EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms D Barker	v	Bondco 628 Limited

Heard at: Sheffield **On**: 4 and 5 July, 20 and 21 October 2022

Before: Employment Judge James

Representation

For the Claimant: Mr Y Lunat, solicitor

For the Respondent: Ms T Ahari, counsel

JUDGMENT

(1) The claim for automatic unfair dismissal (s.104 Employment Rights Act 1996) is upheld.

(2) In the alternative, had the Tribunal concluded that the reason for dismissal was misconduct, the claim for unfair dismissal (ss.94 and 98(4) Employment Rights Act 1996) would have been upheld.

(3) The claimant's actions contributed towards her dismissal and it is just and equitable to reduce the basic award and any compensatory award by 25% as a result.

REASONS

The issues

1 The agreed issues which the Tribunal had to determine are as follows. The words in bold have been added to the list provided to the Tribunal by the parties, in order to better reflect the wording of S.104 Employment Rights Act 1996. The tribunal was also invited by the parties to decide the contribution to dismissal question.

Automatic unfair dismissal

2 Did the Claimant ("C") **allege that R had infringed** ~~assert/complain regarding~~ any of the following statutory rights **and if so when**:

   a. Failure to provide itemised payslips

   b. Request itemised payslips **(This appears to be the same as a)**

   c. The requirement to give to employees sufficient notice before requiring them to take holidays

   d. Unlawful deduction from wages

3 **Was the reason (or, if more than one, the principal reason) for** C's dismissal **that she asserted one or more of the above rights** ~~influenced by any of the above~~?

Ordinary unfair dismissal

4 What was the reason or principal reason for dismissal? (The Respondent – R- says conduct).

5 Did R genuinely believe C had committed misconduct?

6 Was that belief based on reasonable grounds?

7 At the time that belief was formed, had R carried out a reasonable investigation?

8 Did R otherwise act in a procedurally fair manner?

9 Did R act reasonably ***or unreasonably*** in all the circumstances in treating it as a sufficient reason for dismissing C?

10 Was the dismissal within the range of reasonable responses?

11 Were all the relevant circumstances reasonably taken into account including length of service, previous record and any mitigation?

Remedy

12 **If the claimant succeeds, should there be any reduction in the compensation awarded to her because she caused or contributed to her dismissal by any action she took?**

The proceedings

13 Acas Early Conciliation commenced on 15 November and was concluded on 1 December 2021. The claim form was issued on 31 December 2021. The response form was received on 11 February 2022. The claimant makes claims for automatically unfair dismissal for asserting a statutory right; and 'ordinary' unfair dismissal.

The hearing

14 The hearing took place over four days. Evidence and submissions on liability/remedy were dealt with on the first three days. It was arranged that on the fourth day, the Judge would deliberate in private. Judgment was reserved.

15 The Tribunal heard evidence from the claimant and Elizabeth Hamer; and for the respondent from Mark Hobson, Managing Director; Rosemary De Ville,

former shareholder and director; and Alexandra Gardner, Managing Director of Smile Business Support Limited. There was an agreed hearing bundle of 545 pages. That increased during the hearing to a bundle of about 600 pages including the index. A supplementary bundle was produced by the claimant consisting of 99 pages, which was not objected to by the respondent on the basis that only a small number of pages were to be referred to during cross examination of the respondent's witnesses.

16 Following the first two days of the hearing, a further supplementary bundle was prepared, which contained invitation letters to disciplinary hearings dated 29 June 2021, for six members of staff, including Liam Smedley, Ryan Wignall and Nicholas Peach. Mr Lunat objected to that to that bundle of documents being admitted in evidence. The Judge decided that the bundle should be admitted, because the documents demonstrated that a number of other former colleagues of the claimant were subjected to disciplinary proceedings at the same time as her. That was potentially relevant to the issues in the case.

Findings of fact

Commencement of employment

17 The claimant began working for the respondent on 8 November 2004. At the time of her dismissal, the claimant was employed in the role of Night Manager a role she took up about two years after her employment commenced.

18 The respondent company, t/a The Corporation, is a nightclub and grass roots live music venue which employs about 50 people. The Managing Director is Mark Hobson. The claimant reported directly to Mr Hobson. The clamant was one of three managers – a manager of bar staff; a manager who managed the band staff if a band was playing in the venue; and a manager of the door staff.

19 The Claimant's job consisted of the following duties: responsibility for opening and closing the night club; responsibility for takings; managing all the bars; making arrangements with bands; sorting out staff rotas; management of the staff; and management of the entire venue when Mark Hobson was not present. The claimant's working hours were 12 hours per week.

20 The clamant also carried out extra duties as a gardener at The Old Station, Station Road, Chapeltown. Those duties included weeding, cutting back trees, and general maintenance of the grounds.

21 The claimant was not provided with a written statement of her terms and conditions when her employment commenced. She was provided with one after the Covid-19 pandemic had begun.

Disciplinary Policy

22 The respondent's Disciplinary Policy states:

> *Stage 1 - first warning*
>
> *If conduct or performance is unsatisfactory, the employee will.be given a written warning. … Where the first offence is sufficiently serious it can be justifiable to move directly to a final written warning.*
>
> *Stage 2 - final written warning*

If the offence is serious and there is no improvement in standards or if a further, offence occurs, a final written warning will be given which will include the reasons for the warning and a note that if no improvement results within one month, action at Stage 3 will be taken

Stage 3 - dismissal

If the conduct or performance has failed to improve the employee will be dismissed

Gross misconduct

If after investigation it is confirmed that an employee has committed an offence of the following nature, the employee will be dismissed without notice or payment in lieu of notice

- *theft or fraud*
- *physical violence or bullying*
- *….*
- *serious insubordination*

Covid-19 lockdown

23 The first pandemic related lockdown commenced on 24 March 2020. Nightclubs were forced to close temporarily. Initially, the claimant continued with her gardening duties at the Old Station until she was subsequently stopped by the police on her way to work and told it was not essential work. In a WhatsApp message sent by Mr Hobson to the claimant on 1 April 2020, he stated:

Both neighbors are still working on building projects and the houses being built across the road from us are still going on. Tell them you are a self employed builder working on the station.

The claimant was not comfortable continuing on that basis, and ceased the gardening duties. Mr Hobson told the Tribunal that comment was just 'light chat'. The Tribunal does not accept that was the case. It appears to the Tribunal to be a serious suggestion; although it is noted that Mr Hobson did accept the claimant's refusal to continue to work in those circumstances.

Temporary re-opening – July to October 2020

24 In July 2020, the respondent was able to open a section of the Corporation night club at the corner of Milton Street, providing table service. Mr Hobson maintained in his evidence before the Tribunal that this was operated by a separate events management business which he also owns, Haha Productions and that staff worked for that company on a self- employed basis. The Tribunal does not accept that was the reality. The club was the same one staff had worked at previously; the claimant, Ms Hamer and colleagues were asked to work there, carrying out the same or similar duties. They were paid 'cash in hand'. They continued to receive furlough pay, so the arrangement benefited the staff. The employees were not told they were working for a different employer. The Tribunal notes that it was argued by the respondent's counsel that this issue was not relevant to the issues before the Tribunal. It is however relevant to the issue of reliability and credibility. Hence a finding has been made about it.

Request to staff to take annual leave

25 On 2 September 2020 Mr Hobson sent a letter to staff which stated:

> *We did not request or tell our staff to take their annual leave entitlement during the first four months of furlough as many employers did, as we were initially optimistic about the duration of the pandemic, however the optimism was unfounded and we are now, in accordance with the government's guidelines 'Holiday Entitlements & Pay During Coronavirus' requesting that you take ALL unused annual leave entitlement for 2020 before the end of the furlough scheme,*
>
> *I therefore ask that you please sign this letter below showing that you understand and confirm the request. Please return this by September 4th 2020 to ensure your continued payment in September and October.*

26 This letter was understood by the claimant to mean that Mr Hobson was asserting that government guidance was to the effect that all staff use all of their annual leave for 2020 before the end of the year.

27 At a meeting between Mr Hobson, Andrew Bagnall, and the claimant on 3 September 2020, Mr Hobson confirmed that if staff did not do as requested in relation to annual leave, they would 'probably' be 'the first out the door'; later on, that they would get a foot 'up their arse'. Mr Bagnall explained at the meeting that the respondent needed to give sufficient notice before requiring employees to take holiday.

28 On 7 September 2020, Mr Hobson emailed Mr Bagnall to say:

> *On the point of holidays. No one is going to be on holiday between now and the end of Oct. Holiday pay is being used to allow the staff the top up. Please make sure all the staff know this and please do not tell them to take time off work from now until the end of Oct for god sake.*

Queries about pay

29 On 24 September 2020 the claimant queried her holiday payment [page 209]. A series of texts followed between the claimant and Mr Hobson. He acknowledged that he had received conflicting guidance and he needed to go back and check it had been done correctly.

30 Also on 24 September 2020, there was a discussion between Mr Hobson and Mr Bagnall about pay. During that conversation, the following is recorded as having been stated:

> *Andy - Dutton is 90 quid down, and it shouldn't be, it should be exactly as last period. {Dutton didn't agree to any holidays, so should have received normal furlough of 80%}*
>
> *Mark - ah yep, but Dutton needs to come off, to be honest Dutton needs to come off furlough because he said he didn't want to put any holidays through.*

31 A further meeting took place on 25 September between Mr Hobson, Mr Bagnall and Mr Lee, in which they raised concerns about the way that staff were being paid for their holidays. It was explained to Mr Hobson that the respondent had to top up the amount being received from the government towards furlough pay (whether that was 80%, or 70% at that stage), to 100% for any holidays taken.

