EMPLOYMENT TRIBUNALS

Claimant: **Mr M Z Kabir**

Respondent: **John Lewis PLC**

Heard at: **East London Hearing Centre (by CVP)**

On: **8 June and 12 November 2021**

Before: **Employment Judge Jones**

Representation

Claimant: Mr Z T Simret, Legal Executive
Respondent: Ms L Gould, Counsel

JUDGMENT

Liability

1. The claimant was unfairly dismissed. The claimant was wrongfully dismissed.

2. The complaint of failure to pay holiday pay is dismissed on withdrawal.

3. The claimant is entitled to a remedy for his successful claim.

Remedy

Basic Award

4. The claimant's effective date of termination – 29 July 2020.

5. A week's pay = £597.15. maximum of £538 x 17 years' service. The claimant's age at dismissal was 44 years. 8.5 x £538.00 = £9,953.00.

6. 10% reduction for contributory fault = £9,953.00 – 995.30 = £8,957.70.

Compensatory award

7. From dismissal date of 29 July 2020 to hearing date of 12 November 2021 = 67 weeks x £597.15 = £40,009.05.

8. Loss of partnership pension contributions £14.43 x 67 weeks = £966.81.

9. Loss of statutory rights = £450.

10. The total compensatory award of £41,425.86 must be reduced by 25% to reflect the claimant's conduct.

11. £41,425.86/25% = £10,356.46. £41,425.86 - £10,359.46 = £31,069.40.

Breach of contract

12. The claimant was entitled to 12 weeks' notice because he has been employed by the respondent for 17 continuous years.

13. 12 x £597.15 = £7,165.80.

14. The claimant is entitled to the total sum of ££8,957.70 + £31,069.40 + £7,165.80 = £47,192.90.

15. The respondent is ordered to pay the claimant the sum of £47, 192.90 as his remedy for his successful complaints of unfair dismissal and wrongful dismissal.

REASONS

1 This was the claimant's complaint of unfair dismissal, wrongful dismissal and failure to pay holiday pay for 4 weeks outstanding holiday entitlement. The claim was strongly resisted by the respondent.

Evidence

2 The Tribunal had an agreed bundle of documents and witness statements from all the witnesses that appeared before it. The Tribunal had live evidence from the claimant on his behalf and for the respondent the Tribunal heard from the following: Donna Lakey, Deputy Branch Manager who conducted the investigation; Josh Gladstein, who dismissed the claimant; and Melanie Ridley, manager in the appeals office, who heard the claimant's appeal.

3 This matter was initially scheduled for 1 day and listed for 8 June 2021. The evidence was not concluded by the end of the day and the hearing was part-heard to 12 November 2021. The hearing concluded on that day. The Tribunal apologises to the parties for the late promulgation of the judgment and reasons in this case. This was due to the pressure of work arising from the pandemic.

Issues

4 The issues in the case can be summarised as follows:

Dismissal

5 What was the reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

6 If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

6.1 there were reasonable grounds for that belief;

6.2 at the time the belief was formed the respondent had carried out a reasonable investigation;

6.3 the respondent otherwise acted in a procedurally fair manner;

6.4 dismissal was within the range of reasonable responses.

Remedy for unfair dismissal

6.5 Does the claimant wish to be reinstated to their previous employment? The claimant has indicated a desire to be reinstated if successful in this claim;

6.6 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

6.7 What should the terms of the re-engagement order be?

6.8 If there is a compensatory award, how much should it be? The Tribunal will decide:

6.8.1 What financial losses has the dismissal caused the claimant?

6.8.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

6.8.3 If not, for what period of loss should the claimant be compensated?

6.8.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

6.8.5 If so, should the claimant's compensation be reduced? By how much?

6.8.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

6.8.7 Did the respondent or the claimant unreasonably fail to comply with it by [specify alleged breach]?

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

6.8.9 If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?

6.8.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

6.8.11 Does the statutory cap of fifty-two weeks' pay or [£86,444] apply?

6.9 What basic award is payable to the claimant, if any?

6.10 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

Wrongful dismissal/Notice pay

6.11 What was the claimant's notice period?

6.12 Was the claimant paid for that notice period?

6.13 If not, was the claimant guilty of gross misconduct? / did the claimant do something so serious that the respondent was entitled to dismiss without notice?

Holiday Pay (Working Time Regulations 1998)

6.14 Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when their employment ended?

7 From the evidence in the case, the Tribunal drew the following findings of fact. The Tribunal did not make findings on all the evidence but only on those matters in dispute that were relevant to the issues in the case.

Findings of fact

8 The claimant began his employment with the respondent in October 2002. At the time of his dismissal on 29 June 2020, the claimant had been employed by the respondent for over 17 years. Throughout the duration of his employment, apart from the events leading to his dismissal, the claimant had not had any disciplinary action taken against him.

9 The claimant was employed as a supermarket assistant. The respondent has two trading divisions – John Lewis and Partners Department stores and its Waitrose & Partners supermarkets. The claimant had worked at various branches of Waitrose over the years. At the time of the incident discussed in these proceedings, the claimant was working at the department store in South Woodford. As this is a co-owned retail business, the respondent's employees are referred to in the documents, handbook and in these reasons as Partners.

10 The respondent relied on a section in its handbook which states as follows:

'In certain cases, your conduct may be considered so serious that you may be dismissed summarily... whether or not you have been warned about such

conduct on a previous occasion and regardless of your performance or length of service'.

11 The handbook contained examples of serious misconduct which could result in summary dismissal. Those examples included inappropriate behaviour outside of the workplace, including online or via social media, that is capable of causing harm or offence to Partners or customers. Paragraph 3.6.2 of the handbook stated that serious misconduct:

'includes misconduct outside of work where this may have implications on or links to our business'.

12 The handbook also stated, in the section on personal conduct:

'*Partners are people of outstanding honesty and integrity….. Behaviours that fall short of our high standards are not tolerated and may result in disciplinary action, which will include losing your job'*. Also, '*make sure that your own conduct does not cause offence to other Partners, customers, suppliers or anyone else you have contact with during the day. We treat bullying, harassment or any offensive conduct of a written, spoken, physical or visual nature as a disciplinary matter'.*

13 English is the claimant's second language. He arrived in the UK in 2002 from Bangladesh. The claimant is married with two children who at the time were 11 and 5 years old. The claimant usually took his children to and from school and his wife worked during the day as an accounts' assistant. The claimant would usually prepare the children's supper and put them to bed before his wife returned from work at around 6.15pm. The claimant would then leave home to travel to work to start his shift at the respondent at 7pm. The claimant worked Sundays, 9pm – 6am and Monday – Thursday, 7pm – 2am. He worked in the ready meals, meat and fish section of the store.

14 His tasks sometimes included doing daily reductions on items of food that were close to their sell by dates; as instructed by managers.

15 On 9 July 2020, while the claimant was at work, the deputy branch manager, Mr Gladstein, invited him to come to the office. When he got to the office, Mr Gladstein questioned the claimant about a product that was due to expire on 5 July, that had been thrown or dumped on shelves in the store, at approximately 22.40 on that day. The claimant objected to any accusation that he had failed to deal properly with the item or that he had dumped a product. He did not agree that he had been at work at 22.40 on 5 July. He explained that if during a shift, he found products that should be removed from shelves, he would either keep an eye out for the partner whose job it is to remove products from the shelf and record their disposal or place it on the designated area on the shelf for the attention of the Partner responsible for removing it and recording its disposal.

16 Although the claimant denied that he had ever disposed of a product outside of the respondent's procedures, the note at page 54 recorded that there was CCTV evidence showing him throwing the item back on the shelf when the store was about to close, which meant that another Partner would not have been able to deal with it.

17 Mr Goldstein recommended the case for further action as the report noted that there was a '*case to answer'*. However, the respondent did not take any further action on this matter.

18 On 12 July 2020, the claimant was at work and was asked by the deputy manager about an item that had not been marked down properly as although it was due to expire on 10 July, it was still on the shelf on 12 July. The claimant explained that when he worked on 10 July, Mr Ford had instructed him to reduce products with expiry dates between 11 July – 13 July. The claimant's evidence was that this item should have been removed by other members of staff who had been assigned to do daily reductions on Friday 10 July or Saturday 11 July. The claimant considered that it was unfair that he should be assigned responsibility for this error when many other partners had worked on reductions between 10 and 12 July, while the item remained on the shelf. When he left the office, the claimant was aware that the deputy manager and Mr Ford were continuing to discuss this matter and why, although the task to do reductions on items dated 11 – 12 July was not on the weekly job list, the claimant had been asked to do it.

19 Although the claimant was not personal friends with Matthew Ford, the assistant team manager at the store; they did have a positive working relationship. There were many text messages between the claimant and Mr Ford; (copies of which were in the hearing bundle) which showed a cordial, positive working relationship between them. I refer to pages 199 – 202. There were also messages between the claimant and Tracey in the bundle on pages 193 – 197, which show that the claimant adopted a similar casual style with other managers. The claimant's style was more casual than that of his managers.

20 In the copies of various text messages the claimant sent to managers, that were in the bundle, the claimant asked for leave, for overtime, agreed to work overtime, was told that his manager was on leave; and told his managers of the hours he has worked so that they could input them into the pay records system to ensure that he got paid for the hours worked. His managers responded positively to those texts.

21 The respondent produced a copy of their '*updated serve request'* in the hearing bundle. This document appeared to be a real time note of activity by managers on the claimant's file, including advice received from HR and action taken; with regard to the claimant and this incident. Whenever a manager took action or sought advice on this issue, they would make a note in this document of the date and time and the action taken. This document, along with the live evidence at the hearing, was helpful in making findings on the sequence of events on 20 July.

22 On Monday 20 July, at around 16.02 the claimant sent a text message to Mr Ford who he called Matt. The text messages exchanged between them were as follows: -

16.02 claimant: Hi Matt how are you
16.21 Mr Ford: Hi, kabir you ok
17.32 claimant: I am ok what about you
18.05 Mr Ford: yh fine thanks can I help you with something

18.07: claimant:	*I found a knife*
18.13: claimant:	*I don't know what to do*
18.13: Mr Ford:	*What?*
18.13: claimant:	*4 emojis (smiley face with heart eyes)*
	Are you scared
18.14: Mr Ford:	*I have no idea what you're on about*
18.16: claimant:	*what time you finish today*
18.16: Mr Ford:	*I'm finished already what are you on about Kabir*
18.16: claimant:	*when will I see you next*
18.16: Mr Ford:	*why*

The text conversation ended there. The claimant was at home at the time and was in the process of making dinner for his children. It is likely that the claimant realised that the conversation might have been concerning for Mr Ford as he then made three calls to Mr Ford on his mobile after Mr Ford responded with '*what*?'. Mr Ford did not answer the phone.

23 On the following day, 21 July, Mr Ford attended work and spoke to his line manager, Ms Lakey, and the branch manager, Rob Pender, about the claimant's text messages. He asked for their support as he was scared and unsure what to do. The claimant was due to come to work that evening. Mr Ford would have finished his shift before the claimant arrived at work to start his shift but he reported concerns about the claimant coming to work with a knife. Mr Pender spoke to the respondent's Profit Protection section to discuss the situation. They advised that if the team at the store was concerned, they should report it to the police and the claimant should make a report to the Metropolitan police via their website, which he did. A note on the respondent's updated service request records that the respondent messaged its community policeman who stated that he would have someone at the store to see the claimant when he arrived for work that evening. This was unlikely to have been a 999 call.

24 Also, on 21 July, at 3.03pm before he went to work, the claimant and Mr Ford had another text conversation. It is likely that this occurred after Mr Ford had informed his managers about the conversation which happened the previous day. The conversation on 21 July was as follows: -

15.03: claimant	*Hi Matt you have not input my hours yet*
15.26: Mr Ford:	*All input*
16.02: claimant	*thumbs up emoji*

25 The claimant attended work to start his shift at 7pm. When he arrived, he found a police officer at work waiting for him. It was not clear to the Tribunal whether the officer attended as a response to Mr Ford's report on the Metropolitan police's website, or because he was a colleague of the respondent's community policeman or because of a call from the management of the store. Ms Lakey's evidence was that she did not call the police but that she was present when the branch manager made the decision to call the police. Ms Freeth was also present when that decision was made. It was a decision made between Mr Pender, Profit Protection and Mr Ford.

26 The police officer searched the claimant. Ms Lakey was present for the search. The claimant did not have a knife in his possession. The record of the search confirmed that the claimant was extremely nervous on seeing the police.

The officer informed the claimant that it was an offence to threaten someone over the telephone. The claimant reportedly told police that it was a joke. The police accepted that the claimant meant no malice towards Mr Ford and he was not cautioned. The police took no further action in this matter.

27 It is likely that the claimant now appreciated that the respondent was taking this matter seriously. He was also now aware that Mr Ford had taken the messages seriously. The claimant decided to apologise to Mr Ford to assure him that he had not meant him any harm and because he had not intended to alarm him. He also wanted to avoid any friction between them as they continued to work together. They had the following exchange by text messages: -

19.18:	claimant	*I am so sorry Matt*
20.31:	*Mr Ford*	*no problem kabir I was a little worried when you text, was a little out of context. Very serious and a worrying conversation need to be little careful. Thumbs up emoji*
21.33:	*claimant*	*please forgive me* *I do apologise for this fun text* *never happened in the future* *I am so sorry Matt*
21.34:	*Mr Ford*	*no worries kabir, but you have to understand that is not something to joke about*
21.35:	*claimant*	*I realised just after came to work* *I am so sorry Matt*
21.41:	*Mr Ford*	*I'm glad you've realised*

28 The claimant thought that Mr Ford had accepted his apology and that that was the end of matter. It is likely that after the police left the store, Mr Ford was asked to write a statement giving his recollection of the incident on 20 July. His statement was in the hearing bundle. He stated that he had brought the messages to the attention of the managers because he was '*scared and unsure of what to do'.*

29 The respondent decided that the matter should be investigated and Ms Lakey, the deputy branch manager, was assigned to conduct an investigation meeting. Although Mr Ford had not made a formal complaint about the claimant's text messages, he had shown them to her and to his managers and the respondent decided to act as he brought them to their attention.

30 On 23 July, Miss Lakey met with the claimant, when he attended for his shift. Ms Freeth took notes of the investigation meeting. Ms Lakey informed the claimant of the reason for the meeting and told him that Mr Ford had shown her the text messages he received from the claimant on 20 July. She asked the claimant whether he had sent those messages. The claimant agreed that he had intended at least part of the message as a joke. In the hearing, the claimant's evidence was that when he told Mr Ford that he had *found a knife*, he was informing him that he found a knife to start cooking a meal for his children. When Mr Ford responded with '*what?'* he sent the smiling eye emojis as a joke. That was what he was referring to when he referred to his messages being in fun. He had since come to realise that the messages made Mr Ford feel scared.

31 The claimant was visibly upset during the investigation meeting. The updated service request notes record that he was upset and that he told Ms Lakey that he felt like he was going to vomit. Ms Lakey confirmed that the claimant did leave the room to vomit. His evidence was that he was physically upset by the investigation meeting and by the thought that he had caused a colleague to feel scared. On his return Ms Lakey asked him whether he was okay to continue with the meeting. It is likely that she left the room to get him some water before she continued with the meeting. The claimant said that he joked with Mr Ford because he thought that he was a very nice man and that they joked with each other. He stated that he felt awful for Mr Ford and that he had tried to call him as soon as he thought that the messages could be taken the wrong way but Mr Ford did not accept the call. He had not thought to send a message to reassure him but decided that he would speak to him on the next occasion that he saw him.

32 Ms Lakey confirmed in evidence that she was aware that the claimant was a parent with young children and that he had no prior misconduct matters on his record with the respondent. She confirmed that she had known him since she joined the branch approximately two years earlier and that they had a good working relationship. She had never seen him being violent or abusive to customers or to colleagues.

33 Ms Lakey asked the claimant to show her any text conversations he had with Mr Ford in which they had a similar jokey relationship. The claimant told her that they had previously referred to each other as '*mate'*. Mr Ford did confirm that they had a friendly working relationship, which she accepted. Mr Ford did not show her the text messages in which the claimant apologised and Mr Ford appeared to accept the apology. The claimant also failed to mention that he had apologised to Mr Ford. In the hearing Ms Lakey stated that if she had been aware of the messages between them on 23 July, she would have asked Mr Ford about them as they gave a different picture to the one which he presented to her.

34 Following her investigation meeting with the claimant and her conversation with Mr Ford, Ms Lakey concluded her investigation and spoke to the respondent Personnel Policy Advice Line. She talked everything through with the advisor. Ms Lakey did not suspend the claimant as although Mr Ford said that he did not want to be in the same building as the claimant, she decided that the claimant was not a threat to anyone. She confirmed in the hearing that she did not consider that he was an immediate threat or that there was any evidence that he intended to harm anyone. The claimant continued to work his shifts.

35 At the same time, Ms Lakey recommended that there was a case for the claimant to answer for potential serious misconduct. This appeared to be mainly because Mr Ford took the messages as a threat. Also, she did not consider it reasonable to view the messages as a joke.

36 Mr Ford had not raised the issue as a grievance but had complained to his managers. The respondent did not consider it to be a grievance between two Partners but a threat to Mr Ford as that was how he reported it. Mr Ford sent his statement to Ms Lakey on 21 July.

37 Following consultation with the respondent's Personnel Policy advice line on the correct wording for the letter, Josh Gladstein, another deputy branch

manager, wrote to the claimant on 24 July to invite him to a disciplinary hearing on 27 July to discuss the following allegation: - *'potential serious misconduct. Serious inappropriate behaviour, capable of causing a partner distress'.*

38 The letter enclosed a copy of the notes of the investigation meeting, the text messages between Mr Ford and the claimant on 20 July and Mr Ford's witness statement. The claimant was advised of his right to be accompanied. He was also advised that the meeting was being held under the respondent's disciplinary procedure, that it may result in disciplinary action being taken against him, including his dismissal; and that said dismissal could be without notice or pay in lieu of notice. He was provided with the contact details of the confidential Partner advice line and the respondent's internal HR advisors who could advise him on its disciplinary process.

39 In preparation for the disciplinary hearing, Mr Goldstein had copies of the investigation meeting notes produced by Ms Lakey, the text messages and the statement Mr Ford gave to Ms Lakey. The claimant had not been asked to produce a witness statement.

40 The disciplinary hearing took place on 28 July. The claimant attended unaccompanied. There was a notetaker present with Mr Gladstein.

41 Mr Gladstein asked the claimant why he had sent the text messages to Mr Ford. The claimant informed him that he had been in the kitchen at the time and that he had not intended to scare Mr Ford. He realised it was a serious matter when he arrived at work and the police spoke to him, and when he was invited to the investigation meeting.

42 The claimant agreed that he would be worried and scared if someone had sent him the messages that he sent Mr Ford. He also told Mr Gladstein that he had not meant to frighten Mr Ford and that he considered him to be a friendly and nice manager who was always helpful.

43 The claimant confirmed that he understood the respondent's Partnership behaviours. He agreed that dignity and respect were important and were in the respondent's handbook. He agreed that he was expected to be professional.

44 He told Mr Gladstein that he was in the kitchen at the time of the text message exchange with Mr Ford and that he was about to start slicing something to prepare food for his family. The claimant said that he sent the text as a fun joke. At the hearing, the claimant said that he intended the emojis with the heart eyes to be fun. Mr Gladstein did not remember a discussion about the emojis in the disciplinary hearing. The rest of the text messages was meant to be about overtime although the claimant did not actually mention overtime or work in the texts. He also never told Mr Ford that he was joking.

45 Although the claimant's case in the hearing was that the minutes of the disciplinary hearing were inaccurate and that he never said that the text messages were a joke, the Tribunal finds it likely that he did say so as it is recorded on many occasions during the hearing. It is likely that he was distressed and upset in the disciplinary hearing and may not recall accurately what he said but it is likely that he said at the time that it was a joke and that he sent the emoji with the heart eyes to confirm that, once Mr Ford replied with '*what?'*.

46 The claimant stated in the meeting that he had never had any issues in 17 years of employment and asked Mr Gladstein to take that into account.

47 The claimant told Mr Gladstein that he and Mr Ford had a professional relationship and that he respected him as a people manager. He said that he and Mr Ford had joked with each other in the dining room but when asked for details, he could not remember what the joke was about. The claimant told Mr Gladstein that he was sorry for any upset he had caused Mr Ford. He was upset and told Mr Gladstein that he should never have sent such a message. At the end of the meeting the claimant threw up again. The minutes record that he appreciated the seriousness of the matter and that this was a good lesson for him to teach him that this is not a good message to send someone as it made Mr Ford scared. He stated that the message was not supposed to be taken like that but he could see how it was. Mr Gladstein adjourned the meeting to consider his decision.

48 When Mr Gladstein considered the evidence, he concluded that the phrases '*I have a knife'* and '*are you scared'* were intimidating. Especially when combined with the claimant's question to Mr Ford about what time he finished his shift. He conferred with the respondent's Personnel Policy section on his decision. There was a note from Personnel Policy on the respondent's updated service request, made earlier that day. It advised Mr Gladstein that if the partner does not raise anything new in the disciplinary hearing, he would need to persuade him that there was no intent and that it would never happen again. If he does so, Mr Gladstein may choose to step back from dismissal and consider issuing the claimant with a first and final written warning. If he believed that there was intent to threaten another partner, he may decide that an appropriate response is to terminate or '*close'* the partner's employment. Mr Gladstein was advised that it was his decision how to proceed and he could do either.

49 Mr Gladstein concluded that the claimant's messages were threatening because Mr Ford considered that they were threatening. He did consider whether a lesser sanction would be appropriate but ruled it out because of the impact that the incident had on Mr Ford as it caused him severe distress.

50 The meeting minutes record that when the hearing resumed after a 15-minute break the claimant was informed that Mr Gladstein's decision was to terminate his employment for serious misconduct, because of the seriousness and distress that the messages caused to Mr Ford. It is likely that the claimant was so upset that he left the room without signing the notes of the meeting.

51 Mr Gladstein wrote to the claimant on 29 July to confirm his summary dismissal for serious misconduct, namely, *'serious inappropriate behaviour, capable of causing a Partner distress'*. The letter enclosed another copy of the disciplinary hearing notes. The claimant was advised of his right to appeal, which should be submitted within seven days. He was also informed that as he had been dismissed for serious misconduct, Mr Gladstein would recommend to the appropriate committee that the claimant be excluded from that trading year's Partnership Bonus. The claimant was reminded of the availability of the contact details of the respondent's Partnership Support line which provides a confidential, non-judgmental listening and emotional support service.

52 On 4 August, the claimant submitted an appeal against his dismissal. In his appeal the claimant stated that he had texted Mr Ford because he wanted to ask him if there was any available overtime. He started the conversation by asking Mr Ford how he was. By the time Mr Ford answered, about half hour later, he was in the kitchen about to prepare food for his family and stated that he had found a knife as a joke. When he asked Mr Ford whether he was still at work, he was going to ask about overtime but as Mr Ford stated that he was no longer at work he did not ask him to input his hours into the system. He realised that Mr Ford had not taken it as a joke, so he called him three times. When he still did not answer he decided to clear it up with him at work the following day. He stated that he had not meant anything at all and that he did not think at the time that it was harmful.

53 The claimant stated that he had apologised to Mr Ford as soon as he realised that he had taken it seriously. He confirmed that he had sent those text messages but that he had no intention to threaten Mr Ford or cause him any distress. The claimant referred to his length of service with the respondent and the fact that he had never, in 17 years been accused of violence or threatening behaviour to other Partners. He suggested that it must have been Mr Ford's perception of him as a result of generalisation and prejudice towards him because of his racial background that led to him assuming that he was a threat. The claimant did not bring a complaint of race discrimination in this case.

54 The claimant ended his appeal letter by agreeing that it was a rather weird conversation but that it was not meant to be threatening and that being dismissed had had an adverse effect on his mental health. He hoped that it would be possible to hold the appeal meeting in person.

55 Melanie Ridley, a manager in the respondent's appeals office, was assigned to conduct the claimant's appeal against dismissal. The respondent has a dedicated team that considers appeals against dismissals, who are independent and separate from the management at the store where the Partner worked and where the manager who made the decision to dismiss would usually also be based. As an appeals manager, her role is to balance the needs of the Partnership with the needs of the individual Partner to ensure that the Partnership has been fair in its dealings with the Partner. Her job as appeals officer was to review and consider both the procedure followed and the reasonableness of the outcome.

56 On 11 August, the respondent wrote to the claimant to invite him to an appeal hearing on 3 September 2020, to be conducted by telephone as that was how the respondent was conducting appeal hearings during the pandemic. The claimant repeated his request for an in-person hearing as at the time, he was suffering from tinnitus. The meeting was re-scheduled to 11 September, as an in-person hearing.

57 Before conducting the appeal hearing Ms Ridley read through the claimant's completed appeal form and the dismissal letter.

58 The claimant attended the appeal meeting with a friend. Ms Ridley explained her role and confirmed that she would take a note of the meeting and provide the claimant with a copy. She found the claimant to be friendly and described him as someone who was desperate to keep his employment.

59 At the start of the minutes of the appeal hearing, Ms Ridley recorded the claimant's statement that he made a silly mistake and that he took responsibility for the error. When asked to explain his relationship with Mr Ford the claimant confirmed that it was a good, professional, working relationship. He stated that they had engaged in friendly work banter and that on one occasion when he was emptying cages, Mr Ford had said to him: *'if you don't finish that, I'll kill you'*. He knew that it was said in jest and had not taken it seriously. When Ms Ridley spoke to Mr Ford after her meeting with the claimant, he denied that he had ever said that to the claimant or that they had any sort of banter with each other.

60 Ms Ridley noted that although the claimant told her that the purpose of the text conversation was to ask about overtime, the claimant never actually mentioned overtime in all his text messages to Mr Ford on 20 July. Although he said that he thought the messages had been taken out of context, he did agree that to an objective person, if looked at as a whole, it appeared to be about the knife.

61 The claimant referred to the fact that he had not been charged by the police with any offence and his expectation that that would be the end of the matter. He also referred to his apology to Mr Ford which Mr Ford appeared to accept. He referred to his length of service and his clean disciplinary record and that he had not had any issues prior to this matter. He wanted Ms Ridley to take that into account. The claimant was very upset in the appeal hearing and talked about suicide. Ms Ridley made sure that he had information about the respondent's helpline before she left him alone in the room.

62 The claimant's representative told Ms Ridley that in his Bengali culture, if he had made a similar joke with someone from the same culture, they would not have taken it seriously, but would have found it humorous. Ms Ridley considered that as the claimant did not ask her specifically to look into that and it was not an appeal point in his letter of appeal, she did not look into it. At the hearing the claimant stated that the notetaker had written it down incorrectly and what had been said was that there was room for misunderstanding between people of different cultures.

63 The main point of the claimant's appeal as far as Ms Ridley was concerned was that he had no intention to alarm or scare Mr Ford and that it was a joke that he deeply regretted. He did say to her, as he said in the hearing, that sending Mr Ford the emoji with the heart eyes was to indicate to him that this was a joke.

64 At the end of the hearing Ms Ridley informed the claimant that she would now investigate his grounds of appeal and respond to him by letter once she had made a decision.

65 As part of her investigation, Ms Ridley spoke to both Mr Ford and Mr Gladstein. Mr Ford confirmed that the claimant had apologised to him but stated that he only accepted his apology so as not to anger the claimant any further. He was still worried that the claimant might appear at his place of work with a knife. He stated that when he got the smiley face emoji with the heart eyes, he thought that it was psychotic although he did not explain how he came to that conclusion. He confirmed that the messages he received from the claimant were completely out of the blue and that he did not see how they could be considered a joke.

66 Mr Gladstein confirmed that he had been aware of how scared and worried Mr Ford had been and still was about the matter. He told Ms Ridley that he considered that dismissal had been the appropriate sanction because he believed that the claimant had threatened Mr Ford in the text exchange. He also told her that he would have made the same decision even if Mr Ford had not been as scared as he was because of the seriousness of the conduct.

67 There were no minutes arising from Ms Ridley's discussions with Mr Ford and Mr Gladstein. It was her practice to speak to the decision-maker as part of conducting an appeal so that she could understand the reasoning behind the decision.

68 Ms Ridley then considered her decision. This was sent out to the claimant in a letter dated 18 September 2020. Her decision was to uphold the claimant's dismissal and reject his appeal. She confirmed that she could find no evidence of the claimant and Mr Ford having the sort of relationship where they had that type of banter. She decided that they occasionally worked side by side and that there may have been some banter but not as the claimant suggested. The claimant had referred to a witness but she had not spoken to that person because even if Mr Ford and the claimant had had a verbal exchange as the claimant suggested, that would not explain the texts sent on 20 July.

69 Ms Ridley also concluded that regardless of the claimant's intentions, Mr Ford had been made to feel scared for his safety, which he was still feeling when she spoke to him, sometime afterwards. It is likely that she accepted the claimant's statement that he had meant no harm to Mr Ford but she felt that his actions had seriously affected Mr Ford and were continuing to affect him. Also, she stated that she could see why he had interpreted the claimant's messages from the point where he said that he had found a knife up to his question of when Mr Ford was finishing work, as threatening.

70 She focussed on the claimant's behaviour in those messages and the fact that they had caused severe alarm and distress to another Partner, causing him to feel extremely scared, worried and frightened. She believed that Mr Ford was still fearful when she spoke to him although the Tribunal was not told of anything that had happened between them since the claimant's apology on 21 July. In the hearing, she confirmed that she felt that it was reasonable that he should have felt scared and that if she had received those messages, it is likely that she too would have felt scared of the claimant.

71 As the claimant had stated in the appeal hearing that the comments in the text messages were a joke, Ms Ridley felt that she could not be certain that he would not do so again, if he were reinstated. She confirmed his dismissal.

72 In the Tribunal hearing the claimant submitted that his dismissal may have been linked to the earlier discussion that he had with Mr Goldstein about the stock on the shelf, earlier in July. This was not a matter that he had raised in the internal proceedings.

73 The claimant issued his complaint of unfair dismissal in the Employment Tribunal on 21 November 2020. The claimant confirmed at the end of the evidence

that he accepted the respondent's explanation regarding his holiday pay and he no longer pursued that complaint.

Law

74 Firstly, the Tribunal is concerned with the question of determining the reason for the employee's dismissal and whether it is one of the reasons set out in section 98(2) of the Employment Rights Act 1996. The burden is on the respondent to show the reason for dismissal. The reason for dismissal is the set of facts known by the employer or beliefs held by him at the time, which cause him to dismiss the employee. (*Abernathy v Mott Hay & Anderson* [1974] IRLR 213). It would be the reason which motivated the dismissing manager. Even if the employer is mistaken in his beliefs, the employer's subjective belief is sufficient to establish a reason for dismissal.

75 The law on unfair dismissal is set out in section 98 of the Employment Rights Act 1996 and the well-known case of *BHS v Burchell* [1978] IRLR 379 EAT, in which the court set out a three-stage test that employers must follow in reaching a decision that the employee had committed the alleged acts of misconduct and that it was reasonable to dismiss them for it. The employer must show as follows:

(a) he believed the employee was guilty of misconduct;

(b) he had in his mind reasonable grounds which could sustain that belief; and

(c) at the stage at which he formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.

76 That means that the employer does not need to have conclusive direct proof beyond reasonable doubt, of the employee's misconduct but a genuine and reasonable belief of it which it came to by way of a reasonable investigation. The employer must have conducted *'as much investigation into the matter as was reasonable in all the circumstances'* (*BHS V Burchell).*

77 The Tribunal reminds itself that the standard in relation to the investigation is whether a reasonable employer could adopt the approach taken. The process must be viewed as a whole and any alleged deficiencies in the process can be remedied by subsequent stages (*Taylor v OCS Group Ltd* [2006] IRLR 613). An employer is not obliged to investigate every line of defence advanced by an employee in detail where it reasonably concludes that the employee engaged in misconduct based on the nature of the specific transactions themselves and the implausibility of the employee's account. *(Shrestha v Genesis Housing Association* [2015] IRLR 399.

78 The Tribunal considered the case of *Clark v Civil Aviation Authority* [1991] IRLR 412 where in obiter comments the court set out as part of general principles governing disciplinary hearing procedures that the employee should be informed of the allegation or allegations made against them, given an indication of the evidence whether in statement or other form or by recording of witnesses; allowed either by themselves or through their representative to ask questions, and have the opportunity to call evidence and explain/argue their case.

79 The *ACAS Code of Practice on Disciplinary and Grievance Procedures* (2015) (the *Code*) contains requirements, that the employer inform the employee of the basis of the problem and give them an opportunity to put their case in response before any decisions are made, as basic elements of fairness (Para 4). Another is that employers should carry out any necessary investigations, to establish the facts of the case.

80 The Tribunal would next consider whether dismissal was a reasonable outcome of this process.

81 If the Tribunal concludes from the evidence that the stages outlined above have been followed, then it must decide whether, taking into account all relevant circumstances, including the size of the employer's undertaking and the substantial merits of the case, that the employer acted reasonably in treating it as a sufficient reason to summarily dismiss the employee. In determining this, the Tribunal has to be mindful not to substitute its own views for that of the employer. The onus is on the employer to establish that there was a fair reason for the employee's dismissal such as serious/gross misconduct, which is relied on in this case. The Tribunal must then ask itself whether the decision to dismiss fell within the *'range of reasonable responses'* of a reasonable employer.

82 In the case of *Iceland Frozen Foods v Jones* [1982] IRLR 439, Mr Justice Browne-Wilkinson summarised the law as follows*:*

> *"….in law the correct approach for the tribunal to adopt in answering the questions posed by section 98(4) ERA is as follows: (1) the starting point should always be the words of section 98(4) themselves; (2) in applying the section the tribunal must consider the reasonableness of the employer's conduct, not simply whether they (members of the tribunal) consider the dismissal to be fair; (3) in judging the reasonableness of the employer's conduct, the tribunal must not substitute its decision as to what was the right course to adopt for that of the employer (4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, and another quite reasonably take another; (5) the function of the …tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses a reasonable employer might adopt. If the dismissal falls within the band the dismissal was fair; if the dismissal falls outside the band it is unfair."*

Applying law to facts

83 I will now refer to the list of issues set out at paragraph 5 above and give the Tribunal's judgment on each issue.

What was the reason for dismissal?

84 It is this Tribunal's judgment that the claimant was dismissed because of the statements he made in the text message conversation that he had with Mr Ford on 20 July. Although Mr Gladstein had a conversation with the claimant on the

stock control issue earlier in July, the respondent did not bring that matter up in the disciplinary proceedings related to the text messages. There was no evidence that Mr Gladstein felt so strongly about the stock control issue that he was looking for an excuse to dismiss the claimant.

85 The evidence showed that Mr Gladstein considered that the claimant had committed serious misconduct because of the text messages he sent to Mr Ford on 20 July and that this was conduct that warranted summary dismissal.

86 It is this Tribunal's judgment that the claimant was dismissed for misconduct and that Mr Gladstein believed that the claimant had committed serious misconduct for which he could be summarily dismissed.

Did the respondent act reasonably in treating that as a sufficient reason to dismiss the claimant?

87 The respondent was made aware of the text messages and their content on 21 July. The respondent made the decision to call the police and did so. The police did not consider the claimant to be a threat to anyone and took no further action.

88 Ms Lakey conducted an investigation into the messages and Mr Ford's reaction to them. Ms Lakey considered that the claimant was not a threat to anyone and that is why she did not suspend the claimant. The claimant continued to work in the same store as Mr Ford, while the investigation and disciplinary process continued, even though they worked different shifts and therefore did not have any contact with each other.

89 The claimant was visibly upset in the investigation meeting as he was in the disciplinary and appeal hearings. The respondent did not speak to the person who the claimant said could confirm banter between him and Mr Ford. The respondent also did not make any enquiries into the cultural issue that was discussed at the appeal meeting. However, it is unlikely that either of those enquiries would have made a significant difference to the respondent's conclusion that the claimant had committed serious misconduct in sending those text messages to Mr Ford.

90 The respondent followed a fair procedure in the conduct of the investigation meeting, the disciplinary and appeal hearings. The claimant was provided with enough information to understand the allegation against him and to defend himself against it. The claimant was provided with the investigation minutes before the disciplinary hearing and the disciplinary minutes before the appeal hearing. He had opportunity at those hearings to query the minutes.

91 It is this Tribunal's judgment that the claimant was very upset when he realised that his messages caused Mr Ford to be upset and scared that he himself became upset in the hearings and there was evidence that he threw up at the investigation stage and at the disciplinary hearing.

92 It is this Tribunal's judgment that the respondent had carried out a reasonable investigation at the time that Mr Gladstein formed the belief that the claimant had committed serious misconduct.

93 It is also this Tribunal's judgment that the claimant's biggest complaint with this process was with the decision to dismiss him summarily rather than impose some other sanction.

Was dismissal within the range of reasonable responses?

94 The decision to dismiss the claimant was likely based on the level of upset and distress that Mr Ford expressed to Mr Gladstein on 21 July and because the respondent considered that his text messages were threatening and intimidating. The Tribunal considered whether they were reasons within the band of reasonable responses for the decision to dismiss the claimant.

95 Was it reasonable and within the band of reasonable responses for the respondent to consider the messages to be threatening and intimidating? Mr Gladstein spoke to Mr Ford during the day on 21 July. At the disciplinary hearing he had Mr Ford's written statement. Neither Ms Lakey nor Mr Gladstein spoke to Mr Ford about his seeming acceptance of the claimant's apology on the evening of 21 July. The apology was not referred to in Mr Ford's statement.

96 It is this Tribunal's judgment that the respondent decided that the claimant's conduct was threatening because of Mr Ford's reaction to and his opinion of the claimant's text messages. In this Tribunal's judgment, it is unlikely that Mr Gladstein would have dismissed the claimant if Mr Ford had not stated that he found the messages to be threatening and that they caused him to be worried for his safety and in fear.

97 In this Tribunal's judgment, it would have been reasonable for the respondent to consider all the surrounding circumstances before coming to the conclusion that the text messages were threatening and intimidating. It is this Tribunal's judgment that the respondent did not do so but relied only on Mr Ford's reaction to them.

98 In this Tribunal's judgment, a reasonable employer would have considered the bizarre nature of the messages - which mentioned a knife but contained no obvious threat to Mr Ford's safety; along with the other factors which existed at the same time. Those factors were: the text messages had been sent by a Partner with long service, a clean record, who had a good, professional working relationship with the Partner to whom the messages had been sent, with no history of arguments or anger between them. Also, that upon realising that they had been taken in the wrong way, when Mr Ford replied '*what*?', the claimant had tried to telephone him three times to speak to him. On the following day, as soon as he was aware of how seriously they had been received, he apologised to Mr Ford, who appeared to accept the apology. During the investigation, disciplinary and appeal hearings the claimant put forward that the messages had been sent as a joke but also accepted that he should not have sent them.

99 In the investigation meeting the claimant was upset to find out how his messages had affected Mr Ford. He was physically sick at the realisation that he had upset another Partner and caused him to feel fear. At the disciplinary hearing, the claimant threw up again and agreed that he should never have sent such a message. He appreciated the seriousness of the matter and that it was not a good message to send someone as it made Mr Ford scared.

100 It is this Tribunal's judgment that having taken all the relevant factors into account, it was outwith the band of reasonable responses for the respondent to conclude that what were clearly bizarre, unexplained and arguably stupid text messages; were intimidating or threatening behaviour.

101 There was nothing in the claimant's conduct before these messages were sent or subsequently to suggest that this was threatening behaviour. There was no actual threat in the messages. They did not make sense but that did not mean that they were threatening.

102 In this Tribunal's judgment, it was within the band of reasonable responses for the respondent to conclude that the claimant had committed serious misconduct and displayed inappropriate behaviour, capable of causing a Partner to become upset; but not that this was intimidating and threatening behaviour.

103 Was dismissal within the band of reasonable responses for this misconduct? The respondent's personnel advice line advised the manager conducting the disciplinary hearing to consider whether the Partner had demonstrated that they had any intent to harm another Partner and that the answer to that question should be a strong factor in deciding what sanction to impose. At the end of the investigation, Ms Lakey concluded that here was no evidence of any intent to harm Mr Ford. That conclusion was not challenged in the disciplinary process.

104 In considering his decision at the end of the disciplinary hearing, Mr Gladstein had information from the investigation and the disciplinary hearing from which he could reasonably conclude that on 20 July, the claimant had sent a set of bizarre messages to Mr Ford. It was also reasonable for Mr Gladstein to conclude that the claimant had been unable to explain the text messages during the investigation and disciplinary hearing. The explanations that he gave that the messages were a joke or fun was not accepted. It was within the band of reasonable responses for the respondent to consider that the claimant's conduct in sending those messages on 20 July had been inappropriate. There was no stated context for the reference to a knife and no previous interaction between the claimant and Mr Ford that suggested that it was part of an ongoing joke or fun or '*banter'* between them.

105 In coming to the decision on the appropriate sanction to impose on the claimant for his serious misconduct, it is this Tribunal's judgment that the respondent placed too much weight on Mr Ford's strong reaction to them. Mr Gladstein and Ms Ridley did not consider whether it was reasonable for him to continue to be so distressed and upset months later or, given that he was; whether that should determine the sanction. A reasonable employer would have balanced Mr Ford's upset, worry and continuing distress against the claimant's physical upset when confronted about them, his apology to Mr Ford on 21 July, his acknowledgment in the disciplinary and appeal meetings that the messages should not have been sent and his regret that he had done so, his long unblemished service with the respondent up to that day; and would have come to a conclusion that the reasonable sanction was action short of dismissal. There was no evidence of an intent to harm and as the respondent's personnel advisor stated, in that case, the respondent can impose a sanction short of dismissal. In this Tribunal's

judgment, in those circumstances a reasonable employer would have imposed a sanction short of dismissal.

106 In analysing Mr Ford's reaction to the text messages and whether it was reasonable for him to be still be upset and fearful at the time that Ms Ridley spoke to him the respondent was aware that Mr Ford considered the emoji of the smiley face with the heart eyes to be '*psychotic'*. It was not clear why he thought that. There was no evidence of the claimant being psychotic or displaying psychotic conduct at work prior to 20 July. There was no evidence of the claimant displaying violent, threatening or concerning conduct to managers or to any other Partner or customer before 20 July or in the shifts that he worked after 20 July. Mr Ford did not provide information about any other interactions with the claimant that would lead him to conclude that the claimant was angry with him or that he was angry with the respondent or that he had ever displayed anger at work. Ms Lakey confirmed that she had worked with the claimant for 2 years and never seen him angry or violent and that they had a good working relationship.

107 It was also not clear on what basis Mr Ford considered that the apology was not genuine and that (as he told Mr Ridley) he needed to accept it in order to keep the claimant from harming him or from displaying anger towards him. As stated above, there was no evidence of the claimant ever displaying anger at work or to Mr Ford. They both gave evidence in the internal procedures of having a good, professional working relationship. Whether or not they had the type of banter with each other as the claimant stated, neither or them referred to anger or aggression or threats between them.

108 In considering what would be the appropriate sanction to impose on the claimant, Mr Gladstein had to consider whether there had been intention to harm Mr Ford, whether the claimant would repeat this conduct in future, whether there was a continuing threat or possibility of harm and whether it was reasonable for Mr Ford to continue to still be distressed about the messages or even if he was, whether that was a factor that should decide the sanction he imposed rather than all the other factors set out above.

109 In this Tribunal's judgment, the claimant had displayed thoughtless conduct. He had sent some stupid, random text messages to his manager without thinking of how they could be received. As soon as it became apparent that they were not received well, he tried to call the recipient.

110 It was in the band of reasonable responses for the respondent to conclude that the claimant had displayed inappropriate conduct but that there was no evidence of an intention to harm Mr Ford. His quick apology before being asked to give one and his attempts to speak to Mr Ford on 20 July before the matter had been referred to management as well as his upset at being told of how upset Mr Ford was and how serious it was being taken; were all factors to be taken into account in deciding the appropriate and reasonable sanction to be imposed on the claimant for this inappropriate conduct.

111 In deciding what would be the appropriate sanction for the claimant's misconduct, a reasonable employer would also have considered the claimant's long service during which nothing like this had ever occurred, that the claimant and all his managers had a good working relationship and that the claimant had

become physically ill when confronted with the seriousness of the messages in the investigation meeting.

112 It is this Tribunal's judgment that the claimant's mitigation and the surrounding circumstances as outlined above, were not considered by Mr Gladstein before he decided to terminate the claimant's employment.

113 This was not remedied at the appeal stage. Ms Ridley also focussed on Mr Ford's continuing distress and upset. It is unlikely that Mr Ford had seen or had any interaction with the claimant since 20 July and there was no reason given why he thought that he needed to accept the apology because of a fear the claimant would be angry or continuing to be angry with him.

114 There was no evidence that the claimant had any intention to harm or to scare Mr Ford. There was no evidence arising from the investigation, the disciplinary hearing or from the appeal that demonstrated that the claimant had any intention to harm him. The respondent had no evidence to contradict Ms Lakey's judgment that the claimant posed no threat to Mr Ford or to anyone else. The claimant did not have a satisfactory explanation for the messages but that did not mean that the reasonable conclusion open to the employer was that they were threatening or that there had been any intention to harm the manager.

115 In this Tribunal's judgment, Mr Gladstein and Ms Ridley did not consider a sanction short of dismissal such as a final written warning. It is also this Tribunal's judgment that a reasonable employer, faced with the same circumstances would have decided on a sanction short of dismissal for this inappropriate conduct and would not have dismissed the claimant.

116 In the particular circumstances of this case, it is this Tribunal's judgment that the claimant was dismissed because of serious misconduct and that the decision to dismiss the claimant rather than impose a sanction short of dismissal was outside of the band of reasonable responses open to the respondent.

117 It is this Tribunal's judgment that the claimant was unfairly dismissed.

118 The claimant is entitled to a remedy for his successful complaint of unfair dismissal.

119 It is this Tribunal's judgment that the respondent complied with the ACAS Code of Practice.

Contributory fault

120 At the hearing the respondent submitted that the claimant should be judged to have contributed 100% to his dismissal. Counsel submitted that the claimant never told Mr Ford that he was cooking during his text messages which would have explained the reference to a knife. He also never left a message or voicemail once Mr Ford refused to take his three telephone calls on 20 July.

121 This Tribunal considered section 123(6) of the Employment Rights Act 1996 which provides that if the tribunal finds that the employee has, by any action, caused or contributed to his dismissal, it shall reduce the amount as it considered

just and equitable. There does not need to be a causal connection between the dismissal and the conduct, where the tribunal is considering a reduction in the basic award, the conduct simply needs to have resulted or contributed to the dismissal. The correct test is to consider whether the conduct was culpable, blameworthy, foolish or similar, which includes conduct that falls short of gross misconduct and need not necessarily amount to a breach of contract *Nelson v British Broadcasting Corporation (No.2)* 1979 IRLR 346 CA.

122 The categories of reduction suggested in *Hollier v Plysu* [1983] IRLR 260 are guidelines, which the tribunal does not have to follow. The Tribunal is aware that the more serious and wrong an employee's conduct, the higher the deduction is likely to be.

123 In this case, apart from Mr Ford's reaction, the respondent did not have evidence that the messages were threatening or intimidating. The claimant was not a threat to anyone. The claimant's text messages to Mr Ford did not make sense but it was not reasonable to conclude, in the absence of any other evidence apart from Mr Ford's reaction; that they were threatening.

124 In those circumstances, the claimant's conduct contributed to his dismissal in that without those messages, he would not have been investigated by Ms Lakey. They were thoughtless and nonsensical and had no purpose. The claimant was reckless that a Partner could have misunderstood his messages and be left confused. It is this Tribunal's judgment that the claimant conduct contributed 25% to his dismissal because the conduct although inappropriate because it upset and Partner was not threatening and did not warrant summary dismissal.

125 The Tribunal considered relevant case law in relation to the amount of the reduction for contributory fault, in the light of the findings and conclusions reached above. *Harvey* refers to the case of *O'Connor v James Taylor Construction Ltd* (Watford) Case No. 3300347/2017) (7 November 2017, unreported), the tribunal reduced the compensatory award to reflect the claimant's part in a heated exchange that led to the disciplinary proceedings hat led to the unfair dismissal. The compensatory award was reduced by 25% to reflect the claimant's conduct due to his part in a heated exchange that led to the disciplinary action. A different reduction was applied to his basic award as the tribunal gave him credit for his length of service and his contrition following the heated exchange.

126 In the case of *Ramchandani v Citibank NA* (East London) (Case No 3200403/2014) (14 July 2020, unreported) the tribunal decided that the claimant had committed *'culpable acts of misconduct in breach of his contract and foolish, blameworthy behaviour which caused his dismissal'.* However, a reduction of 100% was not judged appropriate because the employer's policies were not sufficiently clear and there was no culpability in some conduct relied upon as reasons for dismissal.

127 Lastly, Harvey refers to the case of *Buchholz v GEZE UK Ltd* (Birmingham) (Case No 1305718/2020) (29 March 2021, unreported) in which the tribunal decided that the employee's conduct fell below the standard expected and set by the disciplinary policy and he had not been straightforward at the investigatory meeting. That was conduct that contributed to his dismissal. However, it was equally true that but for the respondent's imposition of a sanction outside of the

bands of reasonable responses he would also not have been dismissed. The tribunal imposed a one-third reduction under section 123(6) for conduct that it classified as 'foolish, insensitive, careless and uncooperative.

128 In this case, the claimant's conduct in sending the text messages was foolish, reckless and stupid. He was blameworthy in the sense that he sent the messages that led to the investigation and the disciplinary proceedings and breached partnership values. The claimant attempted to defend himself in the internal proceedings by referring to the messages as a joke or as fun. That was also stupid and unhelpful.

129 It is this Tribunal's judgment that the respondent imposed a sanction outside of the band of reasonable responses as it treated these messages as showing an intent to harm Mr Ford without evidence and considered them threatening and intimidating without evidence. The respondent's summary dismissal was unfair and unreasonable in the circumstances.

130 It is therefore this Tribunal's judgment that the claimant's compensatory award should be reduced by 25%. The claimant's basic award should be reduced by 10% to take into account the claimant's long service, his apology to Mr Ford before he knew he was facing disciplinary action and his attempts to speak to Mr Ford on 20 July once he realised that Mr Ford did not consider the messages as a joke, when he replied '*what?*'

131 It is this Tribunal's judgment that it is not appropriate to make a *Polkey* deduction in this case.

132 The claimant was entitled to notice pay as he was wrongfully dismissed. The claimant's text messages were not gross misconduct as there was no evidence that they were threatening or intimidating. They were unclear and reckless but not threatening. The claimant committed misconduct as this was inappropriate behaviour to a Partner but not gross misconduct.

133 It is this Tribunal's judgment that the complaint of wrongful dismissal succeeds.

134 The Tribunal makes no judgment on the complaint of a failure to pay holiday pay as the claimant offered no evidence on the issue, having accepted the respondent's explanation of his entitlement at the hearing. The claimant effectively withdrew his complaint in the hearing. The complaint is dismissed.

Remedy

135 The claimant's schedule of loss is at page 360 in the bundle.

136 The claimant's basic award is as follows:

Basic Award

137 The claimant's effective date of termination – 29 July 2020.

138 A week's pay = £597.15. maximum of £538 x 17 years' service. The

claimant's age at dismissal was 44 years. The calculation before reduction is 14 years at 1 week per year (14) and 3 years at the rate of 1.5 weeks per year (4.5) = 18.5 x £538.00 = £9,953.00.

139 10% reduction for contributory fault = £9,953.00 – 995.30 = **£8,957.70**.

Compensatory award

140 From dismissal date of 29 July 2020 to hearing date of 12 November 2021 = 67 weeks x £597.15 = *£40,009.05*.

141 Loss of partnership pension contributions £14.43 x 67 weeks = *£966.81*.

142 Loss of statutory rights = *£450*.

143 The total compensatory award of £41,425.86 (£40,009.05 + £966.81 + £450.00) must be reduced by 25% to reflect the claimant's conduct.

144 £41,425.86/25% = £10,356.46. £41,425.86 - £10,359.46 = **£31,069.40**.

Breach of contract

145 The claimant was entitled to 12 weeks' notice because he had been employed by the respondent for 17 continuous years.

146 12 x £597.15 = **£7,165.80**.

147 The claimant is entitled to the total sum of ££8,957.70 + £31,069.40 + £7,165.80 = £47,192.90.

148 The respondent is ordered to pay the claimant the sum of **£47, 192.90** as his remedy for his successful complaints of unfair dismissal and wrongful dismissal.

Employment Judge Jones
Date: 27 May 2022