EMPLOYMENT TRIBUNALS

Claimant: **M Austin**

Respondent: **A1M Retro Classics Limited**
Heard by CVP at: Newcastle Upon Tyne On: 10 and 23 November 2020

Before: Employment Judge O'Dempsey

Representation:

Claimant: Mr Smith (Counsel)
Respondent: Mr Henry (retired Human Resources Officer)

JUDGMENT

1. The claimant's claim for unfair dismissal succeeds.
2. The claimant's claim for breach of section 10 of the Employment Relations Act 1999 does not succeed and is dismissed.
3. The claimant's claim for wrongful dismissal succeeds.
4. In respect of the unfair dismissal: (a) The respondent shall pay to the claimant a basic award of £3600.00; and (b) the respondent shall pay to the claimant a compensatory award of £24,960.00.

REASONS

1. These are the reasons for the orally delivered judgment in this case. This was a claim for unfair dismissal, and for breach of the claimant's right to representation at a disciplinary hearing. This was a remote hearing to which the parties consented or did not object. The form of remote hearing was CVP (Video). A face to face hearing was not held because it was not practicable to do so and no one requested a face to face hearing or because it was not practicable and all issues could be determined in the current format of hearing. While for the most part it was possible to proceed with the case using the video platform, there were audio difficulties (background noise). All participants in the hearing worked very hard, and with extreme patience, against those difficulties and overcame them. I would like to compliment the representatives on the courteous and collaborative way in which they conducted proceedings. Unfortunately due to the additional time that the technical difficulties required the case ran into a second day.

The law
2. The relevant sections with which this case is concerned are sections 10 of the Employment Relations Act 1999, and section 98 of the Employment Rights Act 1996.

The claimant also relies on the provisions of Section 3 of the Employment Tribunals Act 1996 (ETA 1996) and The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (SI 1994/1623) (Extension of Jurisdiction Order 1994) in respect of a claim for breach of contract in that the respondent dismissed him without his statutory minimum notice.

3. I was also referred to **Laws v Game Retail Limited** UKEAT/0188/14/DA, and to **Procter v British Gypsum Limited** [1992] IRLR 7.

4. It is worth setting out the case law framework in a little more detail.

5. When I have to determine whether an employer has acted fairly within the meaning of Section 98(4) ERA, I apply the "band of reasonable responses" test. I have to ask whether the employer acted within the range of reasonable responses open to a reasonable employer. It is not for me to substitute my own view for that of the reasonable employer (see **Iceland Frozen Foods Ltd -v Jones** [1982] IRLR 439).

6. In reaching that decision, I have to consider the three aspects of the employer's conduct set out in the test in **British Home Stores -v Burchell** [1978] IRLR 379:
1 Did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case?
2 Did the employer genuinely believe that the employee was guilty of the misconduct complained of?
3 Did the employer have reasonable grounds for that belief?

7. If the answer to each of these questions is yes, I must then decide on the reasonableness of the response of the employer.

8. The band of reasonable responses test does not simply apply to the question whether the sanction of dismissal was permissible but to all aspects of the dismissal process, including whether the employer's procedures were adequate (**Whitbread plc -v- Hall** [2001] IRLR 275) and whether the pre-dismissal investigation was fair and appropriate (see **J Sainsbury Ltd -v- Hitt** [2003] IRLR 23. 120).

9. Game Retail Ltd -v- Laws UKEAT/0188/14 stands for the proposition that cases such as this are fact-sensitive, so that the test continues to be the **Iceland Frozen Foods Ltd -v- Jones** test. As the case involves a question of potential interference with human rights, it is worth noting the guidance in **X -v- Y** [2004] IRLR 625 and **Turner -v- East Midland Trains Ltd** [2012] EWCA Civ 1470 to the effect that the ""band of reasonable responses" test for unfair dismissal provides a sufficiently robust, flexible and objective analysis of all aspects of an employer's decision to dismiss to ensure compliance with Article 8". That is the right to private life. In a case such as this it could also be added that Article 10 may be engaged. That protects the right to freedom of expression and the right to receive information. In all such cases s98 remains adequate and does not need a different approach.

10. In **Game Retail Ltd** an employee had been dismissed for having posted several obscene, threatening and offensive tweets on his Twitter account. Several of the employer's stores followed the Claimant on Twitter. At para 46 of its judgment, the EAT said, "We recognise that there is a balance to be drawn between an employer's desire to remove or reduce reputational risk from social media communications by its employees and the employee's right of freedom of expression; see Smith. ……. Generally speaking, employees must have the right to express themselves, providing it does not infringe on their employment and/or is outside the work context. That said, we recognise that those questions might themselves depend on the particular employment or work in question."

11. Article 10 European Convention on Human Rights provides, "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to

receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises." 2. The exercise of these functions, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Facts

12. The claimant was employed by the respondent from 1 December 2014 until he was summarily dismissed on 18 February 2020 as a paint sprayer in the respondent's business. I heard from the claimant, Mr Robinson the managing director of the respondent and Mr Henry, who represented the respondent and who is a retired human resources officer. He heard the claimant's appeal against dismissal.

13. This case centres on the purported application by the respondent of its social media policy, dated February 2020 which states:
"We recognised that some of you may have social media accounts. Such accounts must only be used to express personal views.
"You must not make any comments or engage in discussions which could adversely affect us or our reputation or that of our customers or suppliers. You must not breach discrimination legislation or harass or bully another employee or damage working relationships between fellow employees.
"You must not share any confidential or sensitive information on social networks.
"Any information posted on the Internet may result in disciplinary action up to and including dismissal if it breaches this policy or any other expected levels of conduct. This includes posts on a personal account with inappropriate privacy settings, posts made outside of working hours , and ... Posts made not using our computers or our equipment. You may also be required to remove content created or shared by you if we consider such posts to be a breach of this policy".

14. (I could not read the part of the above which is replaced by "…". However neither party drew my attention to that or to the latter part of that paragraph). The only part of the above to which either party drew my attention were the first and second paragraphs. On the best evidence I had before me this policy was only introduced in February 2020, and does not appear, on its face to be an updated copy of a pre-existing document or policy (although in submissions Mr Henry sought to say that there had been a previous policy). However I have made my decision on the basis that there was some form of policy in existence prior to what was in the bundle before me.

15. The claimant on 11 February 2020 had a conversation with a colleague who mentioned some allegedly poor work done by the respondent and on 13 February he spoke to another colleague about this who advised him to talk to the managing director of the respondent. The latter and the claimant had a conversation in which the claimant told the managing director of a phone call, and the discussion got extremely heated.

16. I accept that the managing director became agitated about this rumour and stated that it could affect the business of the respondent.

17. The claimant said that a lot of things needed sorting out in the company, the managing director asked him what he meant by that. claimant told the managing director that it was often said that cars were overpriced.

18. The managing director became more agitated and said that the claimant had no respect for people, and told him that he could not work on his own initiative. The

managing director started shouting at the claimant and replied rather rudely when the claimant pointed this out.

19. This was clearly an argument that the two men were having. The claimant went on to say that the business had not moved further forward in 5 years. At about this point the managing director ended the conversation abruptly and left the meeting.

20. In this respect I rejected the managing director's evidence which was to the effect that although he was agitated and shouting at the claimant, that was done "not in a bad way". The managing director gave evidence to this effect and I conclude that he was seeking to minimise his conduct during this exchange. I find that the managing director was agitated and shouting and the reaction of the claimant, set out below was understandable.

21. This argument was the context in which the claimant made certain remarks on Facebook about the way he felt after the argument. That evening the claimant went home and put comments on Facebook starting with the comment "I don't think I'm a bad person but I don't think I have ever felt so low in my life after my boss's comments today." A number of people made comments on this posting, aimed primarily at trying to reassure the claimant in a variety of ways, some of which were appropriate and some of which were inappropriate. I do not set these out in this decision. They are contained in the bundle at pages 45 to 77. The parties referred to particular comments and I have dealt with the evidence in respect of those matters below.

22. Whilst I accept the managing director's general evidence that there had been other disputes between the two men over the course of the claimant's employment, I was not given any details about the types of dispute that had occurred between them prior to the dispute on 13 February. In particular there was nothing that the managing director said that indicated that the claimant was, as he suggested in evidence, bullying him. When the claimant was cross examined no details of this alleged pattern of bullying were put to him to permit him to respond to them.

23. I accept the claimant's evidence that the way in which the respondent criticised his competence during this meeting was either new or worse than usual and I accept that the claimant did feel low as a result of them and was expressing his personal feeling on the Facebook page.

24. The following day the managing director attempted "to bury the hatchet" with the claimant and I am prepared to accept the respondent's explanation that he did this in order to move things on.

25. The managing director gave evidence that the social media policy of the respondent had been issued before 13th February. He said that it had been issued in early February. There was no evidence before me that this was a reiteration of an earlier handbook, and this point was not put to the claimant, so he could not comment on the assertion which was made outside the respondent's witnesses giving evidence. I do accept respondent's evidence that it was not the claimant's case that prompted the policy on social media being adopted. I have also proceeded on the basis that there was some social media policy prior to this. However it was clearly no more restrictive than the one before me.

26. The managing director appeared to suggest that he took into account about 20 other occasions on which he had felt bullied by the claimant in conversations with him. I was unable to get to any content of those alleged bullying conversations. It was clear to me from what the managing director said that he had plainly tolerated that sort of behaviour from the claimant. However he would not give any details of the nature of those incidents which were not mentioned in his witness statement (or anywhere else). I asked the managing director whether he took account of this previous conduct when he decided to dismiss. His evidence did seem to vary on this point. He said that he did not take it into account because he was not sure of the other comments, but at another point

he said he did take into account the fact that the claimant had bullied him, and that that was not appropriate behaviour.

27. He accepted that there was no reference to the more than 20 occasions on which claimant was supposed to have bullied him or in any of the documentation including the dismissal letter. I find that this is very surprising that the respondent made no reference to this behaviour in either pleadings or witness statements.

28. Doing the best I can on this evidence, I concluded that it was unlikely that there were occasions on which the respondent felt bullied by the claimant. It seems to me that the managing director did not take these into account at the time, but it is something that the managing director has asserted in the course of the hearing for the first time. Accordingly I reject the managing director's evidence on this point. If I had accepted his evidence that there had been such incidents I would have found that he did take them into account, and that therefore the Claimant was dismissed on a basis which was wholly uncommunicated to him. That would not have been a reasonable basis for an employer to dismiss an employee. However having found that these bullying incidents did not take place (albeit that there had no doubt been disputes between the men on previous occasions) and that the managing director did not take them into account, I ignore them for the remainder of this reasoning.

The investigation carried out by the Respondent

29. The managing director was cross examined on when he first became aware of the matters which the claimant had put up or had allowed to remain on Facebook. The claimant's Facebook friends had contributed to the discussion. The managing director said that he was not aware of the content until 15th. However I found his evidence on this very unclear. Initially he appeared to say that print outs of the material were done on the Sunday morning, which would have been 16th, then he appeared to say that the matter was brought to his attention on the Monday morning, and he asked for the material to be printed out for him then.

30. I was unclear on what his evidence was on this point, but he did seem to be clear that he had read the print outs on the Monday morning. He appeared to accept that he had been shown the comments on the Saturday, and appeared to accept that at that point he had dismissed them.
What he said was that he had dismissed them to a degree. I do not accept that account as likely. The managing director said that he had been shown some of the comments on the Saturday and the comments he said he was shown was the contents of pages 45-49 in the bundle, at that point.

31. However in particular he appears to have been aware of the "shirtlifter" (page 65) comment (as he was cross examined on this point) but he sought to say that he was not aware of the comment on the Saturday to the extent that he was aware of it on the Monday. I do not accept that evidence as likely. I conclude that he was aware of that comment on the Saturday and that he had dismissed. When he was challenged on the question of whether he had dismissed the remarks he said that he was not aware of the whole context and the whole situation. Again it seems to me that he was aware of the comments and those comments were perfectly plain. He does appear to have dismissed the comments as at Saturday.

32. In relation to a couple of the comments which were homophobic, the managing director was challenged about whether he had dismissed those remarks. He said that as a gay man he tended to tolerate those sorts of remarks and not let those sorts of remark get to him. He was then asked what changed his mind between the Saturday and the Monday. He said that it was the fact that the claimant was discussing the business. He felt that this was not the right way to go about things, and that it was not professional, and that he would not tolerate being talked about on social media.

33. So what appears to have concerned the managing director was that the claimant was discussing the situation at work. The letter of dismissal, however referred to potential breach of equality legislation as well as the damage to the business which was claimed.

34. The extent of the investigation that appears to have been carried out by the managing director was, with respect, minimal. He did not attempt, for example, to find out what the extent of the publication had been, to see whether it had been made available to the public generally or to what extent it had been made available.

35. He said that he does not use Facebook and does not fully understand it, and that he had got help from his manager to download the comments. The managing director made no effort at all to find out anything about the settings which the claimant had and simply assumed a number of things, for example how big the group was.

36. He was challenged in cross examination as to whether he had taken steps to identify the size of the group to who the remarks were made visible. He said he had, but when he expanded on that answer it was simply to say that he had asked to make sure that the posts were printed off. He read the information and he noted that he did not know a lot of the people involved. I do not think that the managing director misunderstood this line of questioning in this respect. His answer that he did take steps to find out the size of the group because he asked someone else to download the messages simply did not address the question he was asked. I therefore conclude that the investigation of the alleged misconduct was flawed.

37. A reasonable employer in similar circumstances would have been careful to check the size of the group and the settings attached to the group. Moreover if the respondent was attempting a reasonable investigation of this matter it would have had regard to the social media policy itself. The respondent appeared to argue that the breach was allowing posts to remain on the discussion. This is not prohibited by the social media policy but might conceivably fall under “other expected conduct”. This was not how the respondent put the case before me explicitly. Considering that case, the social media policy would require some attention to the fact that these were “posts on a personal account” and consideration of whether they were made “with inappropriate privacy settings”. None of that was done at any stage, including at the appeal stage.

38. Although there was no cross examination on this aspect, in writing up these reasons I have also noticed that the social media policy made reference to the settings of groups on social media. It is therefore surprising both as a matter of general reasonableness but also by reference to the social media policy itself, that the managing director made no inquiries into these matters.

39. The managing director was also asked whether he took any steps to find out whether there was information on the claimant’s profile to identify who the claimant worked for. His answer was that it was possible to tell by information and comments in the discussion themselves. I accept that this was the case.

40. He then identified one customer and one supplier/customer and/or an ex employee. In relation to the first example he gave there was no evidence that the person suggested either read or contributed to the chain of comments. Clearly at the time the decision to dismiss was taken there was no evidence at all that this person knew about the exchange. Instead the respondent appears to rely on the fact that the person came into the premises about a week after the dismissal and had been aware of what had gone on. I have to consider what was in the mind of the respondent at the time of the decision to dismiss and dismissal and judge that by reference to what a reasonable employer would have done in those circumstances.

41. In relation to the client and ex employee the managing director said that he had not spoken to that person since these incidents. So in short it was not clear whether there was any impact on the reputation of the respondent outside the group of Facebook friends of the claimant. There is also no evidence that respondent made any investigation in to this point.

42. The claimant explained in very broad terms what a person would need to do in order to become his Facebook friend. Essentially there is a kind of gatekeeping system. So there was not publication generally. The claimant said that he had not taken down the posts because he was expecting to need them for the appeal. I accept his evidence that the group was essentially a group of friends, and essentially private. It was asserted that there was a risk that one member could share the information, but again there appears to have been no investigation into whether this was the case or not.

43. The managing director appeared to accept at one point in cross examination that the claimant was not inciting the comments, but that he had been expressing his personal views in the comments that he himself made. It was put to him that there was no breach of the social media policy. The managing director's response was that if one read the conversation chain as a whole it was negative about his whole company. He did accept in cross examination that the social media policy did not place an obligation on the claimant to police what was said by others.
He criticised the claimant because he felt that the claimant had fuelled the conversation. When I asked him what he meant by that, he said that essentially the claimant was inciting the behaviour and that he had brought his dismissal upon himself.

44. I find that the managing director's thinking, and that of Mr Henry when hearing the appeal, unreasonably confused what was required of an employee by the social media policy. The policy did not require the employee to police the comments of others, but simply not to engage in discussions having a particular effect. There was no evidence which would have supported to a reasonable employer the contention that the claimant was engaging in a prohibited discussion. The managing director could not, under cross examination, maintain that the claimant was doing anything more than expressing his own personal views, and criticised him for omitting to do something which the social media policy does not require him to do: taking down posts (made by others) without an instruction from a discussion on the basis that his employer might reach the conclusion that they were damaging to the business.

45. There were also some comments in this chain about which the managing director was cross examined. One example was that someone had said that the claimant should punch his boss in the face because it would make him feel better. The managing director accepted that the claimant never said that he was going to punch him in the face, but said that the claimant had fuelled the discussion. He agreed that there was no sign that the claimant replied to that comment or agreed with it. When he was asked how the claimant could be guilty of wrong doing when all he had done was to express a personal opinion, he said that there was a time and a place to express a personal opinion, and that the claimant should not bring things related to work into social media.

46. There was clearly no blanket ban on mentioning work in social media in the respondent's disciplinary policies or social media policy. This is despite the fact that there is mention of certain things being prohibited because they damage the business. However viewing the social media policy it does not prevent an employee talking about his situation at work.

47. The managing director said that he felt that the claimant had breached equality legislation by starting the string of comments. I understand that the comments about which the managing director was concerned were offensive. However a reasonable employer could not have reached the conclusion that the claimant was breaching equality legislation by starting a string of comments into which someone appears

gratuitously to have injected an offensive remark. There is no evidence that the claimant agreed with the remark or characterisation, and the group was not a public group.

48. It was put to the managing director that the comment about punching the boss in the face was a joke. He said he did not find it a joke but thought that what he was concerned about was not that the claimant would punch him in the face, but that this was a negative comment and could result in him being threatened.

The procedure adopted

49. The disiciplinary policy at p44 said that the claimant should be issued with a written statement of the content which *may* result in a disciplinary hearing. Clearly that has to happen before the decision whether to hold a disciplinary hearing. What appears to have happened is that on the Monday morning the claimant was brought into a disciplinary hearing without any real notice and certainly the respondent's disciplinary policy was not followed in this respect. It is also clear to me that the claimant was effectively not given the choice as to who would represent him under section 10 of the Employment Relations Act 1999. In particular he was not given the choice of the representation of a trade union representative. To make that point clearer, the reason that the claim for section 10 breach fails is that I have no evidence drawn to my attention that the claimant made a request prior to the disciplinary hearing, taking place that he might be represented by a trade union representative. I shall return to that point in the context of unfair dismissal.

50. I accept the claimant's account of the events of the morning of 17th. He was asked by the workshop manager to attend a meeting in the managing director's office with a witness present. He was told that his witness was not allowed to speak during the meeting. A colleague, who was an apprentice of the respondent agreed to attend with him.

51. I accept that this apprentice was also an employee. It was only during the meeting itself that it transpired that it was a disciplinary meeting in any sense or the full context of it. I accept that the claimant was told that the meeting was to discuss his use of social media and I accept that the respondent was concerned with him posting media which could damage the company's reputation on social media. respondent did say that it constituted gross misconduct.

52. However I have concluded that claimant was not given any proper notice of this meeting. He was not given an opportunity to prepare for it, or any advance knowledge of what was being alleged against him, in order for him to prepare any kind of defence against it. One of the problems that not giving notice results in is highlighted I the next point I mention.

53. I accept that the claimant said that he had not put anything on social media which could damage the company's reputation. He was told that it was in the handbook that he must not discuss the company on social medial. That of course was not correct. I also accept that the claimant was shell shocked at the way in which he was brought into the disciplinary meeting. I conclude therefore that it is not surprising that he offered no apology at that point. The managing director told him that he was being suspended whilst a decision was being made regarding the outcome of the disciplinary meeting. He was told that there would be a further meeting the following day and that he could bring a trade union representative to that meeting.

The claimant's section 10 claim

54. As regards the lack of a trade union representative, the claimant was not accorded the rights which section 10 is designed to protect. However section 10 only applies where a worker is required to attend a disciplinary meeting and reasonably requests to be accompanied at the meeting. It is implicit in this that the employer should allow the claimant to know what his rights are, but there is no evidence before me that the claimant requested to be represented at the hearing, prior to the hearing. At best it

seems that when he was told about the meeting he was also told that he could be represented by a work colleague. So there appears to be no breach of s10 on that, unsatisfactory, basis. However it is a plainly of the respondent's own disciplinary procedure which accords the claimant the right to be accompanied by a fellow worker *or an accredited trade union official*. Plainly the claimant's rights to representation were undermined by the approach the respondent took to this, and that is not something that a reasonable employer would do. The disciplinary policy plainly affords the employee a choice in this matter, and it is not sufficient that the employee happens to be represented by someone where that choice is not reasonably honoured. In the circumstances of this case I have no hesitation in finding that the respondent acted unreasonably in failing to accord those rights at the disciplinary hearing. I would add that if the claimant had been represented at the stage at which the facts were being investigated, and if he had had time to prepare what he wanted to say in his defence, no doubt alternatives to dismissal would have emerged in the circumstances of this case and a reasonable employer would not have dismissed the claimant.

55. It is hardly surprising that the claimant did not ask to be represented at the hearing because he was simply not told of the nature of the meeting until perhaps just before it started. A reasonable employer would have given the claimant a genuine choice as to who could represent him.

56. The claimant was suspended at the meeting, and was told that there was to be a further meeting the following day, as stated above. That did not happen. Instead he was simply telephoned and told that he was dismissed. He was told a letter would follow in the post. However on the same day he was informed in writing that he had been dismissed on the grounds of gross misconduct. He was therefore dismissed without notice.

57. There was then an appeal heard by Mr Henry, from whom I heard. This upheld the dismissal but did not constitute a reinvestigation of the facts or matters. I find that Mr Henry did not investigate either the size of the group nor the settings relating to the group. The claimant was represented by a trade union representative at the appeal.

58. Taking a step back there appears to have been no effort by the respondent to investigate what had happened. At the appeal hearing Mr Henry appears to have considered the material on Facebook. He said that he considered the breach of the code of conduct of the company was very clear. He said that it was clearly stated that social media must not be used in a context where a colleague or the employer may be damaged. He said that in this case it was clear that violent and homophobic unpleasant comments had appeared on the claimant's account. He recorded the fact that the claimant argued that he was not responsible because the comments were not made by him. Mr Henry went on to say this:
"I find that he is responsible for permitting the discussion to take place. He hosted the debate. He did not at any time, then or since, seek to correct the impression given which is very unpleasant and may include criminal threats".

59. However there was no evidence that the claimant had ever been asked to take down the material from Facebook. Mr Henry did not ask the claimant to take the material down.

60. Mr Henry also said that others had advised the claimant not to put material up, and it appeared to Mr Henry that the claimant had ignored that advice. In looking at the comments however what one contributor to the discussion said was that the claimant should be careful about what he said on Facebook.

Discussion and conclusions

61. I have to consider what a reasonable employer would do in these circumstances, and I remind myself that I must not substitute my own view of what I would have done in

this situation for that of the respondent. However I am able to, and must, consider whether a reasonable employer could reach the conclusions that the respondent reached, having regard to the ordinary standards of industrial behaviour, and bearing in mind the Acas Code, case law and ordinary principles of rational fairness.

62. I reminded myself of the guidance in **Mears Ltd v Brockman** [2014] UKEAT 0243/14 that it is "moving into dangerous territory for an employment tribunal to allow that a final written warning is within the range of reasonable responses whereas dismissal is outside. Such judgements calls might be said to be what the range of reasonable responses are all about".

63. In my view, however, this is not a case where that kind of fine judgment needs to be made between what a reasonable employer would do in respect of either giving dismissal or a final written warning as a sanction. The social media policy does not say that the employee has to police the comments of others.

64. There is no evidence that the employer asked the claimant to take down the comments before a decision was made (or for that matter at the appeal). I consider that a reasonable employer would have made such a request and would have made it clear that this was a direct management instruction. I do not accept that there was any evidence that the claimant showed behaviour which would have demonstrated to a reasonable employer that he was likely to host a discussion on Facebook again in which other people made comments which were to the employer's detriment.

65. On the contrary I consider that a reasonable employer would not have rushed to judgment on the future behaviour of the claimant as the managing director appears to have done in this case.

66. I think that a reasonable employer would have issued an instruction to the claimant, and that in all likelihood the claimant would have complied with it. The respondent has offered no evidence to suggest that there was a reasonable basis for any conclusion that he would not have complied with an instruction to do this, but relies on the fact that the claimant said that he had not done anything wrong and then (in the time to the appeal) did not take down the material.

67. I consider that a reasonable employer would have issued that instruction and then if the claimant was refusing would have issued a warning for allowing the comments to remain, requiring the claimant to remove them within a short space of time. If the claimant had refused to do this, that refusal to obey a reasonable management instruction might have formed a basis for dismissal. However that was not what the respondent did.

68. At the time the decision to dismiss was made the comments had only been on Facebook for a very short period of time, and it was highly unlikely that they would have caused any damage to the respondent or to the managing director, given what would have come out on a reasonable investigation of the settings of the group and the size of the group on Facebook.

69. I have found that a reasonable employer would have made those inquires and would have drawn rational conclusions from them.

70. I have reminded myself that when determining whether an employer has acted reasonably for s 98 terms I apply the band of reasonable responses test. I ask myself whether the respondent acted within that band I respect of all aspects of the case.

71. I have to consider the **BHS v Burchell** test. I ask myself the question:

(a) did the employer carry out an investigation into the misconduct which was reasonable in the circumstances of the case. I have no hesitation in saying that the respondent did not carry out an investigation which was reasonable in the circumstances of this case.
(b) did the employer genuinely believe that the claimant was guilty of the misconduct about which complaint was made. Here, although I have considerable doubt about the answer to this, I consider that it is more likely than not that the managing director believed that the claimant had committed an act of misconduct in allowing the discussion to take place or continue. I do not accept that the respondent believed that this was a breach of its social media policy however. I do accept that there was a genuine belief that it was an act of misconduct of some sort.
(c) did the employer have reasonable grounds for that belief. I do not accept that the respondent had reasonable grounds for that belief. The claimant had simply expressed his personal opinion and the most that can be said of him is that he did not prevent other people making comments (which he had not been asked to do). There is one or possibly two instances of him appearing to endorse comments in some way but the respondent did not seek to explain how those particular comments had any significance in relation to the claimant's behaviour during the internal procedures (so that the claimant might have answered the points or offered to remove them).

72. I have considered the case law to which I have been referred. I do not accept that this is a case in which respondent acted inconsistently within the terms of the **Procter** case. I do accept that the other employee was an apprentice and of course there are much more inflexible rules concerning employment or dismissal of an apprentice, so therefore I do not think that the two situations are comparable.

73. Viewed in the light of all the matters I have mentioned, and specifically the face that there was no request for claimant to take the material down, and looking at the matter in the round, I have concluded that the dismissal was unfair in all the circumstances of the case and having regard to the size (small) and administrative resources of the respondent (limited) and to equity and the substantial merits of the case.

Polkey and contributory fault
74. Although the respondent did not argue that there should be a reduction to any compensation for contributory fault or "Polkey", I considered whether either of these factors should be applied.

75. I considered the principle that if I determined that the dismissal is unfair, I may go on to consider the percentage chance that the employer would have fairly dismissed the employee, **Polkey v AE Dayton Services Limited** [1988] ICR 142. This is the principle referred to as "Polkey".

76. I remind myself that does not only apply to cases where the employer has a valid reason for dismissal but has acted unfairly in its mode of reliance on that reason, so that any fair dismissal would have to be for exactly the same reason but also whenever there is evidence to suggest that the employee might have been fairly dismissed, either when the unfair dismissal actually occurred or at some later date (**Gover v Propertycare Limited** [2006] ICR 1073).

77. The applicable principles are in **Software 2000 Limited v Andrews** [2007] ICR 825

78. In addition I considered whether under s122(2) ERA, there was any conduct of the complainant before the dismissal which I considered was such that it would be just and equitable to reduce the amount of the basic award to any extent. If I found any such conduct I may make a reduction. By s123(6) ERA, if I found that the dismissal was to any extent caused or contributed to by any action of the Claimant I must reduce the amount of the compensatory award by such proportion as I consider just and equitable having regard to that finding (see **Optikinetics Limited v Whooley** [1999] ICR 984).

79. Three factors must be satisfied if I am to find contributory conduct:
a. The relevant action must be culpable and blameworthy;
b. It must actually have caused or contributed to the dismissal;
c. It must be just and equitable to reduce the award by the proportion specified.
(see Nelson v BBC (No 2) [1980] ICR 110)

80. I do not consider that the claimant's behaviour constitutes something upon which contributory fault could be founded, in any event, and particularly when I have regard to his rights under Article 10 to impart and receive information.

81. I also concluded that the reductions that might be made because (if a fair procedure been followed) the claimant might have been dismissed do not apply. This is because the dismissal was not rendered unfair due to procedural mistakes, but because the conclusion reached was one which no reasonable employer could have reached. This was an employee with a clear employment record and this was a first case of misconduct. If I had accepted the managing director's evidence that there had been a string of unchallenged behaviour by the claimant I would have nonetheless found, as I do on the facts I have found, that a reasonable employer would have sought to moderate the unacceptable behaviour of the employer by issuing a warning/instruction in circumstances where, as I have found, of any reason why the employee would not have moderated his behaviour. In that regard I have dealt with the point that the claimant appeared to the respondent to be unrepentant. The claimant was entitled to look at the social media policy and his own conduct. The respondent accepts that there was no duty on claimant to police the conduct of the participants in this Facebook discussion. So in those circumstances he cannot be expected to be repentant in any relevant way for something which is not within his own conduct. For all those reasons, I have concluded that the dismissal was unfair.

82. I have to ask whether the claimant was dismissed in breach of contract. I have to ask whether he committed an act of gross misconduct. I consider that he did not commit an act of gross misconduct under the contract. I have had regard to the social media policy, the Facebook settings and the fact that he had not been asked to take that material down. So I have concluded that he was wrongfully dismissed in breach of contract and he is entitled to his notice pay.

Remedy
83. I heard the parties' submission on remedies. The basic award was not ultimately in dispute
The claimant's counsel urged a 25% uplift on the compensatory element. I reject that amount. Whilst there were several respects (paragraph 4 bullet point 3-5 in particular) in which the Acas Code was not observed by the respondent, I do not think that they merit a full 25% uplift, and I have determined the uplift at 20%. I award £500 for lost statutory rights reflecting the fact that it will take the claimant two years to generate statutory protection from unfair dismissal in any new employment.

84. The respondent submitted that job seeker's allowance should be deducted. However this will be recouped by the secretary of state out of the relevant parts of the claimant's award. The respondent nonetheless will have to pay that recoupment over to the secretary of state.

85. I have taken account of the fact that the Covid Pandemic has made it much more difficult for the claimant to find work. I had no evidence before me that the respondent had furloughed any employees or dismissed any as a result of the Pandemic. Mr Henry pointed out that the Respondent would find difficulty in raising the sums sought in respect of compensation and suggested that the respondent would need time to pay. Those are matters which of course the claimant should consider but lie outside of my remit.

86. I made the following awards against the Respondent therefore:
Basic award: £3600
Compensatory element:
Loss to date £15,155
Future loss at 14 weeks £5325.88
Lost statutory right £500,
This comes to £20980
With the 20% uplift of £4196 this comes to £25,176.

87. To this apply the statutory cap so that the total compensatory element is £24960. Together with the basic award: £3600 the claimant's total compensation is to be £28560.

The Recoupment provisions

88. The recoupment provisions apply in this case.
(a) the total monetary award made to the claimant; £24960
(b) an amount called the prescribed element, if any; £15003.45 (being 99% of £15155, ie, the proportion of the compensatory element relating to past loss to the hearing date as a proportion of the capped compensatory element);
(c) the dates of the period to which the prescribed element is attributable are the effective date of termination 18 February 2020 to the date of hearing being 23 November 2020; and
(d) the amount, if any, by which the monetary award exceeds the prescribed element: £9956.55.

Authorised by Employment Judge O'Dempsey

Date 13 December 2020