on 23 May 2022 when it was Ordered that the case would proceed based on the claimant's disclosure. The respondent should have been ready for trial. This morning, no detail was forthcoming at all about the inadequacies in the Bundle which had prevented the respondent from producing its witness statements wholesale. This was a case where an express dismissal is admitted and decisions have been made by respondent.

Images (alleged to be explicit) not in the Bundle

12. The Tribunal concluded it did need to have sight of the images the respondent relied upon to dismiss the claimant in the proper course of examining satisfaction or otherwise of the ***Burchell*** test and the range of reasonable responses and more generally in relation to the discrimination claim and the burden of proof.

13. The Tribunal believed that it was reasonable and proportionate to do so privately and thereafter the images need not form part of the trial bundle. The Tribunal considered this to be in accordance with Regulation 50 (1) and 50 (3) (a) of the ET Rules to restrict public disclosure of any aspect of the proceedings and to conduct that part of the Hearing privately.

Overriding Objective

14. The ET had regard to the overriding objective in reaching its decisions and noting the substantial delay of about a year or more which would be caused by a postponement in relation to a claim issued in September 2020.

Images

15. The Tribunal did subsequently view the images it was sent by the claimant. The Tribunal did so privately and were unanimous in their view that the images contained graphic/offensive photos including several of the claimant's genitalia.

Relevant Findings of fact

16. The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered the evidence given by the claimant during the Hearing, including the documents referred to and taking into account the Tribunal's assessment of the witness evidence.

17. Only findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was directed or taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statement/evidence.

18. The claimant was employed by the respondent until his dismissal on 1 July 2020. The claimant's employment was continuous from 6 October 2006.

19. The respondent is a manufacturer of FM broadcasting equipment. It had 25 employees and 2 Directors around the time of the claimant's dismissal.

20. At the time of his dismissal, the claimant was the Production and Manufacturing manager. The claimant managed a team of 8 employees and reported into Mr Scott Incz, a Director.

21. The respondent's founders were Mr Incz and Mr Roger Howe. The respondent has a holding company called Aquarian Broadcast.

22. There was no evidence of any performance or conduct concerns relating to the claimant throughout his tenure of employment save in relation to the circumstances leading to the claimant's dismissal.

23. In 2017/2018, a dispute arose between the two directors Mr Howe and Mr Incz in relation to alleged wrong-doing by Mr Incz such that he was alleged to be in breach of fiduciary duty. The circumstances and substantive issues were beyond the scope of and relevance to the issues in this case.

24. It was however relevant for the Tribunal to have regard to the exchange of messages between the claimant and Mr Incz at this time because of the claimant's assertion his relationship with Mr Incz deteriorated as a result of Mr Incz's view that the claimant had sided with Mr Howe in the dispute. The Tribunal found that this was borne out by some of the text exchanges between the period 25 May 2018 and 8 June 2020 on pages 452 to 474. By way of example:

    - 22 July 2018 – 'Hi Scott, I know things are not great between us and I don't want to fight' (page 453) (claimant)

    - 4 September 2019 - 'my opinion is you fucked it up…you decided Roger was a better option for you' (page 456) (Mr Incz)

    - 4 September 2019 - 'you conspired with Roger to defraud me of my shares (page 457) (Mr Incz)

    - 26 February 2020 - 'you tried to steal my shares and you can fuck off' (page 466) (Mr Incz)

    - 26 February 2020 - 'I have every email you sent. You are fucked!' (page 466) (Mr Incz)

    - 26 February 2020 – 'you are not my boss, you and your wife are going to be lit up in lights. She will be famous! (page 466) (Mr Incz)

    - 3 April 2020 – 'return the car or I will call, the police' (page 470) (Mr Incz)

- 30 May 2020 – 'I'm getting bored with your threats' (page 474) (Mr Incz)

25. On 8 October 2019, Mr Incz used a picture of the claimant and his then girlfriend as the respondent's Facebook profile picture. Following the claimant's complaint to another employee, the picture was taken down (page 194). The claimant married his wife on 12 October 2019.

26. There was a share sale agreement being discussed/negotiated between Mr Howe and Mr Incz. The Tribunal found the claimant was trying to act as the 'middleman' to broker a deal for both parties. This was evident from some of the text messages – pages 459 to pages 469, though Mr Incz took umbrage to the claimant asking to being paid for his efforts to get the sale through (page 466), which the claimant believed had been offered previously.

27. Mr Howe passed away on 27 March 2020 following a fall from the second floor of a building. The share sale was delayed as a result and de facto control vested in Mr Incz at this time.

28. On 1 April 2020, Mr Incz sent a text to the claimant saying that his wife should stop spreading rumours (about the death of Mr Howe). He also sent messages saying 'MI5 have been informed' and 'I was there Ricardo and you know' to which the claimant said he had no idea what Mr Incz was talking about (page 470).

29. Mr Incz also asked the claimant if he had witnessed the Will of Mr Howe. The claimant believed Mr Incz had witnessed the Will, but this was disputed. In addition, Mr Incz queried if the claimant's salary was £51,000. He said he had not sanctioned or agreed to this. He asked the claimant to send him a copy of his payslip. This was on 28 April 2020 (pages 471, 472).

30. On 15 May 2020, there was an exchange of emails between the claimant and Mr Brendan Lofty, another employee of the respondent. In the exchange Mr Lofty commented "so it's no secret Scott doesn't want to work with you, Pavol is just following instructions". This was in the context of the claimant being told to remain on furlough (page 351).

31. On 1 June 2020, the claimant was invited to a meeting to discuss a settlement agreement proposal. This was at page 377. The invitation was from Ms Lensen (HR). It said a settlement proposal was in the post. On the same day, a warning of potential redundancy of some staff was issued to 22 members of staff, but the claimant did not receive this as his work email was not working. The claimant was informed that 2 weeks' pay was being offered for voluntary redundancy (which would have amounted to 26 weeks in the claimant's case). The claimant, at the settlement agreement meeting on 3 June 2020, was offered £5,000. The claimant emailed Ms Lensen on 5 June 2020 asking why he had not been offered voluntary redundancy and that a settlement agreement was being forced on him (page 365).

32. In response, the claimant was informed the voluntary redundancy was underway after the settlement agreement discussions. Further, that the claimant's email access had been revoked due to the claimant's suspension that day.

33. The Tribunal found that whilst there was clearly hostility between the claimant and Mr Incz in the months leading up to the settlement agreement offer, there was no work-related dispute. There was no grievance or disciplinary process which had been commenced informally or formally or any performance or conduct concerns. Further, the offer of £5,000 was not a bona fide offer in circumstances where the claimant stood to gain considerably more if he had been offered a chance to volunteer for redundancy. The discussion was thus not without prejudice.

34. The discussion was, potentially, a pre-termination discussion under S.111A ERA 1996. However, there was no evidence that the claimant was given sufficient time to consider the settlement agreement in accordance with the ACAS Code – a minimum of 10 days, which was not reasonable. This was improper behaviour and the Tribunal did not consider it just for these discussions to be inadmissible. Alternatively, in circumstances where the respondent suspended the claimant 2 days later, the respondent's actions lacked transparency which the Tribunal also found to be improper behaviour rendering it not just for those discussions to be inadmissible. The discussions were admissible in any event in relation to the discrimination complaint.

35. The claimant was suspended on 5 June 2020. This was for potential breach of the respondent's IT policy. The claimant was not given any further details. An investigation meeting took place on 10 June 2020. This was chaired by Ms Lensen, with Mr Borgula, another Director also in attendance.

36. The claimant was accompanied by Mr Denbigh. His notes of the meeting were at pages 154-155. In the absence of any assertion or evidence to the contrary, this note was accepted by the Tribunal. It was explained at the meeting that a company-wide IT security check, consequent on Mr Howe's passing, had been undertaken. The claimant was shown 2 explicit images which had been sent to his work email address in 2017 and then forwarded on to his personal email address in 2019 during work time. The claimant said he believed someone had accessed his emails to do this. He said Mr Incz had informed him that any investigation about this was 'BS' (which the Tribunal found to mean 'Bullshit'). The claimant asked for an independent expert to be appointed to check if there had been a breach and to be allowed to check his own emails. Ms Lensen confirmed the claimant could do the latter under supervision and regarding the former, she would send him names of an IT expert to agree. The claimant said he thought this allegation was a fabrication and a witch hunt. He added he believed Mr Incz had access to the company

server and emails and that he had personal issues with him such that he wanted to get rid of him.