Payslip issues

32 Payslips from May 2020 just stated 'furloughed salary'. Previously, they would set out the different hourly rates eg Night Manager hourly rate and General Operative hourly rate. This was raised on 25 September 2020 during a meeting between Mr Hobson, Adam Lee (known as 'Bruce') and Mr Bagnall. Mr Hobson stated:

> *I probably wasn't very clear Bruce, the one thing I did get pulled up on by the solicitors, she said, as far as the break down on the wage slips are concerned, that is illegible mark, doesn't make any sense, and you need to break that down.*

33 On 29 September 2020 the claimant messaged Mr Hobson about her pay being incorrect – she had been paid until 9.15 one night and 9.45 the next night but they were working until 10 pm and was 1 hour 15 minutes short.

Redundancy consultation

34 On 12 October 2020 the respondent received a grant from the Culture Recovery Fun to assist with the cost of keeping the venue running but also to give the respondent the option of making redundancies should these be necessary.

35 On 22 October 2020 a letter was sent to the claimant and her colleagues, advising them that they were at risk of redundancy. Redundancy consultation meetings took place with the employee representatives on 3 and 17 November 2020.

36 On 8 November 2020, staff were told that they would continue on furlough, at 80% of salary.

37 On 12 November 2020 a letter was sent to staff headed, 'Your next pay date of 19.11.20'. The letter said:

> *We have sought advice regarding the use of holidays and I can confirm that all employees will be required to take one weeks holiday during this next pay period. You will receive 100% of your pay for the one weeks holiday.*
>
> *For the avoidance of doubt, your next pay period will be broken down thusly:*
>
> *1.5 weeks 60% Initial furlough*
>
> *1 weeks 100% Holiday*
>
> *1.5 weeks 80% Extended furlough*

38 Following concerns raised by the staff reps, on 16 November 2020, a further letter was sent to staff from Mr Hobson, confirming that they would be paid at 80% during the next pay period. Further, that incorrect advice had been given about the request that everyone take a week's holiday during the last pay period, that the request had been removed, and that an employer was required to give notice to employees who it required to take holidays, of twice the length of the period of holidays the employer was requesting the employee take. Notice was given to those who had three weeks holiday entitlement or more remaining to take two weeks during the next pay period.

Approach to Acas

39 In about December 2020, a number of staff who shared concerns about the messages they were receiving from the respondent about levels of pay, the taking of holiday, the lack of employment contract etc, approached ACAS and asked them to approach the respondent about those issues.

40 On 3 December 2020 a letter was sent to staff by Mr Hobson by email stating:

> ***Proposed redundancies at Corporation - update***
>
> *I must apologise for not coming back to you all sooner as I promised.*
>
> *Unfortunately we are now facing legal action from a number of employees. We do not have any clear information as to what this action is in relation to and how it can be resolved. We are working closely with ACAS but have so far received limited detail. We would like to resolve this issue as amicably as possible and would welcome any employees involved to come forward with details of their claim so his can be considered further. We would also invite those not involved to come forward.*
>
> *In the meantime, no final decision can now be made in respect of the redundancy process and we are working with our legal team to plan the best way forward. Until we receive further information about the claims brought against the Company, we are unable to give a timescale for this.*

41 On 9 December 2020 a further message was sent which stated:

> ***Proposed redundancies at Corporation - further update***
>
> *Unfortunately we have still not received any clear information from ACAS as to what those involved in this action against us are demanding.*
>
> *For the sake of the health and wellbeing of those NOT involved, we now urgently require that those NOT involved come back to me before Friday 11th Dec to avoid any further consternation being caused.*

42 On 7 December 2020, the claimant raised a query about her wages. The claimant was told by Mr Hobson, after he investigated the issue, that she owed him 4 hours [246]. On 9 December Mr Hobson asked the claimant to confirm if she was or was not 'part of this group action with Wignall'. The next day the claimant agreed to call Mr Hobson. Specific evidence about that was not before the Tribunal, but from the following paragraph, it is apparent that Mr Hobson was aware that the claimant was one of the individuals who were part of the group who approached Acas.

Written contracts, furlough agreements etc

43 On 16 December 2020, the claimant received a letter by email headed **Re: Acas**. The letter stated: '*Further to the above action, please find the enclosed documents and information you requested'*. The respondent accepts that names of those who approached Acas for assistance were supplied to the respondent. Enclosed with the letter were furlough agreement letters, a furlough update, a redundancy update, September holiday pay details and details of holiday hours remaining.

44 The redundancy update letter informed the claimant that the redundancy process had ended. Since furlough support was to be extended by government:

> *The decision has therefore been made not to proceed with redundancies but to continue to use the furlough scheme to support employees.*

45 The query in relation to wages in August/September was acknowledged, and the claimant and other staff were told that the company was still looking into that. In the same letter, the claimant was told that staff were being moved to zero hours contract, claiming they were all in effect working such contracts so no fundamental change was being introduced. The claimant and other staff were asked to sign and return one copy of the contract.

46 The claimant refused to agree to sign the new contract and asserted that she was not on a zero hours contract, in a letter dated 23 December 2020. The claimant concluded that letter with the following suggestions for moving forward:

> ** New contract better fitting to the position, with guaranteed average hours set out, or*
>
> ** Re-table the redundancy with pilon/notice period or some sort of amicable settlement agreement, then rehire, refurlough.*
>
> *I really hope you understand why I feel the need to send this email.*

47 The claimant returned the furlough agreement with the following comment hand written on it:

> *I just made some changes because it was wrong. The dates stated was the 16th. Also it say that I will not do any work while on furlough. I have worked several times over this period.*

48 The claimant returned the contract, unsigned, with the following handwritten comment:

> *I have sent you an email explaining why I won't be signing that contract. It has parts missing and has errors.*

Ongoing issues about holidays and holiday pay

49 During December 2020 and January 2021, the claimant continued to assert that her holiday pay had not been calculated correctly ie at 100% of her average wage over a 52-week period. Mr Hobson agreed to look at the matter again.

50 On 27 February 2021 Mr Hobson sent a further letter to staff confirming that staff were expected to take their holidays during furlough. The covering email said:

> *Please see the attached memo, clarifying those who can and cannot carry holidays forward and also the forthcoming requirement for everyone to take holidays accrued up to and including 30th April* [139-140].

The memo stated:

> *There seems to be some confusion and misunderstanding regarding the Government's directive regarding holidays for 2020. For clarity the position is that holidays can only be carried forward by essential front-line workers*

who were unable to use their holidays due to pressure of work. This does not apply to employees whose place of work is closed.

With regards to holiday entitlement for the first months of 2021, this will be required to be taken before furlough ends on 30th April.

51 The claimant replied on the same day, stating:

This is so stressing me out, I cant actually put it into words.

With regards to holiday entitlement I have been waiting for a number of months, for you to get back in touch, regarding my holiday entitlements. I'm still actually waiting.

I've had another look on the government website and can't find anything suggesting that only frontline workers can carry holidays over.

52 Messages in the bundle show that the holiday pay issue was still outstanding in June 2021 [266] and August 2021 [271].

WhatsApp Group chats

53 The claimant was a member of a number of WhatsApp groups, with colleagues who worked for the respondent. One of those groups was set up in March 2020, to help staff remain connected with each other during the first lockdown. In the group forum, staff discussed issues such as furlough; possible redundancies; furlough pay; and holiday pay. There were about 25 staff members in that group. It was not a formal work group - although as the preceding sentence shows, the content was often work-related. The claimant confirmed in evidence before the Tribunal, which was not challenged, that she did not check the group chat every day; when she opened it, there would often be dozens of unread messages. She was an occasional contributor of messages to that group.

54 Another group was set up on 9 November 2020, with 6 members of staff. The group was originally set up for organising a gift for a mutual friend, a member of the Bar Staff, Gee Day. After the present was given to Gee Day, she was made a member of that group. None of the members of either group expected that any of those messages would be forwarded to Mr Hobson.

55 The comments made by the claimant which she was subsequently disciplined for, are set out below.

Approach to Mr Hobson by Mr Twigg and Ms Staniforth

56 On 2 March 2021 Mr Hobson met with Mr Twigg and Ms Staniforth. The Tribunal accepts Mr Hobson's evidence that he reached out to them because he felt he had a good working relationship with them, neither had sent any complaints, and both returned the signed contracts without raising any issues. They were both supervisors and he considered them 'trustworthy'.

57 Mr Hobson was told that the WhatsApp redundancy group chat was becoming 'toxic'. He was told by Ms Staniforth that threats were being made against him. He asked to see evidence of such comments, so Ms Staniforth sent some of the messages to him. Mr Hobson asked Mr Twigg and Ms Staniforth to monitor the group chat, and to send him any messages they were concerned with. The members of the group remained unaware that the chat was being monitored.

58 In April 2021 Mr Hobson moved out of his home for a few months due to fear for his safety. On 17 June 2021 a report was made to the police. The Tribunal was not told what happened to that report.

Notification of investigation

59 On 13 May 2021, the claimant and other staff were informed in a letter sent by email by Mr Hobson of an investigation he was undertaking, regarding the WhatsApp Chat group. He stated in the letter:

> *Unfortunately, we have been made aware of a Facebook Messenger group which a number of employees have joined during the lockdown period. Whilst we would encourage staff to support each other during these stressful and uncertain times, some of the comments made within this group have been threatening, defamatory and contain unacceptable language in reference to myself and my mother.*

60 Mr Hobson subsequently went through the messages that were provided to him, deciding whether they should result in disciplinary proceedings against any of the staff. Mrs de Ville was not shown any formal investigation report; no such report was produced by Mr Hobson.

61 On 14 May 2021 a collective grievance was submitted by staff concerned about a potential breach of their rights to privacy. An external company, Bhayani HR and Employment Law, and the respondent's representative in these proceedings was appointed to investigate the grievance.

