EMPLOYMENT TRIBUNALS

SITTING AT: **LONDON SOUTH**
In person

BEFORE: **EMPLOYMENT JUDGE N COX**
sitting alone

BETWEEN:

Paul Weller

Claimant

and

First MTR South Western Trains Limited

Respondent

ON: **10 –11 November 2022**

Appearances:
For the Claimant: **In person**
For the Respondent: **Ms Robertson , Counsel**

RESERVED JUDGMENT

1. The claimant was unfairly dismissed..

2. The Basic Award and the Contributory Award for unfair dismissal are reduced by 100% because of the claimant's conduct.

REASONS

Claims and Issues

1. The claimant complains that he was unfairly dismissed. The claimant was dismissed by reason of his conduct relating to the publication of various tweets on his private twitter account.

2. The issues arising from the claim to be determined at this hearing were agreed between the parties to be:

Unfair dismissal

3. Whether the respondent genuinely believed the claimant had committed misconduct.

4. Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? In particular:

   4.1. whether there were reasonable grounds for that belief;

   4.2. at the time the belief was formed had the respondent carried out as much investigation as was reasonable in all the circumstances of the case taking account of the size and administrative resources of the respondent?

   4.3. was dismissal within the range of reasonable responses for the respondent?

5. Was the claimant dismissed fairly in all the circumstances, determined in accordance with equity and the substantial merits of the case .

Remedy for unfair dismissal

6. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason? If so: should the claimant's compensation be reduced? By how much? [Polkey adjustment]

7. Did the claimant cause or contribute to his dismissal by blameworthy conduct? If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion? [Conduct adjustment]

8. Did the respondent unreasonably fail to comply with the ACAS code on disciplinary and grievance procedures by:

   8.1. failing to take into account mitigating circumstances

   8.2. failing to act consistently having regard to a lesser penalty imposed by the respondent in a similar case

8.3. failing to take account of the seriousness of the offence.

9. If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

Procedure and Evidence

10. The claimant represented himself. He was accompanied by his wife for support and note taking.

11. The respondent appeared by Ms Robertson of Counsel. There were two observers present.

12. I discussed and agreed with the parties the list of issues above, explained the procedure and timetable for the hearing to the claimant and adjourned to read the key documents in the bundle to which the parties wished to refer me.

13. There was an agreed bundle before me of 242 pages and a clip of witness statements. At one stage during the re-examination of one of the respondent's witnesses it became clear that, although previously emailed to him, the claimant did not have with him copies of the bullying and harassment policy and his Contract of Employment. Copies were provided and I adjourned the hearing to allow the claimant as much time as he required to consider and prepare questions for the witnesses on those documents.

14. I agreed with the parties that I would hear evidence and submissions on issues of remedy only so far as concerned Polkey adjustments and conduct adjustments, and whether any adjustment should be made for non-compliance with the ACAS Code. The calculation of any award would be determined at a separate remedy hearing if the parties were unable to agree on an amount, having applied the findings I would make on the above adjustments.

15. For the respondent I heard oral testimony from:

    15.1. Mr Danny Kennedy, the driver depot manager at Salisbury depot. Mr Kennedy conducted the disciplinary hearing.

    15.2. Mr Neil Gillies. Mr Gillies is the Respondent's Head of Drivers. Mr Gillies conducted the appeal.

16. I heard oral testimony from the claimant on his own behalf.

17. Both parties provided oral submissions on the conclusion of the evidence.

Findings of Fact

18. I find on the balance of probabilities the following to be the relevant facts. I have set out some key points below, but for the sake of conciseness, I

have not repeated every single point. Nevertheless, I have borne in mind everything which was submitted and drawn to my attention.

19. The respondent is a train operating company providing passenger services from London Waterloo to the south and south west of England. It is a substantial employer with a multicultural staff profile.

20. The claimant commenced employment with the respondent on 9 June 2008 as a train guard. He qualified a train driver in 2011 and operated from the Wimbledon depot.

21. Before the events in issue in this case he had an unblemished employment record, and had received a number of employee awards and commendations. I accept that in general the claimant was a popular colleague.

22. In about 2009 the claimant opened a twitter account. He also maintained an Instagram account where he posted material about his weightlifting interest. His twitter account was accessible by the public. He used his own name and his profile picture was of himself lifting weights. By the time of the events in issue the claimant had posted over 3700 tweets. Initially the content related to his hobby of weightlifting, latterly it had become focussed on Brexit and expressions of opinion against immigration.

23. He signed updated terms of employment of drivers on 1 April 2011. These provided, amongst other things, that: "*You are required without exception to act in the spirit of the equal opportunities/Harassment policies at work which are applicable to employees…and which are not part of your contract of employment a copy of which is available on request*'.

24. The respondent's harassment policy (last updated February 2019) provided (amongst other things):

    24.1. Purpose: "*We have a zero-tolerance stance on ..harassment of any kind both in and connected to the workplace. All allegations will be investigated and harassment..by an employee will be treated as misconduct under our disciplinary procedure. In some cases it may amount to gross misconduct leading to summary dismissal*"

    24.2. Social Media: "*Social Media can pose a risk of …harassment and/or discrimination against employees or third parties. Social Media includes online social forums such as Twitter. For further information on the use of social media please refer to the company social media policy.* "

    24.3. What is Harassment: "*Harassment will amount to discrimination if it relates to a 'relevant protected characteristic' Specifically it is unlawful if it relates to : …. Race, which includes….nationality, ethnic or national origins…Religion or religious beliefs. Types of behaviour that may amount to unlawful harassment include unwanted conduct that …creates an intimidating, hostile, degrading, humiliating or offensive*

environment for that person." Practical examples include calling someone a nickname linked to their …. nationality"

25. In March 2018 one of the respondent's main stakeholders – FirstGroup - issued an IT Acceptable Use Policy "The Acceptable Use Policy". The Acceptable Use Policy provided (amongst other things):

    25.1. Purpose: the policy 'outlines the standards you must observe when using First Group's IT systems'. The objectives listed related to information security;

    25.2. Application: the policy applied to all employees and to all IT resources used to conduct business operations and to all business areas within the First Group, including subsidiary companies and operating divisions and their employees. (The Acceptable Use Policy therefore applied to the respondent and the claimant).

    25.3. Line managers were responsible for ensuring that those under their supervision were aware of and complied with the policy.

    25.4. All users are responsible for ensuring that First Group IT facilities are not used in a manner that : (i) could or does bring the company into disrepute (ii) causes…offence or discomfort to other employees, clients or customers.

    25.5. Section 12 of the Acceptable Use Policy was entitled 'Social Media'. It provided (i) access to social networking sites on First Group equipment was prohibited (ii) Outside of work employees must ensure that, when using social networking platforms First Group's ..reputation [is] protected. Where there could be any confusion , you should always make clear that any views expressed are your own and not those of First Group.

    When using social media you must (amongst other matters listed) (i) not identify your workplace in your user profile in a negative way (ii) be aware that social networking sites are public (iii) check security settings and ensure any private comments remain private (iv) not make derogatory or abusive comments about First Group, industry stakeholders (including customers) on matters specifically relating to First Group or its subsidiaries (v) <u>not behave in a way that could damage working relationships with other employees through ..harassment or making derogatory or abusive comments </u>(emphasis added).

26. In July 2018, to coincide with the introduction of tablets to drivers, the respondent's own Social Media Policy v 3.0 was introduced ("the Social Media Policy").

27. The Social Media Policy provided in summary (amongst other things) :

    27.1. Purpose: (i) to minimise the potential of …damage to the reputation of the company through inappropriate communication on

social media: (ii) to ensure that …employees… are aware of their responsibilities and obligations in respect of social media.

27.2. Application: the policy applies to all employees and to use of social media whilst at work and outside of work and sets out the accepted use and your responsibilities as an employee for the use of social media. The policy should be read in conjunction with the First Group Acceptable Use Policy.

27.3. The use of social media was prohibited at work.

27.4. Guidance for Staff using social media outside work: Employees must ensure that, when using social networking platforms SWR's ..reputation [is] protected. Where there could be any confusion , you should always make clear that any views expressed are your own and not those of SWR. When using social media you must (amongst other matters listed) (i) not identify yourself – name and when relevant role – when you discuss SWR or SWR related matters (ii) be aware that social networking sites are public (iii) check security settings and ensure any private comments remain private (iv) not make derogatory or abusive comments about SWR, industry stakeholders (including customers) (v) <u>not behave in a way that could damage working relationships with other employees through ..harassment or making derogatory or abusive comments.</u>

27.5. Employee's Responsibility: Comply with the guidelines. Seek guidance from your manager if you are unsure or unclear of anything in this policy.

28. On 13 November 2018 the claimant received an electronic tablet which was issued to train drivers. At the same time as the tablets were distributed to drivers a bundle of other documentation was provided in a plastic folder including the Social Media Policy and the Acceptable Use Policy.

29. On 13 November 2018 the claimant signed a document headed SWR Driver Tablet Policy. He also signed a 'Receipt of Publications' document. I accept the claimant's explanation that this document only acknowledged receipt of a SIM card for the tablet. A third document was entitled Record of Briefing "Samsung Tab Active 2 Tablet briefing". It contained a table. Separate rows listed (among other items/documents) i) the Tablet itself and ii) the Social Media Policy. Columns were headed 'Completed' - y/n" and 'Actions'. In the Tablet row the word 'issued' appeared. In the Social Media Policy row were the words 'Policy issued and agreed'. The purpose of this document was to record formally the receipt of the tablet, the Social Media Policy and a relevant briefing on them. This document was not signed by the claimant.

30. On 29 November 2019 the claimant re-tweeted without comment a post from a third party saying "*I want my country back, I don't want any more immigrants, I dont want any more diversity or multi-culturalsim I've had enough of it I don't want the ideology of Islam I don't want halal slaughter*

I don't want burkhas everywhere I want to hear the English language.' ("the Diversity re-tweet")

31. On 21 December 2019 the claimant re-tweeted without comment a cartoon of the figure of 'the grim reaper carrying an axe marked 'Islam' and, having passed a number of doors marked with arabic country names and showing blood emerging from beneath each door, the figure was opening a door marked India. It was accompanied by the statement 'Keep them out' ("The Islam re-tweet").

32. On 10 January 2020 the claimant issued a tweet relating to the NHS. It said "*Our beloved NHS isn't under funded…you allow over 2 million immigrants into your country and give them full access to the NHS, its now at full stretch"*. A second tweet on the same day made a similar point ("the NHS tweets").

33. On the same day he retweeted a tweet by Jeremy Corbyn MP encouraging people to hold up a sign at home/workplace to encourage people to 'take the knee' in support of the Black Lives Matter movement. The claimant commented: 'You total c*nt' ("the BLM Tweet").

34. On 12 February 2020 the claimant tweeted; "*I am so pleased the government went ahead with the deportation plane. We have a lot more flights to fill especially to Pakistan #evilgroominggangs".* ("the deportation re-tweet") . The deportation tweet was made in the context of news reports of the chartering of a flight to deport people with criminal convictions to the West Indies, and reports at around the same time of the activities of grooming gangs of Pakistani origin in Oxford.

35. On 14 April 2020 the claimant tweeted "*China whoops, sorry those chinki cunts released this virus to kill the western world yes no*?". ("the Chinese tweet").

36. On 23 April the Claimant tweeted 'Happy St George's Day' with a picture (illegible) of tattoos ("the St George's Day tweet")

37. On 12 June April 2020 the respondent received an anonymous letter from *" A concerned SWR User"*. The letter sought to '*highlight the disturbing trend of the views frontline SWR staff seem consistently to hold*.". The letter referred to the use of terms including 'Chink' and attacking/mocking Muslims. It stated '*If you are not willing to address this my next letter will be sent to my local MP, the transport secretary, the Police and the national press*". It went on to refer to the fact that one of SWR's parent companies is Chinese owned. It attached screenshots of the Chinese Tweet, the Diversity Re-tweet and the St George's tweet.

38. On 17 June 2020 at about 17.20 the claimant was summoned to attend an interview on the following day at, in the event, 16:00. The purpose of the interview was a fact find to investigate the complaint letter. The claimant was not advised in advance of the reason.

39. Also on 17 June 2020 in preparation for the meeting Mr Bumstead, because he was not familiar with twitter, had arranged for a HR colleague ('Jade') to look at the claimant's twitter account. Jade took screenshots of some earlier tweets – specifically the Islam re-tweet, the NHS tweets, the deportation tweet and the BLM tweet.

40. On 18 June 2020 the first fact find hearing took place. It was attended by Mr Bumstead, Jade remotely as note taker, and the claimant. I refer to the minutes contained in the bundle which are an accurate record of the meeting.

    40.1. During the first fact find meeting Mr Bumstead put before the claimant a copy of the documents the claimant signed on 13 November 2018 and suggested that the claimant had received the social media policy. The claimant said that he did not recall receiving the social media policy, but that if he had he didn't remember because he didn't use his tablet anyway. The claimant said he had not read the Bullying and Harassment policy or the Social Media Policy.

    40.2. Mr Bumstead read out the anonymous letter and showed the claimant the attached Chinese Tweet, the St Georges Tweet and the Diversity re-tweet. The claimant denied being a racist but accepted that he should not have used the words 'chinki cunts' in the Chinese Tweet and that there must be Chinese or 'oriental' workers at SWR, and they probably wouldn't like the Chinese tweet, and that it was derogatory and offensive. He stood by his opinion about the virus.

    40.3. When Mr Bumstead asked for permission for Jade to look into his twitter account, the claimant immediately took his phone out and made the account inaccessible. During a short break he deleted his account before any further inquiry could be made into the content of his twitter account.

    40.4. Mr Bumstead put to the claimant the BLM tweet, the Islam re-tweet and the NHS tweets which had been screen-shotted by Jade the day before.

    40.5. The claimant then lied to Mr Bumstead. He falsely stated that the account had in fact been deleted on the previous Monday. He falsely stated that he could not delete the account on his phone and needed a laptop to do that. He falsely claimed that his account had been hacked so that he could not admit whether he had tweeted or retweeted any of the tweets.

    40.6. He accepted that he 'possibly' had 'friends' on twitter who were work colleagues, but that he could no longer say because the account had been deleted. He said that he did not read tweets before retweeting them .

41. On 30 June 2020 Mr Bumstead held a second in person fact finding meeting with the claimant and Jade taking notes (by phone). I refer to the

minutes of that meeting in the bundle. The claimant said that he had taken legal advice and that re-tweets expressed others' opinions or ideologies, or they were political or factual comment. He said that he had received a large number of messages in support.

42. On 2 July 2020 Mr Bumstead convened a meeting with Jade. A note taker was present. I accept the notes of this meeting are accurately set out in the bundle.

43. On 7 July 2020 the claimant attended the third fact finding meeting with Mr Bumstead. Jade attended by phone to take notes. I refer to the minutes of this meeting in the bundle as accurately recording the content of the meeting. I note in particular

    43.1. Mr Bumstead said that the Acceptable Use Policy had replaced the social media policy> He put to the claimant that he had collected the social media policy when he collected his tablet. The claimant said that he did not remember whether he picked up the paperwork. He said that the company had not got a signed piece of paperwork showing he had been briefed on the policies. "*No-one has been briefed so the policy is whatever I interpreted it as*". He accepted that he was supposed to read policies and go and see someone if they are not understood, he said that he clearly didn't understand the policy.

    43.2. The claimant again said (falsely) that he had been hacked, and that he had closed down his account, but (falsely) he wasn't sure when.

44. Following this meeting, the claimant was provided with a letter setting out the charges against him and that they were being considered as gross misconduct:

    44.1. That between Friday 29 November 2019 and Tuesday 14 April 2020 you have posted or shared offensive insulting discriminatory and derogatory comments on your twitter account which resulted in a complaint being received

    44.2. By posting or sharing such comments on social media you have behaved in a way that could damage working relationships with other employees in contravention of the Acceptable use Policy

    44.3. As a result of the above you have demonstrated behaviour and views unbecoming of a SWR employee.

45. On 10 July the claimant was advised of the date of his disciplinary hearing. He was provided with a pack of documents in advance of the disciplinary hearing.

46. On 27 July 2020 the claimant attended a disciplinary hearing with his representative, Mr Davey. Mr Davey was a very experienced employee representative. A note taker was present. The minutes in the bundle

before me accurately record the meeting. The disciplinary manager was Mr Kennedy.

47. I note the following matters in particular.

48. After being read the charges the claimant's representative asked questions:

   48.1. about the anonymous letter. Mr Kennedy explained that its author was unknown and that the other employee whose conduct was referred to in it was also being investigated.

   48.2. about the unsigned briefing form. He submitted that the claimant should have been briefed and educated on the policy. Mr Kennedy agreed to check with Mr Bumstead.

49. The claimant made a prepared speech:

   49.1. He complained about the first fact find, that he had a long journey to attend it, that he broken his glasses and couldn't see properly, that Mr Bumstead had suggested incorrectly that he had signed for the social media policy. He gave an explanation about the day that the tablet was given out which he said he had been reminded of following discussions with colleagues. He said that he never knew about the paperwork, and re-iterated that he had not collected it and had never read it. He said he had collected his tablet, signed for it and walked out. He said he had not used the tablet since.

   49.2. He admitted that he had lied to Mr Bumstead about the account being hacked, and that he had deliberately deleted the account during the first fact finding meeting and lied about that not being possible on a mobile phone. He said he panicked because he was being accused of racism.

   49.3. He said he had made an error, that he could see how his tweets could be 'offending and discriminating a work colleague'.

   49.4. He emphasised his length of service and the references from colleagues.

   49.5. He said in effect that he thought that if he didn't mention the company it was not a work problem.

   49.6. He expressed hope that he could apologise. He had drafted a letter of apology to the complainant and a letter to the company. He said he was out of his depth on social media, and asked for help with awareness or equality courses. He offered to do an instructional video to warn other drivers of the issue, and said that other drivers shared his understanding that if you didn't mention the company you were ok on social media.

49.7. He apologised and explained that there were no other bad things on his account, and that he had been sucked in when during Brexit his followers increased from 300 to 1100.

49.8. The claimant admitted that he deliberately re-tweeted material for popularity.

50. Mr Kennedy asked whether the claimant thought colleagues would be offended if they saw what he had tweeted. He replied that he thought they would complain. Mr Kennedy said that he thought that sounded like the claimant was not remorseful about his conduct, but only about the fact that it had come to light. The claimant said that he was remorseful and that he had been '*into the political thing'* and had been chasing popularity.

51. The claimant accepted that by making his account public he was broadcasting to the world. He commented on each of his tweets (except the St George's tweet which was not discussed). Broadly he said they were political comments but not appropriately expressed.

52. Mr Kennedy pointed out, and the claimant accepted, that the rail business employs a very diverse workforce, and transports many nationalities – SWR transports 130,000 people per day at peak. The claimant said it was a lack of education and he had not looked at the bigger picture. Mr Kennedy said that he accepted lack of education to a degree but that making a comment like 'those chinki cunts' was not down to a lack of education and was a terrible and unacceptable thing to broadcast or to write down. The claimant agreed.

53. There was a short break. I find that during that break Mr Kennedy contacted Mr Bumstead to clarify the position as it was during the fact finding about signing for the social media policy.

54. I reject the suggestion by the claimant (as I understood it) that Mr Kennedy was consulting higher authority who were telling him to dismiss the claimant. This suggestion was unsupported by any evidence. By contrast Mr Kennedy had said that that was what he was going to do earlier in the meeting and his comments after the break are consistent with his evidence that he called Mr Bumstead.

55. After the break Mr Kennedy said that he knew that other material and instructions, Q&A etc as well as the social media policy was provided at the same time as the tablet. The claimant said that he did not recall the paperwork, that he had taken the box with his name on it (containing the tablet) that he didn't remember the day but he did recall that it was a rush. He said he had seen the tablet policy document and signed it.

56. Mr Kennedy said that "*when you work for a big company, there are policies and procedures for everything right at the start. But policy or no policy can you agree those statements are wrong".* The claimant accepted that the tweets were '*not defendable. I don't condone that at all'* He said he was disgusted with himself and had let his colleagues and family down.

57. Mr Kennedy said that employees have to follow policies, that they need to be aware of them, '*whether you refer to them every day or signed them on paper or not'*. *The policy referred to here and the general behaviours in it is not a policy that we have to brief every day of the week, but it is part of what we do and how we expect people to work…some things are an absolute no-no whether you specifically mention it or not'*.

58. The claimant was permitted to make a final submission. In it he said' *Policy or no policy they (the tweets) were unacceptable. I agree I don't need a policy to see how silly I was*" he asked for one more chance.

59. Mr Kennedy took approximately 45 minutes to reflect. After summarising the claimant's submissions and noting his honesty about his lies during the fact find meetings, he concluded that the charges were proven (the third really being a consequence of the first two rather than a separate head) and that the appropriate sanction was immediate dismissal. He said that

    59.1. the claimant knew the comments he made were offensive;

    59.2. the claimant worked for a business with a diverse workforce and customers, but the comments would be offensive anywhere, and could not be condoned in any way;

    59.3. all policies were issued together and with tablets, and he had a reasonable belief that the claimant had been issued with all policies including the Acceptable Use Policy;

    59.4. as an employee the claimant was expected to behave in a manner which was in line with the company's behaviours and views, and the claimant had not done so.

    59.5. He was grateful for the expressions of remorse, but the effects of the conduct could not be undone. The tweets were published without regard for how colleagues and passengers may have been upset and offended.

60. The respondent provided him with a dismissal letter on the same day.

61. On 27 July 2020 the claimant submitted a notice of appeal on the following grounds : (i) misinterpretation of the facts ii) severity of the punishment.

62. The Appeal hearing was held on 2 September 2020. The claimant attended and was represented by a very experienced union representative, Mr Morris. A note taker was present. The Appeal was conducted by Mr Gillies, Head of Drivers. The notes in the bundle before me accurately record the meeting. I record in particular:

63. The claimant's representative referred to an incident at the Salisbury depot which involved a racist comment by a driver towards a black guard in front of witnesses on SWR premises. He said that that driver was still employed as a driver. He said that there should be consistency of sanction. In this

case the claimant's comments were made on a private phone, outside of work with no mention of working at SWR;

64. He emphasised the claimant's character references including 11 references from "people from the BAME community" – a selection of these were read by the claimant to Mr Gillies.

65. He emphasised the lack of documentary proof that the claimant was provided with the relevant policies, or that he was briefed on them. He said that the claimant says that 80% of his depot were unaware of the policies.

66. The claimant repeated that he had simply believed Mr Bumstead's statement at the first fact find meeting that he had signed for the Acceptable Use Policy. He then gave another more detailed account of the day the tablets were collected. He said that he collected the tablet, signed for it, saw a pile of clear plastic folders with all the paperwork but didn't collect them.

67. Mr Gillies asked him about the tweets, in particular the Chinese tweet, which he said was not a comment made in isolation. The claimant said he thought there was nothing wrong with the re-tweets at the time because they related to news articles. As regards the Chinese tweet he said that he was drinking on his days off and "*when I drink I say silly things'*. Those things then remain because they are on social media. He referred to domestic difficulties at the time of the Chinese Tweet.

68. Mr Gillies invited the claimant to comment on his obstructive, evasive and dishonest conduct during the investigation. The claimant explained that he panicked.

69. Mr Gillies said that it appeared to him that the claimant was trying to avoid accepting what was on the account and sought to remove it. It was only after taking advice from his union representative before the disciplinary, that he came clean. The claimant replied that Mr Bumstead had not been honest with him either by putting the form in front of his and saying the policy had been signed for.

70. Mr Gillies said that "*you don't need a social media policy to know what's not right".* The claimant asked in response if the comments were even racist, except for the Chinese tweet for which he was remorseful, and said they were talking about events that were happening.

71. Mr Gillies adjourned the appeal for a week to consider the matter. I find that, in particular, Mr Gillies wanted to inquire about the other case which Morris had relied upon. He was told that the case had not resulted in a dismissal at that stage but that it was an unusual outcome for a case of that nature and was receiving further consideration.

72. On 16 September 2020 the same individuals attended the adjourned Appeal hearing. I accept as accurate the minutes of this meeting which are contained in the bundle before me.

73. Mr Gillies endorsed the sanction of dismissal. He said he found the charges against the claimant proven and that the disciplinary officer had understood the issues and issued an appropriate sanction. He referred to the claimant's previous good conduct, expression of remorse and the need for consistency in disciplinary action and considered alternative sanctions but he could not reconcile a reduced sanction with his belief that to do so would endorse the comments and attitudes that the claimant had displayed in his posts.

74. On 16 September 2020 the respondent issued an appeal outcome letter conforming the sanction of dismissal for gross misconduct.

Relevant Law

75. Under section 94(1) of the Employment Rights Act 1996, an employee has the right not to be unfairly dismissed by his employer.

76. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996.

77. Under s98(4) '… 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.'

78. The question is whether dismissal was within the band of reasonable responses open to a reasonable employer. The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed: Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, CA. The question of whether a reasonable investigation was carried out is judged according to that employer's belief in the alleged misconduct: Uniqwin UK Ltd v Weston EAT 0454/13. It is not for the Tribunal to substitute its own decision as to the reasonableness of the investigation.

79. If a dismissal is found unfair by reason of procedural defects then the fact that the employer would or might have dismissed the employee anyway goes to the question of remedy and compensation reduced to reflect that fact Polkey v A E Dayton Services Ltd [1988] AC 344..

80. Section 122(2) of the Employment Rights Act 1996 provides that where the Tribunal finds that any conduct of a Claimant before the dismissal was such that it would be just and equitable to reduce the amount of the Basic Award, the Tribunal must reduce that amount accordingly.

81. Section 123(6) of the Employment Rights Act 1996 provides that where the Tribunal finds that the dismissal was to any extent caused or contributed to

by any action of the Claimant, it must reduce the amount of the compensatory award by such proportion as it considers just and equitable.

82. I was referred by the respondent to the following cases: Beedell v West Ferry Printers Ltd [2000] EAT 135; Hadjioannou v Coral Casinos Ltd [1981] IRLR 352; London Ambulance Service v Small [2009] EWCA; Hollier v Plysu Ltd [1983] IRLR 260.

Conclusions

83. In reaching my conclusions I have considered the oral submissions made on behalf of the claimant and the respondent.

Did the respondent genuinely believe the claimant had committed misconduct?

84. That the facts occurred which the respondent relied upon as constituting the misconduct was not seriously in dispute. Although he initially claimed that his twitter account had been hacked, by the date of the disciplinary hearing the claimant admitted that he had published the China tweet, and the other tweets and retweets taken into account by the respondent.

85. I heard evidence from Mr Kennedy and Mr Gillies that each genuinely believed that the conduct had occurred and that those facts constituted misconduct in connection with the claimant's employment with the respondent. I accept their evidence.

Did the respondent hold the belief that the claimant had committed misconduct on reasonable grounds ?

86. I remind myself that this question must be determined on the basis of the information and evidence which was before the decision makers at the time the decision to dismiss was made.

87. I approach the question of whether the respondents managers had reasonable grounds for their belief that the claimant's conduct (which in fact occurred) amounted to misconduct justifying dismissal by asking the following questions:-

    87.1. Did the respondents have reasonable grounds for believing that the conduct in question could constitute misconduct within the meaning of the respondent's Acceptable Use Policy and/or Social Media Policy for the purposes of the claimant's employment?

    87.2. Did the respondents have reasonable grounds for believing that the Claimant's conduct in fact breached one or more terms of the policies ?

    87.3. Did the respondents have reasonable grounds for believing that the claimant had knowledge of the policies and their contents?

88. As regards whether the respondents had reasonable grounds for believing that the conduct in question could constitute misconduct within the meaning of the respondent's Acceptable Use Policy and/or Social Media Policy for the purposes of the claimant's employment:-

89. Both the Acceptable Use Policy and/or the Social Media Policy provided that employees must "not behave in a way that could damage working relationships with other employees through ..harassment or making derogatory or abusive comments". The Harassment Policy set out descriptions and examples of harassment amounting to discrimination which included unwanted conduct that …creates a…hostile, degrading, humiliating or offensive environment' for an employee including 'calling someone a nickname linked to their …. nationality". Both policies warned employees about the use of public settings on private accounts.

90. I accept Mr Kennedy's evidence that he believed that the policies could apply to conduct of the kind the claimant was charged with. In particular the prohibitions against making derogatory comments about stakeholders and customers, and not behaving in a way that could damage working relationships with other employees through making discriminatory, derogatory or abusive comments in a public forum or one to which to which other employees of the respondent could have followed or had access:-

    90.1. It is clear that the claimant's account was public.

    90.2. Mr Kennedy considered the Chinese Tweet racist, offensive and disgusting. He considered that the Diversity re-tweet was also racist and offensive and a rejection of multi-culturalism by an employee of a multicultural company. He considered the Islam tweet offensive and discriminatory on religious grounds and he rejected the claimant's explanation that the Islam tweet related only to ISIS.

    90.3. In so far as the claimant sought to argue that the content should be interpreted as legitimate political comment or opinion/ideology, I accept Mr Kennedy's evidence that he considered that the deportation tweet was difficult to categorise and could be considered the expression of a reasonable political opinion on contemporaneous news items, and that although expressed in terms that may offend he would not have dismissed for that tweet alone. He regarded the NHS tweet and the BLM tweet in a similar way. He considered there were some clear offensive and discriminatory (race and religion) tweets. Others that were less clearly so but taken with the clearly offensive tweets he concluded they were probably intended to be discriminatory and offensive.

    90.4. I am satisfied that Mr Kennedy had reasonable grounds for believing that the tweets could constitute misconduct within the meaning of either of the policies.

    90.5. My finding is supported by the fact that the claimant himself admitted at the time that the content could not be condoned and/or was inappropriately expressed.

90.6. I do not consider that there would have been reasonable grounds for Mr Kennedy to believe that the conduct could fall within the terms of the policies prohibiting abusive or derogatory comment about the respondent, its stakeholders or customers. The claimant did not identify himself with the respondent. Whilst his tweets might have offended stakeholders (one of the respondent's owners was controlled by Chinese entities) or customers, they were not directed at them. However, although Mr Kennedy makes reference in the disciplinary meeting to the respondent's passengers being multicultural, having heard his evidence, I conclude that whilst he noted that the terms of the anonymous complaint showed the *potential* for damage to SWR's reputation, his decision-making was focussed on the misconduct charge and terms of the policies which addressed the potential of the tweets to affect that working environment. My conclusion is supported by the fact that it is clear from the disciplinary meeting that Mr Kennedy believed that the anonymous letter, although signed as 'an SWR User', in fact came from an SWR employee. I also accept Mr Kennedy's evidence before me that he took account of the fact that the claimant's twitter account was operated in a personal capacity and was not linked to his employment, and that nothing before him linked the claimant as an employee of the respondent

91. I accept Mr Gillies evidence that he considered also that the views expressed in the claimant's tweets were expressed publicly and were racist and that such offensive tweets would be upsetting to a large proportion of his colleagues, and there was no limit on who could have read them. So for the same reasons as above, I find that he had reasonable grounds for considering that the policies could apply to them

92. As regards whether the respondent had reasonable grounds for believing that the claimant's conduct in fact breached one or more terms of the policies:

93. Mr Kennedy believed that at least one person (the anonymous complainant) had identified the claimant as an SWR employee and that he had admitted that SWR employees were among his followers, or at least that that was likely and the claimant's claims to ignorance because the account had been deleted was not credible. Mr Kennedy said in the disciplinary meeting that he believed that the anonymous letter was likely from an employee of SWR. This was because the content of the complaint – which threatened to take action if the company 'was not willing to address' the complaint - could only have been made by someone with close links to the company or who was an employee themselves.

94. It is clear from the disciplinary meeting notes, and it was clear from his evidence before me, that Mr Kennedy took account of the potential impact of such material on a multicultural workforce.

95. Further, the claimant accepted that his conduct in publishing the tweets and retweets was deliberate and done for the purpose of courting personal popularity amongst the public and his followers.

96. I conclude therefore that the respondent had reasonable grounds for concluding that the claimant's conduct in fact breached one or more terms of the policies.

97. As regards whether the respondent's managers had reasonable grounds for believing that the claimant had knowledge of the policies and their contents, I find that they did not have reasonable grounds for this belief.

98. The claimant had claimed that he had not in fact collected the paperwork was not aware of the contents of the policies, had not been briefed on them, and had not used his tablet (in other words he would have had no need to question the lack of paperwork explaining how to use it) at the time he published the tweets.

99. The documents signed by the claimant on 13 November 2018 and the unsigned Record of Briefing in relation to the Tablet of the same date show that the respondent had a policy or procedure both of briefing employees in relation to new policy documents and of obtaining signatures from employees to record that that had occurred.

100. The critical document which recorded that the claimant had received, been briefed on and agreed the Social Media Policy – the Record of Briefing - was unsigned. The significance of obtaining a signature to support his belief in the claimant's conduct in breach of that policy was underlined by Mr Kennedy taking steps to check the position with Mr Bumstead during the break in the disciplinary meeting.

101. There is a further difficulty for the respondent. The policy the breach of which was relied upon by the respondent as a distinct allegation was a breach of the Acceptable Use Policy, not the Social Media Policy. Although the terms of the relevant provision (i.e that relating to comments affecting the working environment) are identical, the Acceptable Use Policy is expressly directed at the misuse of the respondent's IT systems. That is not what occurred in the claimant's case, and it is not reasonable, I find, for the respondent to rely on an expectation that an employee would proactively have sought in that policy information on wider social media usage restrictions. Furthermore, during the second fact find meeting Mr Bumstead told the claimant that First Group had replaced the Social Media policy with the Acceptable Use Policy. I do not know if this was accurate or not, but it was certainly unclear because it is the Social Media Policy v3.0 which was identified as having been distributed with the materials accompanying the tablet, and that policy version post-dates the date of the Acceptable Use Policy.

102. The claimant claimed that the process of dismissal was unfair because he was misled by Mr Bumstead in connection with Mr Bumstead's suggestion that he had signed for a social media policy. I find that Mr Bumstead did incorrectly tell the claimant during the first fact find meeting that a document he had signed showed that he had signed for the social media policy. I find that in fact the signed documents recorded that the claimant had collected a tablet and a SIM card. However, I reject the

claimant's allegation that there was unfairness because Mr Bumstead knew that he had broken his glasses just before this meeting and could not therefore see what was before him. I find that the claimant was not significantly impaired from looking at documents. The claimant made no mention at the time that he was unable to see documents and I would have expected him to do so if he was having genuine difficulties. Further, in the meeting notes, which the claimant accepted in his evidence were accurate, Mr Bumstead says "I showed you the tweets, which you looked at…'. Moreover, the claimant later accepted in the course of his disciplinary hearing that he had manipulated his mobile phone under the table during the meeting. In any event the claimant had the opportunity, which he took, in later fact-find and disciplinary and appeal hearings to deny that he had in fact received the policies or a briefing. This enabled him to rectify any potential unfairness arising from this error by Mr Bumstead.

103. Mr Kennedy relied on the fact that he had personal knowledge that the standard procedure of issuing tablets involved distribution of the Acceptable Use Policy and the Social Media Policy at the same time, and the claimant's apparent understanding that if he didn't mention the company and the account was his own he would not be sanctioned. In the absence of proof by way of signature that the claimant had received the polices and had them explained to him - as the respondent's procedures envisaged – I find that there were insufficient grounds for Mr Kennedy's belief that he had done so.

104. Mr Kennedy relied also on the fact that the policies were available on the respondent's hub. Whilst it was an obligation of employees to acquaint themselves with applicable policies, I do not consider it fair and reasonable to have expected the claimant, even though he was an active social media user, to have proactively sought out the details of the Acceptable Use Policy in circumstances where that purpose of that policy was expressed to be to 'outline the standards you must observe when using First Group's IT systems' and he was not using the respondent's IT system.

105. This shortcoming was not remedied during the appeal stage before Mr Gillies.

106. The absence of reasonable grounds to conclude that the claimant had been given notice of and had been briefed on the policies was significant in my opinion. This is because the circumstances in which social media activity which does not directly identify or criticise an employer and is conducted on personal equipment out of working hours might be relied upon by an employer as constituting gross misconduct justifying immediate dismissal is a nuanced area in which a reasonable employer might be expected to provide clarity or some degree of prior education or awareness raising. In any event I infer this was intended by the respondent because the documentation shows that a briefing on the Social Media Policy was intended.

107. In the absence of better evidence I do not think that it was fair for Mr Kennedy or Mr Gillies to rely on the proposition that 'policy or no policy ..

those statements are wrong" or that ' some things are an absolute no-no whether you specifically mention it or not' or that "you don't need a social media policy to know what's right" in circumstances where the principal allegation against the claimant was based upon breach of the Acceptable Use Policy. In any event a mere assertion that something is 'wrong' without making clear how any such wrongdoing relates to a person's employment or constitutes a breach of any requirement of their employment is an insufficiently clear allegation of misconduct.

<u>Was dismissal within the range of reasonable responses for the respondent?</u>

108. Because the respondent had no reasonable grounds (and had not established reasonable grounds by way of further investigation at the time) for believing that the claimant had been notified of and briefed on the policy for breach of which he was being disciplined I find that dismissal was not within the reasonable range of responses for the respondent.

109. However, I record that if the claimant had received and been briefed on the relevant policy, I am satisfied that dismissal would have been within the range of reasonable responses open to the respondent.

110. The respondent had reasonable grounds to believe and did believe that the China Tweet and the Islam re-Tweet and the Diversity Re-tweet were made to the public. They were not an isolated single instance. The tweets had been posted deliberately for the purpose of personal popularity knowing (as his acceptance in the course of the disciplinary meeting showed) that the content was offensive. They had attracted the attention of at least one individual who (as Mr Kennedy reasonably inferred) was likely to have been an employee and who had complained about them. It is reasonable for the respondent to have concluded that the impact on the working environment could have been serious for a multi-cultural employer. Mr Kennedy took account of these matters and further:-

110.1. took account of the claimant's clean record, length of service and testimonials and Mr Kennedy's own satisfactory experience of dealings with the claimant; but .decided that the seriousness of the conduct outweighed those considerations;

110.2. considered that the claimant had been evasive and dishonest during the investigation: he had lied about being hacked, and Mr Kennedy considered that he had deleted his twitter account peremptorily because he was worried about what else was in it: he had had argued in the second fact find meeting that it was not inappropriate to re-tweet ideology, while still maintaining that he had been hacked;

110.3. disbelieved that the claimant's expressions of remorse were genuine, and believed that if he had not been subject to investigation he would have continued.

111. decided that the conduct amounted to gross misconduct and merited immediate dismissal.

112. I accept Mr Gillies evidence before me that in considering the sanction applied by Mr Kennedy he considered that it was reasonable also to conclude that failure to dismiss someone who had made derogatory, discriminatory or offensive comments (as the claimant accepted he had) would be seen amongst staff as an insufficiently robust response.

113. I find that decision to dismiss for gross misconduct would have fallen within the range of reasonable responses.

114. Both managers reached the conclusion and recorded in the minutes of the disciplinary and appeal meetings that the claimant was not genuinely remorseful in part because of his dishonesty at the investigation stage and the deletion of his account in the middle of the fact find. It was reasonable to so conclude, and reliance on this as a factor in consideration of the sanction was within the range of reasonable responses.

115. The claimant relied upon a single instance of another case where he claimed that an employee had received a lesser sanction for the use of racist language on company premises as being an example of inconsistent treatment which made the imposition of the sanction of dismissal unreasonable in his case. This issue was specifically raised at the Appeal stage and Mr Gillies delayed his decision in order to investigate it.

116. I was told by Mr Gillies and accept that the other case referred to involved a direct exchange between employees who were known to each other and was part of a chain of conversation and that it could reasonably have been expected to be addressed through a different disciplinary/remediation process. I was told that in the event that the sanction was reviewed and that driver has been dismissed. In any event I am not satisfied that there was a truly analogous example of a disparity in treatment which would have made the sanction of dismissal in his case unreasonable or unfair.

<u>Was the claimant dismissed fairly in all the circumstances, determined in accordance with equity and the substantial merits of the case.</u>

117. For the reasons I have given, I find that he was unfairly dismissed.

Remedy

<u>Polkey Adjustment</u>

118. The Respondent did not submit that there was any basis for an adjustment to any award on the basis of a Polkey adjustment. I therefore make no adjustment on that basis.

<u>Conduct Adjustment</u>

119. I make the following findings of fact on the balance of probabilities in relation to the claimant's conduct:

120. Contrary to the position adopted by the claimant at the time of his dismissal, on 5 February 2019 the claimant had in fact been briefed on the

existence of the Social Media Policy and the potential implications of that policy including for employment:-

120.1. The bundle contained an email dated 23 September 2021 from Mr Bolton to Mr Gillies. Mr Bolton's email stated that he had provided a presentation to drivers when the tablets were introduced as part of the driver training programme ("DDD"). He attached copies of slides which he had used at his presentation. These contained a slide of the Social Media Policy and related commentary including about the dangers of dismissal from work related and personal social media posts.

120.2. Mr Gillies also referred to a schedule in the bundle showing that the claimant had attended such DDD briefing on 5 February 2019.

120.3. These documents were not before Mr Kennedy or Mr Gillies at the date of the decision to dismiss and to dismiss the appeal.

121. The claimant in fact collected a copy of the social media policy when he collected the tablet, but failed to sign the relevant form. If I am wrong on that, I find that the claimant was nevertheless fairly warned by the respondent of the existence and potential consequences of the Social Media Policy for his online activities in the course of the DDD briefing on 5 February 2019. If he did not know the details of the Social Media Policy or understand its application to his social media activities outside of work, his ignorance was due to his own wilful failure to obtain a copy or to ask managers for guidance about it.

122. Notwithstanding that he knew or ought to have known about the Social Media Policy and its contents he:

122.1. published one or more tweets and/or re-tweets on his twitter account whose content was offensive, derogatory and/or discriminatory, or reasonably regarded as such. In reaching this conclusion I record that the claimant accepted in his evidence before me that these adjectives could be applied to the Chinese Tweet;

122.2. made those comments public;

122.3. did so deliberately for the purpose of courting personal popularity;

122.4. did so knowing that work colleagues were amongst those following his account. For the avoidance of doubt I find that on the balance of probabilities colleagues were amongst his followers and that he deleted his account partly in order to prevent that fact becoming known to the respondent;

123. The Chinese Tweet and the Diversity Tweet attracted a letter of complaint about racist language and attitudes amongst front line SWR staff. I find on the balance of probabilities that that letter was from an employee of the respondent, alternatively that the conclusion that that was the case reached by Mr Kennedy contributed to the claimant's dismissal.

124. When questioned about his account by Mr Bumstead the claimant was evasive and dishonest:-

    124.1. He claimed (falsely as I find) that he had never received the social media policy or been briefed in relation to it;

    124.2. He falsely told the fact finder that his account had been hacked;

    124.3. He took steps to make the contents of his twitter account inaccessible to the respondent during the investigation meeting.

    124.4. This conduct was cynical and deliberate and undertaken in order to hamper the respondent's legitimate inquiries into the contents of his twitter account, or into the number or the identities of followers who were colleagues employed by the respondent.

125. This conduct contributed to the respondent's reasonable belief that the claimant was not genuinely remorseful.

126. Although he admitted at the disciplinary stage that he had lied, and to that extent could potentially have reduced responsibility for his dismissal, he continued to maintain that he had neither received or been briefed on the social media policy.

127. Irrespective of the claimant's alleged belief that he would not be sanctioned if he did not mention his employer or his employment, it was a reasonably foreseeable consequence of posting in a public forum which he knew, as I find, was followed by colleagues, that his offending material could become widely known within the workforce and could by their nature damage working relationships, in particular in a multi-cultural workforce.

128. I find that the claimant's conduct was culpable and blameworthy and that it caused or contributed to his dismissal.

129. I judge that he was wholly to blame.

130. I consider that the just and equitable reduction by reason of conduct in the basic award is 100% and in the compensatory award is also 100%.

<u>ACAS Adjustment</u>

131. In light of my conclusion on contributory conduct it is not necessary to determine any ACAS adjustment.

132. If it were necessary to do so, having regard to the grounds relied upon by the claimant as constituting breaches of the ACAS Code on the basis of my findings of fact above I would decline to make any adjustment for breaches of the ACAS Code.

Employment Judge N Cox
Date: 5 December 2022