THE INDUSTRIAL TRIBUNALS

CASE REF: 704/11

CLAIMANT: **Daniel Joseph Teggart**

RESPONDENT: **TeleTech UK Limited**

DECISION

The unanimous decision of the tribunal is that the claimant was not unfairly dismissed and his claim is dismissed.

Constitution of Tribunal:

Chairman: **Mr B Greene**

Members: **Mr S Pyper**
Mr R Hanna

Appearances:

The claimant appeared in person.

The respondent was represented by Miss M McGinley of EEF Northern Ireland.

Sources of Evidence

1. The tribunal heard evidence from the claimant and on behalf of the respondent from Mr G Riddiough, Ms Williamson and Ms K Mellon. The tribunal also received two bundles of documents amounting to 410 pages, an agreed chronology and two written submissions of 66 pages.

The Claim and Defence

2. The claimant claimed unfair dismissal. The respondent denied that the claimant had been unfairly dismissed. The respondent asserted that the claimant had been dismissed for gross misconduct.

The Issues

3. The issues to be determined by the tribunal were:-

   (1) Did the claimant suffer a breach of his rights under Articles 8, 9, or 10 of the Human Rights Act 1998?

(2) Was the claimant unfairly dismissed by the respondent?

(3) If the dismissal was unfair what is the appropriate remedy?

Findings of Fact

4. (1) The respondent employed the claimant from 11 July 2007 until 26 January 2011 as a customer service representative.

(2) The respondent is a UK subsidiary of TeleTech Inc a leading global service provider of strategic customer management solutions. Its operation in Belfast primarily involves the function of a call centre for a number of key clients. It employs almost 800 people at its Belfast operation.

(3) The claimant had a profile on Facebook and posted messages and comments on Facebook from time to time. The claimant's Facebook friends included a number of fellow employees of the respondent and also a number of persons who were not employees of the respondent.

(4) From the claimant's home, on his own computer and in his own time, on 19 December 2010 the claimant posted a message on his Facebook page which stated,

> "quick question who in Teletech has A not tried to fuck? She does get around!"

A number of other persons added comments to the claimant's Facebook page, further discussing or debating the topic raised by the claimant.

(5) A was known to the claimant as a work colleague but was not a friend.

(6) It appears A did not see the Facebook page initially. She was excluded from it. However she was told about it by a work colleague, Corey Breen and it may have been shown to her.

(7) On 20 December 2010 A spoke to the claimant's then girlfriend to ask him to remove the page.

(8) A series of emails then ensued between a person called Mark Spence and the respondent. From the email of 27 December 2010 it is clear that Mark Spence knew the claimant and A, who were both based in the Belfast office. He stated that the comments were in breach of company policy but finished the statement with a question mark. He referred to the screen shot on which he had seen the comments and set out an address.

(9) The tribunal is satisfied that Mark Spence had attached a copy of the comments to his original email although this only became clear following further research on emails provided to the respondent. It seems an attachment only appears on the first and final emails and not on intermediary emails.

(10) The respondent did not make any attempt to contact Mark Spence to obtain a statement from him or to find out how he became aware of the claimant's Facebook page or if he had any connection with any of the employees of the respondent or how he knew two out of almost 800 employees.

It appears that Mark Spence is not and was not ever an employee of the respondent.

(11) As a result of the claimant's girlfriends telling him of A's request to remove the page the claimant posted another message on his Facebook page. He believed that A's intervention with his girlfriend was an attempt to manipulate both his girlfriend and him and he was not pleased with that and posted further comments on his Facebook page.

The further comment was,

> "A can go and suck donkey dick … LOL".

Again a number of other persons made comments. The date of the second post is not clear.

(12) Corey Breen approached Gordon Riddiough, the service delivery manager, on 13 January 2011 and complained about the Facebook comments.

(13) On the same day Gordon Riddiough spoke to A who confirmed that she had been told about the comments by some of her friends who were also Facebook users. She was upset, physically distressed and tearful. Mr Riddiough did not conduct a formal investigatory meeting with A nor did he record what she had said nor obtain a statement from her at that time.

(14) The respondent has a number of policies which are pertinent to this claim and the claimant's dismissal.

(a) The Dignity at Work Policy states,

> "It is the policy of TeleTech to provide a safe working environment, free from harassment and intimidation. …"

The policy also states:-

> "Harassment and bullying are considered misconduct and if proven may result in the immediate dismissal of the offender.
>
> **<u>Definitions of Unacceptable Behaviour</u>**
>
> Harassment is any of the following:
>
> - Unwanted conduct, whether verbal or not, which violates the dignity of the individual; or

- Any form of verbal or non verbal conduct, which creates an intimidating, hostile, degrading, humiliating or offensive environment,

Harassment can take many forms, it can be visual, verbal or physical and may be prompted by an individual's sex, race, ethnic group, religion, personal beliefs, nationality, sexual orientation, age, physical or mental ability or some other personal characteristic".

(b) The Code of Conduct provides,

"**Discrimination Harassment**

We are committed to maintaining a working environment based on mutual respect. One that is free from discrimination or harassment, including intimidating, hostile, or offensive conduct. Discrimination and harassment based on ethnicity or national origin, race, color, gender, religion, sexual orientation, disability, age, martial status, or other category protected by law is strictly prohibited.

Inappropriate or unwelcomed sexual behaviour is strictly prohibited. The company does not permit advances, requests for sexual favours, or other verbal, written, visual, or physical conduct of a sexual nature.

Harassing or discriminating conduct may occur on or off TeleTech premises and during work or non-working hours. Harassment or discrimination is prohibited whether committed by or against subordinates, managers, supervisors, co-workers, or non-employees, including vendors, clients or other customers.

A violation can occur even when the conduct does not rise to the level of unlawful discrimination or harassment. Nothing in the Code of Conduct is designed or intended to limit TeleTech's authority to discipline or take remedial action for conduct that is, in TeleTech's sole discretion, determined to be unacceptable. "

(c) The respondent's Disciplinary Policy sets out examples of gross misconduct. Those applicable to this claim are;-

"13. Serious acts of Harassment and Bullying or other discrimination including, racist, sexual or other offensive remarks, gestures or actions directed at fellow employees, customer or clients.

14. Bringing the company into serious disrepute through actions taken either on or off company sites."

(15) A forwarded the email she had received from Corey Breen to Gordon Riddiough on 13 January 2011.

(16) The respondent held an investigatory meeting with the claimant on 14 January 2011.

(17) At the investigatory meeting the claimant accepted he was the author of the offending pages on Facebook.

(18) The respondent suspended the claimant, effective from 14 January 2011, pending investigation of the complaint.

(19) On 14 January 2011 the claimant was invited to a disciplinary meeting scheduled for 18 January 2011. The letter indicated:-

> "… The purpose of this meeting is to discuss your alleged gross misconduct in accordance with TeleTech's disciplinary policy, code of conduct and dignity at work policy in that you have made inappropriate comments on Facebook on multiple occasions in relation to fellow employee A which the company may consider to constitute bullying and harassment. In addition it is alleged that your use of TeleTech's name in association with these comments within a social media forum may bring the company into disrepute."

The claimant was provided with the disciplinary policy, the code of conduct, the dignity at work policy, the copies of three of his Facebook pages and the notes of the investigatory meeting.

(20) The claimant made a further comment on his Facebook page on the evening of 14 January 2011 at 19.59 pm where he stated:-

> "its been brought to my attention at previous posts that i have made on my facebook about A have been taken that i hate her and want her dead, this is not true i neither like or dislike you A not going to apologize just wanted you to know that it was a piss take didnt mean it seriously, the cobra joke i heard from jimmy carr yurs was the first name that came to mind, my intention was not to upset you just take the piss a bit but seems as if you my have taken it a bit to seriously so i'll knock it on the head."

(21) On 21 January 2011 the claimant attended the disciplinary hearing. He was accompanied by a witness. The meeting was chaired by Gordon Riddiough and he was accompanied by Kate Millen who also took notes of the meeting.