62 On 15 May 2021, the claimant posted the following comment in the Gee Day group chat: *'why are the two fuck stains still in this chat'*. She accepted that referred to Mr Twigg and Ms Staniforth, after the claimant became aware that they had been providing screen shots of messages between staff to Mr Hobson, without their knowledge.

Request for volunteers for redundancy

63 On 22 May 2021 a letter was sent to all staff by email, inviting applications for voluntary redundancy, due to the business reviewing the staffing levels that would be required for reopening. Staff were told that it was anticipated that there may not be the same hours available to all members of staff as previously offered.

64 The claimant emailed Mr Hobson on 26 May 2021 stating that she had some questions about the voluntary redundancy as she was '*assuming that I'm on your list of employees that you don't need any more*'. On 27 May 2021, the claimant asked for her redundancy figure. In a reply sent on 4 June Mr Hobson told the claimant:

> *I don't have a list of employees that I don't need any more and unsure as to how this conclusion has been drawn?*
>
> *Redundancies could potentially be in all areas.*
>
> *Given the current environment, it is unlikely that we will be offering alternative roles at similar pay.*
>
> *This process could potentially take a couple of weeks to a couple of months depending upon the individual.*
>
> *The enhanced redundancy package will include an extra week.*

I hope this answers your questions and if there is anything else you need to know, then just ask.

65 After Mr Hobson told staff that the government had postponed the reopening date for nightclubs to July 19 2021, the claimant chased up her figures about a redundancy payment. The figures were provided on 19 June. Mr Hobson asked the claimant to let him know if she wanted to be considered. On 20 June 2021, the claimant confirmed that she did.

66 On 22 June 2021, Mr Hobson sent a circular to staff confirming that the respondent had received responses from all who formally requested voluntary redundancy and asked that any final requests be submitted by 5 pm on Wednesday 23 June.

Collective grievance investigation

67 The collective grievance was investigated by Phoebe Davis, HR Advisor. She interviewed Ryan Twigg on 4 June 2021. He told her the following about the monitoring of the WhatsApp groups:

It was monitored because I spoke with Mark, with Nicole, with concerns. We showed him one or two screenshots. We said we are worried about the group. We offered to say that we'll keep an eye on it and if things get said we'll let you know and the best way to do that would be to screen record or screenshot.

68 The notes of the meeting also record:

PD: Did Mark ask you to go in for a meeting specifically to discuss the Facebook group chat or was it about other things?

RT: Was about the group (of people), he was also concerned about the group because they'd gone to Acas without following the grievance procedure. He was concerned they didn't go to him and we were concerned about the group.

69 At the same time, adverts appeared for a door supervisor and bartender [273]. Mr Hobson told the Tribunal: *Yes, it was a very difficult time, staffing levels were absolutely all over the plac*e. He said in his witness statement:

At the same time I accept that an advert for bar staff did go out but this was to provide me with options so that I could meet staffing needs as and when we were given the go ahead to reopen. I also had to make preparations for staff that would possibly not turn up to their shift as this what the management were encouraging the staff to do in the group chat. I also had to factor in that some people may be self-isolating due to Covid.

The Tribunal finds that evidence unconvincing, when Mr Hobson had warned of possible redundancies on 22 May 2021, and invited volunteers for redundancy.

70 On 22 June 2021 an email was sent to staff by Mr Hobson, to say that the club would be re-opening on 19 July 2021, and staff rotas would be issued. The claimant asked for the rotas to be sent to her; none were.

Collective grievance outcome

71 On 23 June 2021 the collective grievance outcome was provided. The conclusion was that the WhatsApp group messages were not obtained

unlawfully and could be used in the disciplinary process. On 4 July 2021 an appeal against the grievance outcome was submitted. That was referred to an external HR consultant. The decision was sent to those involved on 17 August 2021. The appeal was rejected. The reasons for doing so are not relevant to the issues in this claim and nothing more needs to be said about them.

Disciplinary proceedings

72 On 29 June 2021, seven members of staff were invited to disciplinary hearings, including the claimant, Liam Smedley, Kevin Skill, Ryan Wignall, and Nicholas Peach. The letters were signed by Mrs Rosemary de Ville, Mr Hobson's mother. The Tribunal was not provided with any written email or other written instructions between Mr Hobson and Mrs de Ville regarding the disciplinary process or any other documents relating to his investigation. The absence of any such written instructions is striking.

73 The allegations against the Claimant were:

> *1. Serious insubordination;*
>
> *2. Serious breach of duty of fidelity;*
>
> *3. Serious breach of confidence; and*
>
> *4. Obscene language or other offensive behaviour.*
>
> *The basis for these allegations is that you are part of a group chat named 'Rebel Alliance' within which a number of inappropriate comments appear to have been posted by yourself. Further to that you also made derogatory comments about other members of staff.*

74 Attached to that letter were the three posts by the claimant on which the respondent relied. These are as follows:

> *'Just keep emailing, it's all evidence of him being a cunt' (19 December 2020)*
>
> *'He can suck my balls too!' (29 December 2020)*
>
> *'Why are the two fuck stains still in this chat?" (15th May 2021 [not 2020 as stated in the letter to the claimant])*

75 Nicole Staniforth also provided a statement. In that statement she said, amongst other things:

> *During this meeting [on 2 March] I told Mark about the redundancy group chat and my worries about how this had changed with threats now being made towards him. As a supervisor, it seemed unbelievable to me that staff members senior to me would be behaving in this way. Mark asked if I could send him evidence of this and I said I would. I had previously discussed my worries with Ryan Twigg, so we talked about this further. Mark then got in touch with Ryan separately…*
>
> *Later on I saw a post in the Supervisors chat group. Here Debbie Baker the Night Manger called myself and Ryan Twigg, "Fuck stains". I have now left this group chat. …*
>
> *I had to block Adam Lee, Ryan Wignall, Andrew Bagnall, Nick Peach and Debbie Baker as the insulting and threatening text had become too much.*

76 There was evidence in the bundle that the claimant had herself blocked Ms Staniforth on 10 November 2020, and Ryan Twigg on 3 October 2020.

77 On 11 July 2021, the claimant emailed Mr Hobson as follows:

> *I just want to say how saddened I am with everything that has gone on over the past year. 16/17 years is a long time to work for someone and it's sad that it ended like this.*
>
> *A lot of things have been said, in the heat if the moment when tempers were frayed. All I can do is apologise for that. I am genuinely sorry for calling you names.*
>
> *I will add that I have never threatened or hassled Nicole or Ryan, that bit is untrue. I've never been anything but honest with you, from the moment you first employed me.*
>
> *So yeah, it was just to say sorry, really.*

78 Mr Hobson told the Tribunal that he thought he passed that email to Ms de Ville. Ms de Ville told the Tribunal however that she had not seen that before. The Tribunal finds, on the balance of probabilities, that it was not sent to Ms de Ville.

Suspension of the claimant

79 On 14 July 2021, the claimant was told in writing by Mrs de Ville that she would be suspended on full pay from 19 July 2021.

80 A further collective grievance was issued on 14 July 2021 by Ryan Wignall on behalf of himself, the claimant, Liam Smedley, Kevin Skill, Adam Lee, Nik Peach and Andrew Bagnall. The grievance referred to issues that occur during further, including request to take to start to take holidays, holiday pay being incorrectly calculated, and the issuing of zero hours contracts. All of these individuals no longer work for the respondent. Mrs de Ville saw the collective grievance before she made her decision. She stated in evidence to the Tribunal that it was 'rubbish from start to finish' and did not mitigate the allegations against the claimant.

Ms de Ville's role for the respondent

81 Ms de Ville is an ex-Director and shareholder of the business. Mr Hobson states in his witness statement (#2) that Ms de Ville plays an active role in HR and associated staff management of the club but not in a paid capacity. He originally set up the business with Ms De Ville. When asked if she played an active role in both the management and staffing of the business Ms de Vile stated that during lockdown, she was aware that there were issues with pay, which she put down to problems with the accountancy firm that dealt with payroll for them. Ms de Ville was not consulted by Mr Hobson about staff wanting written contracts although she was aware of that. She was not consulted about the issues regarding furlough payments, or about staff being paid cash in hand. Mr Hobson told her about staff being sent zero hours contracts. She did not draw up the new contracts, that was done by the respondent's solicitors. The Tribunal therefore finds that contrary to the assertion by Mr Hobson to the contrary, Ms de Ville did not play an active part in HR and associated staff management, during 2020 and 2021.

82 Ms de Ville told the Tribunal that she had written the disciplinary policy; but she did not read that policy before she commenced the disciplinary proceedings.

83 On 19 July 2021, the respondent night club re-opened fully having been closed or severely restricted for around 16 months.

Disciplinary hearing - written representations

84 The claimant's disciplinary hearing was due to take place on 7 July 2021. That was not convenient for the claimant due to other work commitments. The hearing was eventually rearranged to 22 July. Unfortunately, the evening before, the claimant informed Ms de Ville that she had been 'pinged' by the NHS Covid App and told to self-isolate. The claimant was told that she could join the meeting by Zoom. The claimant was not however confident with such technology and declined that offer. The claimant was requested by Mrs De Ville to provide written representations by 5 pm on the same day. The claimant put together a written response which she sent at 6.34 pm.

85 The claimant set out in her written response, the concerns she had about Mr Hobsons' behaviour towards staff during the pandemic. These included staff being forced to use holidays during furlough without adequate notice; unlawful deductions from wages (holidays) which she was still waiting to hear from Mr Hobson about; none itemised pay slips; holiday pay being based on furlough pay (80%), not 100% of average pay over a 52 week period; trying to force zero hours contracts on staff; and the suggestion that staff who did not agree to use holidays would be 'the first to go'.

86 As to the WhatsApp groups, the claimant confirmed that one was set up to organise a gift for a colleague Gee Day; it was not a supervisors chat as alleged by Ms Staniforth. There was a supervisors chat which was set up in February 2018. The claimant offered to show both chats to Ms de Ville.

87 The clamant continued:

> *We all trusted each other and felt safe within. That was the level of trust we had in that our information was safe within the group and not to be shared outside.*
>
> *I will also add that particularly Nicole contributed to the conversations just as much as anyone else. Unfortunately she deleted all her ramblings before passing it over. I have added [two] screen shots of Nicole stating she wanted to kill Mark and the other stating she would "drag" his name on Facebook. Unfortunately she deleted the more severe ones.*
>
> *I think Nicole's statements are much worse than mine and she is back working at Corporation.*
>
> *On a final note, I'd like to highlight the inconsistent and selective nature of this process given the disciplinary procedure appears to only target individuals with longer service duration.*

88 The claimant attached a text message stating, under the name 'Nicole big balls Staniforth': '*I'm fed up of the cunt now*'. Mr Hobson was asked if an employee should be disciplined for that. He replied: M*aybe, if true. Think would be good if the claimant bring these to your attention.* In response to a question from the Judge, as to whether that was a dismissible offence, Mr Hobson stated that it was.

89 Also, on the same message, Ms Staniforth accused Mr Hobson of forging staff signatures. Ms de Ville told the Tribunal that she could not open that message, she had not seen it before. The Tribunal accepts, on the balance of probabilities, that she could not. Significantly, despite that fact, Ms de Ville did not ask the claimant to re-send it to her.

90 The same screen shot contained a message from Ryan Twigg about Mr Hobson which described Mr Hobson as a 'bald cuck pedo'. After Ms Staniforth stated: 'I'm just fed up of the cunt now', Mr Twigg replied 'All I want is my finish date and money'; Ms Staniforth replied 'Yeah same here'.

91 The claimant attached the text message from Ms Staniforth in which Ms Staniforth stated: *I'm ready for a big fight I want to kill him*. Mr Hobson told the Tribunal, and it is accepted, that he had never received that he had not seen that message before these proceedings. Ms Staniforth was appointed to the claimant's role after she was dismissed; she is now employed in a higher role still.

92 The claimant also attached the message in which Ms Staniforth stated – *Once we get paid do I have the right to drag his name on Facebook.*

93 The claimant also attached supporting statements from two colleagues, Elizabeth Hamer and Chris Baker. Those statements confirmed that staff working in nightclubs suffered verbal abuse on every shift; and that to help inure themselves against such comments, staff use such language towards each other, but not in a hostile manner. Ms de Ville was asked about those statements during the hearing. She told the Tribunal they referred to language used by customers, not staff. The statements do in fact refer to staff using profanities towards each other.

94 During cross examination Ms de Ville did state she investigated further as follows:

> *RdV: I looked at Chris Baker, Georgina Day, John Lennon, Liam. Were they involved in the group that went to Acas.*
>
> *[Mr Lunat]: Why relevant? RdV: They obviously had a grievance, even though all decided, obviously all misled, the leaders shout the loudest, they were very young and impressionable, the junior staff followed these more senior people.*
>
> *Mr Lunat: So fact that went to Acas was a factor? RdV: No, they were impressionable. Mentioned it because the claimant seems to be saying fact that other people done things it exonerates the claimant. 18 people in the group, one person had an axe to grind. There were young people, who were influenced by managers.*

95 The claimant gave two examples in her written response of the use of obscene language by Mr Hobson, as follows:

> *I will list 2 instances of Mark using such language.*
>
> *Marks outburst with Andy Bagnall and Adam Lee...*
>
> *25th September 2020. They approached Mark about paying people 70% furlough. He didn't like it, erupted at them both, swearing and shouting at them to get out. You know the story but if I need to extend then let me know.*

Mark's outburst with Jacob Kennedy.

Just before lockdown started. Some equipment was broken in a dj box in corporation, Jake and I both tried to fix it... Couldn't do it so Mark had to come to the club with a new cable/plug. Again, Mark exploded, throwing the cable at Jake and hurling obscenities at him. I had to call a doorman because Mark was furious and I wasn't sure how it was going to go. Adam Lee came and witnessed Mark's outrage. Jake and Adam will give a statement if needed.

Plenty more of these episodes but these were the most recent and hopefully shows how comfortable Mark is with swearing and obscene language.

He is also part of a doormans group chat and the content of it is quite phenomenal, he has never questioned obscene language before. Why he choses now to only suggests to me that this is what he is using against me with regards to my employment.

96 Ms de Ville did not carry out any further investigation into the examples given by the claimant of Mr Hobson using obscene language.

Warning letter to Ms Staniforth

97 Ms de Ville told the Tribunal that after receiving the claimant's comments regarding Ms Staniforth, she subsequently sent Ms Staniforth a warning letter. The document that was later produced during the hearing, was in fact a letter of concern, dated 20 July 2021 (pre-dating the claimant's email of 22 July 2021) which stated [590]:

I am writing to inform you that following an investigation into comments made within the group, 'The Rebel Alliance', I have decided that no formal disciplinary action will be taken against you at this time. I am however issuing you with a letter of concern.

Whilst I do not consider the comments you made as being serious enough to warrant disciplinary action, the nature of some of the messages you posted within the group are disappointing.

This letter is not a warning for disciplinary purposes but will be kept on your file. If there is a repeat of this behaviour or if any further information comes to light, further action may be taken

Termination of employment letter

98 Ms de Ville did not contact the claimant at all in relation to her written response. About four weeks later, on 19 August 2021, the claimant was sent a letter by email, terminating her employment. The letter stated:

I will give you my rationale for each allegation below, however, although I do not feel that any of them alone constitute gross misconduct which would warrant summary dismissal, I do feel that the series of acts demonstrates a pattern of serious misconduct that is of sufficient seriousness to undermine the relationship of trust and confidence between employer and employee to such a degree that it warrants a dismissal with notice….

[In relation to the comments 'Just keep emailing, it's all evidence of him being a cunt' (19 December 2020) and 'He can suck my balls too!' and the first charge of serious insubordination]

I consider that these comments both constitute insubordination. Your role as a manager should have been to not only support the staff but also to manage the other employees during this time and aim to moderate the conversations had rather than inflame them further.

In conclusion I believe that the comments amount to serious insubordination especially given your senior role within the business. I have taken into account your length of service and your previous clean record and for that reason I uphold this allegation although I do not consider it to be gross misconduct but serious misconduct.

[2. Serious breach of confidence]

When making a decision on this allegation I have considered two questions when deciding whether your conduct has breached the implied term of trust and confidence:

• Was there a reasonable proper cause for the conduct?

• If not, was the conduct 'calculated or likely to destroy or seriously damage trust and confidence'?

I have considered all of the messages sent by yourself held within the investigation pack to relate to this point, with the exception of the ones that I have accepted your explanation for which are detailed above.

When considering the above questions in the context of the messages that you sent, I do not feel that there was a reasonable proper cause for the conduct. Further to that I do feel, given the nature of the messages in question, that it was likely to destroy or seriously damage trust and confidence.

I have taken into account your length of service and your previous clean record and for that reason I uphold this allegation although I do not consider it to be gross misconduct but rather serious misconduct. …

[3. Serious breach of your duty of fidelity]

[The following message was taken into account]

• Just keep emailing, it's all evidence of him being a cunt.

Every contract of employment contains an implied term that the employee will serve their employer with good faith and fidelity. An action which would be lawful if done in good faith may be a breach of contract if done with the motive of disrupting the employer's business.

I have taken into account the written submissions provided to me on 22 July 2021.

I feel that the comment made by yourself in the group chat constituted an intention to disrupt the business. For that reason, I do uphold this allegation although I do not consider it to be gross misconduct but rather serious misconduct. …

[4. Obscene language or other offensive behaviour]

I have taken all of the comments into account when making a decision on this allegation.

I have considered your written submissions when deciding upon this allegation.

I accept the business does tolerate some bad language; however I view the comments made by yourself to be direct insults and aggressive rather than foul language used in conversation, which is accepted as being tolerated. I find the comment 'why are these fuck stains still in this chat' to be of particular concern as that is obscene name calling directed at fellow colleagues who are under your management in a group forum.

I have taken into account your length of service and your previous clean record and for that reason I uphold this allegation although I do not consider it to be gross misconduct but rather serious misconduct.

I thank you for bringing to my attention any other behaviour within the business that you believe to be inappropriate. This behaviour does not change my decisions with relation to the allegations against you. I will, however, contact any current employees that you have indicated may have been subjected to inappropriate language or behaviour to discuss it with them directly and take any action that is necessary.

99 No evidence was presented to the Tribunal of any such follow up action actually being taken.

Appeal against dismissal

100 The claimant was told of her right to appeal, which had to be exercised by 29 August 2021. An appeal was submitted by the claimant on 28 August 2021. The grounds of her appeal included that Mr Hobson carried out the investigation, when he was the very person that it was alleged the claimant had written disparate disparaging comments about; that the disciplinary hearing was conducted by Mr Hobson's mother; that none of the mitigating circumstances were taken into account, and in particular, the issues raised by the claimant about her wages, holiday pay and contract; that the comments made were not in work groups and shouldn't have been monitored; that the charges and outcome were highly disproportionate to the severity of the comments made; that the claimant had worked for the company for 17 years and had an unblemished disciplinary record; that the disciplinary policy states that the serious misconduct should have resulted in a written warning, giving the opportunity to show improvement.

101 The claimant concluded:

With hindsight I should possibly have shown a bit more restraint with expressing my pent-up frustrations of the last 12 months regarding the unlawful deductions, forced holidays, incorrect accrual of holidays, and the general poor treatment of staffs employment rights, and their financial and mental wellbeing, and chose the comments that I posted in a private group with a little bit more decorum. I have already shown remorse for my actions and i have taken ownership of my comments and apologised directly to Mr Hobson for any feelings of his that i might have hurt.

102 On 21 August 2021, Mr Hobson acknowledged that the issue with the claimant's holiday pay was still outstanding, and that it would be corrected as soon as possible.

Appeal hearing

103 The appeal process was conducted by Alexandra Gardner of Smile Business Support. She had been recommended to Mr Hobson by his legal advisers, Bhayani HR & Employment Law. The appeal hearing took place on 5 October 2021.

104 Ms Gardner decided that it was not necessary to speak with Ms de Ville. As for the allegations about the issues with wages, zero hours contracts etc, Ms Gardner told the Tribunal:

> *Did not need to follow any of that up, complete sympathy with position she was in with her employer but that did not justify her comments. Took her on her word completely, believed everything that she said. … It makes a lot of difference but did not mitigate her own behaviour. Did not offset it against their behaviour.*

105 Ms Gardner was asked during the hearing if she accepted that 'stealing' pay, threatening to dismiss if don't sign to accept holidays was bad behaviour? Ms Gardner accepted that it was but when asked if that amounted to mitigation, stated that she 'cannot speak on behalf of the employer'. Ms Gardner did not follow up the messages that others sent, that the claimant had provided.

106 In her witness statement at #13, Ms Gardner states:

> *A notable point from the meeting was that she appeared to accept that her actions lead to the break down of the relationship as she said that 'I imagine that Mark feels that I have stabbed him in the back because of that comment'.*

107 That is not what is recorded in the minutes (which were not complete as part of the recording was either deleted inadvertently or the recording was ended prematurely in error). Ms Gardner told the Judge in response to a question that she thought the claimant said she thought there was a breakdown of the relationship. The claimant denied that was the case. On the balance of probabilities, in light of what the minutes actually record, the Tribunal prefers the evidence of the claimant on this point.

108 In the appeal decision letter dated 14 October 2021, Ms Gardner stated:

> *It is clear in the outcome letter that Ms De Ville felt that there was no case for gross misconduct however as you held a position of seniority within the business, she felt that all of the allegations taken together constituted a serious breach of trust and confidence and were therefore serious misconduct. Only a charge of gross misconduct can be dealt with by summary dismissal i.e., no notice and therefore as the allegation was serious misconduct there was a legal obligation to provide you notice. I therefore cannot uphold this point.*

109 Ms Gardner also stated [539]:

> *In a meeting between yourself, Andy Bagnall and Mr Hobson, Mr Hobson stated that anyone who didn't sign to say their holiday pay could be used*

would be the first to go. You were already struggling with 80% of your pay under furlough.

Whilst I can understand your frustrations around all the issues pertaining to your furlough payments, introduction of contracts of employment, redundancy and any holiday pay issues, the basis of this disciplinary was around inappropriate messages sent by yourself.

Unfortunately, in my opinion, your frustrations do not mitigate your behaviour in regard to the messages you sent via the Facebook messenger group to your colleagues and about your employer and I agree that they constituted a breakdown in trust and confidence and therefore serious misconduct and therefore I am unable to uphold this point within your appeal.

Relevant law

Section 104 Employment Rights Act 1996

110 Section 104 Employment Rights Act 1996 provides:

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—

*(*a*) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or*

*(*b*) alleged that the employer had infringed a right of his which is a relevant statutory right*

(2) It is immaterial for the purposes of subsection (1)—

*(*a*) whether or not the employee has the right, or*

*(*b*) whether or not the right has been infringed*

but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith

(3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

(4) The following are relevant statutory rights for the purposes of this section—

*(*a*) any right conferred by this Act for which the remedy for its infringement is by way of a complaint or reference to an employment tribunal,*

*(*b*) the right conferred by section 86 of this Act, …*

*[(*d*) the rights conferred by the Working Time Regulations 1998...*

111 *Harvey's Encyclopaedia on Employment Law* notes as follows:

For the section to apply it is necessary for the complainant actually to have brought the relevant action or made a substantive allegation; it is not enough that the employer's conduct could have *given rise to such an*

action or allegation: Mennell v Newell & Wright (Transport Contractors) Ltd *[1997] IRLR 519***,** CA*.*

Unfair dismissal

112 The legal issues in an unfair dismissal case are derived from section 98 of the Employment Rights Act 1996. Section 98(1) provides that it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2). Conduct is a potentially fair reason.

113 Section 98(4) provides:

> *… 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*.

114 Employment Tribunals were given guidance about the application of s.98(4) by the EAT in *British Home Stores v Burchell [1978] IRLR 379; [1980] ICR 303*. There are three stages to consider in a conduct dismissal:

i. did the respondent genuinely believe the claimant was guilty of the alleged misconduct?

ii. did they hold that belief on reasonable grounds?

iii. did they carry out a proper and adequate investigation?

115 Whereas the burden of proving the reason for dismissal lies on the respondent, the second and third stages of *Burchell* are neutral as to burden of proof and the onus is not on the respondent (*Boys and Girls Welfare Society v McDonald [1996] IRLR 129, [1997] ICR 693*).

116 In deciding whether it was reasonable for the respondent to dismiss the claimant for that reason, case law has determined that the question is whether the dismissal was within the 'band [or range] of reasonable responses' ('The range'). 'The range' does not equate to a perversity test. See *Iceland Frozen Foods Ltd v Jones [1982] IRLR 439***,** *[1983] ICR 17 at 24-25***;** *Foley v Post Office [2000] ICR 1283 at 1292D – 1293C*, per Mummery LJ, with whom Nourse and Rix LJJ agreed.)

117 Employment Tribunals must not therefore decide themselves on the basis of the disciplinary hearing evidence, whether they would have dismissed the claimant, and substitute their decision as to what was the right course to adopt for that of the employer. Instead, the Tribunal must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which '*a reasonable employer might have adopted'*. A Tribunal must focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any internal appeal process (*West Midlands Co-operative Society Ltd v Tipton* [1986] 1 AC 536)) and not on whether in fact the employee has suffered an injustice. The logical conclusion of which appears to be that an Employment Tribunal might consider a dismissal to be unjust but nevertheless 'fair'.

118 The range of reasonable responses test applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from their employment for a conduct reason. The objective standards of a reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed, including the investigation (*Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, CA*). The range also applies to any question of alleged inconsistent treatment - in short, whether the decision of the employer to distinguish between the misconduct of the claimant, and the misconduct of alleged comparators, is inside or outside The range.

119 In *Strouthos v London Underground Ltd [2004] IRLR 636* at para 38 the Court of Appeal held (per LJ Pill):

> *it does appear to me to be basic to legal procedures, whether criminal or disciplinary, that a defendant or employee should be found guilty, if he is found guilty at all, only of a charge which is put to him.*

120 In *Reilly v Sandwell Metropolitan Borough Council [2018] UKSC, IRLR 558,* Lady Hale provided a separate opinion, paragraphs 33 to 35 of which state:

> *33 Nor have we heard any argument on whether the approach to be taken by a tribunal to an employer's decisions, both as to the facts under s 98(1)–(3) of the Employment Rights Act 1996 and as to whether the decision to dismiss was reasonable or unreasonable under s 98(4), first laid down by the Employment Appeal Tribunal in British Home Stores Ltd v Burchell [1978] IRLR 379 and definitively endorsed by the Court of Appeal in Post Office v Foley, HSBC Bank plc (formerly Midland Bank plc) v Madden [2000] IRLR 827, is correct. As Lord Wilson points out, in para [20] above, the three requirements set out in Burchell are directed to the first part of the inquiry, under s 98(1)–(3), and do not fit well into the inquiry mandated by s 98(4). The meaning of s 98(4) was rightly described by Sedley LJ, in Orr v Milton Keynes Council [2011] EWCA Civ 62, [2011] IRLR 317, at para [11], as 'both problematical and contentious'. He referred to the 'cogently reasoned' decision of the Employment Appeal Tribunal (Morison J presiding) in Haddon v Van den Burgh Foods Ltd [1999] IRLR 672, which was overruled by the Court of Appeal in Foley. Even in relation to the first part of the inquiry, as to the reason for the dismissal, the Burchell approach can lead to dismissals which were in fact fair being treated as unfair and dismissals which were in fact unfair being treated as fair. Once again, it is not difficult to think of arguments on either side of this question but we have not heard them.*
>
> *34 There may be very good reasons why no-one has challenged the Burchell test before us. First, it has been applied by employment tribunals, in the thousands of cases which come before them, for 40 years now. It remains binding upon them and on the Employment Appeal Tribunal and Court of Appeal. Destabilising the position without a very good reason would be irresponsible. Second, Parliament has had the opportunity to clarify the approach which is intended, should it consider that Burchell is wrong, and it*

> *has not done so. Third, those who are experienced in the field, whether acting for employees or employers, may consider that the approach is correct and does not lead to injustice in practice.*
>
> *35 It follows that the law remains as it has been for the last 40 years and I express no view about whether that is correct.*

121 There is a thought-provoking article in the Industrial Law Journal Volume 50 Number 2, June 2021, at page 226 in which the above passages are considered and the potential pitfalls with the range of reasonable test are set out. Whilst the Tribunal has noted with interest the arguments set out there, the Tribunal notes that unless and until the issue reaches the Supreme Court, the law remains as it has for decades and that is the law which has been applied in this judgment.

The Acas Code

122 In reaching their decision, Tribunals must also take into account the *Acas Code on Disciplinary and Grievance Procedures (2015).* By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and if any provision of the Code appears to the Tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question. A failure by any person to follow a provision of the Code does not however in itself render them liable to any proceedings.

123 The *Acas Code* states, at paragraphs 5, 19, 20, 23 and 24:

> *5. It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.*
>
> *19. Where misconduct is confirmed or the employee is found to be performing unsatisfactorily it is usual to give the employee a written warning. A further act of misconduct or failure to improve performance within a set period would normally result in a final written warning.*
>
> *20. If an employee's first misconduct or unsatisfactory performance is sufficiently serious, it may be appropriate to move directly to a final written warning. This might occur where the employee's actions have had, or are liable to have, a serious or harmful impact on the organisation.*
>
> *21. A first or final written warning should set out the nature of the misconduct or poor performance and the change in behaviour or improvement in performance required (with timescale). The employee should be told how long the warning will remain current. The employee should be informed of the consequences of further misconduct, or failure to improve performance, within the set period following a final warning. For instance that it may result in dismissal or some other contractual penalty such as demotion or loss of seniority.*
>
> *…*
>
> *23. Some acts, termed gross misconduct, are so serious in themselves or have such serious consequences that they may call for dismissal without*

notice for a first offence. But a fair disciplinary process should always be followed, before dismissing for gross misconduct.

24. Disciplinary rules should give examples of acts which the employer regards as acts of gross misconduct. These may vary according to the nature of the organisation and what it does, but might include things such as theft or fraud, physical violence, gross negligence or serious insubordination.

124 As to para 19, see also the obiter comments of Lord Denning in *Retarded Children's Aid Society v Day [1978] IRLR 128*:

It is good sense and reasonable that in the ordinary way for a first offence you should not dismiss a man on the instant without any warning or giving him a further chance.

Lord Denning explained the exception was an employee:

who is determined to go on in his own way.

Breakdown of trust and confidence

125 Harvey's Encyclopaedia on Employment Law also states the following regarding reliance on the breakdown of trust and confidence as justifying dismissal:

[1915]

In a suitable case the employer may rely upon the breakdown in trust and confidence as a substantial reason justifying the dismissal…

In Governing Body of Tubbenden Primary School v Sylvester ***UKEAT/0527/11*** *(*25 April 2012, unreported*) the EAT under Langstaff P recognised the dangers for employees in this application of SOSR; they accepted that it exists but disapproved a particularly extreme version of it put forward by the employer which could have weakened the position of the employee even further. The claimant was deputy head of the school at which a teacher was arrested for alleged possession of child pornography. She had been friendly with him, and continued that friendship discreetly, to the knowledge of the school who did not object to it. However, nine months later and with little warning the school changed its view on this, suspended her and disciplined her, leading to dismissal. On these facts the Tribunal found the dismissal unfair because of the suddenness of the change of mind and the previous condonation by the employer. On appeal, the employer made the radical argument that, where the employer alleges loss of trust, the Tribunal must take that* at face value *(as long as shown to be genuine) and may not enquire into the background and the way that it arose; thus, the Tribunal had been wrong to consider the circumstances leading up to the suspension and disciplining. Given the novelty of this area of law it is not surprising that counsel for the employer could point to possibly supportive passages in* Ezsias *(and also in* Perkins v St George's Healthcare NHS Trust*) but the EAT explained these as specific to the contexts of those cases and held unambiguously that in a loss of trust case a tribunal* can *look at the facts behind that loss and whether on all the facts the dismissal was unfair under s 98(4). Perhaps equally important to the legal interpretation was*

the EAT's justification of their decision on grounds of policy. At [38] the President said:

> *"We are not at all unhappy, as a matter of principle, to reach the view that that is so, because as a matter of principle if it were to be open to an employer to conclude that he had no confidence in an employee, and if an Employment Tribunal were as a matter of law precluded from examining how that position came about, it would be open to that employer, at least if he could establish that the reason was genuine, to dismiss for any reason or none in much the same way as he could have done at common law before legislation in 1971 introduced the right not to be unfairly dismissed. Lord Reid in* Ridge v Baldwin [1964] AC 60 *observed that the law of master and servant was not in doubt; that an employer could dismiss an employee for any reason or none. It was to prevent the injustice of that that the right not to be unfairly dismissed was introduced. The right depends entirely upon the terms of the statute, but there is every good reason, we think, depending upon the particular facts of the case, for a Tribunal to be prepared to consider the whole of the story insofar as it appears relevant and not artificially, as we would see it, be precluded from considering matters that are relevant, or may be relevant, to fairness."*

This is an important clarification, but one further question lurks behind this whole area—should the employer be able to rely on this head of loss of trust at all*? On one view what it really involves is reversing the implied term of trust and confidence on to the employee, whereas its true nature is as an implied term on the* employer *(and its true home* constructive *dismissal); see* ***All [194.01]*** *ff. On that basis, its use by employers to avoid the need for proof of actual incidents of misconduct by the employee was strongly disapproved by the previous EAT President, Underhill P. In* A v B ***[2010] ICR 849***, EAT *(upheld on appeal, sub nom* Leach v OFCOM ***[2012] IRLR 839***, CA*) he referred to the reversal of the implied term on to the employee as a form of 'mission creep which should be avoided' and in* McFarlane v Relate Avon Ltd ***[2010] ICR 507***, EAT *he said that employers seemed to see it as a 'solvent of obligations', adding trenchantly 'It is not'. These cases are not cited in the instant case, but its decision and that in* Ezsias *show that the matter may not be so simple and that reliance on loss of trust is indeed now permissible. A tentative suggestion is that the position we seem to have reached is as follows:*

> *(1) Loss of trust should not be resorted to too readily as some form of panacea (*A v B; McFarlane*; see also the subsequent decision in* Z v A ***UKEAT/0380/13*** *(*9 December 2013, unreported*)).*
>
> *(2) In particular, if there are specific allegations of misconduct the employer should rely primarily on those and be prepared to prove them in the normal way (a point made strongly by the Court of Appeal in* Perkins *in the parallel area of awkward personality).*
>
> *(3) However, in a strong enough case an allegation of (terminal) loss of trust may come within SOSR and justify dismissal (*Ezsias*, where*

arguably a vital factor was that the patient *interest was suffering because of the dysfunctional nature of the hospital department).*

*(4) Where this is the case, it may not be enough for the employer to establish merely the fact of that loss of trust because a tribunal may (not must) look into the background to that loss to consider the fairness of the dismissal in the light of all the facts (*Sylvester*).*

Article 8 ECHR

126 In *Pay v United Kingdom [2009] IRLR 139* the ECtHR proceeded on the assumption, without finally deciding the point, that Article 8 was applicable. But it found that interference with that right was justified, in the circumstances of that case, to protect the employer's reputation.

Conclusions

127 The above law has been applied to the facts found in order to determine the issues. Not every fact is repeated, in the interests of keeping these reasons to a manageable length. Paragraph numbers related the fact findings are referred to below by the # symbol; e.g, #10 is a reference to para 10 above.

Automatic unfair dismissal

Issue 1 - Did the Claimant ("C") allege that R had infringed any of the following statutory rights and if so when:

(Issue 1.a) Failure to provide itemised payslips

128 The claimant raised the issue of the failure by Mr Hobson to provide itemised payslips (a statutory right) in her response to Ms De Ville, sent on 22 July 2022 [see the facts at #85 above]. This allegation was therefore made.

(Issue 1.b) Request itemised payslips

129 This appears to be the same issue as above; nothing further needs to be added.

(Issue 1.c) Requirement to take holidays without sufficient notice

130 This issue was first raised by Andrew Bagnall at a meeting which the claimant also attended with Mr Hobson on 3 September 2020. It was also a matter that was raised by the claimant with Ms de Ville, in the claimant's written response to the disciplinary allegations sent on 22 July 2021. The alleged infringement of this statutory right was therefore made by the claimant, in September 2020 and on 22 July 2021.

(Issue 1.d) Unlawful deduction from wages

131 The claimant raised issues about her wages on, for example, 24 and 29 September 2020, during December 2020 and January 2021, on 27 February 2021. She informed Mr Hobson that the issue was still outstanding in June and August 2021. It was also one of the issues raised with the group of staff that made a complaint via Acas, in about December 2020. It was also specifically raised in the written response of the claimant to the disciplinary allegations sent to Ms de Ville on 22 July 2021. Ms de Ville was also aware of the Acas complaints [see the facts at #94 above]. An alleged breach of this statutory right was therefore made by the claimant.

(Issue 2) Was the reason (or, if more than one, the principal reason) for C's dismissal that she asserted one or more of the above rights?

132 The conclusion of the Tribunal is that the principal reason for the claimant's dismissal was that she asserted the above statutory rights. The reasons for this conclusion are as follows.

(1) Mr Hobson was aware of issues with the language used in the WhatsApp group used by some of the respondent's employees in March 2021. Instead of informing staff then, that those groups would be monitored, Mr Hobson asked for any concerning messages to be forwarded to him by Ms Staniforth and Mr Twigg.

(2) No credible evidence was presented to the Tribunal that Mr Hobson carried out any systematic investigation into the contents of the WhatsApp messages. No investigation report was put before the Tribunal; Ms de Ville confirmed that she was not provided with any written report. She was simply provided with the selected comments, which accompanied the disciplinary hearing invitation letters to the claimant and her colleagues.

(3) Both of the above are suggestive of an agenda being pursued by Mr Hobson, not an independent investigation with a view to providing both sides of the story to Ms de Ville so that she could make an independent decision. So also, is the failure of Mr Hobson to forward to Ms de Ville the apology email sent by the claimant to him Hobson on 11 July 2021 [see facts, at #77 above]. Mr Hobson had suggested at the meeting on 3 September 2020 [facts, #27] that those refusing to take holidays as ordered would be 'first out the door'. The Tribunal concludes that Mr Hobson used the disciplinary process to 'show the door' to a number of employees who stood up for their statutory rights.

