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EMPLOYMENT TRIBUNALS

Claimant		***Respondents***
Mr K Martel	**AND**	Harrys of London Ltd

Heard at: London Central **On**: 3-4 July 2017

Before: Employment Judge P Stewart

Representation
For the Claimant: In person
For the Respondent: Mr A Blake, of Counsel

JUDGMENT

The claim of unfair dismissal is upheld but, having regard to s 122(2) and s 123(6) of the Employment Rights Act 1994, both the basic and the compensatory awards are reduced to nil.

REASONS

1. This is a claim of unfair dismissal made by the Claimant in respect of his employer, Harrys of London Ltd, a company in the shoe business.

2. I heard from three witnesses for the Respondent, namely Mr Steven Newey, Mr Ian Lewis and Mr Nicolas Vendramin. I also heard evidence from the Claimant and read the signed statement of Ms Carman Stone and the unsigned statements of Mr Fedro Gaudenzi and Mr Will Forrester.

3. Mr Forrester's evidence was always going to be in writing. He is, I am told, resident in the United States but Ms Stone and Mr Gaudenzi were not instructed by the Claimant to attend today. Instead, the Claimant had been requested them to attend tomorrow morning. In the event it did not matter that much. Mr Blake for the Respondent indicated he did not wish to cross-examine those two witnesses. In adopting that approach, he perhaps unintentionally found himself replicating the approach yesterday of the Claimant who refrained from cross-examining the witnesses.

4. That was the Claimant's approach yesterday but, this morning, he requested permission to ask a small number of questions of each of the witnesses. Fortunately, the witnesses had chosen to be present at the hearing today. Mr Blake did not resist the Claimant being permitted to ask such questions doubtless because he had regard to the fact that the Claimant is both a litigant in person and not legally qualified and to the overriding objective,.

The Facts

5. The Respondent company owns a shoe firm. The Claimant began working for it as a creative designer in 2005. He is proud of his work in building up the business from humble beginnings in 2005 when there were only two other employees apart from himself. In October 2014, a private equity company called Palladin purchased the company and, in June 2015, a new CEO, Mr Steven Newey. was appointed in place of the previous interim CEO, Ms Wikstruom. The position of CEO had been filled by an interim for some nine months.

6. When Mr Newey joined, the Respondent was losing money. A priority for Mr Newey was to bring costs under control. He recruited Mr Ian Lewis in November 2015 as Chief Financial Officer and Mr Nicolas Vendramin in March 2016 as Chief Merchant. These appointments met with the approval of the Claimant. These three individuals, together with the Claimant, formed the senior management team at the Respondent.

7. For an initial period of some six months after Mr Newey joined, there was reasonable atmosphere and co-operation among the senior management team. However, it appeared to Mr Newey that the Claimant was not performing as he should. He failed, for example, to attend a photo shoot for the autumn / winter collection meaning the shoot had to be rearranged. He took the time off without explanation and he used vile and abusive language in the office. Further he appeared to spend a lot of money and appeared reluctant to adhere to budgets.

8. After the appointment of Mr Vendramin, the Claimant became more resistant to financial controls and, when he discovered that Mr Vendramin had been questioning suppliers about pricing and investigating alternative suppliers, he became aggressively upset. An email of 12 May 2016, just two months after Mr Vendramin had joined the company, from the Claimant to Mr Newey contained a reference to Mr Vendramin as 'that little cunt Nicolas'. He articulated the proposition that Mr Vendramin might demonstrate designs to the Claimant who, of course, was the Creative Director but dismissed it with the epithet: 'fuck that, mate'.

9. Mr Vendramin's activities led to the Claimant on the following Monday morning asserting to Mr Newey, apropos Mr Vendramin. that 'that cunt needs to go'. When Mr Newey demurred, the Claimant indicated he already got rid of one chief executive officer and he was not afraid to do the

same to Mr Newey. When Mr Newey responded by pointing out to the Claimant that he should be careful about what he said, the Claimant left the room but not before he had pounded his fist on the table and said 'game on'.

10. At that time, the company was the subject of discussions between its biggest shareholder, Palladin, and an outfit called Kasia Investment. Mr Newey's role was to promote the Harrys brand to Kasia. An incident occurred in June 2016 at the London Collection for Men at Somerset House where Mr Newey was disturbed to witness a rather drunken Claimant unsuccessfully attempting to establish a cordial relationship with Mr Jake Astor, one of the partners of Kasia.

11. Palladin, in the shape of its chief executive officer, Mr Mark Schwartz, , was aware that Mr Newey was dissatisfied with the Claimant. However, he had restrained Mr Newey from taking disciplinary action against the Claimant because he was concerned that the Kasia deal might be derailed if the Respondent did not have its creative director in place.

12. However, in or about July 2016, Kasia then made an offer for the business which gave Mr Schwartz confidence that the deal could go ahead without the Claimant. As a result of that Mr Newey started to make preparations for taking disciplinary action against the Claimant.

13. On 3 August 2016, Mr Newey, Mr Lewis and Mr Vendramin were in a telephone conference meeting with two of the individuals from Palladin, one of them being Mr Schwartz. The subject matter of the conference call was to review their campaign numbers and the products they had sold. Shortly after the call began, the two Palladin personnel mentioned they had received news of a press article concerning Harrys from an online newspaper called Drapers. They said it referred to a sale to Kasia and to the fact that the Claimant was leaving.

14. Mr Newey and Mr Lewis were shocked at the time. Their future employment was tied up in the potential sale. Both they and the Claimant were shareholders in the Respondent company. Palladin was not putting more money into the business and Mr Newey and Mr Lewis were concerned to try to achieve a successful outcome to the negotiations with Kasia.

15. They obtained a screenshot of the Drapers article that had gone out that day: the article contained a quotation that was said to come from Mr Newey as well as one from the CEO of Kasia. They realised that this article was entirely false but it was damaging to the Respondent company. It also incorrectly said both that the Claimant was leaving the business and that he was being replaced by the chief merchant Nicolas Vendramin.

16. The conference call was stopped by Mr Newey so that they could take action to minimise the perceived damage that would flow from the article. Mr Newey's first priority was to speak to the Claimant because the article

mentioned him leaving. He did on the afternoon on 3 August accompanied by Mr Lewis. Armed with a copy of the article, Mr Newey told the Claimant about the article and assured him that it was fraudulent and someone was trying to damage the company.

17. Both he and Mr Lewis found the Claimant's reaction on being told about the article very strange. He seemed calm. Rather than ask for more details he said something like 'because you too have kept me out of the business for so long I don't know what you're talking about'. When he said this his expression appeared to Mr Newey to resemble a smirk. He did not seem particularly interested in seeing or reading the article. Mr Newey asked the Claimant if he knew anything about it and again, in a tone of apparent heavy sarcasm he said: 'I know nothing, Mr Newey'. He did not appear to either the two people there to be shocked or concerned about his reputation.

18. Mr Newey described him as appearing happy, confident, even buoyant and the only time he seemed at bit worried was when Mr Newey said that they were taking this seriously and investigating it and that the Respondent's lawyers would be dealing with it. Mr Newey also mentioned they were seeking a retraction and the Claimant said: 'I'll leave that to you'.

19. Mr Newey emerged from the meeting confident that the Claimant had already known about the article and most likely was the one behind it. He says that this was reinforced by the fact that the Claimant left the office early that day and sent later an email before 5 o'clock saying that he was a bit shocked. Shock was the reaction that Mr Newey had expected from the Claimant but not one that the Claimant had demonstrated in the meeting.

20. That same evening, the Claimant sent along a detailed email to Mr Schwartz, copying the same to Mr Newey. Attached to the email was a copy of the press release. In the email, he referred to being removed from his role by the article despite the fact that Mr Newey has specifically assured him at the meeting the at the article was fraudulent. The Claimant referred financial terms, legal terms and making payments in a tax efficient way. He also discussed the PR element of his exit. To Mr Newey, it seemed as though he had already taken financial advice including, for example, on the vesting of his shares and specifically he said that he had already contacted a lawyer.

21. Mr Newey formed the view that this email and its terms must have been worked out some time in advance and that increased his suspicion that the Claimant had perfectly planned the whole thing to engineer his exit in a way that would give him a chance of a payout by the company.

22. The Claimant sent an email for each of the next two mornings saying that he was unwell and, after that, he was on a period of annual leave. When his annual leave came to an end, he was suspended by the company by letter dated 29 August 2016 and invited to a disciplinary meeting. After

that, he was signed off sick and remained so until his employment came to an end on 21 November. He therefore never attended the disciplinary hearing to which he had been invited.

23. The Claimant had been suspended because Mr Newey had suspected that he had written the false press releases for his own personal gain to the detriment of the company. The suspension was to allow Mr Ian Lewis, the Chief Financial Officer to investigate matters further. Mr Lewis had been chosen to investigate because he had not been cited in the article.

24. The invitation to a disciplinary meeting was made in the suspension letter which covered four pages and was sent on 29 August 2016.

25. As part of his investigation Mr Lewis asked both Mr Newey and Mr Vendramin as to whether or not they had had anything to do with the release of the false press releases. Both of them said they had not. Both their computers were subject to searches but there was no evidence of either of them having created the article or of any indication of their article on their computer before 3 pm on 3 August. In terms of motive, neither of them had motive for releasing prematurely at press release ahead of the conclusion to the Kasia negotiations.

26. The invitation to a disciplinary meeting was scheduled for 2 September but in the event, the Claimant did not attend because he was unwell. In mid-November, he responded to the detailed letter of 29 August by setting out his responses in red at appropriate points in the letter of 29 August. Mr Lewis received the Claimant's response on 18 November. The Claimant had written the following:

> I was not aware of the article before you informed me of its existence. I first became aware of the article when I was called into a meeting with you and Steven that is Mr Newey. You had previously been on the phone with Palladin during which the article was "discovered" and I was informed that there was "an issue". I had no previous knowledge of the article.

27. Mr Lewis in response wrote:

> It is now clear to us that these are false statements. At 4.02pm on 3 August you sent an email to Mr Mark Schwartz copied to Steven Newey that email attached a PDF of the article concerned. The properties of that PDF records that the document was in fact created at 14:56:02 on 3 August.
>
> This confirms our suspicion that you were already aware of the article before we spoke to you about it shortly after we came off the 3pm call. This is consistent with the wider evidence, detailed in my 29 August letter (and not materially allied by your responses), but you forged and disseminated these press releases for your own purposes.
>
> Each and all the above constitutes gross misconduct. In respect of the false statements above: I note that you denied your awareness to the article three times over the space of these four sentences. You made this denial having taken legal advice. You are well aware of the significance of making false representations to your employer in these circumstances. Despite this, you could not have made your position any clearer.

> You are therefore dismissed with immediate effect. Please return all company property within three working days, in particular, your laptop and mobile phone and you are reminded that you should remain bound by duties of confidentiality, pursuant to Clause 16.2 of your employment contract.
>
> If you wish to appeal against your dismissal, you should submit your detailed grounds of appeal to Tobias Nanda within five working days of the date of this letter.

28. This was responded to by solicitors acting on behalf of the Claimant in which they took issue with a number of the comments that Mr Lewis had made and asserted their instructions at point 4.6 of the letter that:

> (i) The Claimant did not know about the Drapers article prior to his meeting with your client on 3 August.
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> (ii) The Claimant was not their author of the press releases nor did they send them to Drapers.
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> (iii) The PDF attached to the Claimant's email was created after the meeting and you have not supplied any evidence to the contrary.
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> (iv) The allegations that the Claimant had acted dishonestly are entirely without foundation.

29. The letter concluded with formal notice that the Claimant wished to appeal against his dismissal.

30. Although the letter of dismissal had indicated detailed grounds should be specified along with the indication of appeal, the letter from the Claimant's solicitors had indicated that detailed grounds of appeal were difficult to articulate when the case for his dismissal rests entirely and on founded allegations or apparently no investigation or evidence at all.

31. Nonetheless, solicitors for the Respondent asked for detailed grounds of appeal which were given on 2 December by McFarlane on behalf of the Claimant.

32. During this period following the dismissal and before receipt of the detailed grounds of appeal, the Respondent conducted an investigation into the metadata pertaining to the document that had been attached by the Claimant to his email to Mr Mark Schwartz of 3 August. The metadata informed them that, while the PDF document had been created at 14:56:02 on 3 August, that time was displayed in Greenwich Mean Time and not British Summer Time. The difference of an hour meant it was not the case, as Mr Lewis had asserted, that the time of the PDF document meant the Claimant must have known about the article.

33. However, the Claimant's phone and his computer were analysed by the Respondent after he had handed them in and a number of items came up that were of some considerable concern. First, on 5 August, one of the days when the Claimant had informed his employer that he was unwell, he had met with a Mr Matt Leese of Frescobol Carioca on 5 August.

34. The email correspondence that was revealed showed that, on 19 July 2016, there had been communication between Matt Leese and the Claimant which had resulted in the Claimant asking Mr Leese on 29 July whether he was free on the morning of Friday 5 August to meet for a coffee and that was responded to affirmatively by Mr Leese. On 4 August, Mr Leese checked with the Claimant: "Are we still on for tomorrow 10 o'clock our Soho store?" and the Claimant on 4th had said 'I'm see you in the morning'.

35. After the meeting Mr Leese emailed the Claimant on 5 August indicating 'thanks again for your time this morning. Pleasure of meeting you. Have a great day. Look forward to catching up with you on your return.'

36. When the Claimant gave evidence, he referred to this being a meeting of old friends or friends of a year standing but it transpired that he had met Mr Leese on one occasion the previous year and thought it might have been at a stall in trades exhibition in Rome and he also made it clear that the reason he had arranged to meet Mr Leese was that there was a possibility of collaboration between himself not as a representative of the Respondents and Mr Leese's company.

37. He accepted in evidence that, in such circumstances, his use of the term "friend" might have been inappropriate: Mr Leese was merely someone who had been a casual acquaintance but with whom he had a common business interest.

38. In addition, there were some 19 documents revealed on his laptop that the Claimant had accessed from the computer storage system of the Respondents. There was no legitimate business reason for him to access these documents. It was his explanation that he was tidying up his computer for the purposes of returning it in good order to the Respondent and that is why the meta-analysis of the data showed that these 19 documents had been put into a folder during the period of his suspension.

39. The conclusion that was reasonably drawn by the Respondent was that the Claimant was in fact copying the documents because they might be of some use to him in business life outside of the Respondents. But, in any event. the meeting with Mr Leese took place on a day in which the Claimant was asserting to his employer that he was too sick to attend work. But he was not too sick to attend to the discussion of possible collaboration that would have been in competition with the Respondent.

40. In addition, the analysis showed up various text messages that had been erased from his mobile telephone but which had been backed up on the compute. These messages indicated that at different times the Claimant was making comments with friends which were consistent with him having formed a strategy whereby he would take the Respondent company for a great deal of money, sufficient for him to joke about the possibility of being able to open his own sneaker store in Rome. This discovery after the

dismissal fortified the conclusion that the Respondents had drawn that in fact he had been involved in the fraudulent production of the press release.

41. In addition, the recorded text chats indicated a certain degree of abusive descriptions being given to his work colleagues in his conversation. Additionally, there were indications that the Claimant at different times sought to obtain recreational drugs while he was on trips abroad.

42. The Claimant disclosed an anonymous letter said to have been received in December 2014. The Claimant believes that Mr Newey had written the letter but Mr Newey denies having anything to do with it. I am not able to form any view as to the origin of this letter or who wrote it. I make no finding in respect of it at all.

43. The legal framework has been set out in the note that Mr Blake supplied. It refers to Section 98 of the Employment Rights Act which sets out that in determining the purposes of this part whether a dismissing an employee is fair or unfair 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 the sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position in which the employee held. Sub-section (2) such as is relevant says a reason falls within this sub-section if it relates to the (b) the conduct of the employee.

44. At sub-section (4) where the employer has fulfilled the requirements of sub-section (1) 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.

45. Mr Blake has reminded me of the well-known authority of British Home Stores Ltd v Burchell [1978] IRLR 379 and the three questions a tribunal should ask itself when considering a claim of unfair dismissal arising from a dismissal on the grounds of gross misconduct:

    a) Did the employer believe that the employer was guilty of misconduct?

    b) If so, did the employer have reasonable grounds for that belief?

    c) Was the belief formed after the employer had carried out as much investigation as was reasonable in the circumstances

46. Reference was made to **Polkey v A E Dayton Services Ltd [1988] AC 344** and, in particular, to the passage of Lord Bridge's speech at 364E in which he said:

> If an employer has failed to take the appropriate procedural steps in any particular case, the one question the industrial tribunal is *not* permitted to ask in applying the test of reasonableness posed by section 57(3) is the hypothetical question _ whether it would

> have made any difference to the outcome if the appropriate procedural steps had been taken. On the true construction of section 57(3) this question is simply irrelevant. It is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the G decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness under section 57(3) may be satisfied.

47. Mr Blake also drew to my attention the earlier House of Lords' decision of **Davis v Atkins [1977] ICR 662**.

48. Applying the law to the facts of this case, at the time of Mr Lewis's decision, he had an honest belief that the Claimant had himself created the false press release. However, the most material factor that led Mr Lewis to that conclusion was the analysis that was provided of the time when the Claimant attached to his email to Mr Schwartz, copied to Mr Newey, the PDF copy of the press release. Mr Lewis was mistaken about the time and its significance. Therefore, is seems to me that he could not have had reasonable grounds for arriving at his belief that the Claimant was responsible for the emails.

49. Although at that stage there had been a reasonable investigation into the matter as much as was justified at the time. Unfortunately, the investigation missed out the significance the time zone recorded for the creation of the PDF copy of the press release.

50. However, although that must lead to a finding of unfair dismissal there is the question of remedy. The Claimant's backup of his text messages made on his telephone disclosed material from which a proper inference can be drawn that in fact the Claimant was behind the release of the press releases. Furthermore, it indicates that two days after the press release had been made, the Claimant was deceiving his employer – asserting he was unfit to do his employer's work when, in reality, he was fit enough to meet with Mr Matt Leese, a representative of a rival organisation, and discuss with him a collaboration in business which would have placed the Claimant in competition with his employer. This behaviour, if known to the Respondent, would have destroyed the trust and confidence that ought to exit between employer and employee. It would have led to his dismissal for gross misconduct.

51. In my view, a proper investigation might have resulted in a slightly longer period of time that the Claimant was employed by the Respondent. It most likely would have entailed an investigation of his computer and his phone at an earlier stage than was the case. Such a proper investigation would have resulted in a dismissal at most two weeks later than was the case. Polkey would thus suggest that the Claimant's loss of salary would be limited to two weeks.

52. However, the text and email correspondence that he was engaging in through his telephone with other people gives rise to an obvious inference

that he was the author of the false press releases. I remind myself of section 123 of the Employment Rights Act 1996 at subsections (1) and (6):

> (1) Subject to the provisions of this section and sections 124, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.
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> …
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> (6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

53. And, in respect of the basic award, I remind myself of section 122(2) of the Act:

> (2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

54. I take the view that it is just and equitable to reduce both his compensatory award and his basic award to nil. In those circumstances, although I find that there was an unfair dismissal, I find that the Claimant is not entitled to either a basic award or a compensatory award.

Employment Judge P Stewart
22 August 2017