37. The minutes sent by Mr Borgula were disputed by the claimant. He informed Ms Lensen of this in an email on 12 June 2020 (pages 123-131). In particular, the claimant highlighted that he had asked for an independent IT review and to have access to his emails. He also referred to the Facebook image of the claimant and his wife which Mr Incz had used. He attached 3 screenshots of WhatsApp messages from Mr Incz which included the aforementioned facebook image and the message that the claimant and his wife would be lit up in lights. In another message, the claimant told Mr Incz to stop mentioning the claimant's wife in messages. The claimant requested policy documents, the procedure for undertaking IT security checks, how wide this search had been, details of previous checks undertaken and challenged the fairness of the investigation process because the specific allegations had not been highlighted in advance. He queried why the IT Manager had been left out of the process and who else would be interviewed. He maintained there had been a security breach, he had not breached the IT policy or sent the photos. He referred to 12 years' service, 10 of which he had been on the management team, without ever having had a performance concern or his professionalism questioned. He said he could provide more evidence of inappropriate messages received from Mr Incz. He also raised the non-inclusion in the voluntary redundancy exercise and the settlement agreement discussions in supporting his view it had been a witch hunt to get him out.

38. In an email of 17 June 2020, Ms Lensen confirmed there were no other witnesses to the investigation. She provided the GDPR policy and IT security checks policy by reference to the handbook. A report from the IT Manager (Mr Sannassy) was sent and the claimant was informed he could attend the office under supervision to check his emails. This was at pages 170 and 171.

39. Ms Lensen's request had included 4 questions of the IT Manager:

- Does a Director have access to the servers and emails?
- Can anyone else gain access without IT or Director permission?
- Are we able to trace forwarded emails?
- Would anyone be able to hack into an employee's emails to send an email?

40. Mr Sannassy's reply was as follows:

- The email system was cloud based
- Each user had a personal login which is 2 factor authenticated
- Only the IT Manager and a Director have an admin login which gives them access to the system
- However, the Director had never logged on to the system

- It is highly unlikely for employees to be able to gain access to other employees' email accounts without being given access by an admin
- However, if a PC is left unattended and unlocked, then access on that machine is possible
- To gain access from a web interface, the password will need to be known and the 2-factor code sent to a registered phone number is needed
- The system can trace emails for a few months only but the content cannot be viewed, only subject line.

41. In oral testimony, the claimant said he believed that if a Director had accessed emails, it would be traceable. In his witness statement (paragraph 54), he said the IT Manager's statement did not deal with his queries adequately – he did not however explain why.

42. A grievance hearing took place on the morning of 23 June 2020 and a disciplinary hearing in the afternoon. The invitation letter for the disciplinary hearing was at page 138. The claimant was charged on 3 counts:

    - That he had used the Respondent's IT facilities to access explicit/inappropriate images on 13 and 6 July 2017
    - On 5 November 2019, he had further accessed the images to forward them on to his personal email address
    - The claimant had failed to devote his whole time and attention to his duties on 5 November 2019

43. The claimant was provided with supporting documentation – including 4 images and the emails, the IT Manager's report, Ms Lensen's statement (page 143), investigation minutes, email usage policies and letters regarding the Handbook updates. The claimant was forewarned that dismissal for gross misconduct was a possible outcome. The claimant was informed of his right to be accompanied. The meeting was outsourced to a third-party consultant (Mr McCabe, Peninsula).

44. The claimant had attended the office on 22 June 2020 to view emails, supervised by the IT Manager and Mr Borgula. The claimant was given 1.5 hours to check his emails.

45. The minutes of the grievance meeting were at pages 182-187 which the claimant accepted as accurate. This was in respect of the claimant's concerns raised on 12 June 2020. At this meeting, the claimant stated he believed that Mr Incz held 'significant' pictures of himself (Mr Incz and his wife) on his computer (page 183). The Tribunal noted that the claimant had been informed at the investigation meeting that Mr Incz's behaviour was also being looked into (page 155). The claimant explained he had asked who else had been IT

checked. He said he believed his Facebook account had been accessed on 14 April 2020 too.

46. The claimant's grievance was rejected. This was at pages 175-212. These pages included additional message exchanges between the claimant and Mr Incz. The claimant was afforded a right of appeal. There was no evidence before the Tribunal that any further investigation was carried out by Mr McCabe for example taking a statement from Mr Incz. The recommendations of Mr McCabe were adopted by Ms Lensen who rejected the grievance and provided a right of appeal (pages 213-216).

47. The claimant's disciplinary hearing notes were contained in the outcome report at pages 157-172. The claimant stated his belief that, essentially, Mr Incz was behind this and this was a key aspect advanced in his witness statement – paragraphs 78 and 79. The Tribunal noted that the claimant asserted that Mr Incz also had explicit/naked pictures of his wife and/or other women in the email system (page 162). The recommendation was for all 3 charges to be upheld. It was stated in relation to the charge about accessing the images in the 2017 emails, that 'Notwithstanding the emails were received by Mr Da Silva, rather than him sending the email, and possibly without his knowledge of the content, I uphold this charge.' The report referred to the prohibition against accessing or transmitting pornography in the respondent's email policy contained within the handbook (pages 90 and 168). The respondent's examples of gross misconduct were not exhaustive (page 103). The handbook was dated December 2019. In addition to the IT Manager's statement, Mr McCabe stated about the possibility of Mr Incz being involved that he was abroad at the time and that the images related to emails sent 6 months previous. There was no evidence before the Tribunal that any further investigation was carried out by Mr McCabe, for example taking a statement from Mr Incz. The recommendations were adopted by Ms Lensen who dismissed the claimant summarily for gross misconduct and provided a right of appeal (pages 173-174).

48. The claimant exercised his right of appeal in relation to the grievance and dismissal outcomes. In relation to his dismissal, he maintained he had not been aware of the emails and that there had been no independent IT investigation or any investigation with/statement from Mr Incz. In relation to his grievance appeal, he said the minutes of the investigation meeting had not been agreed, the use of his personal data had been overlooked, the evidence in relation to Mr Incz was being overlooked and that he was being forced out.

49. The appeals were heard by Ms Anna Hicks, also an out-sourced consultant at Peninsula. The disciplinary policy says that it may be necessary for the person hearing the appeal to conduct a re-hearing if the employee was saying he had not committed the offence (page 105). The disciplinary appeal was rejected by a letter dated 28 July 2020 when Mr Borgula, Director, adopted the recommendations of Ms Hicks (pages 229-258). There was no evidence

before the Tribunal that any further investigation was carried out by Ms Hicks, for example taking a statement from Mr Incz (pages 259-260). The disciplinary appeal was not a re-hearing.

50. The grievance appeal was also rejected by a letter dated 28 July 2020 when Mr Borgula, Director, adopted the recommendations of Ms Hicks, save in relation to the appeal regarding the use of personal data which was upheld (pages 261-298). It was stated that employees would be made aware of their expectations in this regard and that an apology about the publication of the claimant and his wife's photo would be forthcoming. (This did follow). There was no evidence before the Tribunal that any further investigation was carried out by Ms Hicks, for example taking a statement from Mr Incz (pages 299-300).

51. The Tribunal noted, at page 289, that the claimant had alleged that Mr Incz had intimate pictures of him (Mr Incz) and his wife, the inference being on his computer. This was similar to the allegation made at the disciplinary hearing.

Applicable Law

Unfair Dismissal – S.98 (2) & (4) Employment Rights Act 1996 ('ERA')

52. The respondent relied on S.98 (2) (b) (conduct) in relation to its potentially fair reason for the claimant's dismissal. The burden to show the reason rested with the respondent.

53. Subject to showing a reason, the Tribunal needed to consider whether the dismissal was fair or unfair, having regard to the reason shown by the respondent, whether the respondent acted reasonably or unreasonably in treating it as a sufficient reason for dismissal which question shall be determined in accordance with equity and the substantial merits of the case. The test in this case was as set out in the well-known case of ***BHS v Burchell 1978 IRLR 379*** :

- that the respondent genuinely believed in the claimant's misconduct
- that belief was based on reasonable grounds
- that there was as much investigation as was reasonable.

54. Further, the Tribunal needed to be satisfied that the dismissal was within the range of reasonable responses. This does not entitle a Tribunal to substitute its view for that of the employer. The range of reasonable responses applies both to the substantive decision to dismiss and to the procedure ***Sainsburys Supermarkets Ltd v Hitt EWCA Civ 1588.***

Discrimination – The Equality Act 2010 ('EqA')

55. The Tribunal had regard to sections 13 (direct) and 26 (harassment) of EqA.

56. The burden of proof is set out in S.136 (2) EqA. This provides:

> "If there are facts from which the Court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred."

57. S.136 (3) provides that S. 136 (2) does not apply if A shows that A did not contravene the provision.

58. The guidance in ***Igen Ltd v Wong 2005 ICR 931*** and ***Barton v Investec Henderson Crosthwaite Securities Ltd 2003 ICR 1205 EAT*** provides guidance on a 2-stage approach for the Tribunal to adopt. The Tribunal does not consider it necessary to set out the full guidance. However, in summary, at stage one the claimant is required to prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, (now any other explanation) that the respondent has committed an act of discrimination. The focus at stage one is on the facts, the employer's explanation is a matter for stage two which explanation must be in no sense whatsoever on the protected ground and the evidence for which is required to be cogent.

59. The Tribunal notes the guidance is no more than that and not a substitute for the Statutory language in S.136.

60. In ***Laing v Manchester City Council 2006 ICR 1519 EAT***, the EAT stated that its interpretation of Igen was that a Tribunal can at stage one have regard to facts adduced by the employer.

61. In ***Madarassy v Nomura International PLC 2007 ICR 867 CA***, the Court of Appeal stated:

> "*The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal "could conclude" that, on a balance of probabilities, the respondent had committed an unlawful act of discrimination"*

Conclusions and analysis

Unfair Dismissal – *Burchell* & the range of reasonable responses

62. The Tribunal concluded, unanimously that the respondent did hold a genuinely held belief in the claimant's misconduct. The search of the claimant's email system showed that the 2017 emails had been received into the claimant's work email address from his wife. This was not disputed. They were sent on

from the claimant's work email address to his personal e-mail address. This was not disputed. They had been received into the claimant's personal email address, although in a different folder which the claimant could not identify or describe. This was not disputed. The entire thrust of the claimant's case was that he had been set up, by Mr Incz and this was why this email exchange had appeared. It was not clear if he was saying this entirely or just in relation to the email forwarded on in November 2019. He had produced circumstantial and chronological evidence suggesting Mr Incz wanted him out, providing the motive for interference with his email system. However, in the Tribunal's conclusion, this belief came up against a brick wall being the IT Manager's express statement that only a Director or the IT Manager had admin rights and thus were the only people who could access his email system. Further that the director had not done so: he had 'never logged on'. This was corroborated by the claimant's own evidence that any such attempt would have been traceable. There was no assertion against the IT Manager individually or that he had colluded with Mr Incz. In fact, he had wanted the IT manager involved. The subsequent caveat that it was highly unlikely for employees to gain access to other employee email accounts without being given access by an admin did not mean that the respondent did not hold a genuine belief. Even if the evidence against the claimant had been sought or was opportunistic, this did not render the respondent's belief not genuine. The Tribunal reminded itself it was not sitting in Judgment on a constructive dismissal claim. On any reasonable view, the photos were graphic and explicit.

63. The Tribunal concluded that the respondent had reasonable grounds to hold its belief in misconduct in relation to the charge of forwarding on the email on 5 November 2019 for reasons already analysed relating to genuine belief. It was open to the respondent to conclude, in relation to an email from his wife with the explicit photos attached, that the claimant knew what he was forwarding on. However, in relation to the non-devotion of full attention, the Tribunal concluded this charge was a virtual non-starter. The time engaged in doing so was one minute and 9 seconds and even on a zero-tolerance basis, it was perverse and outside the range of reasonable responses for such an incident to provide a reason for formal disciplinary action. In relation to the charge relating to accessing the photos when they had been sent in an email in 2017, this was more problematic. The Tribunal concluded that absent an allegation that the claimant knew, in advance, what the photos were of and absent an allegation that he viewed the images a second time, on the first occasion of receiving the email and opening the attachments, the claimant could not sensibly be culpable. The Tribunal concluded this appeared to be partially conceded in the disciplinary report. There was no separate charge that he had, thereafter, deliberately and/or knowingly retained the photos on the computer/email system. It was not the Tribunal's task, particularly in the absence of any evidence from the respondent, to assess whether or not the respondent would have dismissed the claimant for just forwarding on the email on 5 November 2019 as an act of gross misconduct. The claimant had been

dismissed cumulatively for all three charges amounting to gross misconduct. This rendered the dismissal unfair.

64. In relation to whether the respondent carried out as much investigation as was reasonable, the Tribunal concluded no statement was taken from Mr Incz about the allegations against him about accessing the claimant's emails. He was not spoken to. This was a flaw, but this did not render the investigation unreasonable in the light of the enquiries of the IT Manager which provided a robust or at least, sufficient counter to the assertions about Mr Incz. It was open to the respondent to rely on its IT Manager's expertise and not commission an external opinion. There was no investigation of whether or which other employees had been subjected to an IT check even on an anonymised basis. The Tribunal were left with an overwhelming impression that the claimant was targeted. The absence of a transparent case, in evidence, about others being checked in a comparable way, meant the Tribunal were not satisfied that there was no inconsistent treatment as a result. This was particularly important as the claimant had, more than once, asserted that Mr Incz held comparable content on his computer/email system which went entirely un-investigated. This rendered the dismissal unfair.

65. The Tribunal also considered whether the sanction of dismissal was within the range of reasonable responses, in particular with regard to whether alternatives were considered having regard to any mitigating factors or otherwise. The Tribunal noted the claimant had 13 years' service and an unblemished record for performance and conduct. Indeed, in between the intermittent hostilities, Mr Incz had been appreciative of the claimant's work. The forwarding on of the email on 5 November 2019 was a one-off incident and containing photos of the claimant and his wife only and sent to the claimant's personal email address only in contrast to for example, circulation to co-workers or a supplier or client which was likely to have engaged reputational issues. As such, as a matter of degree, it could be viewed of comparative lesser severity which a reasonable employer might have regard to. Equally, if a reasonable employer applied its mind to such factors and dismissed the employee notwithstanding, it could assert it was within the range of reasonable responses to do so. The obvious and stark issue for the Tribunal was the absence of whether such factors were even considered. There was no evidence before the Tribunal. In those circumstances, the dismissal was rendered unfair.

66. The Tribunal did not consider the decision to hear the grievance and disciplinary processes separately was outside the range of reasonable responses. There was overlap but, the Tribunal concluded, as the decision makers were the same nothing turned on that decision.

67. The Tribunal was satisfied that the claimant was charged under an up-to-date version of the handbook containing the disciplinary rules and the email policy. The gross misconduct examples were non exhaustive and on any objective

view, a reasonable employer was able to treat the accessing of and transmission of explicit and/or graphic and/or pornographic photos as potential gross misconduct. To the extent that the claimant was arguing that such conduct could only be treated as unsatisfactory conduct at a minor level, defied common sense and an employer's judgment to assess the severity of the conduct under its wide margin and discretion of non-exhaustive gross misconduct behaviours.

Wrongful Dismissal

68. The Tribunal concluded that the respondent had not discharged its burden that the claimant was in breach of a material term of his contract or had committed gross misconduct for forwarding on the email containing the offensive photos to his personal email address. As analysed above, this was a one-off incident with no wider circulation or actual risk of harm to another employee, a supplier or client. It was thus a contained incident. The photos were of the claimant and his wife only. The Tribunal concluded that respondent had not proved the claimant was in material breach of contract entitling it to summarily terminate without notice. The absence of direct oral testimony did not assist the respondent, but this was not determinative (***Hovis Ltd v Louton UK EATPA/1023/20/LA).***

Discrimination

69. The Tribunal concluded that the reason why the claimant's relationship with Mr Incz deteriorated was entirely rooted in the shareholder dispute between Mr Howe and Mr Incz and the perception that the claimant was siding with Mr Howe and that the claimant was complicit in defrauding Mr Incz of shares. That was a complete answer to the falling out. Several of the messages before the Tribunal pre-dated the claimant's marriage to his wife in October 2019. There was tension soon after the share dispute started and in July 2018 the relationship between the claimant and Mr Incz was, evidentially, sour, which escalated to an accusation of conspiracy and fraud on 4 September 2019, all of which pre-dated the claimant's marriage. The photo used of the claimant and his wife also pre-dated their marriage. The Tribunal saw no change in the intermittent hostilities between the claimant and Mr Incz after the claimant married. As a result, none of the alleged less favourable treatment was because of marital status and none of it was related to the protected characteristic of marriage. The burden of proof did not shift.

Remedy

70. The Tribunal found it was able to make an assessment that following the enquiry of Ms Lessen, the HR Manager, Mr Incz did not interfere with the claimant's email system. On that basis, the Tribunal found the claimant did transmit an email containing explicit material in November 2019 which was culpable and blameworthy conduct and contributed to the claimant's dismissal pursuant to S. 123 (6) ERA 1996. This was assessed at 25%. For the same reasons, the Tribunal reduced the basic award pursuant to S. 122(6) ERA 1996, which does not require the same causative link to the dismissal itself, but just conduct before dismissal.

71. There is no reduction under the ***Polkey*** principle. This would require a positive case to be advanced by the respondent. They are not here to do so.

Public access to Employment Tribunal decisions
All judgments and reasons for the judgments are published, in full, online at *www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

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Employment Judge Khalil
15 July 2022