(4) Whilst it is accepted that the Acas Code of Practice makes it clear that in some circumstances, there is no need for employees to be interviewed as part of any investigation, in the Tribunal's judgement, this was not one of those cases. Mr Hobson was the main individual against whom the derogatory comments had been made. Although it would arguably still be reasonable for him to carry out the initial investigation given the size of the organisation, it was particularly important in these circumstances that he ensure that all of the necessary information was put before Ms de Ville. It was important therefore that the employees were given an opportunity to respond, before any decisions were taken whether to pursue the disciplinary allegations further. The fact that no such opportunity was given is again indicative of a pre-determined outcome.

(5) The evidence before the Tribunal was that there were no discussions whatsoever between Mr Hobson and Ms de Ville in relation to the outcome of the investigation. Examples are given in the findings of fact above, where the factual position being put forward by Mr Hobson was not accepted by the Tribunal. The Tribunal does not find it credible that no such discussions took place, particularly when there was no documentary evidence before the Tribunal of any written instructions at all between Mr Hobson and Ms de Ville in relation to the disciplinary allegations. Given the number of employees subjected to the

disciplinary process, and the family connection between Mr Hobson and Ms de Ville, this is simply not credible.

(6) There was a four week gap between the 22 July email being received by Ms de Ville, and the written letter of dismissal being emailed to the claimant. Despite this, there was subsequently no further investigation by Ms de Ville, in relation to any of the matters raised by the claimant in the response to the allegations against her. In particular, there was no investigation into the allegations raised by the claimant that the comments by Ms Staniforth were just as bad as her own if not worse. Those comments included a comment that she 'wanted to kill' Mr Hobson; and a threat to 'drag his name on Facebook'. Although the Tribunal has accepted that Ms de Ville could not open one of the messages, Ms de Ville made no attempt to obtain a copy that she could open. That begs the question, why not? In the tribunal's judgement, it is further evidence of a predetermined outcome. Only two days earlier, Ms de Ville had, on her evidence, sent Ms Staniforth a letter of concern for 'comments' (plural) made by Ms Staniforth in the WhatsApp groups. The Tribunal was not told what the specific comments were. If they were the same comments that Ms de Ville had been referred to by the claimant in the email of 22 July, that would indicate a very different approach to the comments made by the claimant, compared to Ms Staniforth, with no explanation being given to the Tribunal for that difference in approach. If on the other hand, the comments relied on by Ms de Ville which led to her deciding to give Ms Staniforth a letter of concern were milder than the ones referred to by the claimant in her response of 22 July 2021, no reasonable explanation has been put forward to the Tribunal as to why those comments were not investigated further, when they were similar to the comments made by the claimant, which led to her dismissal; and in addition, included an apparent threat of violence. Finally, the Tribunal notes that in the dismissal letter, Ms de Ville thanked the claimant for bringing the comments to her attention and said that they would be investigated further. In light of the facts found, the Tribunal concludes that Ms de Ville had no intention of investigating the matters further at all, following the sending of the letter of concern to Ms Staniforth on 20 July [see facts, #97, 98 and 99, above].

(7) Similarly, there was no investigation by Ms de Ville in relation to the alleged use of threatening behaviour and abusive language by Mr Hobson towards nightclub staff. An investigation into those matters would have provided context and mitigation to the language used by the employees, in what they thought was a private messaging group.

(8) Nor was there any investigation into the allegations of breaches of the claimant's statutory rights, in relation to payslips, the notice required before an employer can insist that their employees take holidays, and the incorrect payment of holiday pay. Again, that would have provided context to the comments made in December 2020.

(9) The approach by the respondent to the request by a number of the employees to Acas, about a number of employment-related issues is also significant. It appears to have been seen by Mr Hobson as a hostile and unreasonable act. Mr Hobson attempted to bypass Acas by

writing to employees directly, asking them to come forward individually. This was followed by a further email to employees asking those not involved in the approach to ACAS to come forward 'to avoid any further consternation being caused'. Such actions demonstrate a lack of understanding of the power imbalance in the employment relationship between the respondent, Mr Hobson as a director of the respondent, and individual employees. [See facts, #40-41 above].

(10) Mr Hobson's approach to Acas contacting him is corroborated by the interview between Phoebe Davies and Ryan Twigg is which Mr Twigg stated: *[Mark Hobson] was also concerned about the group because they'd gone to Acas without following the grievance procedure. He was concerned they didn't go to him and we were concerned about the group.* The Tribunal notes that employees have a right to approach Acas with work-related issues; and that Acas has a statutory duty to conciliate in such circumstances.

(11) The Tribunal also takes into account the facts at #94 above, in which it was noted that during cross examination of Ms de Ville as to why she investigated other employees involved in the approach to Acas. She referred to them being:

> *obviously all misled, the leaders shout the loudest, they were very young and impressionable, the junior staff followed these more senior people.*

Ms de Ville was also asked the following by the Judge to which she responded as set out below:

> *EJ: Were employees out of order in going to Acas? RdV: Would have been polite to say we have certain issues and if not resolved will go to Acas. To go to Acas without saying who they were and what issues were creates an anomalous and untenable situation. [Tribunal's emphasis]*

As found in the facts however, the identity of those who went to Acas were in fact known (as the first quote above demonstrates), as were the issues raised – see #43 to #48, above.

(12) Those comments demonstrate to the Tribunal the attitude of Ms de Ville towards the Acas process. Namely, it was seen as a hostile act, in which junior employees had been encouraged to take part by senior employees; and that by doing so, the senior employees, including the claimant, were demonstrating disloyalty. Her attitude is also demonstrated by her comment that the matters referred to in the collective grievance in July 2021 were '*rubbish from start to finish'*. They were not, as the following paragraph shows.

(13) Mr Hobson accepted that he had been advised that there was an issue with the payslips; employees were given inadequate notice before being required to book and take holidays; there were issues in relation to the level of holiday pay; there were issues with staff being asked to work whilst on furlough. Further, on asking for statements of written particulars of employment (another statutory right although not one specifically relied on by the claimant in relation to her section 104 claim), the response of Mr Hobson was to send zero hours contracts,

claiming that the position of staff was not changed by them signing and returning such contracts, because they were already working under such terms. That was disputed by the claimant. Mr Hobson never sought to dissuade the claimant that she was wrong in that regard, nor has that been argued before this Tribunal; presumably because the claimant's position is accepted. These matters were patently not '*rubbish from start to finish*'. There was substance to them.

(14) The Tribunal also notes that at a time when the respondent was inviting applications for voluntary redundancy, it was at the same time placing adverts for new staff. The Tribunal did not find Mr Hobson's explanation in relation to that apparent contradiction at all convincing. Again, it is further evidence that the dismissal of the claimant and a number of her colleagues had already been pre-determined.

(15) Finally, the Tribunal takes note of the fact that Ms de Ville drafted the disciplinary policy, but admitted that she did not consider it before taking the decision to dismiss the claimant. She specifically found that the claimant was guilty of serious, not gross misconduct. Yet although the disciplinary policy states that a written warning is appropriate in such circumstances, Ms de Ville decided to dismiss the claimant. The Tribunal does of course recognise that in certain circumstances, an employer can fairly dismiss for serious misconduct rather than gross misconduct; and further, that failure to follow a disciplinary policy does not necessarily render a dismissal unfair. On the facts of this case however it is a further factor the Tribunal takes into account when deciding what the real reason for the dismissal was.

133 For all of the above reasons, taken as a whole, the Tribunal finds that the reason put forward by the respondent for the dismissal, i.e. conduct, was not the real reason for the dismissal. The Tribunal concludes that the principal reason for the claimant's dismissal was that she had asserted the statutory rights set out above, both individually, and subsequently, via Acas, collectively with others. It is evident from the findings of fact that the respondent took exception to that, and the Tribunal concludes that this subsequently materially influenced the approach of both Mr Hobson and Ms de Ville to the disciplinary process and outcome.

Ordinary unfair dismissal

(Issue 3) What was the reason or principal reason for dismissal? (The Respondent – R- says conduct)

134 Whilst this and the following issues do not strictly speaking need to be addressed in light of the above conclusion, the Tribunal has nevertheless decided them, for the sake of completeness, in case the above conclusion in relation to the principal reason for the dismissal is found to be wrong.

135 As noted above, the Tribunal has found that the principal reason for the claimant's dismissal was the assertion by her of her statutory rights. Had the Tribunal not come to that conclusion, it would have come to the conclusion instead that the reason was conduct.

(Issue 4) Did R genuinely believe C had committed misconduct?

136 The matters relied on by the respondent – the language and tone of the messages relied on by the respondent in relation to the claimant's dismissal - do amount to misconduct. The claimant accepts that she wrote those messages. The Tribunal concludes that the respondent reasonably believed that the claimant had committed that misconduct. Where the Tribunal takes issue with the respondent, is the extent of that misconduct in all of the circumstances and the sanction imposed, whilst recognising, of course, that the Tribunal is not to fall into the 'substitution mindset. These issues are explored fully in relation to issue 9 below.

(Issue 5) Was that belief based on reasonable grounds?

137 Again, it cannot seriously be disputed that the language used by the claimant amounted to misconduct. There were therefore reasonable grounds for the belief that the claimant had committed misconduct. Again, the Tribunal takes issue with the respondent in relation to the extent of the misconduct, and the sanction imposed for it – again, see issue 9 below.

(Issue 6) At the time that belief was formed, had R carried out a reasonable investigation?

138 For the following reasons, the Tribunal concludes that at the time the belief was formed, the respondent had not carried out a reasonable investigation. Reasons have already been set out in detail above in relation to the conclusion on the principal reason for the dismissal question. The following sections are relied on, in relation to the fairness of the investigation issue.

(1) Staff were not informed that the WhatsApp groups were being monitored by Mr Hobson, once he became aware of a potential issue. Further, the employees expressed themselves as they did in that group because they never thought that their comments would be seen by Mr Hobson. The nature of those comments needs to be judged in that context. It was outside the range to ignore that fact. See 132(1).

(2) The lack of any systematic investigation of the WhatsApp group messages by Mr Hobson or of any written instructions to Ms de Ville - see 132(2), (3), (4) and (5) above.

(3) The absence of any further investigation at all into the matters raised by the claimant in her email to Ms de Ville of 22 July 2021 – see 132(6), (7) and (8) above.

(4) The appeal conducted by Ms Gardner amounted to a review of the decision, not a complete re-hearing. That review in no way remedied the insufficiencies in the investigation identified above.

(Issue 7) Did R otherwise act in a procedurally fair manner?

139 The Tribunal notes in addition that the Acas code of practice was breached, in the circumstances of this case, in that there were no interviews of any of the staff accused of the disciplinary allegations, prior to them being invited to interview. Further, there is an apparent breach of the Acas code, paras 19, 20 and 21, in that although the actions of the claimant were found by both Ms de Ville and by Ms Gardner to amount to serious misconduct, the claimant was nevertheless dismissed because of them, albeit with pay in lieu of notice, instead of summary dismissal. See further 139(4) and (15) above.

*(Issue 8) Did R act reasonably **or unreasonably** in all the circumstances in treating it as a sufficient reason for dismissing C?*

(Issue 9) Was the dismissal within the range of reasonable responses?

140 The Tribunal will approach these two issues together, since the range of reasonable responses test is intended to reflect the wording of s.98(4).

141 The Tribunal concludes that the respondent did not act reasonably in all the circumstances in treating the misconduct as a sufficient reason for dismissing the claimant. The Tribunal also concludes that the claimant's dismissal was outside the range of reasonable responses (The range).

142 The Tribunal refers to the conclusions above about the mindset of Mr Hobson, and Ms de Ville, in relation to the approach to Acas by a number of employees in or about December 2020. In short, such actions were not seen as a legitimate and lawful way of raising concerns, but as a hostile act in an attempt to disrupt the respondent's business. The tribunal concludes that a number of those employees were subsequently punished, once the contents of the WhatsApp Group messages came to light, which were selectively considered. See paras 132 (9) to (13) above.

143 The fact that adverts were sent out for vacancies, at the same time as volunteers for redundancy were being requested, is also indicative of a predetermined outcome - see 132 (14) above.

144 Although the disciplinary policy, written by Ms de Ville, indicates that for serious misconduct, a written warning would be the usual outcome, (and that also reflects the Acas code of practice), Ms de Ville, without any reference to the disciplinary policy she wrote, decided that the claimant should be dismissed – see all of what is said at 132(15) above, and at 139. In the circumstances of this case, that was in the Tribunal's judgement, outside of The range.

145 Whilst this is a relatively small point, it is also noted [see facts, #93 above] that Ms de Ville told the Tribunal that the statements from Ms Hamer and Mr Baker were about bad language by customers towards staff, not bad language by staff towards each other. That is not what those statements show. Again, that is indicative of a closed mind and of a predetermined outcome.

146 Finally, whilst there were four disciplinary allegations against the claimant, arising out of the WhatsApp messages which she admitted she wrote, those appear to the Tribunal to be different ways of looking at what were in effect the same three comments. The comments were said to amount to serious insubordination (in relation to the two comments in December 2020); a serious breach of confidence; a serious breach of the duty of fidelity; and obscene language. Whilst the comments could amount to serious insubordination, and obscene language, all of that needs to be judged in the context of the facts of this case as a whole; including the fact that Ms de Vile concluded they were serious, not gross, misconduct. The 'he can suck my balls too' comment, by a woman, was clearly meant as a joke. In the contest of the language used in the nightclub both by staff, and Mr Hobson, that comment in itself could not reasonably have been classed as anything other than minor misconduct. It was made too, in relation to Mr Hobson's attempt to impose zero hours contracts on all staff, regardless of whether they were already employed on such contracts prior to the pandemic.

147 The reference to serious breach of confidence appears to misunderstand the way in which that issue is usually understood in the disciplinary context, i.e. to a breach of confidentiality, rather than a breach of the implied term of trust and confidence. The Tribunal notes the discussion in *Harvey's Encyclopaedia*, referred to in the section on the law, of the tendency by respondents in some unfair dismissal cases, to rely on an alleged breach of the implied term of trust and confidence as amounting to some other substantial reason. This is not, on the respondent's case, an SOSR case, but a dismissal for alleged misconduct. Any impact of that misconduct on the relationship of trust and confidence, where that conduct has been classed as serious and not gross misconduct, is in the Tribunal's judgement, misplaced. Whilst the comments of the claimant undoubtedly impacted on the relationship of trust and confidence, the conclusion that the comments amounted to serious not gross misconduct, is inconsistent with the finding that they necessarily breached the relationship of trust and confidence itself. As for the reference to the comments being a serious breach of duty of fidelity, the tribunal notes that is meant in the sense that the comments by the claimant in December 2020 were disloyal. The Tribunal notes that the pandemic created an extremely difficult set of circumstances for the respondent, which was understandably concerned about the survival of the business. Employees were equally entitled however to be concerned about the ongoing issues in relation to non-itemised payslips, incorrect wages and holiday pay, the proposed zero hours contracts, and being asked to work whilst on furlough. That is the background against which the claimant's comments, her alleged disloyalty, and the question of the reasonableness of the decision to dismiss the claimant because of them, need to be judged. The Tribunal concludes that it was outside of The range to view them as so disloyal as to justify dismissing the claimant. Further, whilst the claimant was one of the more senior managers employed by the respondent, she was not part of a senior management team, responsible for strategic decisions in relation to the business. As a manager of staff, the claimant was entitled to be more concerned to ensure that her colleagues were properly paid and treated, than in defending a management approach which she had not been consulted about as part of a Senior Management Team.

148 The respondent was entitled to be concerned about the comment made by the claimant, '*why are the two fuck stains still in this chat'*, in the WhatsApp Group set up for Gee Day's birthday. That will be further considered in relation to the question of the contribution to dismissal question. Further, that comment was made once it had become clear that the WhatsApp messages were being monitored. It was an ill-advised comment for the claimant to make, after it became apparent to her that Mr Twigg and Ms Staniforth had been forwarding messages to Mr Hobson from chats they were still members of, which members of those groups expected to be kept amongst themselves. Yet these two supervisors, who also made similarly inappropriate comments about Mr Hobson in the wider chat group, are still working for the respondent; and in Ms Staniforth's case, was promoted into the claimant's role after her dismissal, and has been promoted further since then. If the respondent was willing to let bygones be bygones in relation to Mr Twigg and Ms Staniforth, the Tribunal concludes that it was outside of The range of the respondent not to adopt the same approach in relation to the claimant, and give her an opportunity to show she could still be trusted – particularly in light of her apology email to Mr

Hobson of 1 July 2021; such comments in any event having been classed as serious and not gross misconduct by the respondent.

149 As to length of service, the claimant had 17 years' service, and a clean disciplinary record. That is a further factor, taken with everything said above, that takes her dismissal, in the Tribunal's judgment, outside of The range.

(Issue 10) Were all the relevant circumstances reasonably taken into account including length of service, previous record and any mitigation?

150 See above. Nothing further needs to be added.

Human rights arguments

151 The solicitor for the claimant also raised a human rights argument. This was not specifically pleaded, and no written skeleton argument was provided, setting out the basis upon which this argument was being raised. Instead, it was introduced in oral submissions on the third day of the hearing. In the Tribunal's judgement, if such complex arguments are to be raised, a written skeleton argument should be provided setting out the basis of the alleged breach, and copies of the relevant authorities. On the facts of this case, on the basis of the information that is available, the Tribunal does not consider that the claimant's privacy rights under article 8 have been breached. Whilst it is accepted that the claimant and her colleagues had a reasonable expectation of privacy in relation to the WhatsApp groups, Mr Hobson was provided with copies of the messages by members of the group, after concerns about the nature of those messages came to light. Article 8 is a qualified right, not an absolute right. Further, the December 2020 comments were made before the monitoring started (as, apparently, were the similar derogatory comments made by Ms Staniforth and Mr Twigg). Yet further, the comment made in the Gee Day WhatsApp group in May 2021, was made after it became known that the group chats were being monitored.

Written reasons in claim number 1805957/2021

152 The Tribunal was also referred to the written reasons in the claim of Mr Smedley against the same respondent, case number 1805957/2021. Whilst the outcome in that case has been noted, a detailed consideration of the facts found and the conclusions arrived at has not been undertaken. That is because the claimant's claim is to be properly judged against the evidence presented to this Tribunal, the legal arguments made by both parties and the wider legal framework; not by reference to the conclusions of another Tribunal, on the basis of different evidence and argument, for a different claimant, and which claim the respondent has not sought to consolidate with this claimant's claim.

Contribution to dismissal

If the claimant succeeds, should there be any reduction in the compensation awarded to her because she caused or contributed to her dismissal by any action she took?

153 The Tribunal has been invited to decide this question at this stage. The Tribunal's conclusions about the comments made by the claimant in the WhatsApp groups, and the context in which those comments were made, has been set out in detail above. The Tribunal concludes that the claimant did contribute to her dismissal. The comments about Mr Twigg and Ms Staniforth

on 15 May 2021 were, as noted above, ill-advised, at a time when it should have been clear to the claimant that her comments were being monitored. The Tribunal also note that claimant had management responsibilities in respect of the two supervisors.

154 In deciding the level of the reduction, the Tribunal also takes into account that this comment was classed as serious misconduct. A warning would have been appropriate for that, not dismissal. Nevertheless, by making the comments she did, and that comment in particular, the Tribunal finds that the claimant did contribute towards her dismissal and that it is just and equitable to reduce any basic and compensatory award subsequently made by 25 per cent.

Employment Judge James

Employment Judge A James
North East Region

Dated: 2 November 2022

Sent to the parties on:

.....15 November 2022.....

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For the Tribunals Office

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