6387/143

Case Number: 2503016/2012

THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		***Respondent***
Mr R L Weeks	**AND**	Everything Everywhere Limited

HELD AT: Newcastle upon Tyne **ON:** 15 October 2012

EMPLOYMENT JUDGE JOHNSON

Appearances

For the Claimant: Mr Barker, Solicitor

For the Respondent: Mr Robson, Solicitor

RESERVED JUDGMENT

The claimant's complaint of unfair dismissal is not well-founded and is dismissed.

REASONS

1 The claimant was represented by Mr Barker, solicitor, who called the claimant to give evidence. The respondent was represented by Mr Robson, solicitor who called Mr Christopher Groom (team leader), Ms Helen Malcolm (team leader) and Ms Lisa Melanie Scott (operations manager) to give evidence. There was an agreed bundle of documents marked R2 comprising 228 pages. There was an agreed statement of issues marked R1. The claimant and the respondent's witnesses had all prepared typed and signed witness statements which, with the agreement of both representatives, were taken "as read". The Tribunal read all of the statements and

examined the documents from the bundle which the parties' representatives considered to be relevant.

2 The claimant's claim was of unfair dismissal. He claimed that his dismissal for alleged breaches of the respondent's social media policy was outside the range of reasonable responses of a reasonable employer in all the circumstances.

3.1 The issues were set out in an agreed statement of issues marked R1. Those were:

(i) The claimant's claim was for unfair dismissal;

(ii) The employer must show that:

(a) the claimant was dismissed;

(b) the reason for dismissal was a potentially fair reason for dismissal (section 98(1)(b) of the Employment Rights Act;

(c) it was reasonable for the employer to treat that reason as a sufficient reason to dismiss in the circumstances (section 98(4)).

3.2 In determining whether the dismissal was fair or unfair the Employment Tribunal should have regard to:

(iii) Has the employer shown that:

(d) it believed that the employee was guilty of misconduct;

(e) it had in mind reasonable grounds upon which to sustain that belief; and

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

(iv) Does the dismissal fall within the range of reasonable responses of a reasonable employer? This is to apply both to the decision to dismiss and to each stage of the procedure by which that decision was reached.

(v) Did the claimant's conduct constitute gross misconduct?

(vi) Was there evidence of disparate treatment? Has the respondent explained why other employees were treated differently? If there was disparate treatment, does such disparate treatment render the dismissal unfair?

3.3 At the commencement of the Hearing, Mr Barker on behalf of the claimant conceded that the allegation of inconsistency of treatment would not be pursued. Furthermore, the claimant would not pursue any allegation that there was an ulterior motive behind his dismissal. When asked by the Tribunal, Mr Barker conceded on behalf of the claimant that the Facebook postings which formed the subject matter of the disciplinary action, had indeed been posted on his Facebook site by the claimant, save for the one which appeared at page 158 which had been posted by one of the claimant's friends. The claimant's position remains that none of the postings amount to a breach of the respondent's social media policy. In particular, reference to his place of work as "Dante's" or "Dante's Inferno" is something which the claimant had done for some considerable time, to the knowledge of the respondent and without any complaints.

4 Both parties' representatives agreed that the range of reasonable responses test would apply both to the question of whether the postings on Facebook amounted to a breach of the respondent's social media policy and whether those postings amounted to gross misconduct.

5 Having read the statements of the claimant and the three witnesses for the respondent and heard their replies to cross-examination, having examined the documents to which it was referred and having carefully considered the closing

submissions of the parties' representatives, the Tribunal made the following findings of fact on the balance of probability:

5.1 The respondent is a supplier of mobile telephone services and equipment. It was formerly known as T-Mobile (UK) Limited and changed its name to Everything Everywhere Limited in July 2010. It continues to run the Orange and T-Mobile brands in the United Kingdom. It is a substantial company with numerous outlets and call centres within the UK.

5.2 The claimant joined the respondent company on 28 April 2002 and worked as a customer service advisor. He was regarded as a competent and efficient employee with a clean disciplinary record.

5.3 The respondent has a specific "Using Social Media Sites" policy, a copy of which appears as pages 57-60 in the bundle. The first page of the policy states;

"This policy covers your responsibilities when you are using social networking sites or posting on blogs or chat rooms, whether you are at work or it`s in your own time".

The extract on page 58 states;

"You should be loyal to Everything Everywhere and always act in good faith. You should not criticise our brands, products, services, associated companies, suppliers, employees, other workers, contractors, shareholders, offices or customers in blogs or on other internet sites which allow you to post comments. Take care not to allow your comments on these websites to damage working relationships with employees and customers of Everything Everywhere or with anyone else you come into contact with through your work for Everything Everywhere. Do not post comments on internet sites which could be seen as bullying, harassment or discrimination or anything which could be seen as abusive or offensive. We will not tolerate online bullying, harassment or

discrimination and this will be treated in the same way as it would if it were face to face or by e-mail."

5.4 The claimant acknowledged that he was aware of the contents of the "Using Social Media" policy.

5.5 The respondent also has a separate disciplinary policy, a copy of which appears at pages 47-55 in the bundle. On page 48, "misconduct" is defined as "Something which breaks our rules, regulations or policies." The policy sets out circumstances in which an employee may be suspended and sets out the procedure to be adopted when an employee is to be subjected to disciplinary action. On page 53, "gross misconduct" is defined as "A serious offence which leads to a breakdown of the trust which the company has placed in you as an employee and/or is a breach of your contract of employment. It also includes misconduct which in our opinion is likely to have a negative impact on our business or reputation. Acts of gross misconduct will normally lead to summary dismissal. Summary dismissal means that you will be dismissed from the company without notice or payment in lieu of notice." There is then a list of examples of gross misconduct which include "serious subordination, acts of bullying or violence, harassment, discrimination or victimisation, any conduct either at work or externally that may have a negative effect on the company."

5.6 The claimant subscribed to and was a regular user of the social networking site known as Facebook. The claimant posted on Facebook on a daily basis, frequently commenting about his activities, experiences and opinions on various matters, including his work for the respondent.

5.7 In his postings the claimant regularly refers to his place of work as "Dante's", "Dante's Inferno" or "The Inferno". Examples of those postings appear at pages 135-148 in the bundle and cover the period from 6 January through to 10 February. Examples include:

- Hope you'll have a better day than what I'm going to have in my 12 hours in Dantes.
- Another day at Dantes, fat lad living the dream, hope you all have a better day than I'm going to have.
- 12 hours in the Inferno dampen the spirit.
- 12 hour stint in a row in the Inferno has me cream crackered.
- Dante's awaits me – what a downer 12 hours of love and mirth.
- Think I'll have a stroll in the sun. Beats the heat of Dante's Inferno.
- No Dante's Inferno for this happy fatty today.
- Fe fi fo fum 12 hours in Dantes to come.

5.8 Lisa Lynn was a work colleague of the claimants at the respondent's Doxford Business Park call centre. Ms Lynn also subscribed to Facebook where she was recorded as a "friend" of the claimants and the claimant was recorded as a "friend" of hers. Ms Lynn became aware of the frequent references to his place of work by the claimant in the terms set out above. Ms Lynn considered the posts to be inappropriate and informed the claimant's line manager, Mr Christopher Groom. That was not done on a formal basis but was mentioned to Mr Groom by Ms Lynn over lunch one day in mid February. Mr Groom was concerned that, whilst the claimant had not specifically used the company's name in his post, it may have been interpreted as a reference to the company. Mr Groom's manager, Lesley Smith, had also been informed about the comments and she asked Mr Groom to look into it. Mr Groom decided to speak to the claimant about the matter informally and simply to ask him to stop making such posts on Facebook.

5.9 Mr Groom met with the claimant on 18 February at a scheduled one to one meeting. Mr Groom took the opportunity to mention his concern about the postings on Facebook. Mr Groom said that the postings may be a breach of the respondent's social media policy and may impact upon the morale of the team who worked with the claimant, some of whom were "friends" on the claimant's Facebook account. Mr Groom said that he believed the postings were making references to work as being like Dante's Inferno. The claimant flatly refused to

refrain from making any further comments of a similar nature. The claimant made it clear that he believed nobody could interfere with his life outside of work and that he would continue posting on Facebook as he saw fit. The claimant's words to Mr Groom were, "No fucker can tell me what to do in my personal life." Mr Groom made it clear that he would make a note of their discussion and informed the claimant that failure to comply with this request could result in a formal warning or dismissal. Mr Groom provided the claimant with a further copy of the social media policy, which the claimant took away with him. Mr Groom made a note of the exchange, a copy of which appears at page 123. Mr Groom also prepared a formal "Record of Conversation" document, a copy of which appears at page 124. Mr Groom recorded the following:

- On 14 February I became aware through Lisa Lynn a team leader in complaint investigation that you had been updating your Facebook status with negative comments about working in hero retail care. I let you know I was aware of this today in your review.

- I expect you to stop with immediate effect making negative comments about Everything Everywhere or any of its partners on any social media service.

- In our conversation you said that you do not intend to stop making negative comments in regard to your feelings about working here.

- A potential consequence of failing to adhere to this instruction is disciplinary action. It may be considered as gross misconduct which can result in summary dismissal.

5.10 The record was signed by Mr Groom. The claimant was invited to sign it but refused to do so.

5.11 Mr Groom then again spoke to Lisa Lynn and asked whether she would be prepared to send to him copies of the screen shots showing what had been

posted by the claimant. Ms Lynn was unable to do so but provided Mr Groom with her Facebook account details, so that Mr Groom could log onto her Facebook page and see the posts for himself. Mr Groom did so. Copies of the postings were obtained and those are the ones referred to above. Of particular concern to Mr Groom was the posting which appears at page 158. This is a posting by a friend of the claimant in response to some of the comments he made on his "wall" on Facebook. It is a picture of what appears to be the devil in hell with the words "Dante's Inferno" at the top of the picture and the T-Mobile logo printed below the picture. Although this particular image had not been posted by the claimant personally, the Tribunal found that it was obviously one posted by someone who had read his comments and made the connection between the claimant's place of work and Dante's Inferno. The Tribunal found that a reasonable inference to be drawn from this picture was that working for the respondent as the claimant did was equivalent to working in Dante's Inferno.

5.12 Lisa Lynn became concerned that the claimant had become aware that she was the person who had reported his Facebook postings to Mr Groom. On 18 February the claimant posted on his Facebook site the following comment:

> "Facebook? It saddens me that people request to be your friend and then stab ya in the back – I'm a big believer in karma, what goes round comes round. If ya don't like what I put on my Facebook status don't read it and take yourself off my friends list. You requested me. I ain't changing what I say on my Facebook page so eat cake bitch!

5.13 On 19 or 20 February the claimant then posted a further comment on Facebook as follows:

> "Well been a long day – 12 hours in Dantes then off to the sweat factory for a real tough sesh and a long sauna, fuelled by anger, they are the best. Still reeling from the knife in the back but San Miguel and me are chilling and can't wait for 5 am to come round

> so I can get back to the sweat factory as I feel another anger filled session going to engulf my morning, this is my last word on the knife in the back saga. If you perceive my light and jovial manner as a sign of weakness you may get a very unpleasant surprise. If you come to hurt me I'm fuckin ready for ya! No more words from me, next its action."

5.14 Lisa Lynn considered this post to be a threat directed towards her personally. She reported the matter on 20 February to Mr Groom. Mr Groom viewed the posting and in the evidence stated that he had been shocked as the claimant had again "deliberately ignored my instruction and I felt that his behaviour was completely inappropriate". By this time Mr Groom was aware that his manager Lesley Smith was looking into the claimant's behaviour. Mr Groom believed that the claimant's behaviour was clearly a breach of the Using Social Media Sites policy, both by referring to the company as Dante's inferno and by posting a threat against Lisa Lynn.

5.15 On 21 February 2012 Lisa Lynn provided a formal signed statement to Lesley Smith. She described how she believed the comments made by the claimant in his Saturday evening posting ("eat cake bitch") had been directed towards herself. Lisa Lynn noted that two other work colleagues had indicated that they "liked" the particular posting. Ms Lynn was sufficiently distressed that she did not wish to go to work the following day because of the comments made by the claimant and the support indicated by some of his colleagues. Ms Lynn also referred to the posting made the following day (page 157). Ms Lynn stated that she felt "very intimidated and threatened". Ms Lynn went to work on 20 February but stated that she was "very upset and had been taken off the floor by a colleague" as she was crying at her desk. She asked to be able to park her vehicle at the front of the building, as she felt very intimidated. She felt hostility from her colleagues at her workplace and described herself as being nervous, on edge and very upset by the comments – "next time its action". She described herself as "feeling very vulnerable and isolated by the whole incident."

5.16 Lesley Smith, the operations manager, then approached Helen Malcolm and explained that there was a potential disciplinary matter relating to the claimant and that Ms Smith would like Ms Malcolm to deal with it. Ms Smith provided Ms Malcolm with an overview of the situation regarding the postings referring to "Dante's inferno", that Mr Groom had asked the claimant to stop those postings but that the claimant had refused to do so and had subsequently posted what could be perceived as threatening comments about another member of staff.

5.17 Ms Malcolm decided to suspend the claimant in accordance with the respondent's disciplinary policy. Ms Malcolm met with the claimant on 22 February and suspended him pending further investigation into his conduct.

5.18 Ms Malcolm was given a copy of the Lisa Lynn statement (page 159), the Chris Groom statement (page 162), copies of the relevant postings (pages 133-157) and a copy of the record of conversation and meeting between Mr Groom and the claimant on 18 February (pages 123 and 124). Ms Malcolm also printed off further copies of the respondent's code of conduct, Using Social Media Sites policy and disciplinary policy.

5.19 No further investigation was carried out by Ms Malcolm. Having considered the contents of the various documents she considered it appropriate to convene a formal disciplinary hearing under the respondent's disciplinary policy. The letter at page 163 dated 24 February 2012 was sent to the claimant inviting him to attend a meeting on 7 March. He was advised of his right to be accompanied. The allegations against the claimant were:-

> "Namely that you breached the company's social media policy and company's code of conduct policy and specifically you have made comments on Facebook which may be deemed as criticising the company's image and reputation".

5.20 The disciplinary hearing took place on 7 March. Minutes appear at page 170-178 in the bundle. The claimant was accompanied by a work colleague. With the letter convening the disciplinary hearing the claimant had been sent copies of all of the relevant policies and copies of the various postings which formed the subject matter of the disciplinary action.

5.21 The claimant readily confirmed that the references to "Dante's" and "Dante's Inferno" were references to his place of work, but tried to argue that those comments were not negative. The claimant further added that he had been making such references for some considerable time and that other team leaders at his place of work were aware of his postings and had never made any objection. The claimant therefore believed that his postings did not constitute a breach of the respondent's policy. The claimant refused to accept that he had done anything wrong. The claimant acknowledged that he had been told by Chris Groom to stop making those posts, but commented that he had taken exception to the way in which Mr Groom had spoken to him, which he considered to have been in a "threatening and bullying manner" and as a result he had refused to sign the record of conversation and had refused to stop making the posts.

5.22 Ms Malcolm then dealt with the "eat cake bitch" posting. The claimant denied that this was directed towards Lisa Lynn, insisting that it was meant for all of his friends on Facebook and was not directed at anyone specific. Ms Malcolm pointed out that the phrase "eat cake bitch" seemed very specific and appeared to be pointed at a single individual as it said "bitch" and not "bitches".

5.23 Ms Malcolm then turned to the posting which appears at page 157 and which concludes with the words, "If you come to hurt me I'm fuckin ready for ya - no more words from me next its action". The claimant accepted that this post was about Lisa Lynn. However, he said that the "action" referred to "legal action". The claimant did not accept that anyone reading the post may consider it to be threatening. The claimant again took exception that his character was being called into question.

5.24 Ms Malcolm finally dealt with the posting which appears at page 158, where the friend of the claimant had posted on the claimant's account the picture bearing the image of Dante's Inferno with the respondent's name and logo printed below it. Ms Malcolm explained that someone had clearly made the connection between the claimant's place of work, the respondent and the reference to Dante's Inferno. The claimant acknowledged the connection and stated that as soon as he had seen the image he had requested that it be removed by the friend who had posted it and that this had been done.

5.25 The claimant had wanted to speak to Lesley Smith about the matter, in the belief that by so doing the whole matter could be resolved. Ms Malcolm did not agree to that. She informed the claimant that she would speak to the respondent's ER (employee relations) specialist before reaching her decision.

5.26 Ms Malcolm was satisfied that the claimant's activities did amount to a breach of the respondent's Using Social Media policy and was a breach of the respondent's disciplinary policy. She spoke to ER and explained that she considered the claimant's actions to amount to gross misconduct and that she believed dismissal to be the appropriate sanction. With ER's assistance Ms Malcolm then drafted the letter of dismissal which appears at page 186 and which is dated 13 March 2012. The letter sets out that Ms Malcolm had decided to summary dismiss the claimant for gross misconduct. The letter states;

> "The reason for your dismissal for gross misconduct was a result of your conduct. You have breached the company code of conduct and the company social media policy; specifically the reasons for this decision are:-
>
> - I feel that the comments you made on Facebook have brought the company into disrepute by referring to T-Mobile as Dante's Inferno. By using derogatory language during ongoing comments on Facebook which led to another individual making the

association that Dante's Inferno was in fact T-Mobile enabling them to post an illustration of T-Mobile as being Dante's Inferno. I feel that making these inappropriate comments on Facebook you have encouraged your friends to be derogatory about the company, effectively criticising the company name and image.

- It is reasonable for me to believe based on the events and facts that you feel aggrieved at Lisa Lynn for highlighting the Facebook comments to management. It would not be unreasonable for me to interpret the comments you made on your Facebook as a veiled threat towards Lisa Lynn. It is for the company to ensure the safety and well-being of others, notably your comments "eat cake bitch"; "knife in the back" and "no more words and still reeling from the knife in the back ... as I feel another anger filled session going to engulf my morning this is my last word on the knife in the back saga if your coming to hurt me I'm fucking ready for ya no more words from me its actions".

- You were previously given a file note for leaving inappropriate comments on Facebook which were seen as a slur against the company. However, you received to sign the file note and also refused to stop making these types of comments on Facebook.

- As a result of this there is now the loss of trust and confidence in you as an employee of the company".

5.27 The letter then went on to set out in detail Ms Malcolm's findings. The letter informed the claimant of his right to appeal.

5.28 The claimant submitted an appeal on 22 March but it did not set out his reasons. He then set out detailed reasons in the document which appears at page 203. The grounds for his appeal were:-

(a) He was not allowed to consult a senior manager.

(b) He had not put T-Mobile into disrepute.

(c) He wished to dispute the character assassination which had taken place.

(d) He wished to dispute the unlawful way in which pages from his Facebook account were obtained.

(e) That the whole thing had nothing to do with him putting T-Mobile into disrepute.

5.29 Ground (d) above set out the claimant's concern about how the details were obtained from his Facebook account. This was a matter which had been raised by the claimant at the disciplinary hearing. In simple terms, the claimant's position was that he had not given anyone permission to access his Facebook account and therefore any information and data from that account had been obtained illegally. It was explained to the claimant that one of his "friends" on Facebook was Lisa Lynn and that she would therefore have access to this material. She had given permission to Chris Groom to access that material. The claimant did not accept this explanation. The respondent's position was that once the information was posted on Facebook it was effectively accessible by others, whether or not the claimant had given prior permission for that. The fact of the matter was that the information had been seen by Lisa Lynn and reported by her to the respondent.

5.30 The appeal hearing was conducted by Lisa Melanie Scott, operations manager, on 29 May 2012. The minutes from the appeal hearing appear at pages 206-211 in the bundle. The claimant was again accompanied. He again went through his grounds of appeal in turn.

5.31 The first issue raised by the claimant was that he had not been allowed to consult with Lesley Smith at the outset and that had he been allowed to do so the whole matter could have been resolved. The claimant had in fact asked to speak to Lesley Smith on the morning of his suspension but Ms Smith had not been available at that time. Ms Scott did not consider this to be a material matter or a viable reason for overturning the decision to dismiss.

5.32 The claimant's explanation for refusing to sign the record of conversation produced by Mr Groom was because of the way in which the claimant perceived he had been spoken to by Mr Groom. Ms Scott considered this to be unlikely bearing in mind her knowledge of Mr Groom. The claimant then went on to state that he had been on medication for depression and was shocked that Lisa would report his behaviour and feel threatened by him. The claimant then became agitated during the appeal hearing and on four occasions the hearing had to be adjourned, twice at the request of the claimant's representative and twice at the request of Ms Scott because of the claimant's behaviour.

5.33 The claimant complained that he had not received any official warning in relation to his conduct, but Ms Scott pointed out that he had refused to sign the record of conversation which was tantamount to a warning. The claimant also said that he could not understand why Lisa Lynn would suddenly take exception to the comments on Facebook when he had referred to "Dante's Inferno" for a number of years. The claimant considered that he had been subjected to a character assassination and that there had been inadequate investigation into his character and previous good record.

5.34 Finally, the claimant insisted that his postings had not brought T-Mobile into disrepute. He also believed that the sanction of dismissal was too harsh in the circumstances.

5.35 Save for his insistence that there had been inadequate investigation into his previous good record and that he had been denied the opportunity of

speaking to Lesley Smith, the claimant did not allege that there was any other procedural defect in the disciplinary process or the appeal hearing itself.

5.36 Ms Scott considered the evidence against the claimant, his explanations and the grounds of his appeal. Ms Scott rejected the alleged refusal to allow the claimant to speak to Lesley Smith on the grounds that it would have made no difference at all to the outcome. Ms Scott concluded that Ms Smith's approach would have been no different to that adopted by Chris Groom. Ms Scott considered the claimant's comments about suffering from depression but again felt that this had no bearing on his behaviour or the fairness of his dismissal. She acknowledged that there had been no official warning as per the disciplinary procedure but was satisfied that his conduct amounted to gross misconduct which would in any event justify summary dismissal. Ms Scott rejected the allegation that the information from Facebook had been obtained illegally and also noted the claimant's lack of contrition and his refusal to acknowledge that he had done anything wrong. She also noted his aggressive and threatening demeanour at the appeal hearing itself.

5.37 Ms Scott concluded that the posting of the references to Dante's Inferno amounted to a breach of the respondent's social media policy. It was clear to Ms Scott that the connection had been made by at least one person viewing the site, namely the one who had posted the image of Dante's Inferno with the respondent's logo beneath it. Several other "friends" had indicated that they liked the claimant's posts. Ms Scott was also satisfied that the other comments had been directed at Lisa Lynn and were both intimidating and threatening.

5.38 Ms Scott concluded that the decision to dismiss the claimant should be confirmed and the appeal was dismissed.

5.39 The claimant presented his complaint of unfair dismissal to the Employment Tribunal on 8 June 2012.

THE LAW

6 Section 94 of the Employment Rights Act 1996 states that an employee has the right not to be unfairly dismissed by his employer.

7 Section 98 of the Employment Rights Act 1996 states:-

(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 subsection (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 subsection if it –

(b) relates to the conduct of the employee.

(4) 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.

8 In law, the correct approach for an Employment Tribunal to adopt in answering the question posed by section 98(4) is as follows:-

(1) The starting point should always be the words of section 98(4) themselves;

(2) In applying this section an Employment Tribunal must consider the reasonableness of the employer's conduct, and not simply whether they (the members of the Employment Tribunal) consider the dismissal to be fair;

(3) In judging the reasonableness of the employer's conduct an Employment 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 Employment Tribunal 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. (**Iceland Frozen Foods Limited v Jones [1982] IRLR 439**)

9 The reason for the dismissal of an employee is a set of facts known to an employer, or it may be a set of beliefs held by him, which causes him to dismiss the employee. Once the employer has established before the Tribunal that the real reason for dismissing the employee is one within section 98(1)(b), then the Tribunal has to decide whether the dismissal was fair or unfair. That requires first and foremost the application of the statutory test set out in section 98(4)(a). In applying that subsection the Tribunal must consider the reasonableness of the employer's decision to dismiss for that reason. That involves a consideration in a misconduct case of three aspects of the

employer's conduct. Firstly, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; secondly did the employer believe that the employee was guilty of the misconduct complained of and thirdly did the employer have reasonable grounds for that belief. If the answer to each of those questions is "yes", then the Tribunal must decide on the reasonableness of the response of the employer. In doing the exercise set out above the Tribunal must consider by the objective standards of the hypothetical reasonable employer, rather than by reference to its own subjective views, whether the employer has acted within a band or a range of reasonable responses to the particular misconduct found of a particular employee. If it has, then the employer's decision to dismiss would be reasonable. The Tribunal Judge must not simply consider whether he thinks that the dismissal was fair and thereby substitute his own decision as to what was the right course to adopt, for that of the employer. The Tribunal Judge must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which "a reasonable employer might have adopted." The Tribunal should focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal and not on whether in fact the employee has suffered an injustice.

10 In a case where an employee is dismissed because the employer suspects or believes that he has committed an act of misconduct, in determining whether that dismissal is unfair the Tribunal has to decide whether the employer who discharged the employee on the ground of the misconduct in question entertained a reasonable suspicion amounting to a belief of the guilt of the employee of that misconduct at that time. This involves three elements. First there must be established by the employer the fact of that belief – that the employer did believe it. Second it must be shown that the employer had in his mind reasonable grounds upon which to sustain that belief. And third, the employer at the stage at which he formed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case. (**British Home Stores Limited v Burchell [1978] IRLR 379**)

11 An employer suspecting an employee of misconduct justifying dismissal cannot justify their dismissal simply by stating an honest belief in his guilt. There must be reasonable grounds and they must act reasonably in all the circumstances having regard to equity and the substantial merits of the case. They do not have regard to equity in particular if they do not give the employee a fair opportunity of explaining before dismissing him. And they do not have regard to equity or the substantial merits of the case if they jump to conclusions which it would have been reasonable to postpone in all the circumstances until they had, "carried out as much investigation into the matter as was reasonable in all the circumstances of the case". That means that they must act reasonably in all the circumstances and must make reasonable enquiries appropriate to the circumstances. If they form a belief hastily and act hastily upon it without making the appropriate enquiries or giving the employee a fair opportunity to explain himself, their belief is not based on reasonable grounds and they are not acting reasonably. (**Weddle & Co Limited v Tepper [1980] IRLR 96**)

12 The range of reasonable responses test applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it was to other procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason. (**Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23**)

13 In determining whether an employer carried such investigation as was reasonable in all the circumstances, the relevant circumstances include the gravity of the charges and their potential effect upon the employee. The investigator carrying out the enquiries should focus no less on any potential evidence that may exculpate or at least turn towards the innocence of the employee, as any evidence directed towards proving the charges. (**A v B [2003] IRLR 405**)

14 Allegations of misconduct relating to the use of social medical sites are becoming more frequent. Many individuals using social networking sites fail to appreciate, or underestimate, the potential ramifications of their "private" online conduct. Employers now frequently have specific policies relating to their employees' use of social media in which they stress the importance of keeping within the

parameters of acceptable standards of online behaviour at all times and that any derogatory and discriminatory comments targeted at the employer or any of its employees may be considered grounds for disciplinary action.

15 There is no reason why an employer should treat misconduct arising from the misuse of social media in any way different to any other form of misconduct. This means that the fairness of any subsequent dismissal will be determined in accordance with section 98(4) of the Employment Rights Act 1996. The Tribunal must ask itself whether the employer acted reasonably in treating the reason given for the employee's dismissal as sufficient (Section 98(4)9a)) and the question of fairness must be determined in accordance with equity and the substantial merits of the case in accordance with section 98(4)(b). Any dismissal that falls outside the range of responses of a reasonable employer will be unfair.

16 Misconduct cases involving the use of social media typically fall into one of two categories – inappropriate behaviour by an employee that is exposed through social media, or derogatory comments about the employee's workplace posted on a social networking site. The employer should carefully consider the likely impact of the employee's conduct and its staff or business, before taking any disciplinary action. Measures taken against the employee should be proportionate to the seriousness of the offence. Comments amounting to harassment and bullying are likely to constitute gross misconduct which may result in summary dismissal. Similarly, conduct which is likely to cause reputational damage to the employer and which is likely to bring the employer into disrepute may amount to gross misconduct.

17 Whether any particular kind of conduct amounts to "gross misconduct" is not solely a matter for the employer. Whilst it may be open to an employer to specifically categorise certain types of conduct as "gross misconduct", the sanction for which may be summary dismissal, the employer must always act within the range of reasonable responses open to a reasonable employer in all the circumstances of the case. An employer's decision to categorise conduct as gross misconduct justifying summary dismissal remains subject to the range of reasonable responses test.

18 In the present case, the allegations against the claimant related to his use of the Facebook social media network. There was no doubt that the postings which formed the subject matter of the disciplinary action had indeed been posted by the claimant. The claimant readily admitted that. The image on page 158, although posted by a "friend" of the claimant, was undoubtedly as a result of the claimant's earlier references to his place of work as "Dante's Inferno". The claimant had been using that phrase for some considerable time and that use was known to some of his team leaders, none of whom had objected. The respondent did not produce any evidence to show that it had suffered any specific or particular reputational damage as a result of that. The question of whether the respondent's reputation was "likely" to be damaged is slightly different. The Tribunal is satisfied that the use of such references over a long period of time may well be "likely" to cause damage to the respondent's reputation. What is more important is that the respondent was made aware of the posts and took steps via Chris Groom to prevent any repetition. From that date the claimant was undoubtedly aware that the respondent took exception to the posting and that by continuing to post in such terms the claimant was leaving himself wide open to disciplinary action. The claimant's insolent and vulgar response to Mr Groom`s warning was totally unreasonable and without merit.

19 The claimant acknowledged that the post at page 157 was directed towards Lisa Lynn. The Tribunal found that Mr Groom, Ms Malcolm and Ms Scott all believed that Lisa Lynn was indeed threatened and intimidated by the contents of that post. The Tribunal found that a reasonable employer in such circumstances would conclude that such a post was indeed threatening and intimidating and in clear breach of the respondent's disciplinary policy with regard to bullying and harassment. The claimant's attempts to argue that the "eat cake, bitch!" post was not directed to Lisa Lynn as disingenuous and further damaged his credibility.

20 Mr Barker on behalf of the claimant challenged the adequacy and sufficiency of the respondent's investigation into these matters. He bravely argued that the respondent had failed to comply with the claimant's request to investigate his previous good record and to explore with Lesley Smith and if necessary Lisa Lynn, that his personal character was such that he would never embark upon a course of conduct

designed or intended to harm any of his colleagues. The Tribunal found that the respondent's investigation satisfied the test in **Burchell v British Home Stores** and **Sainsbury's Supermarkets Limited v Hitt**. It was reasonable in all the circumstances. Those involved in the disciplinary process were in no doubt as to the claimant's previous clean disciplinary record and his good working record. It was reasonable for them to accept the impact which the claimant's postings undoubtedly had upon Lisa Lynn. Mr Groom had made a brave and sensible attempt to dissuade the claimant from any future transgressions about the way he used his Facebook account. The claimant made it abundantly clear that he was not prepared to change his ways.

21 The Tribunal found that the respondent genuinely believed on reasonable grounds after a reasonable investigation that the claimant had committed the acts of misconduct for which he was disciplined and subsequently dismissed.

22 That then left the question of whether the decision to dismiss the claimant fell within the range of reasonable responses of a reasonable employer in all of those circumstances. The measure taken by the respondent against the claimant was proportionate to the seriousness of the offence or offences. The Tribunal found that the final threatening post against Lisa Lynn was of itself sufficient to justify dismissal. That was a cruel and vicious comment, which undoubtedly caused Ms Lynn to be intimidated and genuinely frightened. It was by its nature a retaliatory measure against Ms Lynn having brought to her employer's attention the inappropriate postings relating to "Dante's Inferno". The claimant's analogy to his place of work as "Dante's Inferno" was one which the respondent clearly regarded as far less serious, as shown by Mr Groom's willingness to simply request the claimant to give an assurance that he would withdraw any posts and desist from any future postings of that nature. However, once it became clear that other Facebook users had made the connection between Dante's Inferno and T-Mobile it was reasonable for the respondent to take steps to ensure that its reputation suffered no further damage. Cumulatively, along with the posts directed at Lisa Lynn, the Tribunal found that some reasonable employers would have concluded that the claimant's conduct amounted to gross misconduct and a serious breach of the social media policy and disciplinary policy. The decision to dismiss was one which some

reasonable employers may have arrived at and was therefore one which fell within the range of reasonable responses.

23 Accordingly the claimant's complaint of unfair dismissal is not well-founded and is dismissed.

G. Johnson

G Johnson EMPLOYMENT JUDGE

RESERVED JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON

24th October 2012

RESERVED JUDGMENT SENT TO THE PARTIES ON

31/10/12

AND ENTERED IN THE REGISTER

L. Haswell

FOR SECRETARY OF THE TRIBUNALS