The disciplinary hearing focussed on the charges against the claimant set out in the letter arranging the disciplinary meeting, ie, that he had made inappropriate comments on Facebook about a fellow employee A which the company may consider to constitute bullying and harassment and that the use of the respondent's name in association with these comments in a social media forum may bring the company into disrepute. The claimant made a number of points in his defence:-

(a) that he did not intend to offend A;

(b) that he was entitled to make such comments as he pleased on his personal Facebook profile;

(c) that the reference to teletech was an abbreviation for telecommunications or technical and not a reference to the respondent;

(d) that when his then girlfriend asked him to remove the posting on behalf of A that he had considered that an attempt to manipulate both his girlfriend and himself and that spurred him to do a further posting;

(e) that he considered the matter to be fun or a joke;

(f) that often times when he did these things he was under the influence of alcohol;

(g) that what he had done in his view did not constitute either harassment or bullying.

(22) The respondent then had an investigatory meeting with A on 23 January 2011 two days after the disciplinary hearing.

(23) Following comments made by the claimant at the disciplinary hearing the respondent had an investigatory meeting with Chris Clarke on 25 January 2011.

The outcomes of these investigations were not reported back to the claimant nor was he given the opportunity to comment on them.

(24) The respondent met with the claimant on 26 January 2011 to explain to him the outcome of the disciplinary hearing. The respondent decided that the charge of gross misconduct was sustained and it dismissed the claimant from his employment.

(25) The claimant was given a letter informing him of his dismissal for gross misconduct with reasons on 26 January 2011.

The letter states:-

> "The reason for dismissal is gross misconduct in that on your own admission you made multiple postings on a social media site regarding a fellow employee, one of which made reference to TeleTech. You have further admitted to creating a profile in this employee's name and creating a further post posing as this employee after she had approached you through a mutual acquaintance asking that you stop and remove the previous postings."

Later in the letter Mr Riddiough stated:-

> "The remarks are deemed to be offensive and the pattern of behaviour you have admitted to is deemed to be of a harassing nature which has resulted in a degrading and humiliating environment for the employee concerned and is deemed to breach the company code of conduct (page 9) demonstrating a lack of respect for other employees. Furthermore the use of the company's name in conjunction with your comments is deemed to have brought the company into disrepute."

The claimant was told that he would be paid any outstanding monies and of his right of appeal.

(26) The claimant appealed by letter of 7 February 2011.

(27) The claimant was written to the same day inviting him to an appeal meeting scheduled for 14 February 2011.

(28) The appeal meeting was chaired by Fiona Williamson who was accompanied. The claimant was also accompanied.

The claimant read a prepared statement in which he made a number of points:-

(a) That the comments about employee A on his Facebook profile were in reality him speaking hyperbolically in that what was being suggested was impossible. It was intended to be a comment made in jest.

(b) That the comments made by him were not intended to bully or harass anyone but rather to generate a vulgar distaste for A and to suggest to her that he did not want her to view his profile.

(c) That he would, on occasions, make comments about himself and others that are disparaging.

(d) That the use of the word 'TELETECH' was intended to mean telecommunications technical as a field and was not a reference to the respondent.

(e) That to publish something on your Facebook with "everyone's" setting, means that you are allowing everyone, including people not on Facebook, to access and use the information and to associate it with you.

(f) That the comments made could not be seen to bring the company into disrepute.

(g) That the Code of Conduct refers to conduct in the workplace or business actions or the working environment or business life. It

does not cover personal actions made in relation to one's personal life or one's personal use of the internet.

(h) In relation to the Dignity at Work Policy he stated that he believed he had been unfairly treated in that his personal opinions, not made on behalf of the respondent nor using the respondent's equipment, had been brought into the workplace by another person and by so doing had stripped him of his dignity and tarnished his reputation.

(i) He did not admit to bullying and harassing A.

(j) That the respondent had not properly followed the investigatory process in that they should have started with investigation of the complainant and the alleged harasser before moving onto other witnesses.

(k) A number of witnesses, ie the claimant's girlfriend and Christopher Clarke, who had received a telephone call from A about the matter, were not interviewed.

(l) That anyone can complain to Facebook and if Facebook deemed the postings to amount to bullying they can be removed from Facebook and the maker warned. Should the maker continue to offend then his profile can be removed altogether from Facebook.

(m) That as a proper investigation had not taken place the respondent could not move on to disciplinary action because they had not complied with their own policy which states:-

> "1. Disciplinary action will only be taken against an employee when a full investigation has taken place."

(n) That as the comments made by him on his personal profile were not sent to A, then in accordance with the respondent's disciplinary policy it cannot amount to harassing or bullying of A because she was not able to see them and they were only seen by her when she was shown them by Corey Breen.

(o) In an American case, National Labor Relations Board (NLRB) v American Medical Response of Connecticut, NLRB filed a complaint against the respondent because Ms Dawnmarie Souza had been dismissed because of remarks she made on Facebook about her supervisor.

The NLRB claimed that in dismissing Ms Souza the respondent had violated her right to free speech. The respondent's rules prohibited workers from making "disparaging, discriminatory or defamatory comments when discussing the company or the employee's supervisors, co-workers and/or competitors. The case was settled. Under the settlement the respondent agreed to revise its rules to ensure that they did not improperly restrict employees from

discussing their wages, hours and working conditions with co-workers while not at work.
The respondent also pledged it would not discipline workers or discharge them for engaging in such discussions.

There was also a separate, private agreement between Ms Souza and the respondent regarding her dismissal which was not disclosed.

The offending remarks had been made by Ms Souza in her own time and from her own computer.

(p) That as his first posting was in a question form and the second one was physically possible he had not violated A's rights.

(q) The respondent had violated his rights by virtue of Articles 8, 9 and 10 of the convention of Human Rights in that:-

(i) his right to respect for his private life had been violated by the respondent during the investigation in relation to his correspondence (Art 8);

(ii) the respondent had disciplined him for manifesting his beliefs (Art 9); and

(iii) the respondent had infringed his freedom of expression.

The claimant also raised, what he believed was, disparity of treatment between him and two other employees, Ronnie Graham and Kevin McGuinness, who had made comments on his Facebook page and had not been investigated.

In the course of the appeal meeting the claimant accepted, that with hindsight, he could see how the comments were humiliating but he did not see that at the time.

(29) The claimant was provided with statements from A and Christopher Clarke and the Code of Conduct. In response to that he submitted a four page attachment to Ms Williamson on 16 February 2011. In the attachment he made a number of points:-

(a) That as the comments were directed at a number of his friends and not A he could not be guilty of harassing or bullying A.

(b) That the policy is the Dignity at Work Policy and it is designed to cover attendance at work whereas his actions were not carried out while in attendance at the workplace. The Dignity at Work Policy therefore does not apply.

(c) That he regularly mocks people on his Facebook postings.

(d) That he never intended to offend A.

(e) That he does not have any views positively or negatively towards A.

(f) That in the workplace worse things are said of employees by him and others than was posted on his Facebook page.

(g) That the procedure followed by the respondent of, investigating the claimant, then the disciplinary hearing, and then investigating the complainant A and other witnesses is the wrong procedure.

(h) That there was no evidence of bullying and harassment of A as she had not been interviewed until after the disciplinary hearing.

(i) That the respondent was in breach of its own policy on Off-duty Misconduct which states:-

> "Your supervisor, together with the security department, human resources, the corporate compliance officer, and the law department will determine if the nature and severity of any off-duty misconduct requires employment action."

The claimant is not aware that his supervisor, security department compliance officer or Law Department were involved in dealing with this alleged misconduct and therefore they are in breach of their own policy.

(j) That in A's statement she indicated that she would not be opposed to the claimant returning to work provided he stayed away from her. The claimant indicated that that would not pose a problem.

(30) The respondent carried out an investigatory meeting with the claimant's girlfriend on 24 February 2011 and a investigatory meeting with Gordon Riddiough on 28 February 2011.

(31) The claimant was told of the outcome of his appeal by letter of 28 February 2011. Ms Williamson affirmed the finding of gross misconduct and affirmed the penalty of dismissal. In the course of her letter she indicated that she did not accept that the word 'teletech' referred to telecommunications or technical as a field. She believed it was a reference to the respondent.

The Law

5. (1) To establish that the dismissal is not unfair the employer must establish the reason for the dismissal and that it was one of the statutory reasons that can render a dismissal not unfair. If an employer satisfies both of these requirements then whether the dismissal was unfair or not depends on whether in the circumstances the employer acted fairly and reasonably in treating the reason as a sufficient reason for dismissing the employee.

(2) Where an employer dismisses an employee for misconduct he must have a reasonable belief that the employee has committed an act of misconduct after having carried out a reasonable investigation (to include a reasonable disciplinary hearing and appeal) and dismissal must be within the range of reasonable responses.

