THE INDUSTRIAL TRIBUNALS

CASE REF: 292/20

CLAIMANT: **Courtney Dawson**

RESPONDENT: **PMC Limited t/a Bluebird Care Holywood**

JUDGMENT

The judgment of the tribunal is that the claimant was unfairly dismissed and she is awarded £5,200.00 in compensation.

CONSTITUTION OF TRIBUNAL

Employment Judge: **Employment Judge Wimpress**

Members: **Mr A Barron**
Mrs M J Reynolds

APPEARANCES:

The claimant represented herself.

The respondent was represented by Ms Lucinda Baxter of the respondent business.

SOURCES OF EVIDENCE

1. The tribunal received witness statements from the claimant, Ms Lucinda Baxter and Mrs Heather Maclure and heard oral evidence from them by way of cross-examination. Both parties provided a number of relevant documents which were supplemented throughout the hearing. It is regrettable that directions given by the Vice President in relation to the exchange of documentation were not complied with by the respondent. This resulted in a plethora of documents being produced during the course of the hearing which was both disruptive for the tribunal and unfair to the claimant.

THE CLAIM AND THE RESPONSE

2. The claimant lodged a claim form on 19 December 2019 in which she claimed unfair dismissal and sought notice pay. The claimant provided sparse information in the claim form as to the basis for her claims. She simply stated that she was dismissed on 23 October 2019 and that the respondent did not follow the disciplinary process as set out in its own handbook or by statutory law. The claimant also stated that she was seeking notice pay.

3. In a detailed response dated 5 February 2020 the respondent contended that the claimant was dismissed for gross misconduct.

THE ISSUES

4. At a preliminary hearing on 9 October 2029 the sole issue identified for determination was whether the claimant had been unfairly dismissed for the purposes of the Employment Rights (Northern Ireland) 1996.

THE FACTS

5. The claimant's date of birth is 3 December 1997. The respondent business is a home care provider which provides domiciliary care to customers in their own homes. The claimant was employed by the respondent as a Care Supervisor. She commenced employment with the respondent on 17 May 2017 and her employment was terminated on 23 October 2019. In her claim form the claimant stated that her basic hours were 55 hours per week but her actual hours were much longer often up to 70/80 hours per week. As a result the amount that she was paid varied from month to month. According to the claimant's claim form her gross pay was £1,900 per month and her normal take home pay was £1,600. This was clearly an average figure and was accepted by the respondent as being accurate.

6. On Saturday 28 September 2019 the Care Manager, Ms Baxter, received a phone call from Mrs Maclure in which she advised that she had been contacted by two members of staff on the Bangor Double Run team who informed her that they had been invited to join a WhatsApp group started by the claimant running in parallel with an official WhatApp group which was used by staff to contact each other in order to cover or swap shifts and other information that needed to be shared. Two staff members had been excluded from this group.

7. In addition, the two care workers who made the initial complaint wanted to report a video that had been posted online by another member of staff, Jessica Lemon, bullying and berating one of the excluded members – Shannon McLaughlin. The staff member concerned was on holiday at this time as was the claimant. The claimant was on a bus in Dublin when the video was posted. The contents of the video are most unpleasant. It appears to have been recorded in a bar and the speaker, Ms Lemon's boyfriend who appears to be inebriated and is somewhat incoherent, reads from a prepared list. A female, presumably Ms Lemon, invites him to –"Tell us what you think of her." Ms Lemon's boyfriend then says:

> *"Now Shannon*
>
> 1. *You're a f**ing spastic, alright*
> 2. *Your hair looks f**king shit.*
> 3. *You're a f**king w…ker to your fiancée.*
> 4. *Your snake bites suit you because you a f**king snake.*
> 5. *Stop f….ing touting on everyone and then slabbering about everyone you f**king b**ch.*
> 6. *No-one f**king likes ya.*

7. *Did I mention your hair looks**king sh*t.*

8. *I'll f**king put Ron's jumper on when I am done feeding him you f**kin c**t, alright.*

9. *Not even Heather likes ya and*

10. *Find your own f**king way home after this because I aint f**king driving ya."*

Ms Lemon laughs throughout this performance.

In response to the posting of this video other members of the WhatsApp group exchanged comments as follows:

> *"<u>Ms Lemon</u> – HAHAHAHA. He just hates her too.*
>
> *<u>Shannon Whitsitt</u> – It was when I heard snake bites [piercings on lower lip] I was like oh he's lucky.*
>
> *<u>Ms Lemon</u> – Hahahaha*
>
> *<u>Shannon Whitsitt</u> – Oh no*
>
> *<u>Ms Lemon</u> – Oh God. Awk fuck I am on my holidays*
>
> *<u>Shannon Whitsitt</u> – Troubles. Enjoy it babe.*
>
> *<u>Ms Lemon</u> –I'll be leaving soon anyway.*
>
> *<u>Shannon Dawson</u> – I'm thinking of it too. I'm hating it at the moment."*

Although the claimant engaged in this exchange she maintained that she did not watch the video at that time as she was on a bus in Dublin when it was posted and did not have her earphone in. The claimant had seen it since but believed that this was after she was dismissed.

8. Over the following week Ms Baxter and Mrs Maclure conducted an investigation by speaking with the staff members involved. According to Ms Baxter notes were taken of these conversations but were not provided to the claimant because the allegations were raised under whistleblowing arrangements.

9. On 1 October 2019 Ms Baxter asked the claimant to attend the respondent's office on 2 October 2019 at 10.30 am. The claimant did not attend. Ms Baxter phoned the claimant to find out why she hadn't turned up and the claimant explained that she had slept in. Ms Baxter advised that she would be in contact later in the day to arrange the meeting. In the event the meeting was not re-scheduled until 11 October 2019.

10. On 10 October 2019 the claimant was contacted by Mrs McClure and asked to call into the office on 11 October 2019 between 4.00 and 5.00 pm. There was some

disagreement as to whether the request was made by text or phone. It is not necessary for the tribunal to resolve this dispute.

11. On 11 October 2019 the claimant was contacted again and told to come in at 3.30 pm instead as Ms Baxter had to go to work.

12. The meeting went ahead as arranged. Ms Baxter conducted the meeting. Mrs Maclure was also in attendance. According to Ms Baxter when she presented the evidence the claimant became upset and started to cry. As a result Ms Baxter decided to postpone the meeting. In her evidence to the tribunal the claimant made no reference to being upset or crying. According to Ms Baxter she handed the claimant a formal letter inviting her to attend a meeting to discuss the matter which the claimant folded and put in her coat pocket. The claimant denied receiving the letter. The letter was dated 9 October 2019 and according to Ms Baxter it was prepared on that date. The letter reads as follows:

> *"Dear Courtney*
>
> *A meeting is being held at the Bluebird Care Offices day and time to be confirmed as per your rota to discuss the following points that have been brought to my attention.*
>
> *That you personally started a what s up group with the sole intention of excluding Shannon McLaughlin, and Shelby Greer, which resulted in bullying taking place and failure to notify office of such.*
>
> *That a video was posted with ref to a member of staff and as your role of a supervisor, failure to notify the office of such video.*
>
> *That you posted a video of a person in a chair, waving their arms in the air, and linked this to a service user SE who is a vulnerable adult.*
>
> *That knowing what was being said in the what's up group, failure as your role of supervisor to inform the office of what was going on.*
>
> *A co-worker explained to you that they had had issues with a member of staff before working with Bluebird Care, and had been bullied at the hands of this co-worker, and instead of reporting this as a matter of urgency to the office you handed the bullied care worker the telephone number of the other care worker and told her to ring and sort it out as they would be working together. This caused great distress to one care worker and I had to be informed of this by another care worker and step in.*
>
> *You will have notice of such meeting so that you may arrange to bring someone along with you, and I would need answers to the above questions.*
>
> *Kind Regards*
> *Lucy Baxter"*

According to the claimant she only received this letter when it was supplied to her by Mr Richard Johnston in December 2019 in the course of a grievance raised by the claimant. Ms Baxter accepted that the letter should have been posted to the claimant by recorded delivery on 9 October 2019. It seems probable that Ms Baxter

did give the letter to the claimant at the meeting on 11 October. If as contended by Ms Baxter the claimant was upset and it is easy to see how the letter may have gone astray. The letter made no mention of an issue with manual handling as this only came to light after the letter was composed.

13. A further meeting took place on 23 October 2019. This was arranged by telephone and a follow up text. The claimant continued to work for the respondent during the intervening period.

14. The meeting was again conducted by Ms Baxter with Mrs Maclure in attendance. The claimant was not accompanied. A typewritten record of the meeting was provided to the tribunal at the outset of the hearing. At the tribunal's direction the original handwritten notes were subsequently provided. The claimant did not receive either of these documents in advance of the hearing and their contents were not agreed. Having examined the documents however the tribunal was satisfied however that the typed noted provided a reasonable account in outline of what transpired notwithstanding that some of the details provided were disputed. At the very least it provides a starting point for the tribunal's consideration of the matter and it reads as follows:

> *"Lucy Baxter thanked Courtney for coming and asked if someone was coming to meet her, she replied no. Courtney set down and Lucy Baxter then started the meeting.*
>
> *Lucy Baxter stated to Courtney that she had evidence and that she was aware that Courtney Dawson had started up the second What's Up group. Lucy Baxter stated to Courtney Dawson that she was aware that Courtney had started the group with the sole intention of bullying S MCL [Shannon McLaughlin] and SG [Shelby Greer]. Courtney said to Lucy Baxter that "not SG" but SMCL yes. Lucy Baxter could not quiet (sic) believe what she was hearing.*
>
> *Lucy Baxter asked Courtney has she seen the video in question and Courtney said yes. Lucy Baxter asked Courtney what she thought in relation to this and Courtney said that she thought it was a bit harsh. Lucy Baxter was taken back and asked Courtney again, Courtney shrugged her shoulders and did not answer. Lucy Baxter asked Courtney why she has yet to report this to either Heather or myself, and she said that she knew someone else had, Lucy Baxter stated to Courtney that in her role as a supervisor that was her responsibility to inform us as soon as she is a bit aware of it. Failure to do so was in violation of the role of supervisor.*
>
> *Lucy Baxter then addressed the situation with ref to HC, and Courtney handing her the number of SW the girl who bullied her at school and told her to ring her and sort it out. Lucy Baxter explained to Courtney that this should never have happened. The situation should have been brought to my attention immediately. The result of this was, that this had to go through different carers until I was informed, and that delayed my ability to diffuse the situation, and calm matters down. The carer HC in question was on the verge of handing in her notice and leaving. Again, this is not the actions of a supervisor or a team member of Bluebird Care.*

Lucy Baxter then addressed the video that Courtney herself had put up on the group. A man in a purple shirt waving his hands in the air and comment that this is how she feels coming out of service user SE's house. This is no way of a reflection of how the rest of the company would comment on a service user, Lucy Baxter was appalled at this. Lucy Baxter then asked Courtney why she felt the need to call SE's care manager a "dick". There was no way that this comment was appropriate in any way, shape or form and is not acceptable by Bluebird Care Hollywood. Courtney was told that we had and do you still have, screenshots of comments that she had posted on screen, one in particular when Courtney acknowledges that SMCL was being bullied.

Any of the above actions fall below and acceptable standard of bluebird Hollywood employment. Courtney never once apologised for any of her actions and never once throughout the meeting showed any remorse for the bullying of SMCL [Shannon McLaughlin] or anything that she said. Failure to alert the office/management fell well below our standards and left no confidence in her by her colleagues. If a supervisor can behave like this, there is no way they would approach her about anything. Lucy Baxter explained all this to Courtney and on the basis of the above, the decision to let Courtney go was made. Lucy Baxter explained to Courtney that she had the right to appeal. Lucy Baxter ended the meeting and we all stood up and proceeded to go down the stairs. At the bottom of the stairs Courtney Dawson then called Lucy Baxter and Heather Maclure 'dickheads' and something else but I could not make out and then slammed the office glass door behind her."

15. There were some matters included in the handwritten note made after the meeting but nothing of any significance. In her witness statement the claimant said that during the meeting Ms Baxter and Mrs Maclure became quite animated and talked over each other with the result that she could not properly follow what was going on. The claimant alleged that when leaving the office Mrs Maclure said – "Hope you enjoy the rest of your day". The claimant felt that this was a backhanded and totally inappropriate comment and she replied "Dick".

16. Having discussed the matter with her family when she went home the claimant decided to lodge a grievance about how she was dismissed due to the lack of proper procedure and reasons. The claimant decided, however, to hold off lodging her grievance until she received a letter from the respondent explaining the situation. When no letter was forthcoming the claimant submitted three undated letters by way of grievance.

17. In her first letter the claimant complained that statutory labour law was not followed nor were the procedures set out in the staff handbook. In particular she complained that her treatment was in breach of the handbook's requirement that managers must always take legal advice before taking any informal or formal action in order to protect the employee and the company. She also drew attention to a provision which stated that dismissal should only be used as a last resort and that she had not been notified of any act of gross misconduct, that she had not been provided with updated disciplinary procedures and nothing in writing including the reasons for instant dismissal or explaining why instant dismissal was the only option. The claimant also complained of a breach of the three stage statutory dismissal procedure. In particular she alleged that she had not been informed of that it was a

disciplinary meeting; was not given details of the allegations; was not told that the allegations constituted gross misconduct; no evidence was presented; was given no right of appeal and was not told that her employment was ended. The claimant also requested references and complained that she had been dismissed without notice pay.

18. Ms Baxter replied to this letter. We have not seen this letter but it appears to have been written on a without prejudice basis and to have indicated that Ms Baxter would chair the meeting. The claimant pointed out that Ms Baxter was personally involved and that the grievance should be dealt with by an appropriate manager within the company – either Ms Baxter's line manager or superior. Ms Baxter's letter also appears to have referred to the claimant's reaction to being dismissed as abusive. This prompted the claimant to submit a second letter in which she complained about Ms Baxter's letter being without prejudice, the proposal that Ms Baxter should chair the grievance meeting and the allegation of being abusive. In response to the latter allegation the claimant retorted that while Ms Baxter may have regarded her reaction as abusive this was in the context of a meeting in which she was ambushed and denied the right to a companion.

19. On 2 December 2019 Mr Richard Johnston, who was acting in a consultancy capacity for the respondent, replied to the three undated letters. The letter first addressed outstanding holiday pay and expenses. It then set out a chronology of the events which led to the claimant's dismissal and concluded by offering to meet with the claimant on 4 December together with Mrs Maclure to discuss the grievance.

20. The claimant replied and objected to either Ms Baxter or Mrs Maclure being involved in the grievance hearing. The claimant complained that what she was accused of had not previously been outlined, that the allegations made against her were not investigated and that it was contrary to procedure to investigate after dismissal. The claimant disputed that she was handed a letter and stated that it should have been sent by recorded delivery. She also sought proof of alleged telephone conversations.

21. The claimant attended the grievance meeting on 4 December 2019 accompanied by Ms Karyn Wyatt. Ms Jordan Milby attended with Mr Johnston. Both parties produced typewritten notes of the meeting. The claimant's notes ran to three pages and provide considerable detail of the discussion. The respondent's note is confined to a single page and records seven short points including that the claimant was seeking two weeks' pay for unfair dismissal and four weeks' pay in lieu of notice.

22. On 23 December 2019 Mr Johnston wrote to the claimant. The most significant point in the letter was Mr Johnston's confirmation that he had identified that a letter explaining the rationale behind the claimant's dismissal had not yet been issued by Ms Baxter; that he had asked Ms Baxter to address this as a priority and that once the claimant had this she could comprehensively address the grounds on which she wanted to appeal. Mr Johnston stated that he took from the claimant's letters and their exchange at the grievance meeting that she wished to appeal against the decision to dismiss her and that the respondent would be happy to convene an appeal. Mr Johnston went on to refer to a list of issues in bullet point format which he assumed would form the basis of any appeal. We have not been provided with this list. Mr Johnson also invited the claimant to articulate her grounds of appeal and advised of her right to be accompanied at any appeal.

23. The dismissal letter was finally issued on 23 December 2019 and reads as follows:

> *"Termination of your employment*
>
> *Dear Courtney*
>
> *This letter confirms your dismissal from Bluebird care Hollywood effective October 23rd 2019.*
>
> *You were dismissed for several breaches of company policy which combined amount to gross misconduct. There were two documented cases of bullying and harassment, one case of breaching the privacy and dignity of a vulnerable customer and breaches to our manual handling policy.*
>
> *On October 11th you met with me and Heather Maclure. In that meeting you were advised that an investigation was ongoing into serious incidents of bullying and harassment. You were issued with a formal letter at this meeting.*
>
> *We were made aware on September 28th of the existence of the secret WhatsApp group set up by you to exclude a colleague in a clear breach of the Bullying and Harassment Policy.*
>
> *We were also made aware of the video threatening the excluded colleague – which you did not report to management – another breach of the Bullying and Harassment Policy.*
>
> *On October 2nd we were made aware of a video posted by you which was a clear breach of the Dignity and Privacy of our customer.*
>
> *We also met on October 23rd where we outlined the subsequent issues which have come to light since that meeting. A number of complaints were raised about your handling of customers in clear breach of our Manual Handling policies and procedures.*
>
> *We were also being aware about a historic bullying situation involving two colleagues – HC and SW.*
>
> *The obvious appropriate action here should've been to inform the office that there was school day history between these two colleagues. You informed Lucy and Heather that you had given HC a telephone number for SW and told her to ring her and sort it out. This in clear breach of our Bullying and Harassment policy.*
>
> *It was our view that your conduct to give rise to Gross Misconduct and we were given no choice other than to terminate your employment with immediate effect.*
>
> *You have been paid all monies owed to you including accrued holiday pay and expenses in the normal way. Your P45 has also been forwarded to you*
> *Yours sincerely*

Lucy Baxter

Care Manager"

24. It is notable that notwithstanding what Mr Johnson said in his letter of 23 December 2019 in relation to an appeal the original dismissal letter which was belatedly issued on the same date made no reference to the claimant's right of appeal.

25. The claimant obtained a new job as a care worker on 4 December 2019. The claimant's gross hourly rate is £8.61 and her normal take home pay is £1,800 per month. The claimant did not apply for Jobseekers Allowance.

SUBMISSIONS

26. Both parties provided helpful written submissions. The claimant submitted that she was never given the opportunity to answer the issues raised by the respondent and that had she been able to give her explanation the outcome would have been different such as a written warning and/or demotion and/or further training. In her evidence to the tribunal and her submissions the claimant made particular reference to the allegation that she posted a video in breach of the dignity and privacy of a customer. The claimant's explanation was that the video was actually a meme in which she mocked herself. The claimant also questioned why she was not suspended if the allegations were so serious and was allowed to continue to work with the colleagues involved and to continue to practice manual handling for 2 weeks without it being addressed. In relation to procedure the claimant reiterated that she was not informed that the two meetings were disciplinary in nature which were set up by either text or telephone rather than written notification. Nor was the claimant shown any of the investigatory papers. The letter of dismissal was only sent 2 months after the event rather than within 5 days as provided in the handbook and without this letter the claimant was unable to mount an appeal.

27. Ms Baxter submitted that the claimant was given every opportunity to explain her actions but failed to engage with her. Ms Baxter maintained that the claimant set up the second WhatsApp group with the sole intention of bullying and cast doubt on the claimant's denial of seeing the video during the weekend of 28/29 September 2019 given that she commented on it 6 minutes after it was posted and the claimant would have been aware of it in any event as it was discussed widely between carers on the following Monday and Tuesday. Ms Baxter submitted that the claimant would have been fully aware of the NISCC Codes of Conduct and of being expected to abide by them. Ms Baxter further submitted that the claimant's actions made it impossible to remain an employee of the respondent. Ms Baxter fully accepted that the two key letters inviting the claimant to the disciplinary meeting and informing her of the reasons for dismissal were not sent to her within 5 working days by recorded delivery as required by the respondent's own disciplinary procedure.

THE LAW

28. The right not to be unfairly dismissed is enshrined in Article 126 of the Employment Rights (NI) Order 1996 ("the 1996 Order"). At Article 130 it is stipulated that it is for the employer to show the reasons for dismissal and that the reason falls within one of the fair reasons outlined at Article 130(2). One potentially fair reason for dismissal is engaged in this case namely the capability of the employee. Article 130

of the Employment Rights (Northern Ireland) Order 1996 insofar as relevant makes provision for dismissal on health grounds as follows:

"130.— (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within paragraph (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this paragraph if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

…

(3) In paragraph (2)(a) —

(b) relates to the conduct of the employee;

…

(4) Where the employer has fulfilled the requirements of paragraph (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."

29. In the application of this statutory guidance the tribunal is mindful of the considerable body of case law and in particular the guidance stemming from the case of ***Iceland Frozen Foods Limited v Jones [1982] IRLR 439*** (reaffirmed by the Court of Appeal in England in the cases of ***Post Office v Foley/HSBC Bank v Madden [2000] IRLR 827***) which includes (inter alia) that 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, another quite reasonably take another and that the function of the industrial 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 which a reasonable employer might have adopted. In this regard the tribunal is also assisted by the guidance given by the Court of Appeal in ***Dobbin v Citybus Ltd [2008] NICA 42*** as to how an industrial tribunal should approach the task of

determining the fairness of a dismissal and in the case of ***Rogan v South Eastern Health and Social Care Trust [2009] NICA 47***.

30. In ***Dobbin v Citybus Ltd*** ***[2008] NICA 42*** the Court of Appeal provided guidance as to how an industrial tribunal should approach the task of determining the fairness of a dismissal. The judgment of Higgins LJ reads as follows:-

> *"[48]... The equivalent provision in England and Wales to Article 130 is section 98 of the Employment Rights Act 1996 which followed equivalent provisions in section 57 of the Employment Protection (Consolidation) Act 1978.*
>
> *[49] The correct approach to section 57 (and the later provisions) was settled in two principal cases - British Homes Stores v Burchell [1980] ICR 303 and Iceland Frozen Foods Ltd v Jones [1983] ICR 17 - and explained and refined principally in the judgments of Mummery LJ in two further cases - Foley v Post Office and HSBC Bank Plc (formerly Midland Bank Plc) v Madden reported at [2000] ICR 1283 (two appeals heard together) and J Sainsbury v Hitt [2003] ICR 111.*
>
> *[50] In Iceland Frozen Foods Browne-Wilkinson J offered the following guidance -*
>
> *'Since the present state of the law can only be found by going through a number of different authorities, it may be convenient if we should seek to summarise the present law. We consider that the authorities establish that in law the correct approach for the industrial tribunal to adopt in answering the question posed by section 57(3) of the [Employment Protection (Consolidation) Act 1978] is as follows:*
>
> *(1) the starting point should always be the words of section 57(3) themselves;*
>
> *(2) in applying the section an industrial tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the industrial tribunal) consider the dismissal to be fair;*
>
> *(3) in judging the reasonableness of the employer's conduct an industrial 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, another quite reasonably take another;*
>
> *(5) the function of the industrial 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 which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.'*

[51] To that may be added the remarks of Arnold J in British Homes Stores where in the context of a misconduct case he stated -

'What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further. It is not relevant, as we think, that the tribunal would themselves have shared that view in those circumstances. It is not relevant, as we think, for the tribunal to examine the quality of the material which the employer had before them, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities, or whether it was the sort of material which would lead to the same conclusion only upon the basis of being "sure," as it is now said more normally in a criminal context, or, to use the more old-fashioned term, such as to put the matter "beyond reasonable doubt." The test, and the test all the way through, is reasonableness; and certainly, as it seems to us, a conclusion on the balance of probabilities will in any surmisable circumstance be a reasonable conclusion'."

31. As highlighted by the Court of Appeal in in ***Connolly (Caroline) v Western Health and Social Care Trust [2017] NICA 61*** the interpretation of Article 130(4)(a) of the 1996 Order "has been fixed by a series of appellate courts over the years i.e. that whether an employer acted reasonably or unreasonably is to be addressed as whether an employer acted within a band of available decisions for a reasonable employer even if not the decision the Tribunal would have made. That test, expressed in various ways, is too long established to be altered by this court, and in any event has persuasive arguments in favour of it. But it is necessary for tribunals to read it alongside the statutory provision of equal status in Article 130(4)(b) i.e. that that decision "shall be determined in accordance with equity and the substantial merits of the case".

PROCEDURAL FAIRNESS

32. Article 130A of the 1996 Order is concerned with the procedural fairness of dismissals. Employees are regarded as unfairly dismissed if the statutory dismissal procedure was not complied with and the failure to comply was attributable to the employer. By Article 130A (1) of the 1996 Order where the statutory dismissal procedure is applicable in any case and the employer is responsible for non-completion of that procedure, the dismissal is automatically unfair.

33. The case of **Polkey v Dayton Services Ltd 1987 3 All ER 974 HL** makes it clear that, if a dismissal is procedurally defective, then that dismissal is unfair but the

tribunal has a discretion to reduce any compensatory award by any percentage up to 100% if following the procedures correctly would have made no difference to the outcome.

34. The Employment Appeal Tribunal in **Alexander v Bridgen [2006] IRLR 422** summarised the interplay between the statutory procedures and fair or unfair dismissal as follows:

   (1) if the statutory procedures were followed and there was a breach of other procedures but the individual would have been sacked anyway, that is the chance of dismissal was more than 50%, the dismissal is fair;

   (2) if the statutory procedures were followed but there was a breach of other procedures and if the chance of dismissal was below 50% the dismissal is unfair, but a ***Polkey*** deduction can be made;

   (3) if no statutory procedures were followed there is automatic unfair dismissal and four weeks pay is the minimum which must be paid and can be increased by 10 to 50% unless the award of four weeks pay would result in injustice to the employer.

35. In **Software 2000 Ltd v Andrews & Ors [2007] UKEAT 0533_06_2601** Mr Justice Elias set out the following principles in relation to compensation at paragraph 54:

   "(1) In assessing compensation the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismiss

   (2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future).

   (3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.

   (4) Whether that is the position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that

an element of speculation is involved is not a reason for refusing to have regard to the evidence.

(5) An appellate court must be wary about interfering with the Tribunal's assessment that the exercise is too speculative. However, it must interfere if the Tribunal has not directed itself properly and has taken too narrow a view of its role.

(6) The s.98A(2) and **Polkey** exercises run in parallel and will often involve consideration of the same evidence, but they must not be conflated. It follows that even if a Tribunal considers that some of the evidence or potential evidence to be too speculative to form any sensible view as to whether dismissal would have occurred on the balance of probabilities, it must nevertheless take into account any evidence on which it considers it can properly rely and from which it could in principle conclude that the employment may have come to an end when it did, or alternatively would not have continued indefinitely.

(7) Having considered the evidence, the Tribunal may determine:

(a) That if fair procedures had been complied with, the employer has satisfied it - the onus being firmly on the employer - that on the balance of probabilities the dismissal would have occurred when it did in any event. The dismissal is then fair by virtue of s.98A(2).

(b) That there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly.

(c) That employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in the **O'Donoghue** case.

(d) Employment would have continued indefinitely.

However, this last finding should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored."

36. Article 130A of the 1996 Order is concerned with the procedural fairness of dismissals. Employees are regarded as unfairly dismissed if the statutory dismissal procedure was not complied with and the failure to comply was attributable to the employer. By Article 130A (1) of the 1996 Order where the statutory dismissal procedure is applicable in any case and the employer is responsible for non-completion of that procedure, the dismissal is automatically unfair. The statutory disciplinary and dismissal procedures are set out in the Employment (NI) Order 2003 (Dispute Resolution) Regulations. Essentially there are three steps in the standard disciplinary and dismissal procedure which the employer must follow when considering the termination of any employment as follows -

"Step 1: Statement of grounds for action and invitation to meeting

1. - (1) The employer must set out in writing the employee's alleged conduct or characteristics, or other circumstances, which lead him to contemplate dismissing or taking disciplinary action against the employee.

(2) The employer must send the statement or a copy of it to the employee and invite the employee to attend a meeting to discuss the matter.

Step 2: Meeting

2. - (1) The meeting must take place before action is taken, except in the case where the disciplinary action consists of suspension.

(2) The meeting must not take place unless –

(a) the employer has informed the employee what the basis was for including in the statement under paragraph 1(1) the ground or grounds given in it, and

(b) the employee has had a reasonable opportunity to consider his response to that information.

(3) The employee must take all reasonable steps to attend the meeting.

(4) After the meeting, the employer must inform the employee of his decision and notify him of the right to appeal against the decision if he is not satisfied with it.

Step 3: Appeal

3. - (1) If the employee does wish to appeal, he must inform the employer.

(2) If the employee informs the employer of his wish to appeal, the employer must invite him to attend a further meeting.

(3) The employee must take all reasonable steps to attend the meeting.

(4) The appeal meeting need not take place before the dismissal or disciplinary action takes effect.

(5) After the appeal meeting, the employer must inform the employee of his final decision."

37. Article 17 of the Employment (Northern Ireland) Order 2003 ('the 2003 Order') provides for adjustment of awards made by industrial tribunals where the claim relates to any of the jurisdictions listed in Schedule 2 of that Order. Unfair dismissals are included in that Schedule. Where a tribunal finds that a failure to complete the statutory procedure is attributable to failure by the employer, it may increase any award it makes to the employee by between 10% to 50% if the tribunal considers it just and equitable in all the circumstances to do so unless there are exceptional circumstances which would make an increase of that percentage unjust or inequitable. This only applies to the compensatory award. Similarly, if the employee fails to complete the statutory procedure, comply with its requirements or exercise a right of appeal a tribunal may reduce any award which it makes to the

employee by 10%, and may, if it considers it just and equitable in all the circumstances to do so, reduce it by a further amount, but not so as to make a total reduction of more than 50%.

CONTRIBUTORY CONDUCT

38. Article 156(2) of the 1996 Order, provides, in relation to the issues of the amount of a basic award and contribution on the part of the claimant:-

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

39. Article 157(6) of the 1996 Order provides in relation to the issues of the amount of a compensatory award and contribution on the part of the claimant:-

> "Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

In most cases, the same reduction will be applied to both the basic and compensatory awards.

DISCUSSION

40. The respondent's disciplinary procedure adheres closely to best practice and if followed would serve to protect the interests of both the respondent and its employees. A significant feature is that managers are instructed to seek legal advice before taking formal or informal disciplinary action. Ms Baxter gave evidence that she had obtained legal advice in relation to this matter. While the claimant cast doubt on this she was understandably not in a position to adduce evidence to the contrary. Ms Baxter also gave evidence that the letter of 9 October 2019 should have been posted to the claimant by recorded delivery post in accordance with the respondent's disciplinary procedure. Ms Baxter accepted that the letter was not sent to the claimant either by recorded delivery post or any other means.

41. The respondent's disciplinary procedure also requires that in cases of instant dismissal for gross misconduct a letter must be sent by recorded delivery to the employee confirming the outcome. A letter of this nature is self-evidently a very important document as it provides written reasons for the dismissal and enables an employee to exercise the right to appeal on an informed basis. Such a letter should have been issued promptly to the claimant after the decision to terminate her employment was made on 23 October 2019. It is not in dispute that the dismissal letter was not issued until 23 December 2019 which was clearly too late to be of any practical benefit to the claimant.

CONCLUSIONS

<u>Substantive Unfair Dismissal</u>

42. The grounds for the claimant's dismissal as set out in Mr Johnston's letter of 23 December 2019 may be summarised as follows:

    (1) Setting up a secret WhatsApp group to exclude a colleague in a breach of the Bullying and Harassment Policy.

    (2) Failure to report to management a video threatening the excluded colleague in breach of the Bullying and Harassment Policy.

    (3) Posting a video in breach of the dignity and privacy of a customer.

    (4) Complaints raised about the claimant's handling of customers in breach of the respondent's manual handling policies and procedures.

    (5) Failure to inform the respondent of a school day bullying situation involving two colleagues and giving one a telephone number for the other and telling her to ring her and sort it out in breach of the respondent's Bullying and Harassment policy.

43. The claimant was summarily dismissed on 23 October 2019. It is not in dispute that the claimant was dismissed for gross misconduct a potentially fair reason for doing so. We are also satisfied that the respondent honestly believed that the claimant was guilty of gross misconduct based on the setting up of a private WhatsApp group, commenting on an unseemly video, giving inappropriate instructions in relation to bullying, mocking a disabled client and poor manual handling but it failed to carry out a proper and open investigation into these matters save for the manual handling. Ms Baxter told the tribunal that she took statements but these were not disclosed to either the claimant or the tribunal. It is therefore impossible for the tribunal to assess the adequacy or otherwise of the investigation or form a view as to whether the respondent acted reasonably. The respondent has therefore failed to discharge the burden of proving that the dismissal was substantively fair.

44. We are entirely satisfied that the claimant was unfairly dismissed. The respondent could have dismissed the claimant fairly on the basis of the allegations levelled against her but the wholesale failure of the respondent to apply a fair process fatally undermined any prospect of doing so. The claimant was clearly at fault in setting up a separate work WhatsApp group which excluded some of her colleagues. In one of the posts provided to the tribunal the claimant alluded to the need to be careful what was said on the other chat as Shannon (McLaughlin) was on it. Although the claimant was not the author or the purveyor of the offensive video posted she should have reported it to the respondent. Due in part to the flawed process the tribunal effectively heard for the first time the claimant's explanation for some of her actions. In particular she gave a cogent explanation concerning the video that was said to be making fun of a customer who was a double amputee to the effect that it was a self-mocking meme.

Procedural Unfairness

45. The dismissal was also procedurally unfair. In terms of process the respondent did not dispute that that it had made serious errors. The claimant was not provided with advance notice in writing of the allegations that were being made against her and causing it to consider dismissing her. As a result the claimant did not have a reasonable opportunity to consider her response. Although the claimant was

informed verbally of her right of appeal at the meeting she was not give a written account of the reasons for her dismissal or advised in writing of her right of appeal. While this is not a requirement of the minimum statutory procedure it is good practice and is embodied in the respondent's own written disciplinary procedure. The dismissal letter was not provided until two months after the meeting at which the claimant was dismissed and this undoubtedly made it difficult if not impossible for the claimant to have mounted an appeal. Moreover, by the time the dismissal letter was issued the claimant had secured a new job. The respondent was in breach of the three step minimum statutory procedure. No fault may be attributed to the claimant in terms of adhering to the minimum requirements.

Compensation

46. The parties did not provide the tribunal with a Schedule of Loss. The claimant sought only modest recompense in the form of 4 weeks wages up until she started a new job on 4 December 2019 and 2 weeks' notice pay which equated in total to £2,400 on her calculation. Conventionally, loss is calculated from the date of dismissal to the date on which the claim is heard but here the claimant secured alternative employment within a short period of time with greater take home pay and compensation will therefore be relatively small. We consider that the claimant contributed to her dismissal by setting up a WhatsApp group that excluded a colleague, failing to the report the video to management and the manner in which she dealt with a bullying situation particularly given her supervisory role. For this reason we are making a 20% deduction from the compensatory award. We do not regard this as an appropriate case in which to make a Polkey deduction as it would not be possible to make any meaningful assessment in this case as to whether dismissal would have occurred had a fair process taken place.

47. On the basis of the claimant's age and two completed years of employment she is entitled to two weeks' pay. However, due to the failure of the respondent to follow the minimum 3 stage statutory dismissal process the claimant is entitled to a minimum basic award of 4 weeks' pay.

Basic Award

4 weeks' minimum award (gross) = £1,900.00

Compensatory Award

As the claimant was unemployed from 23 October to 4 December 2019 and did not receive notice pay she is entitled to 6 weeks compensation (net) = £2,400.00.

Loss of Employment Rights

= £350.00

Sub-total = £2,750.00

Contributory Conduct

Deduct 20% = - £ 550.00

Sub-total = £2,200.00

Failure to follow statutory procedure

50% uplift = £1,100.00

Total Compensatory Award = £3,300.00

Add Basic Award £1,900.00

TOTAL AWARD £5,200.00

48. This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1990.

Employment Judge:

Date and place of hearing: 16-18 August 2020, Belfast.

Date decision recorded in register and issued to parties: