EMPLOYMENT TRIBUNALS

Claimant: **Mr M Kianchehr**

Respondent: **Tesco Stores Limited**

Heard at: **Bristol**

On: **2, 3 and 4 December 2020 (4 December in chambers)**

Before: **Employment Judge Livesey**

Representation:
Claimant: Mr Lassey, counsel
Respondent: Mr Anderson, counsel

JUDGMENT

The Claimant's complaints of unfair dismissal under s. 152 of the Trade Union and Labour Relations (Consolidation) Act 1992 and s. 94 of the Employment Rights Act 1996 are dismissed.

REASONS

1. The claim

1.1 By a claim form dated 18 October 2019, the Claimant brought a complaint of unfair dismissal; both automatically unfair dismissal under s. 152 of the Trade Union and Labour Relations (Consolidation) Act 1992 and under s. 94 of the Employment Rights Act 1996.

1.2 The Claimant also made an application for interim relief within his Claim Form which was dismissed by Employment Judge Bax at a hearing which took place on 6 November 2019.

2. The evidence and the hearing

2.1 The following witnesses gave evidence on behalf of the Respondent;
- Mr Beisser; Warehouse Service Shift Manager at Dagenham;
- Mr Allison; Depot Manager at Hinkley;
- Mr Cartwright; Fresh and Frozen Stream Director.

The Claimant also gave evidence.

2.2 The parties produced the following documents;

- C1; Counsel's closing submissions;
- R1; An agreed hearing bundle;
- R2; An agreed Statement of Facts;
- R3; A revised Statement of Issues;
- R4; Counsel's closing submissions.

2.3 The case was heard by a Judge sitting alone. The parties provided their consent for such a hearing in writing on 19 November 2020.

3. The issues

3.1 The Issues had been discussed, agreed and recorded at the Case Management Preliminary Hearing which Employment Judge Matthews had conducted on 19 December 2019, based upon a succinct List of Issues which had been submitted by the Claimant's representative in advance of the hearing.

3.2 Further discussion over the issues took place at the Case Management Preliminary Hearing which took place on 5 April 2020 and which resulted in the List of Issues dated 15 May 2020 which was agreed in a revised version for the purposes of the hearing (R3).

3.3 There was some further discussion about the List of Issues both at the start and during the hearing;

3.3.1 In relation to paragraph 1, Mr Lassey made it clear that the Claimant was not pursuing a case under s. 152 (1)(a), but under s. 152 (1)(b) only;

3.3.2 In relation to paragraph 7, Mr Lassey identified the following procedural irregularities which, he said, sounded under s. 98 (4);

3.3.2.1 The failure to provide the Claimant with evidence prior to and/or during the investigation;

3.3.2.2 The failure to provide the Claimant with the witness statements of Mr Blake and Mr Franklin until the disciplinary hearing on 14 October 2019;

3.3.2.3 The failure to provide the Claimant with the witness statements of Mr Preston and/or Mr Griffiths until the commencement of proceedings.

4. The facts

4.1 The following factual findings were made on the balance of probabilities, such findings having been limited to the matters in issue between the parties. Any page references cited in these Reasons are to pages within the hearing bundle, R1, unless otherwise stated. Citations have been provided in square brackets.

4.2 The Respondent is a well-known supermarket chain with in excess of 3,400 stores and 300,000 employees across the UK.

4.3 The Claimant was employed by the Respondent as a Warehouse Operative at its Distribution Centre in Avonmouth, near Bristol from 1 November 2008.

4.4 The Claimant was a workplace representative for the trade union Usdaw (the Union of Shop, Distributive and Allied Workers). He represented night shift workers within the warehouse section. He was one of approximately 15 such representatives but had been the longest serving warehouse representative at Avonmouth. The Respondent has a general recognition agreement with Usdaw; it is recognised as the sole negotiating union for staff below Team Leader grade [63-70].

4.5 The Respondent has a number of policies which were referred to during the hearing;

4.5.1 The Bullying and Harassment Policy [86-90];

4.5.2 The Grievance and Disciplinary Policy [52-62], which, amongst other things, described bullying as a potential act of gross misconduct;

4.5.3 The Social Media Policy [71] and [80-85].

4.6 In relation to the Social Media Policy, the Claimant had signed for receipt of the 2012 version [71]. That Policy had been fairly short and broad but it nevertheless warned employees against the use of social networking sites such as Facebook in a way which might have brought the Respondent into disrepute. It also warned against the use of any derogatory or abusive remarks or the making of comments in relation to colleagues which could have caused offence.

4.7 The new Policy was introduced in 2018 [80-5] which helpfully defined what it covered with more precision;

> "*Social media is a platform that allows you to publish information, share content and interact with others either to a wide audience or through private communications, such as private messages.*"

The Policy made it clear that it applied to all media platforms, whether internal or external and, like its predecessor, it described the type of conduct that was prohibited.

4.8 The Claimant denied sight of the updated Policy until the investigation into his alleged misconduct had commenced in April 2019. It seemed that employees did not have personal access to all such policies unless they asked for them prior to that point. Nevertheless, the Claimant accepted that he did not need to have read a Policy to have known that using social media to demean a colleague or to send threatening or intimidating messages would have been viewed seriously by the Respondent. What he said he did *not* know, which the new Policy clarified, was that closed message groups were likely to have been covered by it.

<u>The Usdaw representatives' Facebook Group</u>

4.9 The Claimant was a member of a Facebook Messenger group whose other members were all Usdaw representatives at the Avonmouth Depot ('the Group'). It was a closed group in the sense that, although web-based, it could not have been viewed by anybody not invited to the Group.

4.10 In or around April 2019, extracts from the Group's communications were leaked to management by an anonymous source. They included the

following messages/comments which ultimately became the subject of a disciplinary investigation;

4.10.1 A problem had arisen regarding the running of a union ballot and, specifically, the initial removal of an Usdaw representative from a roster when the ballot was to have taken place. Although the problem had been resolved, the Claimant sought to blame Mr Haynes, a Shift Manager, for the initial problem. Amongst a series of negative comments from others about Mr Haynes, the Claimant suggested that he would blame him for the problem, whether he owned up to it or not. He suggested that Mr Haynes was to have been given "*enough rope*" to "*hang himself*" with [254];

4.10.2 The Claimant identified an individual who he considered had risen within the workforce unexpectedly quickly. He commented "*WTF. It pays to be Nikki's bitch*", a reference to Nikki Stitch, the Transport Lead. In response, Mr Lloyd suggested that Ms Stitch had participated in oral sex with another senior manager, Mr Jackson, in response to which the Claimant posted a thumbs up emoji [259];

4.10.3 The Claimant also posted emails which had passed between a fellow Usdaw representative, Mr Grabarski, and Mr Haynes [252].

4.11 From a full reading of the Facebook documentation, some of the messages had clearly concerned activities which Usdaw was involved in as a union, but some did not relate to such activities in any way (for example [255]).

Investigation

4.12 On 17 April, the Claimant was invited to attend an investigatory in meeting by Mr Bessier, an external manager from Dagenham who knew nothing of the Claimant. The letter erroneously referred to WhatsApp messages [93].

4.13 The initial interview stretched over 24 and 25 April [97-113]. The Claimant was shown copies of the messages and initially declined to discuss them because they were exchanged on a different platform from that referred to in the invitation letter. He did, nevertheless, state that the Facebook group was a closed group which was solely used by trade union representatives to communicate and share information. He stated that such exchanges happened "*in any walk of life*" and that the comments which he had made were "*banter*" and were "*not for public consumption*" [103-4].

4.14 A further interview took place on 16 May [127-171]. On that occasion, the Claimant explained his comments on the Group on the basis of frustration at management's perceived failure to adhere to arrangements for elections, but he repeated his defence that they had been made in the context of a closed discussion. He regretted the use of some of the language on the Group which his representative, Mr Grabarski, described as having been "*offensive, obscene, threatening*" [156].

4.15 As to the posting of the emails, the Claimant explained that he had been copied into them by Mr Grabarski who had given his permission to share them. Mr Grabarski also made it clear that he considered that Mr Blake had been the source of the leak from the Group during that meeting [148].

4.16 Mr Beisser then interviewed other witnesses;

4.16.1 Mr Blake; Mr Blake was interviewed on 16 May and 30 May ([172-8] and [179-188]). He stated that he had been a party to the Group but had not shared its contents. He complained, however, that the Claimant had directed hissing noises at him on more than one occasion (3 occasions were covered by his evidence; the 4, 5 and 13 May), assuming that he had been the source of the leak. Having had a good relationship with the Claimant and his fellow union representatives up until that point, he complained that it had deteriorated and that they no longer spoke to him. He complained that the Claimant had posted WhatsApp messages to the effect that 'his days were numbered' [181] and that Mr Lloyd had told him that the Claimant was 'out to get him' [186]. He said that he felt let down and ashamed by the events [178];

4.16.2 Mr Franklin; he confirmed that he had heard the Claimant make hissing noises towards Mr Blake on 13 May and that Mr Blake had complained to him that it had happened before [209-215];

4.16.3 Mr Preston; he confirmed that the Claimant's use of snake noises towards Mr Blake had been reported to him on 4 May, although he had not heard it himself [195-202];

4.16.4 Mr Griffiths; he expressed concern for Mr Blake's welfare and that he had been aware of Mr Blake's complaint about the Claimant's conduct [203-8].

4.17 On 2 June, the Claimant was suspended in relation to the matters which were already being investigated and his conduct towards Mr Blake [189-190]. At that point, therefore, there were three allegations being investigated; the inappropriate and unacceptable messages on the Facebook Group, his sharing of the Grabarski/Haynes emails and his alleged treatment of Mr Blake [191].

4.18 The Claimant was interviewed again on 12 June, specifically in relation to the allegations concerning his treatment of Mr Blake [215-237]. He was asked about the incidents on 4, 5 and 13 May. He said that he could not remember having referred to Mr Blake as a 'snake in the grass' [224-5] and he denied making hissing noises, although he could not remember the events of 4 May [226].

4.19 The matters were then handed up to management. Mr Beisser did not prepare a report, as such. The interviews themselves contained some summaries of his views (for example [162-4]). Three other members of the Group were also subject to disciplinary action; Mr Thomas, Mr Lloyd and Mr Fawcett.

Grievance

4.20 On 25 June, the Claimant and the other representatives raised a grievance against Mr Beisser and Mr Williams for their part in the investigation. A grievance hearing was conducted by Miss Bayliffe on 12 July, in respect of the complaints against Mr Williams, and by Mr Butcher on 27 July, in respect of the complaints against Mr Beisser. The grievances were dismissed on 24 July and 8 August respectively. Although appeals were lodged, it was decided to move the disciplinary process forward once the initial outcomes had been provided.

Disciplinary process

4.21 Attempts were made to convene a disciplinary hearing with the Claimant in respect of the three issues referred to above on 16 and 27 August but, due to continuing disputes over the grievance process, both were postponed. The hearing did not take place until 20 September, but that hearing was also unsuccessful because the Claimant received news that his daughter had been involved in an accident and the hearing was postponed [276-9]. A further hearing was proposed for 8 October, but that too did not take place. An effective disciplinary hearing did not take place until 14 October.

4.22 The disciplinary hearing was chaired by Mr Allison, who had no prior knowledge of the Claimant. The Claimant was supported by a union representative [307-326]. Either at or in advance of the hearing, in was not disputed that the Claimant had received the statements of Mr Blake and Mr Franklin.

4.23 At the hearing, the Claimant denied having hissed at Mr Blake. He said that he was "*flabbergasted*" by the allegation and that it was "*insane*". He did, however, accept that he had been asked to stop hissing at Mr Blake by Mr Franklin. He said that he did not know what he was being asked to stop [321]. The other allegations were also explored with him.

4.24 Mr Allison then took time to consider his decision. He dismissed the Claimant and read from a document which explained his rationale in relation to each allegation [330]. The following findings were set out in his outcome letter [329];

> "*1. Comments made within a messenger Group set up by Avonmouth Union Representatives where you posted comments I believe to be inappropriate, abusive and threatening.*
> *2. Bullying and Harassing a member of the Management team at Avonmouth who you presumed was responsible for providing the evidence to the Depot.*
> *3. Confidentiality breach where you shared emails from a member of the Depot Senior Management Team on Social Media without the individual's permission or authorisation.*"

4.25 Mr Allison described his reasoning in greater detail in his witness statement (paragraph 24 and following). He considered that the treatment of Mr Blake had been the most significant issue; that he had been treated as a 'target', had been intimidated and threatened and that the Claimant's conduct had fallen within the Respondent's Bullying and Harassment Policy. The Claimant, he concluded, had shown no insight or contrition. In relation to the Group messages, he focused upon three comments in his rationale document [330] and considered that the tone used by the Claimant with reference to Mr Haynes had been threatening. He considered the dissemination of the emails between Mr Haynes and Mr Grabarski to have been a further minor issue. Although Mr Grabarski had given his permission for his email to have been shared, Mr Haynes had not. Overall, he considered that the Claimant's conduct had damaged the working relationship between himself and the management at Avonmouth.

4.26 The Claimant lodged an appeal that day [331A-B]. It was originally due to have been heard as a Stage 1 appeal hearing, but a request was made for it to proceed to Stage 2 by his representative [334]. Despite the Respondent's attempts to proceed at Stage 1, that was rejected by the Claimant [337-8].

4.27 Mr Cartwright chaired the appeal meeting that took place on 3 December 2019 [348-371]. At that point, Mr Preston's witness statement had been released to the Claimant and was referred to during the hearing. Mr Cartwright had seen it too. Mr Griffiths' statement, however, had been released prior to the interim relief hearing which took place at the Tribunal on 6 November 2019. The Claimant accepted that either Usdaw or he had had it, but Mr Cartwright said that he had not seen it.

4.28 Mr Cartwright went over the evidence with the Claimant during the appeal hearing. He listened to the arguments put forward by him and his representative. The notes recorded that the Claimant had considered Mr Blake to have been the source of the leak of the Group communications [360]. During his evidence to the Tribunal, the Claimant denied that he had ever held that view and/or that the notes reflected that. It was extremely difficult to reconcile his evidence with the notes, particularly in light of the similar views which had been expressed by Mr Grabarski at a much earlier stage [148].

4.29 The appeal was rejected after a short adjournment, a decision which was subsequently confirmed in writing [372]. The primary basis of Mr Cartwright's decision was the Claimant's conduct towards Mr Blake;

> "*I felt that Martyn was instrumental in 'outing' Mr Blake as the source of the messages provided to Tesco, which put Mr Blake in a very difficult position as a Team Manager at the time.*" (paragraph 11 of his witness statement)

4.30 Of the other representatives who were also exposed to disciplinary action, Mr Thomas received a verbal warning, Mr Fawcett received a first written warning and Mr Lloyd was dismissed. They were all dealt with by Mr Allison. Their wrongdoing was limited to the communications on the Facebook Group.

5. Discussion and conclusions

Reason for dismissal; relevant law

5.1 It was for the Respondent to prove a fair reason for dismissal. The Claimant accepted that the reason for dismissal related to his conduct if it was not the automatically unfair reason alleged under s. 152 (1)(b) of the Trade Union and Labour Relations (Consolidation) Act 1992 which he contended for;

> "*For purposes of Part X of the Employment Rights Act 1996 (unfair dismissal) the dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee-…*
> *(b) had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time,…*"

5.2 The 'activity' concerned must have been connected to the union; the words in the statute were 'activities of an independent trade union', not 'trade union activities', which would have been a broader concept. Whilst union representatives were presumed to have had some degree of delegated authority, their activities must have been within that authority to have been protected. The IDS Handbook '*Trade Unions*', at paragraph 12.2.1, listed the types of activities which might have been covered. They were said to include discussions with or complaints to an appropriate union official in line with approved union policies or procedures (*Courtaulds Ltd-v-Lees and Bullivant* EAT 437/81). A situation where a member spoke in a personal capacity was likely to have been excluded (*Madigan-v-Suffolk Caterers* ET No. 33855/84).

5.3 In *Lyon-v-St James' Press* [1976] ICR 413, the EAT made it clear that s. 152 ought not to operate as a "*cloak or excuse for conduct which ordinarily would justify dismissal*". A further summary of the position was set out in Employment Judge Bax's judgment in relation to the interim relief application [42-3], particularly at paragraphs 26-30 and his references to the more recent case of *Morris-v-Metrolink* [2018] IRLR 853. In that case, Underhill LJ sought to draw a line between cases in which a claimant sought the type of cloak or excuse considered in the case of *Lyon* and those in which the respondent was seeking to obstruct an individual's right to take part in the affairs of a union. A Tribunal, he said;

> "*…must be astute not to find that the Lyon/Bass line has been crossed wherever there has been an error of judgment or lapse from the highest standards, because that would undermine the important protection which Parliament has enacted for employees taking part in trade union activities.*"

Reason for dismissal; discussion and conclusions

5.4 The Claimant was dismissed for three reasons. The primary reason was his bullying of Mr Blake. That had nothing to do with the activities of Usdaw. Mr Allison and Mr Cartwright considered that it was the most significant reason for the Claimant's dismissal, evidence which I accepted. Their evidence was clear, consistent and logical in that respect.

5.5 That, in itself, was enough to satisfy the Respondent's case, both under the Act and following *Carlin-v-St Cuthbert's Co-operative Associaton* [1974] IRLR 188, since the Tribunal had to identify the sole or the principal reason for the dismissal.

5.6 Nevertheless, in respect of the other matters, the Claimant's comments on the Facebook Group were not covered by s. 152 (1)(b). The Group may have been set up initially to have enabled representatives to exchange communications and information about union related matters, but its purpose and use had clearly strayed beyond that. It could not have been part of Usdaw's activities to have made derogatory and/or threatening comments about management, as Mr Anderson put it in his closing submissions (paragraph 29 of R4). I also accepted the characterisation of the issue which Mr Anderson put forward within the following paragraphs (30 and 31); the Claimant had been fuelling an unhealthy level of vitriol against Mr Haynes and the language used was threatening. To say that the

comments were part of Usdaw's activities was to seek to use s. 152 as the type of cloak discussed in the case of *Lyon.*

5.7 Finally, as to the sharing of the Grabarski/Haynes emails, although a minor issue, the emails broadly concerned a union related matter. Nevertheless, it was the breach of confidentiality for which the Claimant was disciplined and that breach was not an intrinsic part of the activities of Usdaw either.

5.8 Accordingly, he was not dismissed for the reason or principal reason that he had taken part in the activities of an independent trade union within the meaning of s. 152 (2)(b). In those circumstances, the Claimant accepted that the Respondent had had a fair reason for his dismissal which related to his conduct under s. 98 (2)(b).

Burchell

5.9 In cases involving dismissals for reasons relating to an employee's conduct, a tribunal had to consider the three stage test in *BHS-v-Burchell* [1980] ICR 303;

(a) Did the Respondent genuinely believe that the Claimant was guilty of the misconduct alleged;
(b) Was that belief based upon reasonable grounds;
(c) Was there a reasonable investigation prior to the Respondent reaching that view?

Crucially, it was not for the Tribunal to decide whether the employee had actually committed the acts complained of.

5.10 Insofar as the allegations concerning the Claimant's involvement in the Group communications and his dissemination of the Grabarski/Haynes emails were concerned, the Claimant accepted his involvement in that respect. The focus under *Burchell* during the hearing was upon the allegations concerning Mr Blake.

5.11 Having heard Mr Beisser's, Mr Allison's and Mr Cartwright's evidence, I accepted that they had all genuinely believed that the Claimant had been guilty of the acts alleged in relation to Mr Blake. Mr Lassey did not suggest otherwise during his cross-examination of them.

5.12 In relation to the reasonableness of the beliefs held by Mr Allison and Mr Cartwright in particular, Mr Lassey picked up on a number of details in the evidence which, he alleged, ought to have caused them to have doubted the veracity of the evidence. He pointed to the fact that, in relation to the events of 4 May, Mr Blake had initially alleged that the Claimant had shouted 'snake' at him [175] whereas, in a subsequent account, he omitted that detail [181-2]. As a further example, he pointed to the fact that Mr Blake had said that he had received a text message from Mr Lloyd in which he had been told that the Claimant was 'out to get him' [186], a text which Mr Lloyd himself appeared to deny sending [269].

5.13 Mr Allison and Mr Cartwright the points as small details. In my judgment, they did not approach the matter unreasonably in taking that view. In relation to the latter point, Mr Lloyd was only specifically asked about a text sent on 5 May, whereas Mr Blake's evidence did not appear to tie it to that specific date. In relation to the comparison between [175] and [181-2], that

was a better point, but it was still only a detail in the context of the broader, stronger evidence which was, in summary, as follows;

5.13.1 The direct evidence of Mr Blake about the Claimant's conduct which was clear, compelling and straightforward;

5.13.2 The lack of a motive for him to have lied. He had had a good relationship with the Claimant over many years, as with all of the other Usdaw representatives up until that point. When asked, the Claimant could not think of any reason why Mr Blake would have made the allegations up;

5.13.3 Mr Franklin's strongly corroborative evidence. Although Mr Franklin and Mr Blake knew each other well, there were many friendships within the Avonmouth depot which had been forged over the years, as Mr Allison pointed out. There was no obvious motive for Mr Franklin to have made up his account either. He had been friendly with the Claimant for a long time too. The Claimant had persuaded him to join the union and had assisted him at a difficult time during his employment;

5.13.4 The Claimant's account actually corroborated Mr Franklin's in one material respect. He accepted that Mr Franklin had asked him to stop hissing at Mr Blake (see Mr Allison's view of that evidence [331]);

5.13.5 There was an obvious and clear motive for the Claimant's actions, namely his belief that Mr Blake had been the source of the leak. The nature of the taunting (snake noises) was itself consistent with that view. Although the Claimant denied believing that Mr Blake had been the source in his evidence, there was significant evidence to suggest otherwise, as discussed in paragraph 4.28 above.

5.14 As to the reasonableness of the investigation, again Mr Lassey attempted to find fault with the Respondent's approach. He had some success in his cross-examination of Mr Beisser who accepted that he did not interview the other person referred to by Mr Blake in relation to the incident on 4 May [197], nor Mr Pingtree who was referred to in relation to the incident on 5 May [182], nor did he identify the 'Tom' who was said to have been present on 13 May [181-2].

5.15 Mr Allison was more robust on those issues. The view that he took from reading Mr Blake's evidence was that no one else other than Mr Franklin was likely to have heard what the Claimant had been doing. That was why Mr Franklin was approached. It was not unreasonable for the Respondent not to have interviewed those others and it was noteworthy that the type of forensic approach that Mr Lassey took to the evidence was not one which the Claimant and/or his representatives had taken during the disciplinary process. They had not suggested that the investigation was wanting in those respects.

5.16 In the context of the *Burchell* test, the reasonableness of an investigation depended upon the circumstances of the case and the gravity of the offence. This was a serious allegation but the Respondent interviewed the victim, the protagonist and the only witness identified as such specifically. The Respondent did not decide *not* to interview anyone identified to it as a potential, important witness. the investigation was not perfect, but it did not need to have been. The Respondent acted within the bounds expected of a

reasonable employer in the circumstances given the factual nature of the allegation, the evidence of Mr Blake and Mr Franklin and the Claimant's belief as to the source of the leak.

Sanction

5.17 The Claimant challenged the reasonableness of the sanction imposed in the case. In such circumstances, the Tribunal was not permitted to impose its own view of the appropriate sanction. Rather, I had to ask whether it fell somewhere within the band of responses available to a reasonable employer in the circumstances (*Foley-v-Post Office, HSBC-v-Madden* [2000] ICR 1283).

5.18 An employer ought to have considered any mitigating features which might have justified a lesser sanction and the ACAS Guidance was useful in that respect; factors such as the employer's disciplinary rules, the penalty imposed in similar previous cases, the employee's disciplinary record, experience and length of service were all likely to have been relevant. An employer was entitled to take into account both the actual impact and/or the potential impact of the conduct alleged upon its business and staff. Section 98 (4)(b) of the Act required me to approach the question in relation to sanction "*in accordance with equity and the substantial merits of the case*". A Tribunal was entitled to find that a sanction *was* outside the band of reasonable responses without being accused of having taken the decision again; the "*band is not infinitely wide*" (*Newbound-v-Thames Water* [2015] EWCA Civ 677).

5.19 As previously stated, the evidence which Mr Allison and Mr Cartwright gave about their view of the most serious issue was accepted. The treatment of Mr Blake, although not perhaps the worst form of bullying that this Tribunal will have seen, was nevertheless conduct which was seen to have fallen within the Respondent's Bullying and Harassment Policy. The Claimant accepted in evidence that bullying covered by the Policy was likely to have been seen as an act of gross misconduct by his employer. The effect upon Mr Blake was clearly relevant and his own evidence and that of Mr Griffiths demonstrated the level of upset that he had sustained ([178] and [203-8]). Mr Beisser also spoke to the fact that he had been "*devastated and upset*" (paragraph 11 of his statement). It was not difficult to understand how the isolation of a representative from his friends and colleagues might have had such an effect. The Claimant, however, showed no remorse or contrition because he continued to deny the allegation.

5.20 As to the Claimant's involvement in the Group messages, Mr Allison's view, that the message concerning Mr Haynes had been threatening, was certainly not an unreasonable one for him to have taken given the wording used [254]. The exchange in relation to Nikki Stich was also inappropriate and demeaning. Mr Grabarski had accepted the obscene nature of some of the messages [155-6], and even Mr Lassey was prepared to accept that they had been 'unsavoury' during his closing submissions.

5.21 But what of the expectation of privacy which the Claimant had in relation to the messages and his lack of knowledge of the 2018 Social Media Policy? When people think that they cannot be heard or seen, they do not always conduct themselves in a way which might be acceptable to a broader audience. An employee cannot complain if he is caught whispering about a

colleague in a demeaning or threatening fashion. Saying that he did not think that he could have been heard would not help him.

5.22 That was really what happened here. The Claimant thought that his comments would never have been made public, albeit that they were comments *about* work colleagues expressed *to* colleagues. The Respondent took the view that it was not mitigation for the Claimant to claim, in effect, that he did not think that he would have been found out. That was a view which a reasonable employer was entitled to take, whilst it might not have been the view that every employer might have taken.

5.23 As to the Claimant's lack of awareness of the updated 2018 Policy, he accepted that he did not need to know about the Policy in order to have appreciated that the mischiefs covered by it were likely to have been viewed seriously by the Respondent. What he did not know, he said, was that the Policy extended to closed social media groups. The 2012 Policy, which he had signed for, did not distinguish between closed or open groups, but it nevertheless stated that an employee's use of "*any social networking sites such as Facebook…*" had to comply with the standards of the Policy. The definition of 'electronic communications' was extremely broad and it seemed inconceivable that the Claimant would not have known that his communications would have been covered by the Policy had they been made public, irrespective of the fact that they had initially been intended for a limited group.

5.24 As stated previously, the breach of confidentiality concerning the dissemination of the Grabarski/Haynes emails was not, of itself, a dismissal issue.

5.25 Accordingly, although other employers may not have taken the same view, the decision to dismiss the Claimant in the circumstances was not outside the band of responses available to a reasonable employer. Mr Allison impressed me. He considered the seriousness of the acts which the Claimant had committed against his disciplinary record, his length of service and the Respondent's zero tolerance approach to acts of bullying. He could have decided not to dismiss, but that was not the test.

Procedural issues

5.26 Although three procedural issues had been identified at the start of the hearing (see paragraph 3.3.2 above), only one of them found its way into Mr Lassey's closing submissions; the point concerning the witness statements of Mr Preston and Mr Griffiths (paragraphs 53 to 55 of C1).

5.27 Ultimately, the evidence demonstrated that this was a non-point. Although the Claimant ought to have been provided with all of the evidence gathered during the investigation before the disciplinary hearing on 14 October, Mr Allison did not have Mr Preston's or Mr Griffiths' statements at that time either. He and the Claimant were therefore in the same position. At the appeal hearing, the Claimant was in a better position than Mr Cartwright because he and/or his representatives had the statements of Mr Preston and Mr Griffiths as a result of their disclosure through the interim relief hearing, whereas Mr Cartwright only had Mr Preston's.

5.28 There was little value to that evidence in any event. Neither Mr Preston nor Mr Griffiths had been a witness to the Claimant's conduct towards Mr Blake. They had only received reports about it. Mr Griffiths' evidence was, perhaps, more important with regard to the impact of the conduct upon Mr Blake and it was probably more advantageous to the Claimant that the disciplinary and appeal officers had *not* seen it.

Polkey and contributory conduct

5.29 No findings here were necessary in light of the findings above. Had they been, it was likely that a significant finding of contributory conduct would have been made. Although the Respondent did not call Mr Blake and/or Mr Franklin to give evidence in respect of the most serious allegation, there were significant concerns around the veracity of the Claimant's account, some of which have been touched upon above. It would not have been impossible, although perhaps unusual, for a Tribunal to have reached findings of contributory conduct on that allegation in the absence of live evidence from those witnesses but the points set out in paragraph 5.14 were compelling. In addition, of course, there were the unchallenged, additional issues concerning the Claimant's involvement in the Group communications and the copying of the emails.

_____

Employment Judge Livesey

Date: 7 December 2020

_____