(3) Procedural defects in the initial disciplinary hearing may be remedied on appeal provided that in all the circumstances the later stages of the procedure are sufficient to cure any earlier unfairness, according to the decision of the Court of Appeal in **Taylor v OCS Group Ltd [2006] EWCA Civ 702, [2006] IRLR613**. (**Harvey on Industrial Relations and Employment Law D1 paragraph [1528]**)

In that case it was stated that ultimately a tribunal must look at the overall fairness of the procedure, in particular the "thoroughness and the open mindedness of the decision maker" and not just consider whether an appeal had taken the form of a rehearing rather than a review as had been the earlier received wisdom following the decision of the EAT in **Whitbread & Co Plc v Mills [1988] IRLR 501**.

(4) When determining whether or not dismissal is a fair sanction, it is not for the tribunal to substitute its own view of the appropriate penalty for that of the employer. (**Harvey on Industrial Relations and Employment Law D1 paragraph [1534]**).

(5) In the decision of **Rogan v South Eastern Health & Social Care Trust [2009] NICA 47** the Northern Ireland Court of Appeal stated:-

> "21. … It is for the employer to establish the belief in the particular misconduct. The tribunal must then consider whether the employer had reasonable grounds upon which to sustain the belief and thirdly whether the employer had carried out as much investigation into the matter as was reasonable in all the circumstances. The tribunal must also, of course, consider whether the misconduct was a sufficient reason for dismissing the employee."

Later it added:-

> "26. … The judgment as to the weight to be given to evidence was for the Disciplinary Panel and not for the tribunal."

(6) In the decision of **Salford Royal NHS Foundation Trust v Roldan [2010] IRLR 721** the English Court of Appeal reiterated that in a misconduct case **British Home Stores Ltd v Burchell [1978] IRLR 379 EAT** remains the cornerstone of misconduct dismissals. The head note states:-

> "According to **British Home Stores Ltd v Burchell**, cases of dismissal on the ground of misconduct, the tribunal has to decide whether the employer entertained a reasonable belief in the guilt of the employee. The employer must establish the fact of that belief; that there were reasonable grounds in his mind to sustain that belief;

and that he had carried out as much investigation into the matter as was reasonable in all the circumstances of the case."

It further approved the principle in **A v B [2003] IRLR 405 EAT** that when considering reasonableness under Article 130(4) of the Employment Rights (Northern Ireland) Order 1996, relevant circumstances include the gravity of the charges and their potential effect on the employee.

In **Roldan** Elias LJ stated at 724 paragraph 13;-

> "So it is particularly important that employers take seriously their responsibilities to conduct a fair investigation where …. the employee's reputation or ability to work in his or her chosen field of employment is potentially apposite."

(7) Longmore LJ in the English Court of Appeal decision in **Bowater v Northwest London Hospitals NHS Trust [2011] IRLR 331 at paragraph 18** gave some helpful observations about a misconduct dismissal;-

> "… But the employer cannot be the final arbiter of its own conduct in dismissing an employee. It is for the ET to make its judgement always bearing in mind that the test is whether dismissal is within the range of reasonable options open to a reasonable employer.

He later added **at paragraph 19**;-

> "… It is the ET to whom Parliament has entrusted the responsibility of making what are, no doubt sometimes, difficult and borderline decisions in relation to the fairness of dismissal."

(8) Further useful comment is set out on a misconduct dismissal in the English Court of Appeal's decision in **Fuller v The London Borough of Brent [2011] IRLR 414 at 54** where Moore-Bick LJ commented;-

> "The precise nature and extent of the misconduct in question will obviously play a large part in determining whether the employer's decision to dismiss the employee is within the range of reasonable responses."

(9) 1. Everyone has the right to respect for his private and family life, his home and his correspondence (**Article 8, Schedule 1**, **Human Rights Act 1998**).

(10) 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of

public order, health or morals, or for the protection of the rights and freedoms of others. (**Article 9, Schedule 1, Human Rights Act 1998**).

(11) 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary (**Article 10, Schedule 1, Human Rights Act 1998**).

(12) **X v Y [2004] EWCA Civ 662, [2004] IRLR 625**

The Court of Appeal had to consider the interrelationship between the Human Rights Act 1998 and the Employment Rights Act 1996. It considered the position to be that an employment tribunal when applying section 98(4) (Article 130(4) Employment Rights Order (Northern Ireland) 1996) was required to give effect to convention rights under the Human Rights Act 1998 section 3. Furthermore, there was no legal justification for treating public sector and private sector employees any differently. This was for two principal reasons; the first was that HRA 1998 s3 applied directly to the Employment Tribunal itself. Secondly, there was no justification in principal as to why private sector employees should not also enjoy convention rights in an unfair dismissal context.

In **X v Y** Mummery LJ provided the following guidance to employment tribunals whenever HRA 1998 points were an issue:-

> "Whenever HRA points are raised in unfair dismissal cases, an employment tribunal should properly consider their relevance, dealing with them in a structured way, even if it is ultimately decided that they do not affect the outcome of the unfair dismissal claim. The following framework was suggested:
>
> (1) Do the circumstances of the dismissal fall within the ambit or one or more of the articles of the Convention? If they do not, the Convention right is not engaged and need not be considered.
>
> (2) If they do, does the state have a positive obligation to secure enjoyment of the relevant Convention right between private persons? If it does not, the Convention

right is unlikely to affect the outcome of an unfair dismissal claim against a private employer.

(3) If it does, is the interference with the employee's Convention right by dismissal justified? If it is, proceed to (5) below.

(4) If it is not, was there a permissible reason for the dismissal under the ERA 1996, which does not involve unjustified interference with a Convention right? If there was not, the dismissal will be unfair for the absence of a permissible reason to justify it.

(5) If there was, is the dismissal fair, tested by the provisions of ERA 1996 s98, reading and giving effect to them under HRA 1998 s3 so as to be compatible with the Convention right?"

(Harvey on Industrial Relations and Employment Law D1 [981] and [982].)

(13) The Tribunal was referred to three decisions at first instance of employment tribunals in England and Wales, **Gosden v Lifeline Project Ltd (Case No: 2802731/09)**, **Preece v J D Wetherspoon Plc (Case No: 2104806/10)** and **Stephens v Halfords Plc (Case No: 1700796/10)**. In **Preece** the claimant worked in a pub and was found to be fairly dismissed for offensive comments that she posted on Facebook concerning customers although the claimant did not mention the workplace by name. The comments she made were clearly in relation to her work. In that case, the respondent concentrated on the part the claimant had played and not the part played by others in replying to her posts. In **Gosden** the tribunal held that the claimant was fairly dismissed for passing an email onto a third party (not an employee) who subsequently passed it into his workplace. It was found that the email was clearly offensive and was not private as it had a statement stating, "it is your duty to pass it on". In **Gosden** the tribunal considered the issue of privacy under the Human Rights Act 1998 and held that it had no application as the respondent was not a public authority. In **Stephens** the claimant created a Facebook page entitled, "Halford workers against working three out of four weekend" recording his dissatisfaction at proposed workplace changes. The claimant realised that the page breached the company's policy and quickly took it down. The page was not grossly offensive. He fully acknowledged that he should not have done what he did and gave a full apology saying in mitigation that he had been off ill with stress and his judgment had been clouded. The claimant also confirmed during the disciplinary process that it would never happen again.

Application of the Law and Findings of Fact to the Issues

6. (1) The tribunal is satisfied that the respondent has identified the reason for the claimant's dismissal namely that he had committed an act of harassment against an employee and brought the company into disrepute.

(2) The tribunal is further satisfied that the reason is a conduct issue which is one of the statutory reasons that can render a dismissal fair.

The Investigation

(3) The tribunal acknowledges that there were deficiencies in the investigatory procedure followed in this case as set out below:-

(a) An initial statement was not taken from A when she was spoken to in relation to her complaint.

(b) The normal and expected procedure is that a statement would be taken from the complainant and other witnesses that the complainant has drawn to the attention of the respondent before an investigatory meeting would be held with the alleged harasser or person breaching company rules and then if there is sufficient cause the employer would move to a disciplinary hearing. That procedure was not followed here.

(c) Where further investigations take place after a disciplinary hearing the employer should inform the person faced with the misconduct charges that such investigations had taken place, the result of those investigations and provide the person with an opportunity to comment on them. Again, that was not done in this case.

(d) Where a charge of bringing the company into disrepute is brought and that is based on the evidence of an outsider (Mark Spence) one would expect some details to be obtained from that outsider of how and when he came to know of the offending comments and whether he had any connection with any of the individuals within the company even if he were not and never had been an employee of the company. Again, that was not done here.

However, in a misconduct case where the factual matters that give rise to the charge are accepted by the person charged then that usually means that the investigation need not be as extensive or detailed as would normally be expected.

That even if these deficiencies in the investigatory process were such as to render the disciplinary hearing's decision to dismiss unreliable then those deficiencies could be cured later in the process.

The Disciplinary Hearing

(4) The disciplinary hearing itself followed the normal course and dealt with the normal matters that render a disciplinary hearing appropriate, ie, the claimant knew of the charge against him; he had been provided with documentation; he

was invited to be accompanied; and he was allowed to make such comments as he saw fit.

However, the further investigations carried out after the disciplinary hearing, with A and Chris Clarke, did not add anything of substance to the disciplinary process or the charges against the claimant. Accordingly, although this practice is not to be recommended, in the circumstances of this claim the failure of the respondent to notify the claimant of the outcome of these further investigations and give him an opportunity to comment on them did not prejudice the claimant's position.

(5) The decision to find the claimant guilty of having brought the company into disrepute is seriously flawed. On the basis of the evidence before the disciplinary panel no reasonable panel could arrive at the conclusion that that element of the gross misconduct charge had been sustained. There are a number of flaws in the finding that the claimant had brought the company into disrepute;-

(a) The claimant's conduct policy requires for the offence of gross misconduct to be sustained that the employee had brought the company into serious disrepute. The finding of the disciplinary panel was that the claimant was deemed to have brought the company into disrepute.

(b) The disciplinary panel did not deal in any way with the "serious" element of that charge. Accordingly, it could not have been satisfied that that charge had been met.

(c) The concerns, set out above, in relation to the investigation of Mark Spence's evidence and the suspicion that he could be a member of the respondent's staff, mascarading as a person called Mark Spence, or alternatively that Mark Spence, if a genuine individual, had fairly intimate knowledge of persons within the respondent company or a close connection with persons within the respondent company were not investigated at all.

(d) In the absence of any statement from, or information about, Mark Spence or his connection to the respondent company or the circumstances that gave rise to his emails, there is little or no evidence of the respondent having been brought into disrepute.

(6) Though the claimant was also charged with harassing and bullying A the disciplinary panel did not find against the claimant on the ground of bullying. The only finding that was available to it was a finding of harassing of the claimant.

(7) It is reasonable for the respondent to have concluded that the use of the word 'teletech' was a reference to the company and not to telecommunications or technical or both. The similarity of that word with the respondent's name and the somewhat strained explanation advanced by the claimant, that it was a "conjunctive abbreviation" of telecommunications technical, indicate to the tribunal that that finding of the disciplinary panel was itself reasonable.

(8) The finding of harassment against the claimant was itself a reasonable conclusion open to the disciplinary panel. In so concluding the tribunal had regard to the following matters;-

(a) The comments made by the claimant on his Facebook pages were clearly comments that violated the dignity of A and were unwanted and thus fall within the first of the definitions of harassment under the respondent's Dignity at Work Policy.

(b) Similarly, the Facebook comments about A are capable of, at the very least, creating a degrading and humiliating environment. The respondent had evidence that A was upset about these comments and did not want to come into work.

They thus satisfy the second definition of harassment under the respondent's Dignity at Work Policy.

(c) On the claimant's own admission he wanted to create a vulgar distaste for A. That seems to the tribunal to be an objective that satisfies either element of the definition of harassment in the Dignity at Work Policy.

(d) When A spoke to the claimant's girlfriend to have the comments removed the claimant was offended and posted further disparaging comments about A which clearly indicated his desire to retaliate against A.

(9) The definition of harassment seems, to the tribunal, to permit harassment to be caused through comments made to others and not to the particular victim of the harassment. The creation of a vulgar distaste for A can only have happened in the workplace as the claimant did not know A outside of the workplace. The claimant's comments were sent to a number of other employees within the workplace and were known about the same day that they were placed on the claimant's Facebook page.

(10) Accordingly, the conclusion arrived at by the disciplinary panel that the claimant had committed an act of harassment against A is a conclusion that the disciplinary panel was entitled to make on the evidence before it. The disciplinary panel did not comment on whether the finding of harassment alone would have provided a sufficient ground to justify a finding of gross misconduct and to dismiss the claimant.

The Appeal Process

(11) The appeal process covered the same ground as the disciplinary hearing. It had the benefit of the further investigations carried out after the disciplinary hearing and that was known to the claimant. In addition, it carried out further investigations itself and made those available to the claimant and permitted him to comment on them before the decision was made. Accordingly, the deficiencies in the investigation have, in the tribunal's view, been cured at the appeal stage.

(12) Ms Williamson, the appeal decider, was specifically asked before the tribunal what would the difference have been had the disrepute charge not been sustained viz-a-vis a finding of gross misconduct and a penalty of dismissal. She quite fairly indicated to the tribunal that such an eventuality could have changed things but in her view the probability is that she would have upheld the dismissal on the harassment charge alone. If the decision of the disciplinary panel could be impugned for not having addressed this point then it was cured by the appeal.

(13) Accordingly, the decision of the appeal panel to uphold the finding of gross misconduct is a decision at which a reasonable appeal panel could arrive.

The Sanction

(14) The finding that the harassment was sufficient to justify a dismissal of the claimant for gross misconduct is one which a reasonable disciplinary panel and appeal panel could conclude.

The nature of the comments; their vulgarity and coarseness; the intention to create a vulgar distaste for A; the use of some of the postings as a retaliatory measure against the claimant when she sought to have the comments removed; the behaviour that was implied about A in the comments; the reluctance to withdraw them when it was clear that A had been offended; the dissemination of the comments among fellow employees of both the claimant and A; all added together put the sanction of dismissal for this act of harassment within the band of reasonable responses.

(15) The claimant's suggestion that he was treated differently to others who had posted comments of similar nature, albeit following the claimant's lead, was considered by the tribunal. During the tribunal hearing the tribunal was informed, and this was unchallenged, that one of the offending individuals, Ronnie Graham's employment was terminated on 15 January 2011, the day after the claimant's disciplinary hearing and therefore nothing could be done in relation to him. The second person to post comments, Kevin McGuinness, did not refer to 'teletech' in his comments, nor were they the subject of a complaint. These considerations caused the respondent to distinguish the treatment of these two individuals with that afforded to the claimant.

(16) The tribunal accepts that these are distinguishing features which would enable the disciplinary and appeal panel to treat the claimant's act of harassment in the way that it did.

Human Rights Act 1998

(17) Following the approach set out by the English Court of Appeal in **X v Y** the tribunal concludes that the Convention rights relied on by the claimant, Articles 8, 9 and 10 are not engaged. In so concluding, the tribunal had regard to the following matters:-

Article 8

(a) When the claimant put his comments on his Facebook pages, to which members of the public could have access, he abandoned any right to consider his comments as being private and therefore he cannot seek to rely on Article 8 to protect his right to make those comments.

Article 9

(b) The tribunal is satisfied that the "belief" referred to in Article 9 does not extend to a comment about the promiscuity of another person. In the tribunal's view, belief, in keeping with the remainder of Article 9, is intended to refer to a philosophy, set of values, principles, or mores to which an individual gives his intellectual assent or which guides his conduct or behaviour. "The limits to this concept lie in a requirement of a serious ideology, having some cogency and cohesion, …" **(Employment Law and Human Rights, Second Edition, by Robin Allen QC, Rachel Crasnow and Anna Beale)**.

Article 10

(c) The right to freedom of expression, as set out in Article 10, brings with it the responsibility to exercise that right in a way that is necessary for the protection of the reputation and rights of others. The right of freedom of expression does not entitle the claimant to make comments which damage the reputation or infringe the rights of A. The claimant does not assert that A was promiscuous but states that his comments were a joke or done for fun. A's reputation has been harmed on the basis of a joke or fun. Furthermore she has the right not to suffer harassment.

7. Accordingly, the claimant's claim for unfair dismissal is dismissed.

Chairman:

Date and place of hearing: **15, 16 September 2011; 17, 18 November 2011; and 15 December 2011, Belfast.**

Date decision recorded in register and issued to parties: