



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Zhiqian Huang  
**Respondent:** China Unicom (Europe) Operations Ltd  
**Heard at:** East London Hearing Centre  
**On:** 11 – 13 March 2020  
**Before:** Employment Judge Housego

## Representation

**Claimant:** Ms L Millin, of Counsel, direct access  
**Respondent:** Mr J Bryan, of Counsel, instructed by Hill Dickinson LLP

# JUDGMENT

1. **The Claimant was unfairly dismissed by the Respondent.**
2. **There is no reduction for contribution.**
3. **The Respondent is ordered to pay to the Claimant the sum of £52,351.60**

# REASONS

## Summary

1. The Respondent says that it dismissed the claimant for gross misconduct. It says that he sexually harassed a female colleague in WeChat (which is like WhatsApp) messages. Mr Huang claims that he was unfairly dismissed by the Respondent. He says there was simply no misconduct of any sort.

## Evidence

2. I heard oral evidence from Liyan Zhou (head of the company), from Xueyun Li (who dismissed the Claimant) and from Hao Dong (who decided the appeal). All 3 speak good English, but also made use of a Mandarin interpreter. The Claimant gave oral evidence. He did not require an interpreter. I was provided with extensive documentation including the Respondent's policy on sexual harassment and copies (with translations) of many messages.

## Law

3. No sophisticated legal analysis is required. The reason put forward is conduct which is a potentially fair reason for dismissal (S98(2) of the Employment Rights Act ("the Act")). Was that the reason? If yes, did the Respondent have a genuine belief on reasonable grounds of misconduct by the Claimant? If yes, was it gross misconduct (or misconduct justifying dismissal)? Was dismissal within the range of responses of a reasonable employer? Was the dismissal procedurally fair? If not what were the chances of dismissal if there was a fair procedure? If there was an unfair dismissal did the claimant cause or contribute to his dismissal by his conduct?

4. In deciding fairness Section 98 (4) of the Act provides "*.... 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*". There is no burden of proof, for it is an assessment of the fairness of the actions of the employer. It is not for the Tribunal to substitute its own view for that of the employer. The test in *Burchell* (below) is whether the employer had a genuine belief in misconduct on reasonable grounds, after proper investigation.

5. I have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures ("the ACAS Code").

6. Compensation for unfair dismissal is dealt with in sections 118 to 126 inclusive of the Act. Potential reductions to the basic award are dealt with in section 122. Section 122(2) provides: "*Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) 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 the amount accordingly.*"

7. The compensatory award is dealt with in section 123. Under section 123(1) "*the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer*".

8. Potential reductions to the compensatory award are dealt with in section 123. Section 123(6) provides: *"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."*

9. There is provision for increase in compensation of up to 25% if the Acas code is not followed by an employer which unfairly dismisses an employee.

10. I have considered the cases of Post Office v Foley, HSBC Bank Plc (formerly Midland Bank plc) v Madden [2000] IRLR 827 CA; British Home Stores Limited v Burchell [1980] ICR 303 EAT; Iceland Frozen Foods Limited v Jones [1982] IRLR 439 EAT; Sarkar v West London Mental Health NHS Trust [2010] IRLR 508 CA; , Sainsbury's Supermarkets Ltd v Hitt [2003] Sainsburys Supermarkets Ltd. v Hitt [2002] EWCA Civ 1588 IRLR; Sheffield Health and Social Care NHS Foundation Trust v Crabtree UKEAT/0331/09; Bowater v North West London Hospitals NHS Trust [2011] IRLR 331 CA; London Borough of Brent v Fuller [2011] ICR 806 CA; and Polkey v A E Dayton Services Ltd [1988] ICR 142 HL. The range of responses of the employer is not infinitely wide but is subject to S98(4): Newbound v Thames Water Utilities [2015] EWCA Civ 677, paragraph 61.

11. The reason given by the Respondent was misconduct which is a potentially fair reason for dismissal. The first question is whether that was the reason. If so the issue is whether it was fair, or not. Those questions are determined by the findings of fact.

12. If the reason is shown to be misconduct, the starting point for the issue of fairness is the words of section 98(4) themselves. In applying that subsection the Tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal the Tribunal must not substitute its own view of the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the Tribunal is to determine in the particular circumstances of each case whether 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.

13. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances. A helpful approach in most cases of conduct dismissal is to identify three elements (as to the first of which the burden is on the employer; as to the second and third, the burden is neutral): (i) that the employer did believe the employee to have been guilty of misconduct; (ii) that the employer had in mind reasonable grounds on which to sustain that belief; and (iii) that the employer, at the stage (or any rate the final stage) at which it formed that belief on those grounds, had carried out as much investigation as was reasonable in the circumstances of the case. The band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the

circumstances as it does to the reasonableness of the decision to dismiss.

### Findings of fact

14. The Respondent has between 60 and 70 employees. Liyan Zhou has the title of Vice President. She is the most senior person in the company. There are 7 directors below her, each with a deputy director. Xueyun Li and Hao Dong are directors.

15. Mr Huang started with the company on 06 February 2017. He had no line reports. Although his title had the word “*manager*” in it, he was not a manager of anyone in the Respondent – he had no line reports. On 02 November 2018 he was promoted to be a vice director of the office department (that is, of administration). He had a female colleague, A. After his promotion she reported to him. Before that they were of a similar level, or at least not in the same management reporting line. Among her responsibilities A was the personal assistant to Liyan Zhou, and, after his promotion, to Mr Huang as well.

16. Mr Huang and A were very good friends. They would message one another a lot, both in work and out of work. They used WeChat, which is a Chinese app similar to WhatsApp.

17. Mr Huang is married with a child. A is a single parent. There is absolutely no evidence (or allegation put to a disciplinary meeting) of any impropriety in that friendship in addition to the allegation of sexual harassment by messaging. They exchanged some 2,500 messages through the company WeChat account. Everyone in the Respondent is on it: users can select single or multiple recipients for messages. Mr Huang had another 2,000 messages in a group of 3 with A and the one person who worked in human resources, VY. Sometimes it was a group of the 3 of them, and the 3<sup>rd</sup> would sign off and the messaging continue with A and Mr Huang. These were not message and reply but a continuum of short messages, about work, about home, about nothing in particular. There are several which the Respondent says amount to harassment.

18. After Mr Huang became A’s manager he ceased to send her messages as before. He did not think it was appropriate to be on such terms of familiarity with a subordinate. There were some work related messages.

19. In November and December A spoke on 2 occasions to Ms Zhou about Mr Huang. She said that he would blind copy her into work emails more than she thought right. She expressed some concerns at his level of familiarity. Ms Zhou’s recollection, given to the person who investigated, is at 122. It was that Mr Huang often messaged her late at night, expressing his views about colleagues and the management team, and about his confidence in his own work, suggestive comments and questions, though she, Ms Zhou, did not mention sexual harassment “*as it was not clear*”. He also screen shot and sent to her messages with others. A declined to show any messages to Ms Zhou, saying they were personal. Ms Zhou did not give any thought at the first meeting to the possibility of sexual harassment. Ms A told Ms Zhou that she thought Mr Huang was someone who liked to engage in office politics. Ms A said that he would delegate to others rather than doing his job.

20. Ms Zhou did not speak to Mr Huang about this with any particularity. Ms Zhou said to the investigator that she had told him not to use the “bcc” function, to limit email to those who needed it, not to boast about his capabilities or be arrogant, and not waste colleagues’ time on WeChat to bolster his own ego, to eat humble pie and earn respect by conduct not by fact of promotion, and that he needed to be careful with female colleagues, especially Anita who was a single mother and sensitive. On the 2<sup>nd</sup> occasion (12 December 2018) Ms Zhou asked A if she was making a sexual harassment complaint, but she was not. She would think about things over Christmas.

21. Mr Huang had become concerned about A’s capability. She is a forthright individual given to coming straight to the point without any preamble. This approach did not endear her to her colleagues, many of whom were higher than she in the hierarchy. He voiced these concerns to Ms Zhou. Ms Zhou sought advice from external solicitors. She convened a meeting in mid January 2019 with those for whom A worked. It was decided that as she had less than 2 years’ service she should be persuaded to resign, and if she did not she would be summarily dismissed because she had no right to bring a claim for unfair dismissal. She was dismissed at a meeting on 16 January 2019. No one suggests that Mr Huang brought about A’s dismissal by reason of her chats with Ms Zhou, and nor could this have been the case because Ms Zhou did not tell Mr Huang of those discussions, of which he was ignorant.

22. On 17 January 2019 A posted to the WeChat recipients – broadcast to all – a selection of messages between her and Mr Huang. The next day she published many more, which were the opinions Mr Huang had expressed to A about others in the Respondent, including Ms Zhou, for example that she “*could be moody*”.

23. A also went to ACAS, and on 18 January 2019 they were in contact with the Respondent, indicating that A intended to bring Employment Tribunal proceedings against the Respondent for unfair dismissal and for sex discrimination, specifically harassment by Mr Huang.

24. The Respondent settled A’s claims with a financial payment, not disclosed in evidence.

25. Ms Zhou sought advice from external solicitors (not the firm now representing them). The Respondent’s harassment policy states (290) that it reserves the right to suspend people under investigation for harassment. Clause 17.4 of Mr Huang’s contract of employment (34) states that he could be suspended pending the outcome of any disciplinary proceedings.

26. Ms Zhou took advice from the Respondent’s external lawyers. On 18 January 2019 she suspended him from work. The reason given was the allegation of sexual harassment.

27. I am not satisfied that this was the reason for the suspension for several reasons. The reasons were the derogatory messages, primarily, and the intimation that A was to bring a harassment and unfair dismissal claim.

28. First, the suspension was not on the day the messages which were the

basis of the allegation were first posted by A (17 January 2019), or the next day, but on 19 January 2019, which was the day after the second set of messages were posted (those relating to others in the company).

29. Secondly, my note of Ms Zhou's oral evidence about her reasons for suspending is:

***“q there was no need to suspend the Claimant as Anita had gone.***

***a I am not very clear on detailed conversation between lawyers but the screen shots were not just the 2 of them but about other colleagues in the co***

*j comments about who in particular concerned you?*

*a among these screen shots people such as the ex President myself the finance deputy director and other female colleagues in finance department*

*j what was objectionable about them to your mind*

***a because these screen shots talked about many things - that we are not so sure about - about our colleagues - so we thought it not appropriate for him to be allowed to stay in his job***

*j when did you form that view*

*a at the moment I got the call I hadn't formed the view - just knew there were messages - she posted night of 17th and on 18th I saw Mr Huang at his seat - the content of the messages - I would be embarrassed for him and sent him message have you seen the messages - and he said yes - and I left it there - we need to do nothing*

*j I just wondered when you formed that view.*

*a I had not decided to suspend when read the messages - work normally - but after call of Acas we must respond - our lawyer called our agency said suspend”*

30. It is apparent that Ms Zhou did not think that Mr Huang could remain in the Company once his unguarded views, expressed to A, about others in the Company were broadcast to all, and that the decision to suspend was a direct result of A stating that she was to bring a claim against them for sexual harassment by Mr Huang.

31. Ms Zhou arranged for an outside human resources contractor to investigate, the firm being suggested by the external solicitors, and one of their people, AK, investigated.

32. Ms Zhou then sent Mr Huang a letter of suspension, on 18 January 2019. It referred to an allegation of sexual harassment and gross misconduct. This was one allegation as the use of the singular makes clear. It gave no detail. The letter

was drafted by the external solicitor.

33. AK undertook an investigation and Ms Zhou did not take any further part in the matter. There are 7 heads of department and one took the disciplinary and another the appeal. As Mr Huang was a vice director he was at a slightly lower level than they were. Ms Li and Mr Dong knew that Ms Zhou had suspended Mr Huang.

34. On 25 January 2019 VY wrote to Mr Huang to confirm the allegations and tell him what was to happen next. The allegations were identified as:

*"1. You have been giving A unwanted personal attention (i.e. sending messages late at night and commenting on her appearance; and 2. Persisting despite the fact that she did not feel comfortable being alone with you due to the messages that you were sending.*

*Your conduct appears to be contrary to our harassment policy as contained in our handbook. The handbook confirms that any form of harassment is potentially serious and that individuals under investigation for harassment are likely to be suspended pending investigation. The handbook confirms that forms of behaviour that could offend such as asking someone out for a private drink after work could amount to harassment especially where the recipient has made it clear that such conduct is unacceptable. It further confirms that a single incident can constitute harassment if sufficiently serious."*

35. On 25 January 2019 the human resources person in the Respondent, VY, wrote (57) to ask Mr Huang to attend an interview with AK on 29 January 2019. There was little time for him to review all the material, and he had no messages prior to 14 September 2018, having deleted them for memory space reasons. He provided the statement as requested, although he was required to do so before he knew in detail what A was to say. He had seen the 27 messages she posted, but she was not interviewed until after he was interviewed.

36. AK interviewed A and Mr Huang 11:25-1:40 (68-73) on 29 January 2019. She then interviewed A. She prepared a report, dated 07 February 2019 (77(a) et seq). It states that the allegation is that *"he sent harassing and unwanted text messages via WeChat to A"*. It records that A had posted 27 messages to her from Mr Huang on the WeChat site, and states that they appear to be inappropriate and contrary to the harassment policy.

37. The harassment policy (287 et seq) states:

*"Conduct may be harassment whether or not the person behaving in that way intends to offend. Something intended as a "joke" may offend another person. Everyone has the right to decide what behaviour is acceptable to him/her and to have his/her feelings respected by others. Behaviour that any reasonable person would realise would be likely to offend will be harassment without the recipient having to make it clear in advance that the behaviour of that type is not acceptable to him/her, e.g. sexual touching. It may not be so clear in advance that some other forms of behaviour would be unwelcome to, or could offend, a particular*

*person, e.g. certain "banter", flirting or asking someone for a private drink after work. In most of these cases, first time conduct unintentionally causes offence will not be harassment but it will become harassment if the conduct continues after the recipient has made it clear, by words or conduct, that such behaviour is unacceptable to him/her. However, a single incident can be harassment if it is sufficiently serious."*

38. The report ends *"I have concluded that [Mr Huang] should be called to a disciplinary hearing for the following reasons"*. This was a decision not a recommendation.

39. There are 9 reasons given. He was aware of the policy. He sent messages that were in breach of the policy, because harassment was unwanted conduct and these messages were unwanted. Comments about female clothing from a man were unacceptable, especially when out of working hours. He sent a selfie and asked A for one, and as she did not respond this was obviously not a proper request. It was not the case that A had sent Mr Huang any messages that might be harassing him. A did not accept multiple offers of dinner so clearly did not want the attention. A had raised this 3 times with her manager (who had not been spoken with, as she was on holiday). It was an important factor that the tests were unwanted and the perception of the person receiving them was crucial. The attention given to A by Mr Huang made her feel uncomfortable and intimidated such that she refused to meet him one to one. She recommended another issue of breach of confidentiality in sharing with A screen shots of emails from Mr Huang to others.

40. An investigation is supposed to set out the evidence and make a recommendation as to the issues to be decided in a disciplinary hearing. The key issue here was whether the messages were unwanted, and whether A was genuine in her assertion that she was harassed or intimidated. Instead of setting out those issues for decision by a disciplinary hearing, the report made findings of fact that they were unwanted and that A was harassed and intimidated.

41. The report notes that the majority of the text messages were insignificant and cannot be deemed harassment, although their volume could be deemed excessive. Four items were identified as inappropriate – the selfie request, one saying that he looked forward to seeing her outfit that day, one commenting on a skirt, and some asking her to dinner. In this hearing others are relied on (set out below), but not at the time.

42. On 08 March 2019 VY wrote to Mr Huang to tell him that Ms Li would hold a disciplinary hearing, on 12 March 2019. It said:

*"You will be asked to formally answer the allegation of harassment of a fellow worker on the grounds of her sex namely by sending inappropriate and unwelcome communications to her."*

43. At that meeting was Ms Li, Mr Huang, TL, from the same company as AK, and DJ, another employee, who asked Mr Huang questions. There was a notetaker also (86 *et seq*). Mr Huang said that A's motive was revenge for being fired, and A had thought that as her friend he would defend her, but he had not, as he had put the company first.



44. It was put to Mr Huang that he had touched her inappropriately, although this was never an allegation he had been asked to deal with. He denied any intention of sexual harassment, and pointed out that she had teased him a lot, including saying that he was suffering from “*male menstruation*” on one occasion (92).

45. On 29 March 2019 Ms Li wrote to dismiss Mr Huang (93). She signed the letter as “*Chair of the Disciplinary Meeting Board*”. The letter referred to “*the disciplinary panel*” and repeatedly used the word “*we*”. In oral evidence Ms Li said that after Mr Huang left the meeting the others discussed the matter and came to a decision together. This is plainly inappropriate – a colleague of the person investigating was part of the decision and the person questioning Mr Huang was also. It was a group decision, not that of Ms Li alone, she regarding herself (and signing as) Chair of a Disciplinary Panel.

46. The letter states: “*We have noted your explanations for these messages, and that you intended that these were sent due to your friendship with A. However the investigation confirmed that they found the number and nature of the messages were unwanted and that these made her uncomfortable and, at times, intimidated.*”. The problem with this is that the investigation report made a finding of fact which the panel took as already decided, and the investigator’s colleague was part of that decision making panel.

47. The letter also states “*... it is unclear that you appreciated the potential impact that the messages you sent could have on a colleague, particularly following your promotion.*” The difficulty here is that gross misconduct should not be based, even in part, on the decision maker being unclear, or on potential impact.

48. There was an appeal, held by Mr Dong, on 09 April 2019 (97 *et seq*). The notes are in English, but the meeting was conducted in Mandarin, and it is not to be expected that contemporaneous notes taken in another language are exact. Mr Huang felt that Mr Dong listened more than Ms Li, but as it was more a focus on what was said by Mr Huang to be unfair than to revisit the whole matter (point 9 on page 97 makes this clear) it was not going to resolve the matter.

49. The outcome letter (119-121) dated 05 June 2019 dismissed the appeal. Mr Huang’s objections had been that the allegation was false, that the investigation report was not even-handed, and that the sanction was too severe.

50. The letter stated:

*“In the investigation report and by your own admission there were a large number of text messages between yourselves and the colleague who raised concerns. from her evidence and also her behaviour, she clearly felt intimidated and that her dignity had been undermined although I do note that you say you did not intend this. nonetheless in considering the question of harassment I have to consider the manner in which the treatment was received by the individual who was subjected to it and it seems clear to me that despite your assertions to the contrary the*

*number and nature of the messages were unwanted and made the individual uncomfortable."*

*"I also believe that although the messages were sent out of working hours, they clearly related to work and I therefore believe that they were in the course of employment."*

*"I am satisfied that the allegation made against you was not false. You admit the messages and your defence is only that they were not intended to be harassment and were responded to and engaged in by the individual in question. whilst it is unfortunate that the entire WeChat history could not be obtained, there is a sufficient number of messages and investigation to conclude that there has been inappropriate messaging that was unwanted."*

*"... they (the panel) nonetheless after a prolonged consideration concluded that you should be dismissed for your actions as they amounted to harassment. I find that this was not an unfair conclusion to reach."*

51. This appeal does not attempt to deal with the basic issue that the findings of fact of the investigator have been carried throughout the process. The letter does not engage at all with Mr Huang's point that this was revenge by A for her dismissal, or for personal gain, and was not what she thought at the time she and he were exchanging multiple messages.

52. The Respondent does not say that the volume of messages was such that by itself it was a reason for dismissal.

### **The messages**

53. It was accepted by the Respondent that A had never told Mr Huang that she had voiced any objection to anything he had messaged to her. There is no lascivious comment, as submitted. There are some perhaps ill-advised references to a nice skirt and to wonder what outfit she would wear today, an offer to "*hammer*" her shoulder (apparently a stress relieving action not unknown in that office), and a reference in the context of a possible promotion of walking cutely (there appears to be no exact translation of the Mandarin word used). There is an offer to take her to lunch or dinner that went through several iterations. A ignored some comments, and I was invited, without any direct evidence, to find that ignoring a comment implied that it was unwelcome in a Chinese cultural setting. I indicated that I would treat everyone involved in the case exactly as I would treat anyone, in the absence of clear evidence of a cultural difference. There is a reference to chapped lips, said to have a sexual undertone. On one occasion he asked for a "*selfie*" and that was ignored. He asked her if she wanted another child. He sent her a link with 3 faces which invited the recipient to chose the one most likely to be a husband. He wrote that she was young and pretty and could get one if she wished. At one point he messaged "*good night*" and A responded "*say goodnight to your wife*". On one occasion he wondered what she looked like without her glasses.

54. I have examined these carefully. For the following reasons I do not find

that these were messages which infringed the policy. There were about 2,500 messages. This is a huge number, incomprehensible to most people not brought up with a mobile phone always in hand and ever used. Mr Huang was plainly a compulsive user of the WeChat account. There was a not dissimilar number of messages with VY, often as a group of 3 with A. A sent a similar number of messages – this was a 2 way traffic. Social media mix work and personal life, in working hours and outside them, as Mr Dong accepted. There was no manager subordinate power imbalance – Mr Huang had no line reports prior to his promotion on 02 November 2018, and the messages were almost exclusively before he was her line manager.

55. All this time A was the personal assistant to the person running the Respondent, fully able to complain to her, but did not do so until December after Mr Huang was her line manager, and then about a variety of things. Mr Huang did not send messages after becoming her manager, other than work related ones (apart from the ones inviting her to lunch, which he said was specifically noodles as her stomach was fragile and he was concerned about her).

56. The messages are not seen in context. In some he referred to her as “*sister*”. The selfie he sent her was of him and his baby son when asking whether she might want another child, itself connected with her calling him a “*milk daddy*” (apparently an obscure analogy with a female wet nurse). On one occasion A asked him if he had ever had an affair (not the other way round) and he replied that he would never do that to his wife. On one occasion, and not in reply to anything from him, or related to anything he had sent to her, and after a long gap, A sent Mr Huang 3 messages well after midnight, the last one saying that he was a typical Capricorn – dull. Plainly she was expecting and inviting him to respond in the middle of the night. This is not the action of someone being harassed.

57. There are multiple occasions where his messages to her refer to her being angry with him (not about any message he had sent). She was dismissed for being too blunt with people: she was not a shrinking violet.

58. Mr Huang considered A to be a close friend, and from her text messages to him, there was every reason for Mr Huang to think that was so. From those messages I find that it was so. It soured when Mr Huang became her boss, and worked with her, and found that she was not good at her job, and, in short, got her fired.

59. At the time the messages were sent they were between friends who worked in the same company, but not together. Mr Huang sent more than A, but she sent thousands of them as well. This is, in effect, a continuous stream of messages, not a series of separate missives.

60. No consideration was given to the possibility that A was either seeking revenge for her dismissal – her friend had not protected her and let her down, or had been (as was the case) a cause of her dismissal. The letter prepared to suspend A accused her of bullying another member of staff, and that she would not cooperate with her line manager (Mr Huang). She was to be persuaded to resign if possible, and this was all talked through with her before she was dismissed. She well knew that Mr Huang was at the very least an active participant in her dismissal.

61. The broadcasting of the 2<sup>nd</sup> set of messages can be seen only as a vindictive act by A against Mr Huang, successfully to embarrass him in the company.

62. The message selection was entirely that of A. Mr Huang periodically deletes the huge numbers of messages in his phone, and he had none before 18 September 2018 (they started in April or May 2018). He could not retrieve those deleted. Some of her screen shots end part way through: the message about the way she walked ended "*I think...*" and the remainder of the message was not shown. No request was made for all the messages.

63. The statement by A that she was uncomfortable and harassed by the messages was accepted at face value as fact, even though only a month before, on 12 December 2018 she had refused to show the messages to Ms Zhou and made no request of her about messaging – which had in any event largely ceased – and nor did she say that she was feeling harassed. She raised a series of matters, and the rest were unconnected with harassment.

64. It was not considered as a possibility that A was simply looking for a way to extract an exit package from the Respondent, and in that she was successful for she was paid off.

65. I find as a fact that A never told Mr Huang that his messages were unwelcome, and it is not asserted that she ever did. I reject the suggestion that in some way she made it known that they were unwelcome, by not responding to some of them. The messages are a continuum with gaps. The tenor of the messages from A and their frequency and volume is not consistent with it being reasonable for Mr Huang to have formed the view that his messages were not welcomed. There was no need for A to have responded if she did not want to. They did not work together, and Mr Huang had no line reports at the time.

## Discussion

66. The suspension was not fair – there was no allegation of sexual harassment against anyone else. A had left. There was no one to protect. While in her interview with the investigator Ms Zhou makes reference to the possibility of others complaining (124), it was never put to Mr Huang, nor followed up at all. There was no one in the Respondent from whom Mr Huang needed to be separated. That there is a contractual provision saying this is possible and reference to suspension in the harassment policy does not alter the assessment that it was unfair to suspend. It was not a neutral act. It was not by reason of the allegation made by A but for 2 other reasons, one totally unrelated – that A had intimated an Employment Tribunal claim and that he had expressed unpalatable views about senior management,

67. As discussed in the hearing, Mezey v South West London and St George's Mental Health NHS Trust [2007] EWCA Civ 106 makes it entirely clear that suspension is not a neutral act (paragraphs 11-13).

68. Mr Bryan submitted that the seriousness of the allegation warranted suspension. He submitted that there were lascivious messages and the fact that

the matter was serious enough for gross misconduct dismissal plainly meant that suspension was fair. By reason of my findings about the messages I do not agree.

69. The investigation report made findings of fact, and decided that there would be a disciplinary hearing. The finding that A had been harassed was not one that an investigator should have made. The report should have set out the competing assertions and assemble the evidence for the decision maker to assess. Mr Huang was asked for his explanation first, even before A had been interviewed, and the whole process of investigation accepted as fact, and without question or examination, everything A said about being harassed or intimidated, when evidence for and against that assertion should have been a central focus of the investigation.

70. In the dismissal letter, the decision maker expressly relied on the findings of fact of the investigator rather than making findings for itself. The investigator gave no mind to the possibility that A was making this up for revenge or gain. The process was then further flawed by the decision being made, not by Ms Li, but by a panel which included the investigator's colleague and another employee of the Respondent who had questioned Mr Huang in the meeting. The appeal did not address these issues, and did not cure the unfairness for that reason.

## **Conclusions**

71. Ms Zhou was absolutely clear why she suspended Mr Huang, and it was not for the messages, but because of unflattering comments and because A was going to bring an Employment Tribunal claim for unfair dismissal and sexual harassment. I raised with Counsel for the Respondent the fact that the first hurdle was to show, on the balance of probabilities, that the dismissal had been for the conduct asserted to have warranted it. I am not so satisfied. While Ms Zhou took no part in the disciplinary hearing or appeal she is the most important person in the Respondent. There are no more than a dozen senior executives in the Respondent, and they will all have known exactly what had occurred. Once the second set of messages were posted and the call from Acas had occurred the messages were taken as the reason to dismiss Mr Huang, for those two, different, reasons. Therefore the Respondent does not meet S98(2).

72. That conclusion is, however, not relevant, for even if the reason was exactly as the Respondent states, so that the dismissal was for a potentially fair reason, it was not a fair dismissal.

73. The investigation was flawed as described above. So was the decision to dismiss, not cured by the appeal.

74. The Respondent says that it relied on external solicitor's advice throughout and was keen to follow the local law. While not doubting that, it does not make the dismissal fair, for the obvious reason that if so no employer following legal advice would ever lose a case. Ultimately, clients instruct solicitors, solicitors advise, and clients decide. If, and I make no finding of fact that it was so, advice is given that is incomplete inadequate or wanting in some way the employer is still responsible for its actions.

75. From my findings of fact about the messages it follows that this is not case where a *Polkey* reduction is appropriate.

76. I have considered whether Mr Huang caused or contributed to his dismissal. The volume of messaging was extraordinary, but the Respondent expressly did not rely on that as a reason for dismissal. There was no power imbalance when these many messages were sent. They were between friends. It is ok to have friends of a different gender. It is ok to compliment a friend, of any gender. It is in the policy expressly said not to be harassment to invite a colleague to dinner or a drink – or to flirt – unless it has been made clear that this attention is unwelcome. It never was made clear by A that it was unwelcome (and I have found as a fact that it was not unwelcome). Some of the messages were perhaps ill advised, but in the context of thousands of amiable messages between friends, usually inane or trivial, they are not conduct contributing towards dismissal.

77. It follows that I find that Mr Huang did not cause or contribute to his dismissal by any action of his. If the reason for the dismissal was the publication by A of the unflattering comments about others, they were private comments between friends, and the action causing dismissal was their broadcast by A, not the private comments made by Mr Huang to A.

78. While I have found the procedure flawed, it followed the process set out in the Acas code and it would not be appropriate to order a percentage increase in compensation.

### Reconsideration request

79. Having announced the above as an ex tempore decision, Mr Bryan applied for a reconsideration of the judgment in 2 respects, *Polkey* and contribution. I had indicated that I would deal with liability first then remedy, if appropriate. Questions of reduction of remedy were not touched upon. Mr Bryan indicated that his *Polkey* submission would be based upon Software 2000 Ltd v. Andrews & Ors [2007] UKEAT 0533\_06\_2601 (26 January 2007). Ms Millin did not oppose this request, which I granted.

80. Mr Bryan submitted that on the facts as found there had to be doubt as to whether the employment of the Claimant would have lasted long after A's exposé of his views of management. As to contribution, the decision did refer to "*possibly inadvisable*" messages to A. In addition, as to the criticism of management, while plainly it was A that had revealed the messages, nevertheless they were the Claimant's messages, so he must have caused or contributed to his own dismissal if that was its cause.

81. I reserved my judgment on the reconsideration and remedy decisions, after hearing evidence from the Claimant who was cross-examined on liability matters.

### Reconsideration decision

82. I have given careful consideration to the *Software 2000* point. The problem for Mr Bryan's application is that I have decided that the real reason for the dismissal of the Claimant was the publication of his (privately expressed) views, and that this was an unfair dismissal. It follows that there is no issue of how long his employment would have continued had he not been unfairly dismissed for another reason.

83. Mr Bryan submitted also that Mr Huang might well have chosen to leave had he not been unfairly dismissed. The difficulty with that submission is that the incentive to find a job is much greater when unemployed, and Mr Huang has not succeeded in getting one. However much he might have wanted to leave for another job, he would not have done so until he got one. Since he has not been able to get a job he would not have left the Respondent. In any event I accept Mr Huang's evidence that he felt that his former employer should have been embarrassed, rather than him being so.

84. As to contribution, Mr Bryan pointed out that I had twice observed that messages were "*possibly ill advised*". He referred to the well-known tests for contributory conduct set out in the Judgment of Brandon LJ in the Court of Appeal decision in Nelson v British Broadcasting Corporation (No 2) [1980] ICR 110, namely:

- (1) Was there conduct in connection with the unfair dismissal which was culpable or blameworthy?
- (2) Was the unfair dismissal to some extent caused or contributed to by that conduct?
- (3) Was it just and equitable to reduce the assessment of compensation by the amount proposed?

85. I do not consider that the messages sent to A which were the asserted reason for dismissal were culpable or blameworthy and in so far as they caused or contributed to the dismissal it would not be just and equitable to reduce compensation as a result.

86. In so far as the dismissal was by reason of opinions privately expressed to a colleague, I do not find that to be blameworthy or culpable. It is not unusual for colleagues who are friends to exchange views about other colleagues, in private. Nor would it be just and equitable to reduce compensation if the former friend chose later to reveal those privately expressed views. That he might not have been dismissed had he kept his opinions to himself is not to the point. The opinions themselves were not said to be expressed in an offensive or insulting way.

87. Accordingly I decline to reconsider the decision announced and set out above.

### **Remedy**

88. Mr Bryan sought to have the calculation of remedy heard on another occasion. There was a rudimentary schedule of loss, and only today had

evidence of attempts to find employment been provided. Ms Millin pointed out that Mr Huang had been deprived of income for a year, and to put this off would lead to more expense for him, and much delay given that listing was at least 6 months. This was, she observed, a routine unfair dismissal liability calculation, and the Respondent could cross examine Mr Huang. In so far as he had not provided much evidence, that was a disadvantage to him, not to the Respondent, as it was for him to show that he had mitigated his loss.

89. I decided to proceed with remedy. There was nothing complex about the evidence in the remedy aspect of the case. After Mr Huang had given his evidence I took a break of 1 hour, so that Mr Bryan had the opportunity to consider and to take instructions.

90. It is almost exactly a year since the dismissal. Compensation is capped at one year's pay, if less than the statutory maximum, as is the case here. Mr Huang has been unemployed since his dismissal. He has not applied for any state benefit, and so the Recoupment Regulations do not apply.

91. The issues are whether to include bonus payments and whether there has been adequate attempt to mitigate loss.

92. As to mitigation of loss, Mr Huang has mainly sought work in procurement, which was his expertise over some years in China. In the absence of a good reference and with only short term experience in administration he found it even more difficult to find employment as an administrator.

93. Mr Huang has registered with all the big recruitment agencies, such as Reed, Monster and Indeed. He has used LinkedIn extensively. He has made some 50 job applications, throughout the Greater London area. He has looked at salaries from £45,000 a year upwards

94. He found that in the UK jobs often cited as preferable or essential membership of and accreditation with the Chartered Institute of Procurement and Supply ("CIPS"). He had not got the exam related qualification. He has bought 2 books, at a cost of £60, to help him qualify, and put in for the first exam. He cancelled that as he has struggled with some of the vocabulary. While Mr Huang's English is good, there were occasions during the hearing when simpler words had to be used, and this is entirely credible. He had applied for jobs even when it was said to be essential when recruitment agents said that his experience seemed a good match. He has actively sought jobs where he might study for the CIPS qualification by working, even if that was part time work as a result.

95. Mr Huang feels that his Chinese name and work experience has been a handicap, and his accent, as a speaker of English as a second language. He has sought work in Chinese companies also, but there are few of them with suitable positions. The concerns that Mr Huang has are real ones, and there would not need to be laws against race discrimination if it were not a real issue.

96. Mr Huang has not made progress with CIPS. He has tried, but cancelled the exam he had booked for July 2019. Mr Bryan sought to say that he should have done more. Of course the family now relies on Mr Huang's wife's income,



so that he is required to attend to the children and the home in a way not required when he was earning a substantial amount. It would not be appropriate to reduce his award for this reason, as he had been told by recruiters that where his cv was a good fit it was worth applying for jobs even when the qualification was specified as essential. He had also applied for jobs where he might study while working.

97. I find that Mr Huang has made every reasonable effort to mitigate his loss.

98. Mr Huang was 37. He had worked for 2 years. His salary exceeded the cap on the weekly amount. The Basic Award is 2 weeks' pay, at £508 = **£1016**.

99. The compensatory award is limited to one year's earnings. It is almost exactly one year since Mr Huang was dismissed. He has received no state benefits, the family living on his wife's earnings. He has not earned anything in that year.

100. His basic pay and guaranteed bonus was **£50,983** a year.

101. The first issue is bonus. The Respondent says this was non contractual, so should not be awarded. Mr Bryan referred me to Canadian Imperial Bank of Commerce v Beck [2011] EQLR 120. There are many cases involving bankers, such as Attrill & Ors v Dresdner Kleinwort Ltd & Anor [2012] EWHC 1189 (QB) (to which I referred in the hearing). Mr Huang always received the quarterly bonus. The letter offering him the position in from which he was dismissed stated that his annual remuneration package consisted of an annual salary of £35,466.40, paid monthly, and an "On-Target KPI Bonus" of £8866.60 a year, paid quarterly. These totalled £44,333 a year, and this is stated to be the annual on target remuneration package. The bonus is stated to be "*gratuitous*", and the scheme was said to be subject to review or amendment at the Company's sole discretion. When Mr Huang was promoted his annual salary with bonus was £50,983, on the same basis, part salary, part quarterly bonus.

102. I find as a fact that unless someone with such a bonus failed to perform he or she would receive this bonus, and that it was expected that every employee in the scheme would receive it as a matter of course, if doing the job he or she was employed to do. There were no performance issues with Mr Huang's work. He would have been paid the bonus for the year had he been working there. It would, as the cases have it, have been "*arbitrary and capricious*" not to do so, and doubtless capable of founding a successful constructive dismissal claim. Accordingly I calculate loss based on the annual pay, before benefits, of **£50,983**.

103. In addition Mr Huang received a monthly bonus of £150 if he attended at work on time. He was always on time and always received that bonus. It is **£1,800** a year.

104. Mr Huang received £10 a day towards lunch. On average that was £220 a month, which is £2,640 a year. I do not add this to salary for the very simple reason that there is no reason for the Respondent to pay for the lunch of a former employee, even though the dismissal was unfair.

105. Mr Huang could receive £100 a year to spend on books. He actually

spent **£60** on books for CIPS study. I add this sum to his loss, for even if it is not compensatory loss it is a valid expense for seeking employment.

106. The company paid pension contributions for him of £100.80 a month, which is **£1,209.60** a year.

107. These total **£54,052.60**. This is the sum, gross, I award to Mr Huang for loss of earnings. The calculation of the amount payable is set out in the Schedule to this decision.

108. I am satisfied that Mr Huang has been assiduous in his search for work. He has looked in the Greater London area, and at lower salary than he was receiving with the Respondent. He has trawled LinkedIn, and searched on FaceBook. He has registered with Monster, Reed, and Indeed. He has applied for about 50 jobs. He is handicapped in not having the certificate from the Chartered Institute of Procurement and Supply, as it is in procurement that his expertise. He had not been in his administrative role with the Respondent for long, and with a gross misconduct dismissal against his name for sexual harassment it is not easy for him to get equivalent employment. His loss of income is attributable only to his dismissal. There is no reason to think that his income from the Respondent would not have lasted the 12 months. He has not been unable to work in that year.

109. In addition there is the loss of statutory industrial rights, for which I award 2 weeks' pay capped at £508, and so another **£1,016**. Mr Huang has not provided any evidence of the cost of seeking alternative employment and so I make no award under this heading.

110. I have used "employmentclaimstoolkit" to calculate the total amount payable, and that calculation is attached as the Schedule to this judgment. The amount payable is **£52,351.60**.

**Employment Judge Housego  
20 March 2020**

## Schedule

<b>IN THE EMPLOYMENT TRIBUNALS</b> <b>CASE NO: 3201545/2019</b> <b>BETWEEN</b> <b>Z Huang v China Unicom (Europe) Operations Ltd</b> <b>CLAIMANT'S SCHEDULE OF LOSS</b>	
<b>1. Details</b>	
Date of birth of claimant	22/01/1982
Date started employment	06/02/2017
Effective Date of Termination	29/03/2019
Period of continuous service (years)	2
Age at Effective Date of Termination	37
Date new equivalent job started or expected to start	28/03/2020
Remedy hearing date	13/03/2020
Date by which employer should no longer be liable	28/03/2020
Statutory notice period (weeks)	2
Net weekly pay at EDT	779.60
Gross weekly pay at EDT	1,039.47
Gross annual pay at EDT	54,052.60
<b>2. Basic award</b>	
Basic award	1,016.00
Number of qualifying weeks (2) x Gross weekly pay (508.00)	
Less contributory fault (basic award) @ 0%	0.00
Less redundancy pay already awarded	0.00
<b>Total basic award</b>	<b>1,016.00</b>
<b>3. Compensatory award (immediate loss)</b>	
Loss of net earnings	38,980.00

Number of weeks (50) x Net weekly pay (779.60)	
Plus loss of statutory rights	1,016.00
Plus loss of commission and/or bonus	0.00
Less payment in lieu	0.00
Less ex-gratia payment	0.00
Less non-recoupable benefits	0.00
Less early payment of compensation	0.00
Plus loss of pension	761.80
Pension loss	0.00
Class 1 NIC contributions (52 weeks)	761.80
Loss of state second pension in old job	0.00
Gross annual earnings (54,052.44) x Estimated years of loss (0) x One year's accrual of S2P (2.0%)	
<b>Total compensation (immediate loss)</b>	<b>40,757.80</b>
<b>4. Compensatory award (future loss)</b>	
Loss of future earnings Number of weeks (2.1) x Net Weekly pay (779.60)	1,637.16
<b>Total compensation (future loss)</b>	<b>1,637.16</b>
<b>5. Adjustments to total compensatory award</b>	
Less Polkey deduction @ 0%	0.00
Plus failure by employer to follow statutory procedures @ 0%	0.00
Less failure by employee to follow statutory procedures @ 0%	0.00
Less deduction for making a protected disclosure in bad faith @ 0%	0.00
Less contributory fault (compensation award) @ 0%	0.00

Accelerated payment @ 0%	0.00
<b>Compensatory award before adjustments</b>	<b>42,394.96</b>
<b>Total adjustments to the compensatory award</b>	<b>0.00</b>
<b>Compensatory award after adjustments</b>	<b>42,394.96</b>
<b>6. Summary totals</b>	
Basic award	1,016.00
Compensation award including statutory rights	42,394.96
<b>Total</b>	<b>43,410.96</b>
<b>7. Grossing up</b>	
Tax free allowance (£30,000 - any redundancy pay)	30,000.00
Basic + additional awards	1,016.00
Balance of tax free allowance	28,984.00
Compensatory award + wrongful dismissal	42,394.96
Figure to be grossed up	13,410.96
<b>GROSSED UP TOTAL</b>	<b>52,351.60</b>
<b>AFTER COMPENSATION CAP OF £54,052.60 (GROSS ANNUAL PAY)</b>	<b>52,351.60</b>