



EMPLOYMENT TRIBUNALS

Claimant: Ms. Sylwia Borysiewicz

Respondent: Yours Clothing Limited

Heard at: Cambridge (by Cloud
Video Platform)

On: 13, 14 and 15 June 2022 (Full
Merits Hearing)

Before: Employment Judge S.L.L. Boyes (Sitting Alone)

Representation

Claimant: Ms. Diana Janusz, advisor, England Wales Employment Advice

Respondent: Mr. James Boyd, counsel

RESERVED JUDGMENT

The Claimant was unfairly dismissed.

There is no reduction to the compensatory award under the principles identified in *Polkey v A E Dayton Services Limited* 1988 ICR 142

The Claimant contributed to her dismissal by 10%, to be applied to the basic and compensatory awards.

There will be a further hearing (3 hours) to determine remedy.

REASONS

1. The Claimant claims that she was unfairly dismissed by the Respondent. The Respondent denies all claims.

The Proceedings/Hearing

2. After a period of early conciliation through ACAS from 3 July 2020 to 18 July 2020, the claim form (ET1) was lodged with Tribunal on the 28 July 2020.
3. Having been notified of the claim on the 14 September 2020, the Respondent filed a response to the claim (ET3) and grounds of resistance on the 8 October 2020.

4. A Tribunal appointed Polish interpreter was present during the course of the hearing.
5. Pages 128-144 of the Hearing Bundle ["HB"] contains Facebook Messenger messages from a Facebook Messenger group that the Claimant was a member of. The posts are written in Polish. Shortly prior to the hearing, the Claimant served upon the Respondent a translation from Polish in to English of those messages. I was informed that this translation was prepared by Ms Janusz. The Claimant submitted that the Facebook Messenger messages relied upon by the Respondent as evidence of misconduct were taken out of context.
6. The Respondent's position was that there was no significant challenge to the translation of the messages [HB 127] relied upon by the Respondent during the disciplinary process: the Claimant did not take issue with it at the time. The translation that the Claimant now seeks to rely upon was not in existence at the time of the disciplinary proceedings. It is therefore unclear what the purpose of admitting the translation would be. Further, the Respondent had not had time to check the accuracy of the translation.
7. I allowed the translation of the messages to be admitted. The exchange of messages on Facebook Messenger was clearly material and, indeed, central to the matters to be determined. Whilst the Respondent picked out a handful of messages to show to the Claimant during the investigation and disciplinary proceedings and did not have regard to the entire Facebook Messenger conversation during the investigation and disciplinary proceedings, seeing the messages that were relied upon in the context of the overall conversation is important to the proper understanding of that conversation. Further, it is important that the Tribunal has access to an accurate and agreed translation of the messages that the Respondent did rely upon.
8. In the interests of fairness, proceedings were adjourned until the morning of day 2 to provide the Respondent with the opportunity to instruct their own translator. The Respondent's translator did identify some differences in translation. I say more about this below.
9. The Claimant gave evidence. She adopted her witness statement. She was cross examined by the Respondent and asked questions by me. The Claimant called a further five witnesses all of whom adopted their witness statements, were cross-examined by the Respondent and asked questions by me. The Claimant's witnesses were Jolanta Keska, Katarzyna Niewiadomska, Malgorzata Gromek, Natalia Jurkiewicz and Sylwia Michalska.
10. The Claimant and each of the Claimant's witnesses gave evidence through the Polish interpreter.
11. The Respondent called two witnesses. These were Leigh Porter and Anna Heather. Each was cross examined by the Claimant and asked questions by me.
12. Both parties provided written closing submissions and made further submissions in closing at the hearing.
13. I reserved Judgment.

Documents

14. As well as the documents held on the Tribunal file, the Tribunal had before it a hearing bundle (prepared by the Respondent) of 233 pages and witness statements for each witness contained in a bundle of 54 pages. The Claimant's witness statement and the witness statements of the Claimant's other witnesses were translated from Polish in to English and the Polish version has been provided.
15. There is a translation of the Facebook Messenger messages. Those messages and the translation run to 66 pages. The initial translation was provided by the Claimant. This has then been annotated by the Respondent. The Respondent has also provided comments on the translation made by a certified translator. Where there is a difference in the translations, I have relied upon the opinion of certified translator.
16. In addition, the Tribunal had before it the written closing submissions of both parties.

Issues to be determined

17. The issues in dispute in this matter were agreed between the parties. These were:
 - 1) What was the reason for the Claimant's dismissal? In particular was it conduct?
 - 2) Did the Respondent have a genuine belief in the Claimant's guilt?
 - 3) Did the Respondent have reasonable grounds for that belief?
 - 4) If so, was that belief formed following a reasonable investigation?
 - 5) In terms of issue 3. and 4. (where appropriate) do any or all of the following alleged facts and matters mean that there was no such reasonable grounds/reasonable investigation:
 - i. That the Respondent did not have any specific policy in relation to social media / unjustly classified the Claimant's behaviour as inappropriate;
 - ii. That the Respondent alleged that the Claimant's behaviour amounting to bullying but the Respondent's policies did not explain what bullying actually was;
 - iii. That the Respondent concluded the Claimant was guilty of bullying despite the fact her comments were not said directly to the individuals concerned;
 - iv. That the Respondent concluded the Claimant was in a position of influence compared to others in the Facebook group, when in reality there was no difference between team leaders and other employees;

- v. That the Respondent alleged the Claimant had brought the Respondent into disrepute despite the fact that the Facebook group was a closed group;
 - vi. That the Respondent relied upon the Claimant's threat to breach the confidentiality clause in her contract despite there being no evidence to support an actual breach of that clause.
- 6) Did the Respondent had a reasonable belief that the Claimant committed gross misconduct?
- 7) Was dismissal fair or unfair in the sense set out in section 98(4)b? In particular:
- i. Did the Respondent fail to take into account the Claimant's previously good disciplinary record;
 - ii. Did the Respondent treat the Claimant inconsistently with regard to disciplinary sanction - in particular compared to Natalia Jurkiewicz who received a final warning or Malgorzata Gromek who did not have a disciplinary action taken against her? If so, was Natalia Jurkiewicz and /or Malgorzata Gromek an appropriate 'comparator' in the sense set out in *Hadjioannou v Coral Casinos* [1981] IRLR 352
 - iii. Did the Respondent treat the Claimant inconsistently with regard to disciplinary sanction – in particular compared to Manager Jessica Lorenz who allegedly threw her vest on the floor in front of a senior manager shouting she did not give a shit about her job; If so, was Jessica Lorenz an appropriate 'comparator' in the sense set out in *Hadjioannou v Coral Casinos* [1981] IRLR 352
 - iv. Did the Respondent treat the Claimant inconsistently with regard to the treatment of Kamil Cebulak, Wojtek Piasecki and/or Jolanta Malicka who resigned without notice because of a change of working hours but were later re-employed? If so, was Kamil Cebulak, Wojtek Piasecki and/or Jolanta Malicka an appropriate 'comparator' in the sense set out in *Hadjioannou v Coral Casinos* [1981] IRLR 352
- 8) Was dismissal within the range of reasonable responses?
- 9) In the event that the Claimant was unfairly dismissed, to what extent does the principle in *Polkey* apply (if at all)?
- 10) In the event that the Claimant was unfairly dismissed, to what extent does the principle of contributory conduct apply (if at all)?
18. Although the *Polkey* and contributory conduct issues concern remedy and would only arise if the Claimant's complaint of unfair dismissal succeeded, I informed the parties that I wished to hear evidence and submissions regarding *Polkey* principles/contributory fault, but otherwise not on remedy.

Findings of Fact

19. Where there is no dispute between the parties as to a particular fact, my findings of fact are recorded below without any further explanation. Where the facts are not agreed by both parties, I have explained why I prefer one party's account over the other. Where the facts are not clear, I have explained why I have made the finding of fact concerned.
20. My findings of fact are as follows:

Chronology of Events

21. The Respondent is a fashion retailer trading from stores throughout the UK and online. The company also operates a distribution centre located on the same site. The distribution centre is staffed by employees of the Respondent and agency workers when necessary.
22. The Respondent is a large employer. It had 1,177 employees at the date that the ET3 was completed, including 219 employees at the site where the Claimant was based. It has the benefit of human resources officers who were involved in the investigation and disciplinary process.
23. The Claimant commenced employment with the Respondent on the 5 November 2012 as a warehouse operative at the Respondent's distribution centre. Some time later she was promoted to the role of Team Leader.
24. Team leaders work as part of the warehouse management team as a whole, receive additional pay and wear a different coloured vest so that staff know who they are. The Claimant did not manage anyone: there were no staff who she was directly responsible for.
25. The Claimant had a clean disciplinary record. There is no suggestion that she was anything other than an exemplary employee.
26. The Respondent laid off some of its employees between 19 March 2020 and the 22 March 2020 due to the Covid 19 pandemic. The Claimant was laid off unpaid on the 19 March 2020. At around 3.45pm, around 15 minutes before she was due to finish work for the day, a list of those who were to be laid off was read out.
27. On 19 March 2020, some of the employees who were laid off set up a Facebook Messenger group. The group was set up shortly after they were sent home. They called the group 'Welcome Yours'. It was a private/closed group, in other words only those who were granted permission to join by the group administrator could view any messages and post messages. It had about 30 members. The messages posted were in Polish. The Claimant was a member of this group.
28. The existence of the group, and the messages posted, was brought to the attention of the Respondent by an employee who was a member of the Facebook Messenger group. The identity of that employee has not been disclosed. The group was closed down the next day, after members of the group became aware that it had come to the Respondent's attention.
29. Neither of the Respondent's witnesses were able to tell me when the Respondent was provided with the messages from the Facebook Messenger group. However, as the group only existed for around 24 hours or less, and was

closed down because the Respondent had become aware of its existence, I am satisfied of, and find as a fact that, the Respondent was aware of the existence of the group and the messages from on or around 20 March 2020.

30. Employees that were laid off, including the Claimant, were subsequently placed on furlough when the Coronavirus Job Retention Scheme was introduced. The Claimant was sent a letter on the 31 March 2020 confirming that she was a furloughed worker effective from 19 March 2020 and explaining the details of the scheme.
31. The Claimant subsequently returned to work on the 15 June 2020.
32. The Respondent states that it considered the messages posted by the Claimant to be abusive and derogatory in relation to the company, Chief Executive Officer, Andrew Killingsworth, and other senior managers.
33. Consequently, on 15 June 2020, an investigatory meeting was arranged with the Claimant. Ian Hogg, General Manager, was appointed as the Investigating Manager. The Claimant was present at the meeting accompanied by Wojciech Piasecki, Senior Manager of the warehouse. Maria Martino attended as the company representative and note taker. The transcript of the meeting has been provided [HB 145-157].
34. The allegation put to the Claimant by Allan Hogg at the commencement of the hearing was that she *“may have breached company policy, specifically bringing the company into disrepute, through inappropriate behaviours on social media”*.
35. Alan Hogg also made reference during the course of the meeting to *“Accusations of bringing [word ‘company’ appears to be missing] into disrepute and social media policy”* [HB 150].
36. The Respondent had prepared a document, in English, summarising those messages which it considered inappropriate [HB 127]. The contents of that document are as follows:

“Sylwia Borysiewicz -5/11/12

- *Page 9 - Claims that AK doesn't care*
- *Page 16 - Calls AK a moron and how he will need to do all the work*
- *Page 17 - Says “fuck them all” in relation to managers before adding a comment on Jessica Lorenz, using the word nigger*
- *Page 27 - Comments on AK fucked us*
- *Page 30 - Comments on how AK will close the warehouse before saying “fuck him” and how she was drinking to him*
- *Page 35 - Says that AK is a dickhead and how he will cry again*
- *Page 49 - Agreed with NJ comment on how she thought KC was a cock*
- *Page 100 – States how MT, PT made all the decisions*
- *Page 210 – Alleges how many knew how “princess” PL told AK about the groups reaction*
- ~~*Page ??? - Again uses the word nigger in reference to JL*~~
- *Page 255 – Declares her plan to contact the PT and slag off the company”*

37. The relevant pages of the original messages were also available at the meeting [HB 128-137].
38. It is clear on the face of the document at HB 127 that it is not a verbatim translation. It is not in first person [for example it refers throughout to 'her']. Further, it summarises what is said [for example, it says "*declares her plan*", that she "*comments on*" and that she "*agreed with*" another poster]. It is not possible to tell from this document what exactly the Claimant did say in the posts concerned.
39. In the meeting, the Claimant responded to the allegations by stating the following. The messages were posted in a closed group. They were private messages. It was not a public social media forum. She did not want to hurt anyone and did not hurt anyone because it was a closed group. She was angry about having to stay at home and pay the bills, it was not about Andrew or the company; it was just between those who were staying at home. She said that she believed that it is illegal to show messages from a closed group. She wanted to know who provided the information as there should be consequences for them as well. She had not specifically referred to Andrew or the company in the posts. She was angry at the time when she posted. When some of the messages were put to her in the meeting, she said that she could not remember what the messages were about; the messages were being posted very quickly so a post does not necessarily relate to the post immediately before it.
40. In live evidence, the Claimant stated that, at the meeting, she challenged the translation provided by the Respondent. She stated that she went through the pages provided and that Wojciech Piasecki interpreted what she had actually said in the posts. It is not apparent that this was done from the record of the meeting. The Respondent does not accept that the Claimant ever raised any issue with the accuracy of the translation.
41. However, in the record of the appeal hearing, the following exchange is noted. The Claimant stated that much worse things were said than she had written. She was asked "*not correct or translated correctly*". It is not altogether clear, but it appears that this may be reference to the posts on Messenger. The Claimant's response was recorded as follows: "*first mtg reading through Wojciech translating but she wants to know if everything was translated*". This comment (whilst not a verbatim record as it is in third person) supports the Claimant's evidence that the content of messages were translated orally by Wojciech Piasecki at the first meeting.
42. Following the meeting, the Claimant was suspended on full pay pending the disciplinary hearing. She was asked to sign a form headed '*Confirmation of Suspension*'. Within the form it said:

"Whilst on suspension, I would ask that you do not enter company premises, nor contact any employees other than myself [...] or the HR team [...] without our express permission to do so.

Should you breach the terms of your suspension, i.e., contact employees other than those stated above [...] it may result in your suspension being unpaid and the breach being taken into consideration at your disciplinary hearing."

43. On 16 June 2020, Alan Hogg met with Wojciech Piasecki, Warehouse Senior Manager, because he suspected that the Claimant had been in contact with another employee, Natalia Jurkiewicz. It is said that this was in breach of the terms of her suspension. Wojciech Piasecki confirmed that Natalia Jurkiewicz had contacted him twice via messenger to ask him to act as her representative and translator in relation to an investigation interview that she had been asked to attend. He said that Natalia Jurkiewicz had mentioned that Sylvia had had a meeting with him present, so she wanted him to translate for her as well. In the second message she asked him to be her representative like he was for Sylwia [HB 162].
44. On 16 June 2020, the Claimant was given a letter confirming that she was suspended. The letter stated that this was “*in connection with inappropriate behaviours on social media*”. It also stated in the letter that it had come to light that the Claimant may have breached the terms of her suspension, that her suspension may now be unpaid and that the breach may be taken into account if she is invited to a disciplinary hearing.
45. Leigh Porter, Commercial Director of the business, was appointed to deal with the Claimant’s disciplinary proceedings. Mario Martino, Human Resources Officer, wrote to the Claimant on the 17 June 2020 to invite her to a disciplinary hearing with Leigh Porter on 19 June 2020 HB. The letter outlined the allegation as follows:
- “Specifically it is alleged that in March 2020, you may have:*
- *Breached company policy by bringing the company into disrepute through inappropriate behaviours on social media.*
 - *Breach of the confidentiality clause as detailed in your employment contract, section 11.0.*
 - *Made inappropriate comments in reference to the Company, the CEO and Senior Managers on social media.*
 - *Displayed behaviours that are not in line with our bullying and harassment policies.*
- It is also alleged that you may have breached the terms of your suspension following an investigation hearing held on 15th June 2020.”*
46. The letter also stated that this was a very serious matter and that if found guilty of gross misconduct she may be dismissed without notice.
47. The disciplinary meeting took place on the 19 June 2020. As well as the Claimant and Leigh Porter, Kay Clarke attended as the company representative and note taker and the Claimant was accompanied by Filip Glapka, Warehouse Operative. Filip Glapka also interpreted. A transcript of the meeting has been provided [HB 168-188].
48. In the meeting the Claimant stated the following. The group was a private closed group which could only be accessed via the administrator. No-one could access the group. The confidential chats were unavailable to anyone outside the group. Her privacy has been breached without her permission: it was not lawful for the Respondent to obtain the information. She had not been given any social media policy by the Respondent. She did not breach any clause. She did not use any

of the information that was given to her. It was a conversation between employees of the company. The discussion related to the situation and what had happened; it was just about those people. No-one from outside [the company] was in the group. She was disappointed about how the Respondent had treated her after she was sent home and the information provided about what was going to happen next. She did not consider what was said to be bullying or harassment. She did not upset anyone directly or shout at anyone directly. Harassment is a strong thing to throw at her. She did not make anyone embarrassed and she was not aggressive. The group was created because they were told 15 minutes before the end of work that they were going home and they did not know what was happening. She wrote what she did because she was sad and angry. When asked about how she felt about her comments, *"Everyone bad but can say too much when angry."* She said that everyone was furious. When she was asked if she thought she had done nothing wrong she replied that she did not feel that it was as strong as is being said. She was asked how she felt about what she had done; if she was happy, sad, good, bad, sorry. She replied 'not good'. She did not feel good reading them back. She stated that she likes and cares about the job. She always did the job well. There have been no complaints about her. She is good at time keeping and never sick. She raised her length of service.

49. Leigh Porter initially stated that employees were upset by the Claimant's comments on the group and so gave the Respondent the details. The Claimant sought clarification as to whether it was one employee or several employees and Leigh Porter replied that it was one employee. The employee deemed the comments inappropriate but did not want their identity disclosed.
50. The Claimant also stated that there was another supervisor in the group. She felt that she did not have influence over other employees in her role as Team Leader.
51. The Claimant was asked if she had contact with Natalia Jurkiewicz since her suspensions. She stated that Natalia called her and asked her how work was as she was coming in. The Claimant told her that she had had a meeting but did not tell her what it was about. She asked who had translated and the Claimant told her.
52. Leigh Porter confirmed in oral evidence that he did not have a full transcript of all of the posts for the group or a full translation: he was focused on the Claimant.
53. On 25 June 2020, the Claimant was informed by Leigh Porter by letter that the decision had been made to terminate her contract without notice and so her last day of employment was to be the 25 June 2020. The reasons provided for summary dismissal were as follows:

"Whilst I do acknowledge that the handbook or contract do not specify behaviours on social media, it does lay out our code of conduct and the view on bullying and Harassment.

I acknowledge that there is no direct evidence of a breach to the confidentiality clause in your contract, although you did threaten to share information with the local paper and the next day the local paper were aware.

Making comments about the business and its employees in the way that you have does amount to bullying behaviour. The words used are not what would be expected of any employee, especially one in a position of responsibility.

Although they were not said to the employees directly, this does not make them any less hurtful.

Whilst you do not feel your role influences others, it does. Managers of all levels in the warehouse wear different colour hi vis jackets for the very reason that employees know who they can turn to and expressing such views openly to other employees amounts to a breach in our trust and confidence of you as a Team Leader in the business.

Throughout the disciplinary meetings, there was no amount of contrition from you or responsibility taken for your actions and you failed to see the significance that these have. You excused them with what the company can and can't do in your view with regards to data and how you felt you could not raise issues within the business deflecting from your own actions. As a result, I cannot see how you could reintegrate within the business if you were to return from suspension and form effective working relationships with those you have said things about that are unacceptable and you refuse to take any accountability for.

I also acknowledge that you did have a conversation with another employee after being expressly told not to. There is no evidence that you gave information about the meeting contents and for this reason I will not be deducting your suspension pay, but a conversation with another employee occurred when you were told not to speak to any employees without express permission. You gave details of who had represented you and effectively prepared another employee for an investigation. This adds further to my view on how you can't be trusted in a management position going forward.

It is my view that, in making the comments that you have made, in the position you hold and showing no accountability or remorse that your behaviour is in breach of our code of conduct and the severity of your actions amount to an act of gross misconduct. Having considered the options to issue a warning in this case I have determined that this would not be appropriate and deem that the only option available in the circumstances is to summarily dismiss you for gross misconduct as a breach of our code of conduct."

54. Leigh Porter says in his witness statement that he decided that the allegations, individually and collectively, amounted to gross misconduct. In doing so he took in to account that she had a more senior role, showed no contrition and did not see the impact that her behaviour could have on others [paragraph 27]. The other employees who were disciplined did show contrition and did not seek to blame others or portray themselves as the wronged party [paragraph 33].
55. Leigh Porter states in his witness statement [paragraph 33] that the Claimant was the only employee that was disciplined who was a Team Leader and in a leadership role. As such she was expected to exhibit a higher standard of conduct as a role model within their business
56. In oral evidence, Leigh Porter stated that the Claimant's comments were inappropriate and hurtful. They constituted bullying, discrimination and harassment. They were direct, aggressive and graphic and so were in line with the bullying and harassment policies. When it was put that the Claimant's behaviour amounted to general misconduct he disagreed. He stated that all the policies and all of the points pointed to gross misconduct. This included that the Claimant was a Team Leader, showed no remorse and did not apologise or recognise that her conduct was inappropriate as a Team Leader. He said that the Claimant's comments included a slight racial slur, that there was reference

to the 'N' word, that the comments against the owner of the business were very upsetting, that it was a tough time business wise and a very emotional time for him and CEO. The comments were throwing it back in their faces.

57. The Claimant was informed that she had a right of appeal against the decision to dismiss. The Claimant wrote a letter stating that she wished to appeal. In addition to points already raised that I have referred to above she stated that:
- i. The fact that she was employed as a Team Leader was irrelevant. She did not refer to her position in any way in the group. They were a group of people who spoke to each other when the company decided to send them on unpaid holiday. It was outside working hours and due to this she does not agree that that she would have had any influence on other employees as they were all on an equal footing.
 - ii. She did not create the group.
 - iii. It did not bring the company into disrepute because it was a private group. The information was only shared with employees who were already aware of the information. No information was disclosed to the public, potential buyers or contractors which would damage the Company's reputation.
 - iv. The Company admitted that it did not have a social media policy.
 - v. She does not accept that the posts amounted to bullying. It was a private conversation during which she was expressing her feelings. The Company's policies do not define bullying.
 - vi. There is no issue raised about her work performance. Had she continued to be employed this incident would not have affected her performance.
 - vii. There were comments far worse than hers but only she was dismissed.
 - viii. She did not call Natalia Jurkiewicz, Natalia Jurkiewicz called her. The first meeting took place in the warehouse and so other employees saw her with management. Therefore, it was commonly known that she had a meeting that day. She understood that the purpose of prohibiting her from talking to other employees was to prevent her from influencing the outcome of the investigation. She did not influence the outcome of the investigation in any way.
 - ix. The company has treated her excessively harshly. They gave a chance to other employees. She did not have any previous warnings. Natalia Jurkiewicz received a written warning.
58. On the 6 July 2020, Mario Martino wrote to the Claimant to confirm that her appeal hearing was scheduled for 8 July 2020 and that it would be conducted by Anna Heather, Finance Director.
59. The appeal hearing took place on the 8 July 2020. As well as the Claimant and Anna Heather, Suzi Kane attended as the note taker and company representative. Filip Glapka attended as the Claimant's representative. There are notes of the meeting [HB 195-208]. It is clear that it is not a verbatim transcript because much of it is written in the third person.
60. The discussion in the appeal meeting predominantly focused upon what the Claimant had said in her letter of appeal. Much of what was said has been referred to previously.

61. Anna Heather told the Claimant that she was the only Team Leader who had posted comments.
62. In oral evidence, Anna Heather stated that she did not know about Malgorzata Gromek's involvement in the group at the time of the appeal.
63. Anna Heather wrote to the Claimant on the 16 July 2020. She stated that she had decided to uphold the decision to dismiss the Claimant. The basis for her decision was recorded as follows:
 - i. Whilst other people may have spoken to Natalia about the Claimant's meeting, the Claimant still answered the call from her and spoke to her, despite being expressly informed not to. This fact is important in determining her ongoing conduct and the impact that this has on the Respondent's trust and confidence in her.
 - ii. She is a team leader, and paid as such. The people in the chat group would have known this to be the case and as such there was a greater standard of expectation in her behaviour in front of employees in relation to work. This remains the case whether she is in or out of the workplace at the time. This was a specific chat group about the company and, as she was in a management position, she would have been looked up to as an authoritative figure and the views expressed represent the company to her fellow employees. Whilst the action did not involve the company's reputation externally, it did affect the reputation of the management team to internal customers.
 - iii. To air derogatory opinions on the business and people within the company to employees junior to her is not the behaviour expected of a Team Leader. This conduct calls into question how she would behave with fellow employees on return to the workplace once she has spoken in such a way and with her colleagues knowing her opinions. As such this is a breach of trust and confidence in her as a manager, making her position untenable.
 - iv. Whilst her sanction was greater than others, this was due to her higher level of position in the company and the higher expectations of behaviour. It was also based on the level of accountability and contrition for actions taken. It is not known what the sanctions would have been in respect of the individuals who chose to resign prior to disciplinary action. Each case was taken on an individual basis based on the severity of the contribution and the response of the employee following a full investigation and a full disciplinary process.
 - v. Whilst she does not feel that she intended to bully or harass fellow employees and her behaviour was not, in her opinion, bullying, the disciplining Manager has deemed this to be the case and intent is not the determining factor with such behaviour. Whilst she did not think that the words she chose to say about the company and individuals would be seen by them, they were and she has not taken any responsibility for or made any attempt to show how she could rebuild relationships and trust between herself and the company.
64. In oral evidence, Anna Heather said that the Claimant's conduct was probably harassment. When dealing with the appeal she referred to the code of conduct

and prohibited harassment. In the round she considered the Claimant's behaviour to be gross misconduct: the list of behaviour amounting to gross conduct is not exhaustive. She stated that she did not know about Malgorzata Gromek's involvement in the group at the time of the appeal and it was not raised by the Claimant. She was focused on what the Claimant said. She was not looking at who else was involved or the actions of others. She was not aware of actions of others or what was happening in other cases when reviewing the fairness or otherwise of the sanction. The Claimant showed no contrition. She was asked about mitigating circumstances such as long service and previous good record. She replied that it was not a capability dismissal: there was a lack of contrition and trust and confidence was broken. She was asked if she had taken in to account the circumstances in which the Claimant's comments occurred and she stated that if she had shown contrition, she would have taken it in to consideration; everyone was navigating coronavirus and suffering: her comments were hurtful.

Terms and Conditions of Employment, Company Policies, and Disciplinary Procedure

65. The Respondent accepts that it did not have a social media policy in place at the material time.
66. In the Claimant's Statement of Terms and Conditions signed on 13 February 2015, it states that that she must observe all of the employer's policies, procedures and rules [HB 42].
67. The terms and conditions also state that the Respondent reserves the right to temporarily lay the Claimant off without pay or reduce normal hours of work and reduce pay proportionately on giving the Claimant reasonable notice, if, in the Respondent's opinion, the economic situation requires it to take such action [HB 43].
68. The Respondent's disciplinary procedures are found in the Employee Handbook [HB 44] and a separate document entitled Yours Clothing Disciplinary Policy and Procedure [HB 119-124]. The Respondent may terminate employment without notice if there is a breach of the terms and conditions, act of gross misconduct or gross incompetence [HB 45].
69. The Respondent's Employee Handbook contains an explanation of the relevance of trust and confidence, conduct at work [HB 68], the duty of care [HB 55-56], the Respondent's Harassment Policy [HB 59-60] and the Respondent's disciplinary procedure [HB 90-92].
70. The Conduct at Work section includes the following:

6.1 Code of Conduct

As representatives of the Company, employees must show integrity and adopt a professional approach at all times to enhance the reputation of the Company. All employees must ensure their conduct is appropriate and show respect for others opinions and beliefs. [...]
71. The Harassment Policy section includes the following:

"2.8 Harassment Policy

The Company is permitted [sic] to providing a work environment free from unlawful harassment. Harassment because of race, colour, creed, sex, sexual orientation, marital status, national origin, or ancestry, physical or mental disability, age or religion or any other basis protected by legislation is unlawful and will not be tolerated by the Company.

2.8.1 Examples of Prohibited Harassment

Verbal or written conduct containing derogatory jokes or comments

Slurs or unwanted sexual advances

Visual conduct such as derogatory or sexually orientated posters

Photographs, cartoons, drawings or gestures

Physical conduct such as assault, unwanted touching, or any interference because of sex, race or any other protected basis

Threats and demands submit to sexual requests as a condition of continued employment or to avoid some other loss, and offers of employment benefits in return for sexual favours

Retaliation for having reported or threatened to report harassment. [...]

2.8.3 Consequences of Unlawful Harassment

Any employee who the Company finds to be responsible for unlawful harassment will be subject to the disciplinary procedure and any sanction may include termination. [...]"

72. Examples of what may be considered to be Gross Misconduct and Misconduct are detailed at HB 91-92. The Respondent has also produced a separate document entitled 'Yours Clothing Disciplinary Policy and Procedure [HB 119 - 124].

73. In that document the section on misconduct reads as follows:

5. Misconduct

The Disciplinary process is divided into two key levels:-

General Misconduct-which range from minor shortcoming to more serious matters

Gross Misconduct-breaches so serious that they overturn the contract between the employee and the organisation

5.1 General Misconduct

The following are examples of general misconduct which may lead to disciplinary action. This is not a comprehensive list. Other rules may be displayed on notice boards or brought to your attention by other means: [...]

Breaches of the company rules and procedures not amounting to gross misconduct;

Failing to work in a co-operative manner with colleagues or conduct which impairs the efficiency of management or colleagues; [...]

Behaviours construed as misconduct under Yours Clothing Policies and Procedures [...]

Failure to obey the reasonable, lawful and proper instructions of a manager, insubordination General misconduct (e.g. inappropriate, insolent or drunken behaviour, bullying, excessive foul language, rudeness or aggressive behaviour) [...]

Discrimination, harassment and/or victimisation contrary to the law and/or organisational policies on equal opportunities or giving instructions or pressure to bear to do so

Misuse of the organisation's name, property or facilities, including computer facilities, e-mail, internet and social media [...]

Any act which brings the name of the employer into disrepute

5.2 Gross Misconduct

We reserve the right to dismiss you, without notice if, in our opinion, you have committed an act of gross misconduct. Gross misconduct is misconduct serious enough to destroy the employment contract between employee and Company, making further working relationship and trust impossible.

Offences warranting instant dismissal are given below. The list is not exhaustive but is an indication of the company's view of what constitutes a serious offence:

Physical violence or bullying. [...]

Refusal to comply with a reasonable instruction from the employer.

Serious acts of discrimination, harassment and/or victimisation contrary to the law and/or organisational policies on equality of opportunities

Serious breaches of statute

Significant damage to Yours Clothing reputation or business

Irretrievable breach of trust and confidence

There is no definitive definition of gross misconduct and it will depend upon the set of circumstances surrounding the situation."

The content of the messages

74. There were several contributors to the Facebook Messenger Group. The Claimant posted various comments but not in at any greater frequency than anyone else in the group. The discussion focuses almost entirely on the layoff that had happened that day. Matters discussed included who had and had not been laid off (including that many of those who had not been laid off were on temporary contracts or in their probationary period), pay and bonuses, and concerns relating to lack of money. There are various references to members of the group drinking whilst posting on the group, including the Claimant, and to people getting drunk or being drunk.
75. Many of the posters use profanities (most often 'fuck' and various derivatives of the word). There are many posts criticising management mainly focusing on decisions around lay off and the impact that it will have. Some of the posts enquire as to the whereabouts and wellbeing of others. Some are supportive in nature. Some of the posts are very unpleasant, distasteful and may be upsetting to certain readers. Some are offensive. Some appear to have racist undertones (none of these were posted by the Claimant). Some of the posts are offensive for reasons not directly related to criticisms of the Respondent. For example, there is the suggestion of harm to an animal by one poster which other members then engage with. One member of the group then challenges those particular posts.
76. There is a screenshot of what appears to be posts by two employees on the Respondent's main Facebook page.

77. It is not always possible to follow the conversation or establish who or what a particular post relates to. This is because there are many posts made in close succession.
78. The certified translator notes, at various occasions in her comments, that it is difficult to understand what is being said without further context.
79. Taking into account the translations now provided, the following of the Claimant's comments were as follows rather than what is stated at paragraph 36 above [and at HB 127]:
- Page 9 – *He does not give a fuck about people His interests counts* [The certified translator states that 'interest' could refer to business though she states that the context seems to be rather general]
 - Page 16 – *Let him fuck off, he will be working all alone moron* [On the face of the messages it is unclear who this relates to]
 - Page 17 – *Hahahahaha the ass with This. One was trying working his Butt off on overtimes and that's the Pay*
Hahahahaha The black one also stays
 - Page 27 – *Lukasc nicely fucked us over*
 - Page 30 – *He will close this brothel you will see ass with this, we drink for your health*
 - Page 35 – *Freaking insane the fucker will cry*
80. The Claimant does not dispute that she made the posts to which the above translation relates or that some of the above messages related to the Chief Executive Officer of the company.
81. The comment "*The black one*" at page 17 relates to Jessica Lorenz, who is of Polish origin. It is reference to the colour of her hair not her ethnicity or race. As now accepted by the Respondent, the Claimant therefore did not use the particularly offence racist word that is recorded at HB 127.
82. Malgorzata Gromek's posts include the following:
- *Page 8- Fuck even Billaden stayed* [The certified translator states that it could refer to Osama Bin Laden but it could be reference to something else]
 - *He will even fucker up fucker will save up on the bonuses because he will not have to give it to those who are off for the whole month*
 - *Fuck with them you know they only think about their ass*

Other factual matters

83. The Respondent commenced disciplinary action in respect of eight employees as a consequence of the posting of messages on this particular Facebook Messenger group. Three resigned before any conclusion was reached, four were given final written warnings and one, the Claimant, was dismissed.
84. Although it was not the mainstay of the Claimant's case, there was reference by some of the Claimant's witnesses to the Respondent wanting to get rid of her or wanting to avoid paying her redundancy pay. However, having heard evidence

from those witnesses, which was extremely general and lacking in any detail on this point, I find that such views were no more than speculation and without any real evidential foundation.

85. Malgorzata Gromek posted as 'Mal' on the group. She worked for the Respondent as a supervisor and was responsible for a team of around 20 warehouse employees. She had been a supervisor for around five years. Her oral evidence, which I accept, and which was corroborated by the Claimant, was that a supervisor is more senior in the company hierarchy than a Team Leader. Team leaders are paid £0.20 more than warehouse operatives. Supervisors are paid £0.30 more than Team Leaders. No one from the company spoke to her about the messages that she posted on the group. She did not face any disciplinary charges.
86. The Respondent's position, prior to Ms. Gromek's evidence, was that the Claimant was the only member of the group with any supervisory responsibilities who had posted inappropriate messages. Leigh Porter stated in oral evidence that a Team Leader was more senior in the company hierarchy than a supervisor as they are responsible for more staff members. Therefore, the Claimant was not treated less favourably as the Claimant, as a Team Leader, was more senior. He was not aware, during the disciplinary process, of the comments that Malgorzata Gromek had made.
87. Having heard the evidence of Ms. Gromek and the Claimant, the Respondent did not seek challenge the assertion that a supervisor is more senior than a Team Leader.
88. On the evidence before me I find that supervisors are more senior in the company hierarchy than Team Leaders and are paid more per hour for that responsibility. I also find that the Leigh Porter did not know, or misunderstood, the hierarchy within the company which led to him believing, incorrectly, that the Claimant was the most senior poster of inappropriate comments in the group. There is nothing in the evidence before me to show that this misunderstanding was rectified during the appeal process.

The Relevant Law

89. The question of whether or not an individual was unfairly dismissed is a two stage process. The first stage is that it is for the Respondent to show a potentially fair reason for dismissal, and secondly, if that is done, the question then arises as to whether the dismissal is fair or unfair.
90. The reason for the dismissal and the reasonableness of the dismissal is based on the facts or beliefs known to the employer at the time of the dismissal (as per *W Devis and Sons Ltd v Atkins 1977 ICR 662, HL*). However, a Tribunal should consider facts that came to light during the appeal in considering whether the employer's decision to dismiss was reasonable (as per *West Midlands Co-operative Society Ltd v Tipton 1986 ICR 192, HL*).
91. In an unfair dismissal case in which the employee had been employed for two years and no automatically unfair reason is asserted, the burden lies on the employer to show what the reason or principal reason for dismissal was, and that it was a potentially fair reason under section 98(2) of the Employment Rights Act 1996 ("the ERA"). Once that is done there is no burden on either party to prove fairness/unfairness.

Reason for dismissal

92. Section 98(2) identifies a number of potentially fair reasons for dismissal which include conduct. In this case, the Respondent says that the Claimant was dismissed because of her conduct.

Fairness

93. Section 98(4) of the ERA specifies the test to be applied by the Tribunal in order to determine whether a dismissal is fair or unfair. It reads as follows:

“Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -

(a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.”

94. In conduct dismissals, there is well-established guidance for Tribunals on the approach to be taken when assessing fairness under section 98(4). This can be found in the cases of *British Home Stores v Burchell* 1978 IRLR 379 and *Post Office v Foley* 2000 IRLR 827. The Tribunal must decide whether the employer had a genuine belief in the employee’s misconduct. The Tribunal must then decide whether the employer held such genuine belief on reasonable grounds after carrying out a reasonable investigation. The Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. The Tribunal must take in to account all aspects of the case including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4).
95. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (*Iceland Frozen Foods Limited v Jones* 1982 IRLR 439, *Sainsbury’s Supermarkets Limited v Hitt* 2003 IRLR 23, and *London Ambulance Service NHS Trust v Small* 2009 IRLR 563).
96. In considering the fairness of the dismissal, the appeal should be treated as part and parcel of the dismissal process (*Taylor v OCS Group Limited* [2006] ICR 1602). The Tribunal’s task under S.98(4) of the ERA, is to assess the fairness of the disciplinary process as a whole. Where procedural deficiencies occur at an early stage, the Tribunal should examine the subsequent appeal hearing, particularly its procedural fairness and thoroughness, and the open-mindedness of the decision-maker.
97. The range of reasonable responses test that applies to substantive unfair dismissal claims must also be used when assessing the reasonableness of the investigation [as per *J Sainsbury plc v Hitt* 2003 ICR 111, CA].

98. In *Newbound v Thames Water Utilities Ltd* [2015] IRLR 734 CA, the Court of Appeal stated that Tribunals should not consider the band of reasonable responses as one which is infinitely wide, and to focus on the statutory language and the words "in accordance with equity and the substantial merits of the case" at section 98(4)(b) of the ERA. *Newbound* also confirms the importance of considering unblemished long service.
99. In the unfair dismissal context, a finding of gross misconduct does not automatically mean that dismissal is a reasonable response. An employer should consider whether dismissal would be reasonable after considering any mitigating circumstances [*Brito-Babapulle v Ealing Hospital NHS Trust* [2013] IRLR 854]. The employee's length of service and disciplinary record are relevant [*Trusthouse Forte (Catering) Limited v Adonis* [1984] IRLR 382] as well as the attitude of the employee to his conduct (*Paul v East Surrey District Health Authority* [1995] IRLR 305). However, even if the misconduct in question is not correctly characterised as 'gross misconduct', this does not necessarily mean that the employer cannot reasonably dismiss [*Quintiles Commercial UK Ltd v Barongo* EAT 0255/17]
100. Inconsistency of punishment for misconduct may give rise to a finding of unfair dismissal (*Post Office v Fennell* 1981 IRLR 221, CA). However, whilst a degree of consistency is necessary, there must also be considerable latitude in the way in which an individual employer deals with particular cases.
101. In *Hadjiannou v Coral Casinos* [1981] 1WLUK 473 and *MBNA v Jones* [2015] 9 WLUK 7, it was confirmed that the treatment of other employees is only relevant (i) if there is evidence that the dismissed employee was led to believe he would not be dismissed for such conduct; (ii) where the other cases give rise to an inference that the employer's stated reason for dismissal is not genuine; or (iii) in "truly parallel" circumstances, when an employer's decision can be said to be unreasonable having regard to decisions in other cases.
102. In *Securicor Ltd v Smith* 1989 IRLR 356, CA, the Court of Appeal held that the claimant's dismissal was fair on the ground that there was a clear and rational basis for distinguishing between the cases, that is that the Claimant was more to blame for the incident.
103. In considering disparity of treatment, Tribunals must be careful not to substitute their own view for that of the employer.
104. In *Wells & Anor v Cathay Investments 2 Ltd & Anor* [2019] EWHC 2996 (QB) it was decided that participating in a WhatsApp Group of employees distributing offensive material is capable of amounting to gross misconduct.
105. In *Game Retail Ltd v Laws* EAT 0188/14, the Employment Appeal Tribunal declined to provide guidance on unfair dismissal cases involving misuse of social media. It stated that such cases are fact-sensitive and to lay down a list of criteria by way of guidance would run the risk of encouraging a tick-box mentality which is inappropriate in unfair dismissal cases.
106. In *C and Others v Chief Constable of the Police Service of Scotland and Others* [2020] CSOH 61, it was held that in deciding whether or not a person may reasonably expect a conversation to remain private, there is a distinction between 'ordinary members of the public' and those who are required to comply with specific professional standards, whether or not they are at work.

Reduction of any Compensation

107. Section 123(1) of the ERA provides that:

“Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal so far as that loss is attributable to action taken by the employer.”

108. As per *Polkey v AE Dayton Services Ltd*, if a Tribunal finds an unfair dismissal claim to be well founded, it must consider whether the compensatory award should be reduced to reflect the chance that the employee might have been fairly dismissed in any event at a later date if a fair procedure had been used.

109. Section 123(6) of the 1996 Act requires a Tribunal to reduce the amount of the compensatory award by such amount as it considers just and equitable if it concludes that an employee caused or contributed to their dismissal. In addition, section 122(2) requires a Tribunal to reduce the basic award if it considers that it would be just and equitable to do so in light of the employee’s conduct prior to dismissal.

My Conclusions

110. The Claimant accepted that she posted the messages identified by the Respondent. I am satisfied on the evidence before me that the sole reason for the Claimant’s dismissal was the Claimant’s conduct in posting certain posts on the Facebook Messenger group on or around the 19 March 2020. Having heard evidence from Leigh Porter and considered all of the other documents before me in the round, I find that he held a genuine belief that the Claimant was guilty of misconduct. It is clear on the evidence before me why the Claimant was dismissed. The dismissal and appeal letters made it clear that it related to social media activity.

111. Although it was not the mainstay of the Claimant’s case, there was reference by some of the Claimant’s witnesses to the Respondent wanting to get rid of her or wanting to avoid paying her redundancy pay. However, such views were no more than speculation unsupported by other evidence.

112. The Respondent has therefore shown that a potentially fair reason for dismissal existed, namely conduct, and that it held a genuine belief that the Claimant’s actions amounted to misconduct.

113. The Claimant submits that the dismissal was procedurally unfair. The Respondent denies this.

114. The Claimant asserts that the investigation and disciplinary proceedings were unfair because:

- i. The investigation and disciplinary proceedings began three months after the conduct resulting in dismissal;
- ii. The Respondent failed to obtain witness statements prior to commencing disciplinary proceedings which was in breach of its own policy;
- iii. The Respondent failed to obtain a full and accurate translation of the Facebook Messenger messages;

- iv. The Respondent failed to properly consider whether the Claimant's conduct amounted to misconduct rather than gross misconduct: the assumption made by Leigh Porter and Anna Heather was that it was gross misconduct. This was contrary to the disciplinary policy which suggests that the Claimant's actions amounted to misconduct rather than gross misconduct;
 - v. The Respondent does not have a social media policy. The Claimant assumed that her conversation was private;
 - vi. The Respondent's confused harassment and discrimination with bullying, and the latter constitutes misconduct not gross misconduct;
 - vii. The Claimant accepted that her conduct was inappropriate but she did not intend to bully anyone;
 - viii. Neither Leigh Porter nor Anna Heather were concerned about what happened in other people's cases and whether the sanctions applied were fair and consistent. They approached matters with a closed mind, neither of them considered mitigating circumstances such as long and excellent service and the stress and confusion caused by the Coronavirus pandemic and unpaid layoff.
116. The Respondent asserts that the Claimant did not take issue with the translation of the messages which can be found at HB 127. This is not the case. The Claimant raised this as an issue at her appeal hearing.
117. The key evidence in the investigation and disciplinary proceedings in this case was the Facebook Messenger messages themselves. Those messages were in Polish. The Respondent asked one of its own employees to translate the messages that it thought were inappropriate. It is not suggested that the employee who provided the translation is a professional interpreter. Indeed, there is nothing in the evidence before me to suggest that the Respondent applied its mind to the importance of having this evidence accurately translated. Alan Hogg, Leigh Porter and Anna Heather only had before them the translation at HB 127 and the untranslated pages referred to in that document. They did not have a translation of each of the pages referred to nor did they have a translation of the entire Messenger conversation that took place over the 24 hours or less that the group was in existence. This has a number of consequences relevant to the adequacy of the investigation, procedural fairness and fairness generally.
118. Firstly, it is clear on the face of the document at HB 127 that it is not a verbatim translation for reasons that I have provided above. That translation contained inaccuracies. For example, it is recorded that the Claimant used the word 'nigger' in reference to one of her colleagues. It is now not disputed by the Respondent that this was an inaccurate translation. The Respondent submits that this is of no consequence because at no point was it suggested that the Claimant had acted in breach of the Equal Opportunities part of Employee Handbook. Further, it submits that there was no suggestion that that comment (one in a group of numerous comments) was seen as somehow more serious than the others or having some kind of aggravating effect. There is no suggestion that, even absent that comment, Leigh Porter's decision would have been any different.
119. In the investigatory meeting Alan Hogg stated "*when laid off some people went to social media. Allegation of acting with this spectre – bullying, harassment,*

racism." [HB 147]. In live evidence, Leigh Porter referred to the messages posted by the Claimant as having a racist slant.

120. The racist word that it is recorded as having been used by the Claimant is particularly offensive. It would never be acceptable to use this word in the workplace or in communication with work colleagues even if the communication was outside working hours and in a private forum. Given that there was reference to racism by both Leigh Porter and Alan Hogg I find that they both had the use of this word in their mind given that nothing else in the messages identified by the Respondent appears to be racist in nature.
121. I do not consider that the mistranslation of this word was irrelevant. The decision as to whether the Claimant's behaviour amounted to misconduct or gross misconduct required an assessment of the entire factual circumstances of that behaviour. The words used, particularly if they are abhorrent and offensive racist words, are clearly relevant to that assessment. Further, whilst the Respondent now submits that there is no suggestion that the Respondent was relying upon the Equal Opportunities section of the Employee Handbook, in the dismissal letter Leigh Porter referred to the Respondent's bullying and harassment policies. He also stated that the words used were not what would be expected of any employee. Whilst the Claimant also used profanities in her posts ('fuck', 'fucked', 'fucker') the reality is that these words are in common parlance unlike the extremely racist word referred to in the translation relied upon by the Respondent.
122. Secondly, Alan Hogg, Leigh Porter and Annaa Heather only had sight of the translation at HB 127. They could not see the context in which those posts were made. They could not see what any individual post was in response to. They could not tell what others had posted in reply. The decision as to whether the Claimant's behaviour amounted to misconduct or gross misconduct required an assessment of the entire factual circumstances. It is difficult to see how that could be achieved without a full translation of the conversation of which the Claimant was a part.
123. Thirdly, as each investigating officer and dismissing officer had only summary messages for each individual subject to disciplinary proceedings, this made it more difficult for them to ensure that there was consistency of treatment between employees. I say more about this issue below.
124. Finally, around three months had elapsed between when the posts were made and the date of the investigatory meeting. The Respondent became aware of the messages very shortly after they were posted, that is in March 2020. For reasons that are unclear, no steps were taken by the Respondent to investigate the issue until the Claimant was due back at work, almost three months later.
125. The ACAS Code of Practice [paragraph 9] states that it would normally be appropriate to provide copies of any written evidence when the notification of there being a disciplinary case to answer is sent to the employee. Without a copy of the messages in their entirety and an accurate translation, it is difficult to see how the Claimant could have been expected to properly recall with any degree of clarity the exchanges that occurred, the context of those exchanges and respond fully in an unexpected meeting on her first day back at work.
126. Navigating documents containing social media messages is often challenging, and even more so if those messages are not in English and require translation. Pairing the original message with the translation is not always straightforward.

Expecting the Claimant and her representative to quickly assimilate and absorb the content of snapshots of the Messenger conversation out of context and without a reliable translation, in the pressured and stressful environment of an investigatory or disciplinary meeting, is unfair. This in turn makes it all the more important that the Claimant had the opportunity to properly prepare for the disciplinary hearing.

127. For the above reasons, and on the particular facts of this case, I consider that in order for there to have been a thorough fact finding investigation and then disciplinary procedure, the Respondent needed to have obtained a reliable (preferably professional) translation of the entire Messenger exchange. It should then have provided the original messages and the translation in their entirety to the Claimant in advance of the disciplinary hearing to enable her to properly consider it and prepare for the hearing. This would not have been a significant burden upon the Respondent particularly bearing in mind that they have human resources officers, are a large undertaking and as the translation could also have been utilised in all of the investigations. It would not have been disproportionate to expect the Respondent to take such steps bearing in mind that dismissal for gross misconduct was one potential outcome.
128. There is no wrongful dismissal claim in this case and so I need not determine whether or not the Claimant was wrongfully dismissed. However, what is important when assessing fairness is whether the Claimant knew the case against her, including any terms and conditions and/or policies she is said to have breached.
129. Inappropriate behaviour, bullying, excessive foul language and rudeness or aggressive behaviour are listed as examples under the general misconduct section. "Physical violence or bullying" and "Serious acts of discrimination, harassment and/or victimisation contrary to the law and/or organisational policies on equality of opportunities" are listed as examples under the gross misconduct section.
130. If the Respondent relied upon the harassment policy, then this appears to have been based upon an incorrect understanding of what the Claimant had said in her posts, that is that she had made a racist comment. If the Respondent relied upon inappropriate behaviour and bullying then it is not clear why it was decided that the Claimant's actions amounted to gross misconduct rather than misconduct, when according to the Respondent's disciplinary policy, inappropriate and bullying behaviour would ordinarily be considered to be general misconduct.
131. In her witness statement [paragraph 8], Anna Heather states that bullying is referred to in the Employee Handbook, specifically in the Code of Conduct and the harassments sections.
132. When all of the documentary evidence from the investigation stage through to the appeal hearing is considered in the round, it is not always entirely clear what policy, or policies, the Respondent was suggesting were breached by the Claimant. There is reference initially to a social media policy and bringing the company into disrepute. The Respondent did not have a social media policy. There is reference to both the harassment policy and bullying policy in the letter inviting the Claimant to the disciplinary hearing. There is no 'bullying policy' before the Tribunal, although bullying is cited as an example of a type of general misconduct in the disciplinary policy and procedure. Despite what is said by

Anna Heather, I can see no reference to bullying in the Code of Conduct. The harassment policy focuses entirely upon actions against individuals with protected characteristics. It is difficult to see how the Claimant's behaviour could have been considered to have breached the harassment policy unless it was as a consequence of the use of the racist word referred to earlier.

133. Ultimately, it is not entirely clear from the various transcripts and letters written at the time of the investigation and disciplinary proceedings whether the harassment policy, the Code of Conduct in the Employee Handbook or inappropriate behaviour and bullying as referred to in the disciplinary proceedings, or a combination, was the main basis for the dismissal of the Claimant. There is reference to each at various points in the paperwork.
134. This confusing and sometimes incorrect reference to, and potential application of, various policies is somewhat troubling and raises a further question as to the procedural fairness of the decision.
135. The Respondent submits that the Claimant's behaviour amounted to bullying. The Claimant denies this. Leigh Porter stated that the employee who brought the messages to the attention of the Respondent found them inappropriate and bullying in nature. No further detail is provided by the Respondent such as who the employee concerned spoke to, what the individual said, or if they were concerned with any particular aspect of what was posted in the group. There is no evidence to demonstrate that they were offended by what the Claimant said rather than by someone else's post or posts. Further, there is no statement from anyone else in the company identifying the impact that the Claimant's behaviour may have had on them.
136. What amounts to bullying is not defined in any of the Respondent's policies and it is not for me in those circumstances to seek to impose my own definition of bullying or to decide whether or not the posts concerned amounted to bullying. However, for there to be an act of bullying there must be a perpetrator and a victim. The Respondent's policy states that statements should be obtained prior to an investigation. There is no statements or other evidence from anyone who the Respondent considers to have been bullied. Without such evidence it is difficult to see how the Respondent could have assessed whether, or concluded that, the Claimant's action amounted to bullying.
137. For those reasons I conclude that the Respondent's did not have reasonable grounds to sustain the belief that the Claimant's behaviour amounted to bullying or, indeed, harassment.
138. The ACAS Code of Practice on disciplinary and grievance procedures [paragraph 5] makes it clear that investigations of potential disciplinary matter should be conducted without unreasonable delay. In this case, the Respondent has provided no explanation for the delay. The delay was potentially problematic in terms of its impact upon recollection, for reasons that I have provided above.
139. The delay in commencing the investigation, the confusion regarding the applicable policy or policies, and lack of statements from anyone who was considered to have been adversely affected by the Claimant's posts, further adds to the procedural failings in this case. However, for the avoidance of doubt, the failings regarding the lack of an accurate translation and complete set of messages was itself so fundamental as to make the dismissal procedurally unfair without more.

140. In conclusion, the investigation conducted by the Respondent was inadequate and the disciplinary process procedurally unfair. It was not cured by the appeal process during which the same inadequacies were repeated.
141. I am required to consider whether the decision that the Claimant should be dismissed was within the range of reasonable responses for an employer in such circumstances. In doing so I must not substitute my own decision for that of the employer.
142. The context in which the Claimant posted the messages was that the Respondent announced, without any prior notice, that it would be laying off certain employees without pay. This was at the beginning of the COVID 19 pandemic, which was undoubtedly an unsettling time for both the Claimant and the Respondent. The Claimant explained that her emotions were running high and that is unsurprising in the unprecedented circumstances that everyone faced at the time.
143. Much of the Respondent's focus at the investigatory, disciplinary and appeals stages was on whether the Claimant was remorseful and her position as a Team leader. An employer is, of course, entitled to take into account whether or not an individual has shown contrition and his or her position within the company when reaching its decision. However, what is notable in this case is that when carrying out its assessment little or no weight seems to have been given to the circumstances in which the Messenger group was created, that is at a time when the Claimant and others were informed, without any advance notice, that they were immediately to be laid off without pay.
144. The Claimant stated in live evidence that the company "did unfair things to them". Whilst the Respondent may well have had little choice but to lay staff off with such little notice, the creation of the Messenger group, and the posts that ensued did not occur in a vacuum. Rather it was prompted by the Respondent's actions. Whilst not condoning the Claimant's behaviour, this was not a situation in which the Claimant was generally posting inappropriate comments; there was a specific trigger for her doing so. There is no evidence before me to suggest that the Respondent had any regard whatsoever to the context in which the Messenger group was set up and the posts made.
145. The messages were not posted on a public forum. The private group that they were posted on was in existence for 24 hours or less. The Respondent did not have to take any reparative action as a consequence of the posts. There was no real likelihood that the posts would damage the Respondent's reputation or that were intended to do so. The posts did not breach confidentiality. There is no evidence that the Respondent has suffered any harm as a consequence of the actions of the Claimant in posting in the manner that she did.
146. The Respondent did not have social media policy of any sort at the date of dismissal. There is no mention of the use of social media anywhere else in its policies. The Claimant's actions in posting on the group was not undertaken during working hours. Throughout the investigation the Claimant protested that it was a private group and that its contents should not have been revealed to the Respondent. There was nothing to prevent the contents being disclosed to the Respondent by a member of the group and the Respondent did nothing incorrect in considering the content of the posts once they were in its possession. However, what is abundantly clear from what the Claimant said at each stage of the investigatory and disciplinary proceedings is that the Claimant

was taken by surprise by the use of what she had said on a private group. She did not expect her private communications to be used in this way.

147. As the Respondent had no social media policy, and as the Claimant's posts occurred outside working hours in a closed group, she had no forewarning that her posts could amount to misconduct or gross misconduct. On the particular facts of this case, this was a reasonable conclusion for the Claimant to reach. There was nothing within the disciplinary code or other policies that would have alerted an employee in her position to the prospect that the such posts might be regarded as misconduct.
148. Further, the Respondent has produced no evidence to show why it considered that the Claimant's posts amounted to bullying.
149. The messages posted by the Claimant were intemperate and profane. They were inappropriate, as were many of the other posts made by others. However, when properly contextualised, they amounted to little more than venting or a workplace moan against the company's management, at an emotional and stressful time for all concerned.
150. In reaching its decision to dismiss, the Respondent also took in to account that the Claimant spoke to Natalia Jurkiewicz whilst suspended and that this was in breach of the agreement that she not contact any employees. She did not contact any employees as such, rather she answered a telephone call from one. However, in any event, the Respondent accepted that there was no evidence that she provided information about the contents of the meeting and so deductions would not be made from her suspension pay, which suggests that the Respondent did not consider this to be a significant breach.
151. The Claimant was a relatively long-serving employee of over 7 ½ years. It is not disputed that she had an exemplary disciplinary record prior to the events that led to her dismissal. The Respondent did not have any evidence before it that the Claimant had made any inappropriate comments between the 20 March 2020 (when the Messenger group was closed) and the date of the investigation meeting some three months later. It is not suggested, nor is there any evidence that, the Claimant has ever previously displayed an attitude problem or demonstrated any form of insubordination in the workplace in respect of the management of the company.
152. When asked whether she had considered length of service and previous good employment record, Anna Heather's evidence was that this was not a capability appeal; there was a lack of contrition and broken trust and confidence. When considering all of the evidence in the round, it is clear that length of service and previous clean disciplinary record played no real part in the Respondent's decision making process in this case. Conversely significant weight was placed on the Claimant's lack of remorse and her position as a Team Leader.
153. In terms of parity of treatment, it was apparent from the evidence of the Respondent's witnesses that consistency in the treatment of those employees who had posted comments considered to be inappropriate was not considered at the time.
154. Firstly, there appears to have been no efforts made to ensure that there was a joined-up approach as to who was to be subject to disciplinary proceedings and sanctions. The evidence of those involved in the decision to dismiss the Claimant is that they were focused on the Claimant's behaviour not anyone else. They believed that the Claimant was the only person in the Messenger group

with supervisory responsibilities. This was factually incorrect. Inexplicably, they also misunderstood the hierarchy, believing that a Team Leader was more senior than a supervisor, which was incorrect.

155. There was another person in the group, Malgorzata Gromek who had a more senior position of supervisor and who supervised around 20 staff members, unlike the Claimant who, despite being a Team Leader, did not supervise anyone. She also posted profane comments against management. She was not subject to an investigation or disciplinary proceedings.
156. The circumstances in this case are truly parallel. Malgorzata Gromek posted comments on the same forum around the same time as the Claimant. There was no basis upon which to distinguish between the two employees in this manner. The Respondent's decision to dismiss the Claimant and take no action against Malgorzata Gromek was unfair in the circumstances.
157. The Respondent is a large employer with its own human resources officers. It had the resources to deal with the investigation and disciplinary procedure in an adequate manner but did not do so.
158. The band of reasonable responses is not infinite. Taking in to account all of the matters that I have mentioned above, I find that in this case the actions of the Respondent fell outside of the band of reasonable responses and that the decision to dismiss was both procedurally and substantively unfair. Taking into account also the equity and the substantial merits of the case, the unfair dismissal claim therefore succeeds.

Reduction in Compensation

159. The dismissal was unfair not only procedurally but also substantively.
160. Further, and in any event, it is possible that the Leigh Porter would have considered that the posts were less serious had he not been under the impression that the Claimant had used an extremely offensive racist word. Had he had a full translated transcript of the messages, this would have enabled him to consider the Claimant's posts in context and, when coupled with other points of mitigation, may have resulted in a different outcome. On the facts of this case, I do not consider that it can be said that the Claimant would have been dismissed anyway had an adequate investigation and procedure been followed. I do not consider that it would be just and equitable to make any reduction on the basis of *Polkey* in this case.
161. In terms of contributory fault, I do find that there was some misconduct on the part of the Claimant. She accepted at the investigation and disciplinary stages that she made the posts concerned. They were profane and intemperate. They were critical of the Respondent. However, the Respondent's policies do not make it clear that such behaviour would result in dismissal. It is plain that the Claimant was somewhat surprised to be subject to disciplinary proceedings in respect of comments posted on a closed forum. In the circumstances, I find that there is a relatively low level of contributory fault in this case and I reduce the basic and compensatory award by 10%.

162. A remedy hearing will now be listed to determine the remedy to which the Claimant is entitled.

Employment Judge S.L.L. Boyes

Date: 26 September 2022

**Reserved Judgment and Reasons Sent to The
Parties On**

27 September 2022

FOR EMPLOYMENT TRIBUNALS

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